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Richard J. Hunter Jr.

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AN "INSIDER'S" GUIDE TO THE LEGAL LIABILITY OF SPORTS CONTEST OFFICIALS

RICHARD. J. HUNTER, JR.*

I. INTRODUCTION

Consider these scenarios. Little Johnny, a youth (under twelve) soccer player, is lying flat on his back on a soccer pitch with two large wounds on the outside of his knee, caused by being spiked by an opponent wearing illegal studs or cleats. Mary, a high school softball player, has a shard of metal protruding from her left eye-socket that was sheared off from an aluminum bat that had been illegally taped together with athletic tape. Billy, a college basketball player at a prominent college, and a top "pro prospect," is severely injured by flying glass when a previously cracked backboard completely shatters while attempting to illegally dunk a ball during a pre-game warm-up. D.J., an outfielder with the local college baseball team, is severely injured when he trips on a sprinkler head left partially exposed in the outfield. Finally, Boris, a pro hockey player, is rammed into the boards by an opponent. The sideboard collapses at the point where it had been duct-taped, and Boris is impaled on a steel rod, ending his promising two-year playing career.

In the modern, high-tech, and media-oriented world of professional and amateur sports, one individual is as important to the proper functioning of any sports contest as are the players themselves. The sports contest official (SCO)—umpire, referee, linesman—assumes a critical pose as judge, arbiter, peacemaker and sometimes "King Solomon" for the proper and safe functioning of the contest.¹ The business of sports officiating has become a

* Professor of Legal Studies, W. Paul Stillman School of Business, and Adjunct Professor, School of Law, Seton Hall University.

1. The term sports contest official or SCO "denotes a person implementing certain rules of a game for the orderly playing of a particular sporting event." Kenneth W. Biedzynski, *Sports Officials Should Only Be Liable for Acts of Gross Negligence: Is That the Right Call?*, 11 U. MIAMI ENT. & SPORTS L. REV. 375, 376 n.2 (1994). Sports officials have also been defined as "those individuals who officiate or are charged with the administration of a game or contest." See Darryll M. Halcomb Lewis & Frank S. Forbes, *A Proposal for a Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests*, 39 DEPAUL L. REV. 673, 673 n.1 (1990). Note that no mention of the word "compensation" is found in either definition. Depending on the

multimillion dollar proposition on both the professional and amateur levels, and increasingly, actions of SCO's have come under intense scrutiny as players, fans—and regrettably, parents—resort to violence both on and off the field to settle real or imagined disagreements and disputes.

Several important legal questions have arisen in this highly charged context: What is the legal role and responsibility of an SCO? What is the standard by which an official's actions or failure to act will be judged should an injury take place and should an individual player, contestant, or spectator bring suit against the SCO for personal injury? Finally, should it be determined that an SCO is liable for an injury, who else may share or perhaps ultimately bear the responsibility and cost for the negligent or the intentional conduct on the part of the SCO, and under which legal theory or theories?

II. LIABILITY BASED UPON NEGLIGENCE

A. Standard of Care for a Professional

Simply stated, it is the SCO's primary duty to "properly supervise an athletic contest."² As such, an SCO is legally charged with carrying out his or her pre-game, game, and in some instances, post-game, responsibilities carefully and prudently. The standard of care the law applies in most cases is that of a reasonable man or reasonable person,³ that is, the SCO will be judged by the legal system as to how well or poorly the SCO performed those tasks assigned or required. Failure to act in this prudent and careful manner may result in a finding of negligence against the SCO. While there is no one

individual sports contest, game, or match, there may be different types of, and responsibilities for, the SCO. See Victoria J. Davis, *Sports Liability: Blowing the Whistle on the Referees*, 12 Pac. L.J. 937, 937 n.1 (1981) (differentiating between various officiating roles and responsibilities).

2. WALTER T. CHAMPION, JR., *SPORTS LAW* 134 (2d ed. 2000) (The Champion text is a favorite basic text of many undergraduate and graduate sports laws classes). In addition to the failure to supervise, other theories have been offered in support of SCO liability. They include failing to enforce safety rules and failing to warn a participant of a risk of injury. See David Brooks, *Umpires, Referees Are New Negligent Suit Targets*, 119 N.J.L.J. 757, 763 (Apr. 30, 1987).

3. "Negligence is the omission to do something which a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do." *Blyth v. Birmingham Waterworks, Co.*, 11 Ex. 781, 156 Eng. Rep. 1047 (1856). Cf. *RESTATEMENT OF TORTS* § 283 (1934). See especially *Carabba v. Anacortes Sch. Dist.* No. 103, 435 P.2d 936 (Wash. 1967). As will be apparent, the author has relied upon many traditional sources and citations for primary references, underscoring the fact that sports law, in general, and issues surrounding the nature and extent of the liability of an SCO, the doctrines of 'frolic and detour,' the status of independent contractor, and defenses available in a suit based on tortious conduct, in particular, are really not a new undertaking or a new avenue of the law. A traditional tort analysis, however, provides the proper context for this article.

universally accepted definition of negligence, the term has been defined as a "failure to exercise due care" and is based on a presumption of an ascertainable standard of behavior required of similar persons "under the same or similar circumstances."⁴

The concept of a reasonable man or actor is a legal, rather than a factual one, and it is not based on the physical characteristics of any real, existent person. Rather, it is a community ideal of reasonable behavior that will often vary from situation to situation, from sport to sport, from contest to contest, from field or venue to field or venue, and from plaintiff to plaintiff.⁵ Often, the standard of due care will be ascertained by asking the question: What would the reasonable person do under these particular circumstances?

In general, it should be noted that the physical characteristics of the reasonable person are most often those of a particular actor in a particular case, and a jury will be instructed by the trial court to take the circumstances of a particular case into account. The legal system has witnessed a significant trend in recent years towards the filing of suits by clients and patients against certain professionals (most especially, physicians⁶ and lawyers⁷). In this

4. *Yerkes v. Northern Pac. Ry. Co.*, 88 N.W. 33, 36 (Wis. 1901). See *Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W.2d 444, 448 (Tex. 1967); *Kerby v. Abilene Christian Coll.*, 503 S.W.2d 526, 528 (Tex. 1973).

5. Thus, the legal system will "take plaintiffs as they are." See also GEORGE W. SCHUBERT ET AL., *SPORTS LAW* 232 (1986); ALAN S. GOLDENBERGER, *SPORTS OFFICIATING: A LEGAL GUIDE* 20 (1984), wherein the author states:

In other words, the long and the short of it is that to minimize your exposure to a costly and expensive lawsuit, you must act as a reasonably prudent official. What is a reasonably prudent official? A reasonably prudent official knows the rules that are designed to protect the players; knows his or her responsibility in enforcing these rules; and does not permit *anyone* to prevent him or her from doing his or her job.

Id. (emphasis added). But see Jacobus ten Broek, *The Right to Live in the World: The Disabled in the Law of Torts*, 54 CAL. L. REV. 841 (1966) (cited in Aviam Soifer, *Disabling the ADA: Essences, Better Angels, and Unprincipled Neutrality Claims*, 44 WM. & MARY L. REV. 1285, 1331 n.205 (2003) (providing what has been termed "a pioneering argument for a higher duty of care for people with disabilities in the context of tort law").

6. See Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549 (1959). See also W. PAGE KEETON ET AL., *PROSSER AND KEETON ON TORTS* 185 (5th ed. 1984); PATRICIA M. DANZON, *MEDICAL MALPRACTICE: THEORY, EVIDENCE AND PUBLIC POLICY* 11 (1985) (noting that medical malpractice arises when a patient's injury or illness is "the result of a failure to meet the due standard of care"). Concerning the issue of assessing the professional competence of medical practitioners, see Robert S. Adler, *Stalking the Rogue Physician: An Analysis of the Health Care Quality Improvement Act*, 28 AM. BUS. L.J. 683 (1991).

7. See *Ward v. Arnold*, 52 Wash. 2d 581, 328 P.2d 164 (1958). Professional negligence is not a new concept and is deeply rooted in the common law. Professional negligence traditionally involved other professionals besides physicians and attorneys. See *United Dentists v. Bryan*, 164 S.E. 554 (Va. 1932) (dentists); *Tremblay v. Kimball*, 77 A. 405 (Me. 1910) (pharmacists); *Hammer v. Rosen*, 198 N.Y.S.2d 65 (N.Y. 1960) (psychiatrists); *Cowles v. City of Minneapolis*, 151 N.W. 184 (Minn. 1915)

context, the standard of care required of the SCO as a professional has been subject to change and scrutiny.

The suit against an SCO is essentially a suit for professional malpractice.⁸ While a professional malpractice suit is predicated on a theory of negligence—the failure to exercise that degree of care, caution, and prudence that the status of a professional dictates—negligence alleged against a professional, such as a compensated, trained, and licensed sports official, is not subject to the usual or ordinary reasonable person standard. Because a professional "holds himself out" to the general public as having achieved a greater amount of skill, knowledge, judgment, and professional competence than possessed by non-professionals,⁹ the SCO will be judged against this higher, professional standard—the professional officiating peer group.

However, an SCO does not guarantee or warrant that a particular contest will be free from injury or risk under all circumstances. As noted by Professor Champion, "Referees cannot prevent all rule violations, and they only have a duty to use reasonable care to see that the rules of the game, including safety rules, are followed The referee cannot guarantee the safety of each participant" ¹⁰ "The mere fact of injury or the occurrence of a bad result, standing alone is no proof of negligence" in an action based on professional

(architects and engineers); *L.B. Labs., Inc. v. Mitchell*, 39 Cal. 2d 56, 244 P.2d 385 (Cal. 1952) (accountants). As noted by Professor Susan Martin, "There has been critical as well as judicial support for the foreseeability test as the determiner of professional liability, particularly when the professional is a public accountant." Susan Lorde Martin, *If Privy Is Dead, Let's Resurrect It: Liability of Professionals to Third Parties for Economic Injury Caused by Negligent Misrepresentation*, 28 AM. BUS. L.J. 649, 673 (1991). The statement may be equally applicable to other professions or professionals.

8. The term *sports malpractice* may be best applied in this context and may include "bad judgment in calls, permitting games to be played under bad field conditions, allowing events to proceed despite threatening weather, and not inspecting the quality of equipment used by players." WALTER T. CHAMPION, JR., *FUNDAMENTALS OF SPORTS LAW* § 4.1, at 76 (1st ed. 1990). See also *Professional Malpractice*, at <http://www.culpepperlaw.com/profmal.htm> (last visited Feb. 10, 2005) (discussing the nature of professional malpractice, the standard of care required of various professionals, and the types of professional malpractice).

9. See, e.g., *Harris v. Fall*, 177 F. 79 (7th Cir. 1910) ("His own [the professional's] best ability, skill and care," over and above the minimum standard). For an interesting discussion of the issue of the relevance of the peer group in establishing professional negligence, see Scott Burris, *Dental Discrimination Against the HIV-Infected: Empirical Data, Law and Public Policy*, 13 YALE J. ON REG. 1 (1996).

10. CHAMPION, *supra* note 2, at 135-36. The same analysis and standard has been applied to coaches. See, e.g., Paul G. Lannon, Jr., *Are Universities Liable for Players or Coaches?* MONDAQ BUS. BRIEFING, Mar. 3, 2004, at <http://www.mondaq.com/article.asp?articleid=24027&searchresults=1> (last visited Feb. 10, 2005) (citing *Kavanaugh v. Boston Univ.*, 440 Mass. 195 (2003) and noting that because competitive sports regularly involve physical conduct and aggressive behavior, *coaches* should not be held liable for negligent acts during a contest and that liability will only be imposed for reckless or intentional conduct).

malpractice.¹¹ For example, in *Nydegger v. Don Bosco Preparatory High School*,¹² Judge Meehan stated:

Those who participate in a sport such as soccer expect that there will be physical contact as a result of [twenty-two] young men running around a field 50 by 100 yards. Physical contact is not prohibited by the rules of soccer. Injuries do result. Those who participate are trained to play hard and aggressive.¹³

Thus, "[t]he law does not require that for every injury there must be a recovery of damages, but only imposes liability for a breach of [a] legal duty . . . proximately causing injury"¹⁴

In establishing the *prima facie* elements of negligence or professional malpractice, the liability of an SCO will be predicated upon the failure to discharge one or both of two basic and fundamental responsibilities or duties:

(1) It is the duty of the SCO to conduct a thorough pre-game inspection of the players' equipment¹⁵ and of the game site, venue, or facilities¹⁶ in order to ensure safety and appropriateness for play; and

(2) It is the duty of the SCO to insure that the players, coaches, fans, and spectators¹⁷ comply with all safety rules and regulations before, during, and after the contest or for so long as the jurisdiction or authority of the officials is maintained.

It is now well settled that in all but the extraordinary case,¹⁸ the plaintiff

11. See, e.g., *Harris v. Grizzle*, 625 P.2d 747, 749 (Wyo. 1981).

12. 495 A.2d 485, 486 (N.J. Super. Ct. Law Div. 1985).

13. *Id.* See also Michael E. Jones & James J. Richards, *An Introduction to the Law of Torts and Sports in Athletic Competition*, 31 BUS. L. REV. 63 (1998). "The law recognizes that tough, physical play is not only accepted, but a required part of sports, and that players and spectators should recognize the risks of participation." *Id.*

14. *Harris*, 625 P.2d at 749. Recovery has been denied in most player-to-player situations, absent intentional conduct. See, e.g., *Tavernier v. Maes*, 51 Cal. Rptr. 575 (Cal. Dist. Ct. App. 1966) (unintended consequence of opponent's sliding into a base); *Gaspard v. Grain Dealers Mut. Ins. Co.*, 131 So. 2d 831 (La. Ct. App. 1961) (liability denied when bat slipped out of the hands of a batter, striking another player); *Thomas v. Barlow*, 138 A. 208 (N.J. 1927) (basketball player accidentally struck by another player); *Keller v. Mols*, 509 N.E.2d 584 (Ill. App. Ct. 1987) (minor injured while playing floor hockey not as a result of willful or wanton conduct).

15. See SPORTS AND LAW: CONTEMPORARY ISSUES 198-202 (Herb Appenzeller ed., 1985).

16. *Id.* at 198 (holding that, "In deciding whether to begin play when the weather is bad the officials must first inspect the condition of the playing surface").

17. For a discussion of the issue of SCO liability for injuries to spectators, see Biedzynski, *supra* note 1, at 401-02, citing sporting events such as auto racing, baseball, basketball, bowling, demolition derby, dog racing, football, golf, horse racing, ice hockey, jai alai, tennis, polo, rodeo riding, snow mobiling, soap box derby, and wrestling.

18. In such an extraordinary case, the court might apply the doctrine of *res ipsa loquitur*, under which negligence is presumed and the burden of proof is shifted to the defendant, essentially to

has the burden of proof in order to establish a *prima facie* case of negligence or professional malpractice. In cases involving professional conduct (for example, medical or legal malpractice), expert testimony may be essential.¹⁹ Likewise, in the area of sports, expert testimony²⁰ or the introduction and

explain why a defendant should *not* be held liable. The conditions for the application of the doctrine may be traced to *Wigmore on Evidence*, which first appeared in 1905. These conditions include:

(1) The event must be of a kind which ordinarily does not occur in the absence of someone's negligence;

(2) The event must be caused by an agency or instrumentality within the exclusive control of the defendant; and

(3) It must not have been due to any voluntary action or contribution on the part of the plaintiff.

See 4 WIGMORE, EVIDENCE § 2509 (1st ed. 1905). It would thus appear problematic to apply *res ipsa loquitur* to most cases of injuries in sports that might result from a variety of causes or reasons and not necessarily from any negligence.

19. See *Shea v. Phillips*, 98 S.E.2d 552 (Ga. 1957). For an important historical discussion of the use of expert testimony, see Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony*, 15 HARV. L. REV. 40, 41 (1901) (pointing out that expert testimony dates back as far back as the fourteenth century).

20. One definition of an expert is an individual who is "qualified, either by actual experience or by careful study, as to enable [the expert] to form definite opinions with respect to a division of science, branch of art, or department of trade about which persons having no particular training or special study are incapable of forming accurate opinions or of drawing correct conclusions." 31 AM. JUR. 2d, EVIDENCE § 1 (1989). Under the Federal Rules of Evidence, an expert may give testimony in the form of an opinion so long as it will assist the trier of fact or help to determine a fact in issue. FED. R. EVID. 702. See also Russell M. Pelton, *Medical Societies' Self-Policing of Unprofessional Expert Testimony*, 13 ANNALS HEALTH L. 549 (Summer 2004).

Federal Rules of Evidence Rule 702 governs the admissibility of scientific, technical, or other specialized expert testimony. The rule provides as follows:

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based on sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.

FED. R. EVID. 702. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, the United States Supreme Court held that henceforth the district courts should adopt a "gatekeeping function" of "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." 509 U.S. 579, 597 (1993). In so doing, the Supreme Court identified four factors that a District Court may consider in a Rule 702 analysis:

- (1) Whether a theory or technique can be and has been tested;
- (2) Whether it has been subjected to peer review and publication;
- (3) Whether it has a high known or potential rate of error; and
- (4) Whether it is generally accepted in the relevant scientific community.

Daubert, 509 U.S. at 593-94.

The *Daubert* factors, however, are neither mandatory nor exclusive. In *Kumho Tire Co. v. Carmichael*, the Supreme Court emphasized that the basic test for reliability must be a flexible one, since "*Daubert's* list of specific factors neither necessarily nor exclusively applies to all experts or in every case." 526 U.S. 137, 141 (1999). The Court continued: "The trial court must have the same

reference to specific rules or laws concerning specific safety aspects of the contest and the specific application of the rules to playing situations will be required to assist the jury in its determination of any potential negligence. For example, a baseball umpire's liability may be based on Rule 1²¹ and Rule 3²² primarily; while the standard for a youth soccer official is based on Law V (referees), Law I (the field of play), and Law IV (players' equipment), as well as the Criteria for Field Assessment of Officials (inspection of the field and players equipment).²³

Often, the initial determination of professional malpractice will arise in response to a motion for summary judgment on the part of a defendant.²⁴ In

kind of latitude in deciding how to test an expert's reliability, and to decide whether or when special briefing or other proceedings are needed to investigate reliability, as it enjoys whether that expert's relevant testimony is reliable." *Id.* at 152.

21. Rule 1 (Objectives of the Game), available at <http://www.baseballumpires.com/objectives.htm> (last visited Feb. 10, 2005)

22. Rule 3.01, available at <http://www.baseballumpires.com/preliminaries.htm> (last visited Feb. 10, 2005) (stating that, "[b]efore the game begins the umpire shall (a) Require strict observance of all rules governing implements of play and equipment of players . . .").

23. FEDERATION INTERNATIONALE DE FOOTBALL ASSOCIATION (FIFA), LAWS OF THE GAME 2004-2005 (2004), available at http://www.fifa.com/documents/static/regulations/FLOTG2004_e.pdf (last visited Feb. 9, 2005).

24. Summary judgment will ordinarily be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED. R. CIV. P. 56(c). *See also* Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986). The party moving for a summary judgment bears the burden of demonstrating the absence of a genuine issue of material fact. This burden may be satisfied if the moving party can "point to an absence of evidence to support an essential element of the nonmoving party's claim." *Goenaga v. March of Dimes Birth Defects Found.*, 51 F.3d 14, 18 (2d Cir. 1995). "If . . . there is any evidence in the record from any source from which a reasonable inference could be drawn in favor of the nonmoving party, summary judgment is improper." *Chambers v. TRM Copy Centers Corp.*, 43 F.3d 29, 37 (2d Cir. 1994). In making its determination concerning the appropriateness of summary judgment, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986). However, a party opposing summary judgment "may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." FED. R. CIV. P. 56(e). *Noted Judge Motley:*

Judges . . . [are not] required to submit a question to a jury merely because some evidence has been introduced by the party having the burden of proof, unless the evidence be of such a character that it would warrant the jury in finding a verdict in favor of that party. . . . [I]n every case, before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury could properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed.

Eppendorf-Netheler-Hinz v. Entertor Co., 89 F. Supp. 2d 483, 485 (S.D.N.Y. 2000) (citing and quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986)). *See also* *Hayden v. Univ. of Notre Dame*, 716 N.E.2d 603 (Ind. Ct. App. 1999) (discussing the standard for granting a summary judgment in the context of determining that the University of Notre Dame owed a fan a duty of

such a case where the defendant may be pressing the court for a dismissal based on the sufficiency of the pleadings or as a matter of law, the plaintiff has the obligation to establish three essential elements:

(1) The standard of professional care, duty, responsibility, custom,²⁵ or practice;

(2) That the SCO's conduct departed from the recognized or accepted standard;²⁶ and

reasonable care in order to protect her from injury due to the actions of other fans in attempting to retrieve footballs as souvenirs which land in the seating area).

25. Evidence of the usual or customary conduct of others under similar circumstances is normally both relevant and admissible in order to establish the duty of the defendant. In order for the court to recognize a custom—as opposed to a habit, which is particular to one individual—the practice must be so general and so well known so that the defendant might be charged with responsibility for it or with negligent ignorance of it. *See, e.g.,* Cadillac Motor Car Co. v. Johnson, 221 F. 801 (2d Cir. 1915); Garthe v. Ruppert, 190 N.E. 643 (N.Y. 1934). *See also* Shayna M. Sigman, *Kosher Without Law: The Role of Nonlegal Sanctions in Overcoming Fraud Within the Kosher Food Industry*, 31 FLA. ST. U. L. REV. 509 (Spring 2004) (discussing the issue of private customs or practices in the formation of law); Erica K. Rosenthal, Note, *Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play*, 72 FORDHAM L. REV. 2631 (2004) (concerning "customs and practices" in sports and citing Niemczyk v. Burleson, 538 S.W.2d 737 (Mo. Ct. App. 1976)).

26. The degrees of negligence are sometimes referred to as slight, ordinary, and gross. Slight negligence is defined as the failure to exercise great care; ordinary negligence is defined as the failure to use ordinary or reasonable care; and gross negligence, which is defined as the failure to exercise even slight care. Gross negligence is sometimes referred to as "willful, wanton, reckless, or malicious conduct" or a conscious disregard for the safety of others. The finding of gross negligence may result in an increased damage award by the trier of fact when assessing monetary responsibility and damages. Concerning player-to-player liability, the majority of jurisdictions require a recklessness standard in order to impose liability—demonstrating that the actor knew or should have known that his or her conduct involved an ever greater risk than was necessary in order to make his or her conduct negligent. *See* KEETON ET AL., *supra* note 6, § 10; Jones and Richards, *supra* note 13, at 65. *See also* Nabozny v. Barnhill, 334 N.E.2d 258 (Ill. App. Ct. 1975) (soccer player held liable for kicking a goalie in the head, resulting in damage to the goalie's skull and brain on a theory of intentional conduct).

Some have argued that the same standard as applied to "player-to-player" liability should be applied to the SCO, in essence, granting an SCO qualified tort qualified immunity in civil law suits unless the conduct of the SCO constitutes either "gross negligence" or "recklessness." *See* Biedzinski, *supra* note 1, at 398. For a discussion of individual state statutes that support the proposition, see *id.* at 388-98 nn.48-64, citing statutes from Arkansas, Georgia, Indiana, Louisiana, Illinois, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Dakota, Pennsylvania, Rhode Island, and Tennessee.

In the area of recreational sports, for example, whether the conduct of an individual would constitute negligence requires an analysis of the following considerations: the specific game or sport itself; the ages, status and physical attributes of the participants; the respective skills of the participants; their knowledge of the rules; the types of risks that are inherent in the contest or activity and those that are outside the realm of reasonable anticipation; the presence or absence of protective uniforms and equipment; and the "degree of zest" with which the game is being played. *See* JEFFREY K. RIFFER, *SPORTS AND RECREATIONAL INJURIES* 2.01 (1985). *See also generally* Mark Seiberling, "Icing" on the Cake: *Allowing Amateur Athletic Promoters to Escape Liability in Mohny v. USA Hockey, Inc.*, 9 VILL. SPORTS & ENT. L. J. 417 (2002). In an interesting case involving Golden

(3) That the conduct complained of or identified as negligence or professional malpractice was the legal or proximate cause of the injury suffered to the plaintiff.

In examining the issue of professional negligence of an SCO, the following questions are most relevant:

(1) Does the SCO owe a duty of due or reasonable care to the plaintiff? (The question of the scope of the duty of the SCO may be determined by the nature of the relationship between the parties. In one instance, it may be defined narrowly by the contract—either express or implied—between the individual official and the competent contract party. In other cases, the duty will be determined broadly by the playing rules themselves—especially those that relate to the safety of contest participants or others.)

(2) What did the SCO do or fail to do? That is, was there a breach of the duty of exercising due or reasonable care?

(3) Did the act or failure to act on the part of the SCO create a foreseeable risk of harm to the plaintiff or to other parties?

(4) Was actual harm done to the plaintiff? Did the plaintiff suffer an injury or some legally cognizable damages?

(5) Did the act complained of cause the harm? That is, was the negligence of the SCO the cause in fact and the actual legal cause of the injury to the plaintiff?

B. Elements of Proof: A Primer

1. Duty

Professor Champion notes that in law, "[a] duty is an expression of the sum total of policy considerations that would lead an adjudicator [of the facts] to find that a particular plaintiff is entitled to some sort of protection."²⁷ A duty may come into existence through common law, statute, contract, or as a matter of public policy—or as a result of a "special relationship" between the

Gloves boxing, an amateur fighter initially "walked unassisted from the ring but lapsed into a coma about 15 minutes later and died of massive head injuries." See Joe Juliano, UNITED PRESS INT'L, Mar. 3, 1981, available at <http://web.lexis-nexis.com>. The Chairman of the Pennsylvania State Athletic Commission opined that the accident "was not the result of negligence on anyone's part or a fault on anyone's part," but stated that "the probe will attempt 'to determine whether all safety regulations were complied with, or whether anything could have been done to avoid the incident in the first place, or whether anything could have been done to ameliorate the circumstances after the knockdown.'" *Id.*

27. CHAMPION, *supra* note 2, at 72.

parties.²⁸ Generally, the greater the inherent risk in a sport or the more foreseeable the injury—for example, the contact nature of football, hockey, wrestling, boxing, soccer, and lacrosse—the higher the standard of care or the greater the duty will be owed to the participants.²⁹ In addition, while the fact that an official was acting gratuitously, or as a volunteer, is not recognized as a valid defense to a suit based on an allegation of professional negligence on grounds that the absence of consideration denotes an absence of a duty of due or reasonable care, the fact that a person is compensated for his or her services may increase the duty owed to the participants.

2. Breach

Once the duty of due care has been established by making reference to the two basic and fundamental responsibilities of an SCO (equipment and site inspection; compliance with safety rules and regulations before, during, and in some cases, after a contest), the second issue arises: Were the actions or inactions of the SCO a breach of, or failure to live up to, that duty or standard of reasonable care? The question of breach is ordinarily one for resolution by the trier of fact on a case-by-case basis, "unless the evidence is so obvious [or overwhelming] that reasonable minds could not differ in their conclusions."³⁰

Whether an official's act or failure to act is unreasonable and amounts to a breach of a duty depends on the interplay of several factors. One factor is the nature of the act itself. Some acts are deemed so reprehensible, dangerous, or unreasonable in and of themselves (for example, an SCO spitting on a contestant, or encouraging two players to "drop their sticks" and engage in an on-ice fight, or an official permitting a player to continue to participate or play in a contest having suffered an on-field concussion) that a court may impose liability regardless of any serious or substantial physical damage because of the outrageous nature of the SCO's conduct. A second factor may be the manner in which an act is performed (for example, the distinction between intentional conduct, as opposed to purely accidental or unintentional conduct). A third factor is the nature of the injury itself: whether the injury is serious or

28. See, e.g., *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360 (3d Cir. 1993) (recruited collegiate lacrosse player was owed a duty of care by the college to provide prompt emergency medical attention).

29. See *Foy v. Friedman*, 280 F.2d 724 (D.C. Cir. 1960) (the greater the hazard, the greater the care required). See also WILLIAM L. PROSSER, *LAW OF TORTS* 180 (1971) [hereinafter PROSSER] ("The amount of care demanded by the standard of reasonable conduct must be in proportion to the apparent risk."); SEYMOUR D. THOMPSON, *COMMENTARIES ON THE LAW OF NEGLIGENCE IN ALL RELATIONS* (1901) (providing a classic definition of the concept of a "greater duty"); CHAMPION, *supra* note 2, at 73.

30. CHAMPION, *supra* note 2, at 74.

slight, extraordinary, or results as a regular, normal, or usual risk of danger in a sport where physical contact is expected, encouraged, or anticipated.

It is for these reasons that courts have established certain defenses to a negligence suit, based either on the inherent nature of the activity itself—assumption of the risk—or upon the nature of the plaintiff's own actions—contributory negligence. These defenses will be discussed in greater detail below.

3. Injury or Damages

In order for a negligence action to be maintained, there must be a legally recognizable injury or damage suffered by the plaintiff. Since the basis of tort theory is compensatory and not punitive in nature, in all but extraordinary cases, the plaintiff must both plead and prove his or her damages. Unlike the so-called intentional torts, where no provable economic damages need to be shown in order to recover, the plaintiff in a negligence action must have suffered some economic, personal, or physical loss, or some harm, wrong, or invasion of a protected interest (for example, loss of wages, medical bills, hospital bills, or doctor's bills, or in certain cases, damages for "pain and suffering"). It is well settled that nominal damages, sought only to vindicate a technical or moral right, are not normally recoverable in a negligence action.³¹ Absent injury, then, there will be no recovery on a negligence theory.

4. Causation

In order for there to be a recovery under a negligence theory, the wrongful or negligent act must have caused the harm to the plaintiff. In evaluating the issue of causation, courts usually confront the problem by asking two separate questions:

- (1) Is there "*causation in fact*"?
- (2) Was the act complained of the "*proximate or legal cause*" of the injury to the plaintiff?

a. Causation in Fact

The first question is largely a practical one. The second is more technical in nature, involving the application of sometimes artificial principles of tort

31. See Joseph H. King, Jr., *Pain and Suffering, Noneconomic Damages, and the Goals of Tort Law*, 57 SMU L. REV. 163 (Winter 2004) (concerning the issue of nominal damages). See also Michael Tilbury, *Reconstructing Damages*, 27 MELB. U. L. REV. 697 (2003) (citing HAROLD LUNTZ, ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND DEATH 1.8.1 (4th ed. 2002)); CHAMPION, *supra* note 2, at 75 ("Nominal damages alone where no actual loss has occurred will be insufficient").

law.

The issue of causation is necessarily decided on a case-by-case basis. In some cases, the issue may be stated simply: Did the injury to the plaintiff occur because of the alleged negligent act of the defendant, or would it have occurred in any event? Causation in fact may be established by applying the simple "but for" or "*sine qua non*" rule—but for the wrongful act of the defendant, the injury would not have occurred.³² Legally, the "but for" rule is essentially a rule of exclusion: "[I]f the event would not have occurred 'but for' the defendant's negligence," the plaintiff has met this threshold burden of causation and the defendant is potentially liable.³³ However, "it still does not follow that there is liability, since considerations other than causation . . . may prevent it."³⁴

In the sports context, a court may be confronted by a variety of potential causes for an injury—unsafe equipment, faulty maintenance of grounds or facilities, unreasonable or dangerous play of participants, or the negligence of the SCO in failing to carry out his or her core duties—and the court must then apply what is called the substantial factor test.³⁵ If the alleged negligence was a substantial factor in bringing about the injury, the court will find that there is causation in fact as to that allegation of negligence. Note that the cause need not be established as the sole cause or the substantial factor, or even the one nearest in time to the injury. All that need be established is the fact that the negligent act was a substantial factor in causing injury to the plaintiff. The law regarding joint tortfeasors rests to a large extent on the recognition that "each of two or more causes may be charged with a single result."³⁶ As a result, more than one negligent act may be cited as the legal cause of an injury to the plaintiff.

Once it has been established that the defendant's conduct has in fact been a substantial factor in causing injury to a plaintiff, the question remains whether

32. Early, yet topical, discussions may be found in: Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 106, 109 (1911); James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 155 (1925). See also Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1439 n.44 (2003) (citing RESTATEMENT (SECOND) OF TORTS § 432 (1965)).

33. PROSSER, *supra* note 29, at 239 (citing *Gilman v. Noyes*, 57 N.H. 627, 631 (1876)).

34. *Id.* (citing *Gilman*, 57 N.H. at 631).

35. The conduct of the defendant is a cause of an event if it was a material or important element and a substantial factor in bringing about the event. Whether the defendant's conduct is or is not a substantial factor is for a jury to determine, "unless it is so clear that reasonable men could not differ." In that case, it would be a matter for the court to decide, as a matter of law. See PROSSER, *supra* note 29, at 240. See also *Pape v. State*, 456 N.Y.S.2d 863 (App. Div. 1982) (finding no connection or probable cause between the referee's alleged negligence and injuries to the plaintiff).

36. PROSSER, *supra* note 29, at 241.

or not the defendant should be legally responsible for what the defendant has caused. The term "proximate cause"³⁷ is most often "applied by the courts to those more or less undefined considerations which limit liability,"³⁸ even where causation in fact—especially by applying the "but for" standard—has been established. The issue of proximate cause is frequently seen in terms of its public policy implications—that is, will the law extend the legal responsibility of the defendant to the consequences that have occurred?

b. Proximate or Legal Cause

Proximate cause is one of the most vexing concepts in the area of tort law. A determination of proximate cause requires that the injury sustained by the plaintiff be the "natural and probable consequence"³⁹ of the alleged negligent conduct. In resolving the issue of proximate cause, a court will attempt to answer a question: How far (often formulated in laymen's language in terms of time and space) should the liability of a defendant extend for a wrongful or negligent act that has been determined to be the cause in fact and a substantial factor in causing an injury to the plaintiff? Thus, as noted, proximate cause may be best seen in light of practical limitations on liability. For example, a contestant in a soccer match is injured by being 'spiked' in the thigh by an illegal and dangerous cleat; or a contestant in a boxing match has an eye seriously injured by being 'thumbed' by an illegal glove. In both cases, the SCO had failed to thoroughly inspect the equipment prior to the contest. Thus, it is alleged that this failure to properly and thoroughly inspect the equipment was the cause in fact and a substantial factor in the injury to the player or participant. This would present an interesting situation that might be resolved simply and directly by looking at the "but for" and the "substantial factor" tests in tandem, establishing that the injuries were the "natural and probable consequences" of the negligence of the SCO.

Suppose, however, that en route to the hospital, there is a collision with an

37. "In jure, non remota causa, sed proxima, spectator." ["In law, the near cause is looked to, not the remote one."] FRANCIS BACON, MAXIMS OF THE LAW, REG. I (cited in MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 52 (1992)).

38. PROSSER, *supra* note 29, at 244.

39. The phrase apparently originated in *Milwaukee & St. Paul Ry. Co. v. Kellogg*, 94 U.S. 469, 475 (1876). See also RICHARD A. EPSTEIN, TORTS 10.13 (1999); William H. Manz, Palsgraf: *Cardozo's Urban Legend?* 107 DICK. L. REV. 785 (Spring 2003). The *Mondaq Business Briefing* provides an interesting international view: "it was reasonably foreseeable that if the referee failed to exercise reasonable care injury might result." See Herbert Smith, *Duty of Care Owed on the Playing Field- A Further Incremental Step?*, MONDAQ BUS. BRIEFING, Mar. 13, 2003, at <http://www.mondaq.com/article.asp?articleid=20263&searchresults=1> (last visited Feb. 10, 2005) (citing *Caparo Plc. v. Dickman*, 2 AC 605 (1990)).

ambulance transporting the player to the hospital and the injured player is killed. Might the SCO be held liable for this result? The issue of proximate cause would have to be resolved even though 'causation in fact' might be easily established by reference to the simple 'but for' standard. How might a court proceed?

C. Causation, Duty, and Palsgraf

Since the 1928 decision of the New York Court of Appeals in *Palsgraf v. Long Island Railroad Co.*,⁴⁰ many American courts have attempted to resolve the question whether the connection between a negligent act and an injury to a plaintiff is strong enough to impose liability by making reference to a concept known as foreseeability. These courts have framed the issue not in strict terms of "but for" causation, but rather, in terms of determining the nature of the duty owed to a particular plaintiff. Thus, the question becomes one of law to be decided by a court, and not one of fact to be determined by a jury.

In the now famous and still much-debated *Palsgraf* case, the New York court held that there was no liability for the injury to the plaintiff, Mrs. Palsgraf, because there had been no negligence toward her.⁴¹ The facts of the case were quite simple, although still subject to some dispute: A passenger was running to catch one of the defendant's trains. The defendant's employee, the conductor, trying to assist him to board the train, somehow dislodged a package from the passenger's arms and the package fell to the rails. The package contained fireworks of some kind which exploded with some force and violence. The concussion supposedly overturned some weighing scales, located many feet away from the tracks on the platform. One scale fell on the plaintiff, Mrs. Palsgraf, and injured her. Mrs. Palsgraf sued the Long Island Railroad for her injuries.⁴²

Judge Benjamin Cardozo (later Justice Cardozo of the United States Supreme Court from 1932-1938), writing for the majority on the New York Court of Appeals, held that establishing negligence was a matter of evaluating the relationship between the parties and "must be founded upon the

40. 162 N.E. 99 (N.Y. 1928).

41. *Id.* at 102 (the court decided the question on the narrow issue of duty).

42. The record of the case is found in SCOTT & SIMPSON, CASES AT CIVIL PROCEDURE 891-940 (1950). A study by Professor Prosser indicates that the event could *not* possibly have happened in the manner described, but that the scale must have, in fact, been knocked over by a stampede of frightened passengers. See William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 3 n.9 (1953). These facts probably would not have altered the views of either Judge Cardozo or Andrews. For an excellent and complete rendition of the facts of *Palsgraf*, see Manz, *supra* note 39, at 795-811.

foreseeability of harm to the person in fact injured."⁴³ While the defendant's conduct may have been negligent towards several persons (including the passenger attempting to board the train, the conductor himself, and other passengers on the platform), it was not a wrong towards Mrs. Palsgraf because she was not a "foreseeable plaintiff" and was not within a foreseeable "zone of danger."⁴⁴ Thus, Mrs. Palsgraf could not sue as the "vicarious beneficiary of a breach of duty to another."⁴⁵ Since there is no duty owed to the non-foreseeable plaintiff, there can be no finding of negligence against the defendant as to that non-foreseeable plaintiff, Mrs. Palsgraf.

Judge Cardozo summed up the essence of the "foreseeable plaintiff rule" in the following paragraph:

One who seeks redress at law does not make out a cause of action by showing without more that there has been damage to his person. If the harm was not willful, he must show that the act as to him had possibilities of danger so many and apparent as to entitle him to be protected against the doing of it though the harm was unintended.⁴⁶

The decision of the New York court, however, was not unanimous. Three judges dissented, joining in the opinion of Judge Andrews, another well-respected jurist. The "Andrews view" is sometimes referred to as the "direct connection" test. It extends liability, based largely on public policy considerations, to those acts that can be directly connected to the negligent act of the plaintiff. Judge Andrews wrote:

Due care is a duty imposed on each one of us to protect society from unnecessary danger, not to protect A, B or C alone. . . . Not only is he wronged to whom harm might reasonably be expected to result, but also who is in fact injured, even if he be outside what would generally be thought the danger zone.⁴⁷

43. PROSSER, *supra* note 29, at 255.

44. *Id.*

45. *Palsgraf*, 162 N.E. at 100.

46. *Palsgraf*, 162 N.E. at 101. *See also* *Bearman v. Univ. of Notre Dame*, 453 N.E.2d 1196 (Ind. Ct. App. 1983) (holding that the university had a duty to protect invitees at a football game from negligent third party acts because it was foreseeable that fans at these "tailgate" parties could become intoxicated and pose a "general danger to others"). Fans and spectators at sporting events may be classified as business invitees—individuals who enters onto the property of another with the owner's permission and encouragement, normally, but not necessarily, providing the organization with a financial benefit in the form of a ticket or entrance fee. Most high school matches (perhaps with the regular exceptions of football or basketball) permit spectators but do not regularly charge an admission fee. *See* Robin Ammon, Jr. & Nita Unruh, *Crowd Management*, in *LAW FOR RECREATION AND SPORT MANAGERS* § 4.24, at 329, 330 (Doyce J. Cotten et al. eds., 2001).

47. *Palsgraf*, 162 N.E. at 101, 102-03 (Andrews, J., dissenting) (emphasis added).

The *Restatement of Torts*⁴⁸ however, accepted the "Cardozo view" enunciated in *Palsgraf*. According to Professor Prosser, the foreseeability rule has obvious merit for the following reasons:

(1) It simplifies the problem of establishing negligence and facilitates judicial administration by restricting the defendant's responsibility within some ascertainable and reasonable bounds; and

(2) The extension of the duty of a plaintiff to "non-foreseeable plaintiffs" might result in the imposition of liability that may be "out of all proportion to the nature or extent of the departure from ordinary standards of conduct."⁴⁹

In support of the dissenting view, which may be characterized as the "idea of an absolute wrong," an important policy question may be posed: "As between an entirely innocent plaintiff [presumably, Mrs. Palsgraf] and a defendant who . . . has departed from the social standard of conduct" (the employee of the Long Island Railroad); that is, who has been negligent, which party should bear the loss?⁵⁰

Determining the issue of probable cause by framing it as one of duty becomes, in essence, a question of public policy, rooted in social, and not legal, theory. As Professor Prosser noted: "If it is unjust to the defendant to make him bear a loss which he could not have foreseen, it is no less unjust to the plaintiff to make him bear a loss which he too could not have foreseen, and which is not even due to his own negligence."⁵¹

Perhaps a concrete application is in order. A softball umpire fails to perform her pre-game inspection of equipment in a reasonable and prudent manner. As a result, a player comes to the plate with an illegal and dangerous bat held together with a nail and tape—clearly contrary to the rules. Now, the batter swings and hits a foul ball, but as she does, the bat splinters, flies over the dugout, and the upper portion hits a spectator sitting along the third base line in a bleacher area. It appears that both Andrews and Cardozo would assign liability—at least partially—to the SCO. In such a case, a fan or spectator would certainly be a foreseeable plaintiff and the injury certainly could be directly connected to the negligence of the SCO. The spectator is also within a "foreseeable zone of danger." The SCO knows or should know that the rule in question has been promulgated in order to protect against just such an eventuality and that the negligence of the SCO in failing to perform his or her pre-game duties in a professional manner may lead to an injury of

48. § 281 cmt. c (1934).

49. PROSSER, *supra* note 29, at 257.

50. *Id.*

51. *Id.*

this type and character.⁵²

Suppose, however, that a player, in disgust at striking out in a critical situation, throws the same illegal bat and it shatters against a wall, causing splinters to enter the eye of another player, spectator, or an athletic trainer or other club employee in the dugout. In taking the example one step further, suppose that in the prior scenario, five or six wood fragments had struck a person not even remotely associated with the game who was merely walking in an area immediately contiguous to the ball field. Adherents to Andrews' and Cardozo's views might respond to a suit filed by these plaintiffs against the SCO in very different ways by referencing the foreseeable plaintiff or direct connection test—potentially with very different results.

D. Defenses Available in a Negligence Action

Having met the required burden of proof placed on a plaintiff by the courts (not to mention the hurdle raised by Judge Cardozo) in establishing the negligence of the SCO, the defendant may respond by raising certain defenses to the imposition of liability. In the area of SCO liability, three defenses are most common: that the injury was the result of some superseding or intervening cause relieving the defendant of liability, the defense of assumption of risk, and the more traditional defense of contributory negligence.

1. Superseding or Intervening Forces or Causes

An "intervening cause" has been defined as an event or occurrence that breaks the causal connection between the wrongful act of the defendant and the injury to the person or to the interests of the plaintiff, thus superseding the defendant's negligence and relieving the original defendant of liability for the negligent act.⁵³ As such, an intervening cause is one that comes into being or active operation in producing a result after the negligent act of a defendant. The *Restatement (Second) of Torts* provides the following definition: "An intervening force is one which actively operates in producing harm to another after the actor's negligent act or omission has been committed."⁵⁴ An

52. Whether the fan has assumed this particular risk is another matter. See *infra* notes 58-70 and accompanying text.

53. See *Bell Lumber Co. v. Bayfield Transfer Ry. Co.*, 172 N.W. 955 (Wis. 1919). See also *Bigbee v. Pac. Tel. & Tel. Co.*, 665 P.2d 947 (Cal. 1983); *Gill v. Chi. Park Dist.*, 407 N.E.2d 671, 673 (Ill. App. Ct. 1980); Paul T. Hayden, *Butterfield Rides Again: Plaintiff's Negligence as Superseding or Sole Proximate Cause in Systems of Pure Comparative Responsibility*, 33 LOY. L.A. L. REV. 887 (2000) (discussing whether the plaintiff's negligence can constitute a superseding cause).

54. RESTATEMENT (SECOND) OF TORTS § 441(1) (1965).

intervening cause should not be confused with a concurring cause (establishing the fact that more than one party may bear legal responsibility for the negligence) or one that is a substantial factor in bringing about an injury. For this reason, many authorities, supported by the *Restatement*, have argued that the issue may more accurately be stated in terms of a superseding cause by which "its intervention prevents the actor from being liable for harm to another"⁵⁵ caused by his or her negligence.

At least two issues may arise: Is the original actor to be relieved of responsibility because of the happening of this subsequent event? Harkening back to the Cardozo-Andrews debate, should the defendant be liable only if the intervening cause is foreseeable? As postulated earlier, a cause may be foreseeable if it is one which in "ordinary human experience is reasonably to be anticipated" and one which the defendant has reason to anticipate under the circumstances. If the intervening cause is foreseeable, courts are in general agreement that such a cause, though intervening in terms of time, will not supersede the defendant's responsibility so as to relieve him or her of liability for an injury.

For example, if an SCO in a college soccer match were to conduct a negligent inspection of the field, and dangerous and unsafe equipment were made available for use by players (for example, portable goals that are not secured to the ground), it would be anticipated that players might begin the contest with the defective goals in place or that the goalkeeper might even take steps to correct any problem him or herself (for example, by placing some weight temporarily on the arms of the goals). It might also be expected that a third party (coach, maintenance personnel) might deal with the equipment in such a manner as to make it more dangerous (for example, by placing sand bags or temporary ties on the corners of the braces, which present the illusion that the goals have been made secure). During the contest, the goal posts tip over when the goalkeeper attempts to make a save. The goalkeeper and fullback both suffer concussions from the crashing goals. The actions of the goalkeeper and various third parties, although intervening, would not necessarily relieve the SCO of liability for the consequences of his or her negligence should an injury occur, because some or all of the subsequent actions may be considered foreseeable.

As a further example, a contestant in a football game or a hockey match incurs an injury caused in substantial part by the negligence of the SCO (as where the SCO permits a player to participate with a visibly cracked or damaged helmet). The player is then transported to a local emergency room

55. RESTATEMENT (SECOND) OF TORTS § 440 (1965). See also *Trude v. Martin*, 660 A.2d 626, 632 (Pa. Super. Ct. 1995).

where a medical malpractice occurs that seriously aggravates the on-field injury. The SCO may not be relieved of liability—even though the medical malpractice was intervening in terms of time—because the actions of the doctor, although negligent, have been held to be foreseeable. The causal connection is not broken and the medical malpractice is not a superseding event that would relieve the SCO of liability from his or her liability, even for the subsequent medical malpractice.⁵⁶

A second application of the principles surrounding an intervening cause involves the legal doctrine, "danger invites rescue," enunciated in the case of *Wagner v. International Railway Co.*,⁵⁷ in yet another important opinion authored by Judge Cardozo. According to this principle, if an SCO were to commit a negligent act that would endanger a participant (for example, permitting a player to play without the proper head protection in a lacrosse or a boxing match or with an uncovered, unwrapped arm cast) and a third party is also injured (for example, a team trainer, sustains an injury running across the field seeking to administer aid to the injured party or is injured by a golf cart driven across the field by the site supervisor), it is conceivable that the SCO might be held liable for the third party's injury, as well. Someone giving aid—an individual legally termed a rescuer—can injure him or herself,⁵⁸ the person whom he seeks to treat or rescue,⁵⁹ or even a stranger.⁶⁰ The original wrongdoer, the SCO, might be held liable for all or some of these additional injuries on the ground that rescuers, as a class, are most often foreseeable when the defendant's negligence endangers anyone.⁶¹

2. Assumption of Risk

In many cases, the SCO may attempt to defend against a suit based on negligence by claiming that the contestant (or perhaps a spectator) assumed the risk of an injury by voluntarily participating in the event, contest, or

56. See, e.g., *Gen. Motors Corp. v. Farnsworth*, 965 P.2d 1209, 1217 (Alaska 1998).

57. 133 N.E. 437 (N.Y. 1921).

58. See *Williams v. Chick*, 373 F.2d 330 (8th Cir. 1967).

59. See RESTATEMENT (SECOND) OF TORTS § 445 (1965).

60. See *Thomas v. Casey*, 297 P.2d 614 (Wash. 1956). See also Christopher H. White, Comment, *No Good Deed Goes Unpunished: The Case for Reform of the Rescue Doctrine*, 97 NW. U. L. REV. 507 (Fall 2002); Ross A. Albert, *Restitutionary Recovery for Rescuers of Human Life*, 74 CAL. L. REV. 85, 88 (1986) (arguing that a rescuer who has enjoyed the benefits of a rescuer's efforts should bear the costs of that benefit to the extent the rescuer is financially able).

61. *Wagner*, 133 N.E. at 437 (Justice Cardozo stating that "Danger invites rescue. The cry of distress is the summons to relief. . . . The wrong that imperils life is a wrong to the imperiled victim; it is a wrong also to his rescuer").

activity.⁶² The policy underlying the primary assumption of risk defense in the sports context is "the belief that 'the law should not place unreasonable

62. For a definition of the doctrine, see CCH Insurance Services, *Assumption of Risk*, at <http://insurance.cch.com/rupps/assumption-of-risk.htm> (last visited Feb., 2005); Daniel Nestel, "Batter Up!": Are Youth Baseball Leagues Overlooking the Safety of Their Players, 4 SETON HALL J. SPORT L. 77, 79 (1994) ("In cases where a plaintiff seeks relief for an injury resulting from his voluntary participation in a sporting event, courts often must determine whether the defendant's negligence caused the accident"). Traditionally, a plaintiff would be barred from recovery if a court concluded that he or she assumed the risk of injury arising from the conduct of the defendant. See J. Barton Goplerud, *Liability of Schools and Coaches: The Current Status of Sovereign Immunity and Assumption of the Risk*, 39 DRAKE L. REV. 759, 770 (1989).

Assumption of risk doctrine is divided into primary assumption of risk and secondary assumption of risk. See *Mohney v. USA Hockey, Inc.*, 77 F. Supp. 2d 859, 871 (N.D. Ohio 1999) (citing 2 HARPER & JAMES, THE LAW OF TORTS 21.1 (1st ed. 1956)). Under primary assumption of risk, "[t]he question whether the defendant has a legal duty to protect the plaintiff from a particular risk of harm turns solely on the nature of the activity in which the defendant in engaged and the relationship of the defendant and the plaintiff to that activity or sport." *Id.* (citing *Knight v. Jewett*, 834 P.2d 696, 704 (Cal. 1992)). The primary assumption of risk doctrine is most often invoked in connection with voluntary participation in sports and recreational activities. See *Elliott v. Club Med Sales, Inc.*, No. 99 Civ. 1202, 2004 U.S. Dist. LEXIS 4301. The doctrine originated in *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y. 1929). In an opinion by Judge Cardozo, the Court of Appeals held that "[o]ne who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball." *Id.* at 174. Secondary assumption of risk occurs when the defendant owes a duty of due or reasonable care, but the plaintiff knowingly and voluntarily accepts the risk created by the defendant's breach. See *Mohney*, 77 F. Supp. at 872. See also *Parker v. Centre Group Ltd. P'ship*, No. 95-1126, 1995 U.S. App. LEXIS 33694, at *10 (4th Cir. 1995) (holding negligence claim by a professional hockey player injured during a match barred because he assumed the risk of being checked).

In *Brown v. San Francisco Baseball Club, Inc.*, the court held that a spectator is subjected to "certain risks necessarily and usually incident to . . . the game This does not mean he assumes the risk of being injured by the proprietor's negligence but that by voluntarily entering into the sport as a spectator he knowingly accepts the reasonable risks . . . inherent in and incident to the game." 222 P.2d 19, 20 (Cal. Dist. Ct. App. 1950). See also *Akins v. Gelen Falls City Sch. Dist.*, 424 N.E.2d 531 (N.Y. 1981) (holding that ball park owner who screens in the home plate area, where the danger of being struck by a foul ball is the greatest, had provided sufficient protection for spectators/business invitees). The rule in professional baseball has often been mistakenly termed the "no-duty" rule, which emphasizes that baseball park owners are not generally liable for injuries to spectators hit by a ball, provided that the owner or proprietor has exercised reasonable care to protect spectators from harm. *Id.* But see *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 551-52 (Pa. 1978) (noting that the "no-duty rule" applies only to risks that are common, frequent, and expected and does not apply to a person who attends a baseball game as a spectator who cannot be reasonably expected to anticipate as inherent to baseball a risk of being struck by a baseball while using a walkway). See also Biedzynski, *supra* note 1, at 401-02, nn.78-94. The rule may be more properly cited as one of a *limited duty*. See, e.g., *Schneider v. Am. Hockey and Ice Skating Ctr., Inc.*, 777 A.2d 380 (N.J. Super. Ct. App. Div. 2001) *cert. denied*, 170 N.J. 387 (2001), (holding that operators of sports facilities owe spectators a limited duty of care that has two components: (1) to provide protected areas sufficient for those spectators who may reasonably desire protected areas; and (2) to provide protected areas for spectators in the most dangerous section of the stands, for example, behind home plate in baseball and behind the goals in hockey).

burdens on the free and vigorous participation in sports."⁶³ Two requirements must be met in order to engage the defense of assumption of risk:

(1) Knowledge or awareness of a particularized risk; and

(2) Voluntary and free assumption of the risk—in the area of sports, often involving the issue of informed consent.

In certain cases, assumption of risk may be based upon the presentation of a signed statement or an express agreement, waiver, or contract by which a player (or a spectator) assumes a particular risk ordinarily and customarily associated with or found in a sport.⁶⁴ Consider, for example, a putative boxer

63. *Turcotte v. Fell*, 502 N.E.2d 964, 968 (N.Y. 1986) (quoting *Nabozny v. Barnhill*, 334 N.E.2d 258, 260 (Ill. App. 1975)).

64. It is recognized that most exculpatory clauses or contracts releasing a school from liability would be void for public policy reasons. See *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968, 970 (Wash. 1988). Professor Champion notes: "A waiver will be valid if it does not contravene any policy of law and does not involve a quasi-public entity that supports or supplies essential services, but rather relates to the private affairs of individuals." CHAMPION, *supra* note 2, at 172. A waiver may violate public policy if it is ambiguous, where it is a result of great inequality of bargaining power, or where it is deemed to be one of adhesion. *Id.* It has been generally held, however, that a waiver will not bar a claim for gross negligence against a defendant. *Id.* at 173. Professor Champion has outlined the factors that are critical in any determination of whether a waiver or release might violate public policy. These factors include:

whether the agreement concerns the type of business that is generally thought suitable for public regulation; whether the party seeking the waiver is engaged in performing services of great importance to the public; whether the party [seeking the waiver or release] holds itself out as willing to perform these services for any member of the public; whether the party invoking exculpation possesses the decisive advantage and bargaining strength; [and] whether the party thus invoking confronts the public with a standardized adhesion contract.

Id. at 174. See also RICHARD J. HUNTER ET AL., *THE LEGAL ENVIRONMENT OF CONTEMPORARY BUSINESS* 210-11 (2003) (concerning the definition and characteristics of a public and a quasi-public institution).

The following are general guidelines that the writer of a waiver may wish to consider in order to assure that a waiver will be upheld in a court:

(1) The title of the waiver should be descriptive.

(2) Print size should be at least 8-10 point and the language of the waiver should be conspicuous.

(3) The waiver should "clearly and unambiguously state that the signer is releasing the service provider from injuries resulting from the ordinary negligence of the provider."

(4) Denote consideration within the waiver. For example, "In consideration for being allowed to participate in . . . , the signer agrees to . . ."

(5) Specify the parties who are relinquishing rights and who are protected by the operation of the waiver.

(6) In a separate section, inform the signer of the inherent risks, have the signer acknowledge an understanding of the inherent risks, and have the signer specifically assume responsibility for the inherent risks. See generally DOYCE J. & MARY B. COTTON, *WAIVERS & RELEASES FOR THE HEALTH AND FITNESS CLUB INDUSTRY* (2d ed. 2000) (containing twenty-five guidelines that should be considered by the writer of the waiver). Professor Cotton notes emphatically that "[n]o cases have been reported in which a waiver, signed only by the minor, was upheld when challenged in court."

in a collegiate boxing program (the University of Notre Dame "Bengal Bouts") agrees to assume the risks associated with participating in the program by signing a waiver of liability. Such a waiver will be judged by the same generalized standard enunciated above—that is, was the risk stated with sufficient particularity and specificity and did the plaintiff in fact assume that risk.⁶⁵

Ordinarily, however, there may be no conclusive evidence (i.e., no signed waiver) against the plaintiff on the issue of assumption of risk. The issue will be submitted to the jury. As Professor Prosser has noted, "since juries are notoriously unfavorable to the defense, the percentage of cases in which the

Doyce J. Cotten, *Waivers and Releases*, in *LAW FOR RECREATION AND SPORT MANAGERS*, at 87, 89 (Doyce J. Cotten et al. eds., 2001).

When the statement or release is signed by the parent or guardian of a minor, the issue is further complicated—but beyond the scope of this article. See, e.g., *Smith v. YMCA of Benton Harbor/St. Joseph*, 550 N.W.2d 262 (Mich. Ct. App. 1996) (stating that in Michigan a parent has no authority, merely by virtue of being a parent, to waive, release, or compromise claims by or against the child). But see *Hohe v. San Diego Unified Sch. Dist.*, 274 Cal. Rptr. 647 (Ct. App. 1990) (holding that while minors may be free to disaffirm contracts entered into by the minor, they cannot disaffirm contracts made by their parent or guardian); *Aaris v. Las Virgenes Unified Sch. Dist.*, 75 Cal. Rptr. 801 (Ct. App. 1998) (parent may execute a release on behalf of his or her child); *Zivich v. Mentor Soccer Club, Inc.*, No. 95-L-184, 1997 Ohio App. LEXIS 1577, at *1 (Ct. App., Apr. 18, 1997) (waivers signed by parents in favor of nonprofit, public service providers are enforceable against the minor child). However, generally, "[s]chools may have difficulty in enforcing releases signed by parents on behalf of student-athletes because, as the court in *Doyle v. Bowdoin College* noted, parents cannot release a child's cause of action." Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 SETON HALL J. SPORT L. 7, 59 (1996) (citing *Doyle v. Bowdoin Coll.*, 403 A.2d 1206 (Me. 1979)). See also generally Andrew F. Beach, *Dying to Play: School Liability and Immunity for Injuries That Occur as a Result of School-Sponsored Athletic Events*, 10 SPORTS L.J. 275 (2003). There may be a legal distinction between a waiver and a "hold harmless and indemnity clause." See Thomas B. Scheffey, *Faulty Waiver Leaves Ski Resort Exposed*, CONN. L. TRIBUNE, Sept. 1, 2003, at 1 (discussing a circumstance in which the absence of the word "negligence" negated a release form offered by a ski resort).

However, the voluntary participant in a sport or a recreational activity will consent only to "those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." See *Morgan v. State*, 685 N.E.2d 202 (N.Y. 1997). Participants, however, do not assume "concealed or unreasonably increased risks." See *Benitez v. Bd. of Educ.*, 541 N.E.2d 29 (N.Y. 1989). Nor do they assume risks resulting from the defendant's reckless or intentional conduct. See *Turcotte*, 502 N.E.2d at 968.

65. See *Agric. Ins. Co. v. Constantine*, 58 N.E.2d 658 (Ohio 1944). As Professor Prosser noted: "and if he did not know of the provision in his contract and a reasonable person in his position would not have known of it, it is not binding upon him, and the agreement fails for want of mutual assent." PROSSER, *supra* note 29, at 444. See also *How Effective is a "Waiver of Liability"?*, at http://injury-law.freeadvice.com/waiver_liability.htm (last visited Feb. 10, 2005). Concerning the issue of agreements to participate, see *Riddle v. Universal Sport Camp*, 786 P.2d 641 (Kan. Ct. App. 1990). "An agreement to participate is a document that helps to inform participants . . . of 1) the nature of the activity; 2) the risks to be encountered through participation in the activity; and 3) the behaviors expected of a participant. See Doyce J. Cotten, *Defenses Against Liability*, in *LAW FOR RECREATION AND SPORT MANAGERS* 59, 66 (Doyce J. Cotten et al. eds., 2001).

plaintiff has actually been barred from recovery . . . is quite small."⁶⁶

In other cases, assumption of risk will be implied from the plaintiff's specific knowledge of the risk normally, ordinarily, and usually associated with an activity. In an early case, a court noted that "[k]nowledge of the risk is the watchword of assumption of risk."⁶⁷ In this regard, the age, intelligence, experience, knowledge, and ability of the plaintiff would be significant factors in assessing any proposed assumption of risk defense. In addition, a plaintiff does not assume any risk greater than that normally associated with an activity and a plaintiff will not be taken to have assumed any risk of activities or conditions about which he or she is actually ignorant⁶⁸—essentially raising issues for the determination of the jury. Further, the plaintiff must not only know of the facts which comprise or give rise to the risk or which are associated with the risk, but the plaintiff must also comprehend and appreciate the danger itself.⁶⁹

66. PROSSER, *supra* note 29, at 447.

67. *Cincinnati, N.O. & Tex. Pac. Ry. Co. v. Thompson*, 236 F. 1, 9 (6th Cir. 1916). *See also* Jonathan Zasloff, *Law and the Shaping of American Foreign Policy: From the Gilded Age to the New Era*, 78 N.Y.U. L. REV. 239, 267 n.109 (2003) (quoting with approval the maxim). In the case of a minor, a young child is not necessarily required to adhere to the same standard of conduct as would an adult. *See CHAMPION*, *supra* note 2, at 166. A court's inquiry into whether a participant assumed the risks inherent in a given sport hinges on an awareness of that risk. In order to assume a risk, a participant need not have "foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results." *Maddox v. City of N.Y.*, 487 N.E.2d 553, 557 (N.Y. 1985). The participant's personal experience is especially relevant to the inquiry. "[A]wareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff." *Id.* at 556. In a case involving primary assumption of risk, the New York Court of Appeals also took judicial notice of what "[a] reasonable person of participatory age or experience must be expected to know." *Morgan*, 685 N.E.2d at 202.

68. *Guerrero v. Westgate Lumber Co.*, 331 P.2d 107 (Cal. Dist. Ct. App. 1958). *See Maisonave v. The Newark Bears*, 852 A.2d 233 (N.J. Super. Ct. App. Div. 2004). The court held that while watching a game, either seated or standing in an unprotected viewing area, spectators reasonably may be expected to pay attention and to look out for their own safety. However, it is foreseeable—even inevitable—that in the process of placing orders, reaching for money, accepting purchases, or striking up conversations with others on an unprotected and unscreened concession line, spectators will be distracted from the action on the field and the risk of injury from flying objects will be increased significantly. Considering the commercial nature of the venture, the court found a duty to exercise reasonable care on the part of the host club management to protect these spectators during such times of heightened vulnerability and reduced awareness.

69. *Shufelberger v. Worden*, 369 P.2d 382 (Kan. 1962). *See also* *Wood v. Postelthwaite*, 496 P.2d 988, 992 (Wash. Ct. App. 1972) (jury should have been instructed that a player assumes the risk of the game of which he has knowledge but does not assume the risk of negligence of which he has not been forewarned). *See id.* at 993-95. *See also* Karen M. Vieira, Comment, "Fore!" *May Be Just Par for the Course*, 4 SETON HALL J. SPORTS L. 181 (1994). Voluntary participation in a contact sport like football may constitute an implied consent to encounter the normal risks that accompany permissible body contact. *See Kabella v. Bouschelle*, 672 P.2d 290 (N.M. Ct. App. 1983).

Concerning the second element of the test—voluntary and free assumption of the risk—the plaintiff will not be barred from recovery unless his or her choice to participate is truly a free and voluntary one. In many cases, the issue may come down to a simple question: Does the plaintiff, in fact, agree to relieve the defendant of the obligation of protecting him or her? It may thus be said that "if the plaintiff proceeds to enter voluntarily into a situation which exposes him to the risk, it will normally indicate that he . . . has consented . . . to accept the risk and look out for himself."⁷⁰ However, if the plaintiff gives his consent or agrees to participate based on assurances that the situation is safe or will be made safe (for example, reliance on the SCO performing his pre-game duties of field or arena inspection in a professional and thorough manner) or that he or she will be protected against unreasonable harm (starting a contest in a mild rainstorm having been assured that the SCO, or perhaps by the host Director of Athletics, has consulted with a weather service and no severe thunderstorms or lightening flashes have been reported in the area), the contestant will not then assume the risk of any injury unless the danger is so obvious or extreme that no reasonable reliance could be found on the representations of the SCO.⁷¹ These matters are normally left to a jury to decide.

Of course, the situation is a bit more complicated in the context of team sports, as opposed to an individual sport like golf or tennis, where the individual player may be powerless to truly make an informed and intelligent decision that might involve an assumption of risk. The decision to begin a contest is normally made by the host athletic director—sometimes with the input of the SCO⁷²—but in most cases, without any input from the players.

Common experience and the expectations of the participants will likewise bear greatly on the issue of any reasonable assumption of risk; although, as a matter of general application, those who participate or sit as spectators at many

70. PROSSER, *supra* note 29, at 450 (citing *Atchison, T. & S.F. R.R. Co. v. Schroeder*, 27 P. 965 (Kan. 1891)).

71. *See* *Blume v. Ballis*, 291 N.W. 906 (Minn. 1940). The requirement of reliance may be analogized to "open and obvious" hazard cases or to those cases involving negligent misrepresentation and fraud where the plaintiff must prove "reasonable reliance" on the defendant's alleged misrepresentation. *See* RESTATEMENT (SECOND) OF TORTS §§ 537, 552 (1977). In such cases, it may be the duty of the defendant's *not* to make misrepresentations upon which a reasonable person would rely. *See, e.g., Ralston Dry-Wall Co. v. U.S. Gypsum Co.*, 926 F.2d 99 (1st Cir. 1991).

72. For example, in interscholastic sports, the home management (athletic director) will make the decision whether to begin a contest. Once the contest begins, however, the decision to continue or to terminate the match is usually the exclusive province of the SCO. *See, e.g., NATIONAL FEDERATION OF HIGH SCHOOLS (NFHS)*, 2004 SOCCER RULES, Rule 5-3-22 (2004) (*referee shall have the authority to terminate a game when conditions, especially lightening and other climatic conditions, warrant*). In addition, state or local athletic associations may require a certain amount of time to go by before a contest may be restarted when it was *suspended* due to serious weather conditions.

sports and amusements, as opposed to the participants themselves, have been held to assume all of the known risks inherent in that particular activity.⁷³ In *Murphy v. Steeplechase Amusement Co.*, Judge Cardozo may have uttered an apt summary: "The timorous may stay at home."⁷⁴ This may be especially true of an individual who is a spectator at a sports contest where objects from the field frequently fly into the stands.

3. Contributory Negligence

Individuals are expected to exercise a reasonable degree of care in looking out for their own interests. Contributory negligence is conduct that falls below the legal standards which a plaintiff must adhere to for his or her own protection and which is a contributing factor or cause of the injury to the plaintiff.⁷⁵ Many courts have held that a plaintiff will be barred from recovery in whole or in part if his or her own negligent conduct has "contributed in any degree, however slight to the injury."⁷⁶ Under the early common law, contributory negligence was a complete defense or an absolute bar to recovery by a plaintiff where the injured party had failed to exercise that degree of care required of a "reasonable man."⁷⁷ However, as was the case in establishing

73. *Lumsden v. L.A. Thompson Scenic R. Co.*, 130 App. Div. 209, 114 N.Y.S. 421 (1909) (roller coasters); *Hudson v. Kan. City Baseball Club*, 164 S.W.2d 318 (Mo. 1942) (flying baseballs); *Schlenger v. Weinberg*, 150 A. 434 (N.J. 1930) (golf balls). While dated, these cases provide the basic common law justifications for the application of the assumption of risk doctrine. See also *Leakas v. Columbia Country Club*, 831 F. Supp. 1231 (D. Md. 1993); *Riddle*, 1990 Kan. App. LEXIS 50.

74. *Murphy*, 166 N.E. at 174 (phrase cited in Thomas R. Hurst & James N. Knight, *Coaches' Liability for Athletes' Injuries and Deaths*, 13 SETON HALL J. SPORTS L. 27, 42 n.126 (2003)).

75. Prosser and Keeton note that contributory negligence in the United States can be dated from *Smith v. Smith*, 19 Mass. (2 Pick.) 621 (1824). KEETON ET AL., *supra* note 6, at 451-53. See also CCH Insurance Services, *Contributory Negligence*, at <http://insurance.cch.com/rupps/contributory-negligence.htm> (last visited Feb. 10, 2005); CHAMPION, *supra* note 2, at 167 (noting that contributory negligence may involve plaintiff's failure to notice and appreciate a danger). Contributory negligence is normally a question for the determination of a jury, unless there is only one reasonable inference from the evidence. In that case, a court may find contributory negligence as a matter of law. *Id.*

76. See *Crane v. Neal*, 132 A.2d 675, 677 (Pa. 1957). See also *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408, 409 (1953).

77. As long as states refused to substitute a rule of comparative fault for that of contributory negligence, courts were forced to accept the rule that contributory negligence was an absolute bar to recovery by the plaintiff.

No one can appreciate more than we the hardship of depriving plaintiff of his verdict and of all right to collect damages from defendant; but the rule of contributory negligence, through no fault of ours, remains in our law and gives us no alternative other than to hold that defendant is entitled to judgment notwithstanding the verdict. . . . But as long as the legislature refuses to substitute the rule of comparative for that of contributory negligence we have no option but to enforce the law in a proper case.

the negligence of a defendant, the plaintiff will not be barred from recovery unless his or her own negligence likewise has been a *substantial factor* in causing his or her own injury.⁷⁸

Contributory negligence may consist of a failure to discover, appreciate, or comprehend a risk that would be readily apparent to a reasonable man. For example, if a high school football or lacrosse player or a participant in an intramural boxing program refuses to use an approved mouth guard. Contributory negligence may also be found through intentional exposure to a danger of which the plaintiff was aware or should be aware. For example, if a high school soccer player changes his "approved, age-appropriate" shin guards for a smaller, more compact, yet more exposing pair. In this way, the contributory negligence of the plaintiff may indicate consent or willingness to encounter a danger, and thus, to relieve the defendant of responsibility for any subsequent injury. In this sense, the defense of assumption of risk rather than contributory negligence may more properly be cited as the appropriate defense.

Finally, as the law of contributory negligence has developed on a case-by-case basis, if the conduct of the defendant is of the type and character that may be termed intentional (for example, assault or battery),⁷⁹ or approaching intentional conduct (characterized as "willful, wanton, or reckless conduct"),⁸⁰ most courts would hold that ordinary or slight negligence on the part of the plaintiff will not bar recovery on the theory of contributory negligence.⁸¹

Haeg v. Sprague, Warner & Co., 281 N.W. 261, 263 (Minn. 1938).

Five jurisdictions have retained the absolute bar rule, including Alabama, District of Columbia, Maryland, North Carolina, and Virginia. See Vincent R. Johnson, *Transferred Intent in American Tort Law*, 87 MARQ. L. REV. 903, 917 n.48 (2004).

78. Mack v. Precast Indus., Inc., 120 N.W.2d 225 (Mich. 1963). See Berry v. Utica Belt Line St. Ry. Co., 73 N.E. 970, 971 (N.Y. 1905) (applying "but for" or substantial factor rule in determining plaintiff's contributory negligence). See also David Jakobowitz, *"Help, I've Fallen and Can't Get Up!" New York's Application of the Substantial Factor Test*, 18 ST. JOHN'S J. LEGAL COMMENT. 593 (2004).

79. See, e.g., Jenkins v. N.C. Dept. of Motor Vehicles, 94 S.E.2d 577 (N.C. 1956). For a discussion of intentional torts in the sports arena, see Mary A. Hums, *Assault and Battery*, in LAW FOR RECREATION AND SPORT MANAGERS 203 (Doyce J. Cotten et al. eds., 2001).

80. See Kellerman v. J.S. During Co., 199 N.E.2d 562 (Ohio 1964). See also Medina v. Meilhammer, 489 A.2d 35, 40 (Md. Ct. Spec. App. 1985).

81. See Mills v. Reynolds, 807 P.2d 383, 403 (Wyo. 1991) (Urbrigit, J., dissenting) ("Intentionally tortious conduct is 'different in kind' from other classifications of negligent behavior and the distinction is not simply a difference in the 'degree' of knowledge"). See also RESTATEMENT (SECOND) OF TORTS § 503(1) (1977); Randolph Stuart Sergeant, *Gross, Reckless, Wanton, and Indifferent: Gross Negligence in Maryland Civil Law*, 30 U. BALT. L. REV. 1 (2000) (noting that Maryland has eliminated the distinction between gross negligence and reckless disregard and treats gross negligence as a form of wanton or reckless conduct "falling just short of actual malice"). *Id.* at 1. See also *id.* at 3, 8.

For example, a player in a youth soccer match wears shoes with studs or cleats that have been filed down or altered in violation of Law IV. One of these illegal studs breaks or cracks during a match, injuring the individual player. A football player modifies a helmet so that it fits looser (but more comfortably) than the manufacturer's instructions, and the player is injured when he makes an illegal "head tackle." The SCO is sued because of his failure to properly inspect the shoes or to detect the illegal helmet and to prevent the use of illegal and dangerous equipment. The official may be able to raise the issue of contributory negligence on the part of the player or perhaps, as outlined in the prior section, even the more general contention that this risk of a head or knee injury is of the type and character most often assumed by any participant in a soccer match or a football game when the player undertakes the kind of actions described above.

In recent years, there has been a tendency to negate or lessen the full impact and harshness of contributory negligence as an absolute bar to recovery on the part of a plaintiff.⁸² Almost all American jurisdictions now permit recovery on the basis of a theory known as *comparative negligence*. The rule of comparative negligence allows the court to award damages to the plaintiff based on the percentage of damages that was due to the defendant's negligence.⁸³ In essence, the court (or jury) will reduce the damages awarded

82. Comparative negligence actually may have actually antedated the absolute bar of contributory negligence. See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 8 (2d ed. 1986). See also CCH Insurance Services, *Comparative Negligence*, at <http://insurance.cch.com/rupps/comparative-negligence.htm> (last visited Feb. 10, 2005); Katherine A. Adams, *The Kentucky Law Survey: Torts*, 73 KY. L.J. 481 (1984) (noting that "Kentucky became the forty-second state in the nation to abandon the contributory negligence defense and adopt comparative negligence"). *Id.* at 483.

83. Arguments in favor of adopting a comparative negligence standard include the following:

- (1) The contributory negligence doctrine was historically raised under the common law in order to protect the growth of so-called "new industries" (most especially the railroads), and this need is no longer a valid justification for the retention of the defense;
- (2) The doctrine of comparative negligence produces a more "just and socially desirable distribution" of loss than that achieved by the application of a strict contributory negligence standard; and
- (3) Comparative negligence encourages pretrial settlements and will tend to eliminate the need for trial experts and docket delays.

Arguments against the adoption of a comparative negligence standard include:

- (1) Any harshness of the contributory negligence rule may be overcome by compromised verdicts of juries;
- (2) Comparative negligence does not encourage settlements because the plaintiff is more likely to recover something even in doubtful cases and the cost of insurance and defense will thereby increase;
- (3) The art of the trial specialist will be in as much in demand under a comparative negligence as a contributory negligence standard; and

to the plaintiff by a percentage which represents the degree or amount of the fault attributable to the negligent conduct of the plaintiff.⁸⁴ Mississippi was the first state to adopt a general comparative negligent statute in 1910.⁸⁵ Other states to adopt similar statutes were Georgia, Wisconsin, Nebraska, South Dakota, Arkansas, Maine, New Hampshire, Vermont, Hawaii, Massachusetts, and Minnesota; although the form and content of individual statutes may greatly vary.⁸⁶

As noted, the doctrine of contributory negligence is not a defense to the intentional torts—assault, battery, false imprisonment, trespass to land, and trespass to chattels—which arise as a result of the volitional conduct on the part of a defendant, or to a suit based upon a principle of strict liability, where liability may be imposed on the defendant without the finding of any apparent fault and where the conduct of the defendant may have in fact been both prudent and reasonable.

E. Sports and Strict Liability

Under the theory of strict liability, first enunciated in the case of *Rylands v. Fletcher*,⁸⁷ liability is imposed on a defendant for reasons other than fault or negligence, as in cases of abnormally or inherently dangerous activities.⁸⁸ Would the imposition of strict liability be appropriate in the area of sports? Are sports inherently or abnormally dangerous?

The application of strict liability in tort usually involves four determinants:

(1) The activity complained of involves a potential harm of a serious

(4) The cases now considered to be of questionable liability are more likely to be filed and tried under a comparative negligence standard, thereby creating further congestion in the legal system.

See *Maki v. Frelk*, 229 N.E.2d 284 (Ill. App. Ct. 1967) *rev'd*, 239 N.E.2d 445 (Ill. 1968). See also Jordan H. Leibman, *Comparative Contribution and Intentional Torts: A Remaining Roadblock to Damages Apportionment*, 30 AM. BUS. L.J. 677 (1992).

84. Many modified systems of comparative fault will deny damages to a plaintiff whose fault exceeds 50%. Some states will bar a plaintiff from recovery whose fault equals 50%. See Leibman, *supra* note 83, at 679 n.4. See also Cotten, *Defenses Against Liability*, *supra* note 65, at 68 n.1.

85. See PROSSER, *supra* note 29, at 436.

86. See *id.* In at least two states, Nebraska and South Dakota, the general comparative negligence statutes are limited to situations where the negligence of the plaintiff is termed "slight" while the negligence of the defendant is "gross." See Robert E. Johnson, Jr., *Comparative Negligence—The Nebraska View*, 36 NEB. L. REV. 240 (1957).

87. L.R. 3 H.L. 330 (1868).

88. For an early, classic review of the doctrine, see Francis Bohlen, *The Rule in Rylands v. Fletcher*, 59 U. PA. L. REV. 298 (1911). Professor Bohlen was the Reporter for the First Restatement of Torts. Professor Prosser was the Reporter for the Second Restatement. For a decidedly negative view of the application of strict liability, see Frank C. Woodside, III Et al., *Why Absolute Liability Under Rylands v. Fletcher Is Absolutely Wrong!*, 25 DAYTON L. REV. 1 (2003).

nature;

(2) The activity involves a very high ("substantial") risk of injury that cannot be completely guarded against by the exercise of ordinary and reasonable care;

(3) The activity is not commonly performed in the situs, community, or area; and

(4) An evaluation of the appropriateness of the activity to the place where it is being carried out.⁸⁹

As noted, the doctrine of strict liability is most often applied because of the extreme risk of an activity.⁹⁰ A court might apply strict liability because of the nature of the activity itself, quite apart from the conduct of the actors. It does not appear, and no court has so held, that even the more vigorous contact sports, such as football, wrestling, lacrosse, boxing, or soccer, fall into the category of an "inherently or abnormally dangerous activity" that might subject the school, college, or organizing body to strict liability based on the inherent nature of the sport itself or that might subject the SCO to strict liability, in the absence of any finding of negligence, for an injury to a participant.⁹¹ Further, while strictly speaking, the defense of contributory negligence is not available in a strict liability case, the defense of assumption of risk would be available under the requirements discussed above.

Once it has been determined that an SCO is liable to a plaintiff, most likely under a negligence theory, two further questions may be raised: What is the potential liability and responsibility of a contracting party (school, college,

89. For a general discussion of strict liability, including those activities that are termed ultrahazardous activities, see *Beck v. Bel Air Properties, Inc.*, 286 P.2d 503, 509 (Cal. Dist. Ct. App. 1955) (citing RESTATEMENT OF TORTS § 520 (1938)).

90. The Restatement of Torts adopted the basic premise of *Rylands v. Fletcher*. However, the Restatement limited its application to an "ultrahazardous activity"—defined as one which "necessarily involves a risk of serious harm to the person, land or chattels of others which cannot be eliminated by the exercise of the utmost care and is not a matter of common usage." RESTATEMENT OF TORTS §§ 519, 520 (1938). The term "ultrahazardous" has been replaced by "abnormally dangerous" in the Second Restatement. See RESTATEMENT (SECOND) OF TORTS § 520 (1977). This standard was accepted in *Yommer v. McKenzie*, 257 A.2d 138 (Md. 1969). For a common sense definition of the term, see *What is "Strict Liability"?*, at http://law.freeadvice.com/general_practice/legal_remedies/strict_liability.htm (last visited Feb. 10, 2005).

91. See, e.g., Gerald W. Boston, *Strict Liability for Abnormally Dangerous Activity: The Negligence Barrier*, 36 SAN DIEGO L. REV. 597, 599 (1999) (noting that strict liability would be inappropriate when a high degree of risk due to a great hazard can be eliminated by the exercise of reasonable care). See also RESTATEMENT (SECOND) OF TORTS § 520c (1977); Tim Smith, *Dead Boxer's Family Goes to [Johnnie] Cochran Exploring Suit on Negligence*, N.Y. DAILY NEWS, July 11, 2001, available at <http://www.Dailynews.com> (last visited Feb. 10, 2005) (applying the doctrine of assumption of risk to a boxer and stating that the "question is whether it was a reasonable risk under the circumstances").

sports association, league, etc.) for the actions of the game official? What is the legal basis for the imposition of any such liability?

III. LIABILITY BASED UPON A THEORY OF AGENCY

A. The Agency Relationship

The *Restatement (Second) of Agency* defines agency as "the fiduciary relationship which results from the manifestation of consent by one person to act in his behalf and subject to his control, and consent by the other so to act."⁹² The parties in this relationship are generally known as the principal and the agent. In the context of sports officiating, the SCO may, under certain circumstances, be considered as the agent, and the school, college, club, or league, as the contracting party, would stand as the principal.

At various times, the principal-agent relationship has also been termed either the master-servant or the employer-employee relationship—although the term master-servant is anachronistic and most publicists today use the terms principal-agent or employer-employee to delineate the parties. An employee is a special type of agent who has an appointment or contract for salary or wages who has the authority to represent his or her employer.⁹³ As such, the employee's conduct is subject to the control of the employer or is in fact controlled by the employer.⁹⁴ The issue of control is the critical element in defining the nature of the relationship between the parties⁹⁵ and in determining the scope of liability of the parties.

In general, the principal or employer is liable for the physical harm caused by an agent or employee that occurs within the scope of the principal's authority and in the furtherance of the principal's business. This theory of liability and responsibility involves the application of the doctrine known as respondeat superior.

Respondeat superior imposes liability of a vicarious nature—that is,

92. See RESTATEMENT (SECOND) OF AGENCY § 1(1) (1957). See also JORDAN PAUST & ROBERT UPP, BUSINESS LAW 489 (1979).

93. BLACK'S LAW DICTIONARY 617-18 (4th ed. 1968). The Restatement defines the term "servant" as an "agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to . . . control by the master." RESTATEMENT (SECOND) OF AGENCY § 2(2) (1958).

94. For a case turning specifically on the issue of control, see *M.F.A. Mut. Ins. Co. v. U.S.*, 314 F. Supp. 590 (W.D. Mo. 1970). See also *Williamson v. Coastal Physician Servs. of the Southeast, Inc.*, 554 S.E.2d 739, 741 (Ga. Ct. App. 2001).

95. See, e.g., John Dwight Ingram, *Vicarious Liability of an Employer-Master: Must There Be a Right of Control?* 16 N. ILL. U. L. REV. 93 (1995).

liability without regard to the personal fault of the principal or employer—on the principal or employer for a wrong committed by the agent or employee in the course of and "within the scope of employment."⁹⁶

96. For the classic discussion of the term, see Talbot Smith, *Scope of the Business: The Borrowed Servant Problem*, 38 MICH. L. REV. 1222 (1940). Of course, there are various common law duties required of a master-employer for the protection and safety of his employee-servant. These duties were commonly and traditionally classified as:

(1) The duty to provide a safe place to work. See *Armour v. Golkowska*, 66 N.E. 1037 (Ill. 1903).

(2) The duty to provide safe appliances, tools, and equipment for the work. See *Petrol Corp. v. Curtis*, 59 A.2d 329 (Md. 1948).

(3) The duty to give warning of dangers of which the employee might reasonably be expected to remain in ignorance. See *Engelking v. City of Spokane*, 110 P. 25 (Wash. 1910).

(4) The duty to provide a sufficient number of suitable 'fellow servants.' See *Filke v. Boston & Albany R.R. Co.*, 53 N.Y. 549 (1873).

(5) The duty to promulgate and enforce rules for the conduct of employees which would make the work safe. See *Tremblay v. J. Rudnick & Sons, Inc.*, 13 A.2d 153 (N.H. 1940).

These duties may form the basis for the contracting party's obligations towards an SCO, providing the legal foundation for an independent cause of action against the contracting party in an event that an SCO is found to have been negligent in carrying out any of his or her pre-game or game duties that relate to field supervision.

Concerning the issue of "supplying equipment for work," see, e.g., *Kerr v. Corning Glass Works*, 169 N.W.2d 587 (Minn. 1969). A plaintiff can proceed under one or more of a number of theories, including negligence, breach of warranty, and strict liability. Negligence actions may arise out of negligent design, negligent manufacture, or negligent warnings of potential danger in the use of a product or of an item of sports equipment. Under a breach of warranty action, an injured plaintiff can argue that the manufacturer or seller breached an implied or express warranty. See U.C.C. § 2-318 (1977) (providing essentially for *state options* concerning whose rights would be protected and who may bring a warranty action). See generally *Jones & Richards*, *supra* note 13, at 70. Under the rule of strict liability, as applied generally to products, each of the following elements must be established in order for a plaintiff to recover:

- (1) Plaintiff was injured;
- (2) The injury was caused by defendant's product;
- (3) The injury occurred because defendant's product was defective in design, manufacture, or in warnings; and
- (4) The defect was present in the product when it was sold by the defendant.

See also RESTATEMENT (SECOND) OF TORTS § 402A (1965).

In *Southwire Co. v. Beloit Eastern Corp.*, the court noted:

While Section 402A is meant to require manufacturers and sellers to bear much of the responsibility and cost of injuries to consumers resulting from their defective products, it is not meant to impose upon each manufacturer and seller an absolute liability as *insurer for all injuries* to consumers, regardless of the relation of plaintiff's injuries to the particular defendant's product.

370 F. Supp. 842, 858 (E.D. Pa. 1974) (emphasis added).

The principle of strict liability was enunciated by Judge Roger Traynor in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963). "A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to

At early common law, a servant was viewed as no more than the personal property or chattel of the master. With this incident or right of ownership, the master was deemed to have absolute and complete control over the servant's acts. Thus, the master was held strictly liable for these acts no matter how carefully the master had engaged in the supervision of his servant's conduct. In general, the rationale for the doctrine of respondeat superior may be traced to this common law notion. It is deeply rooted in social policy and in the concept of a social duty. As such, and even though the principle of absolute liability is no longer applicable, every person is required to "manage his or her own affairs, whether alone or through [an] agent, so as not to injure another."⁹⁷

The application of the doctrine of respondeat superior may be seen quite properly as a matter of deliberate allocation of risk. Professor Prosser and others have noted that the losses resulting from the wrongful acts of employees, which occur in the conduct of the employer's business or enterprise, are placed on the enterprise itself, as a "required cost of doing business."⁹⁸ Professor Baty may have best stated the underlying and practical rationale for the rule in his treatise, *Vicarious Liability*, when he wrote: "In hard fact, the reason for the employer's liability is that damages are taken from a deep pocket."⁹⁹ This essentially "non-legal theory" of deep pockets¹⁰⁰ is perhaps the most reasonable explanation for the expansive development of respondeat superior and its application today to a host of circumstances far

have a defect that causes injury to a human being." *Id.* at 900. *See also* *Hauter v. Zogarts*, 534 P.2d 377 (Cal. 1975) (applying strict liability to a piece of equipment ("the golfing gizmo") in the sporting context); *Rawlings Sporting Goods Co. v. Daniels*, 619 S.W.2d 435 (Tex. Civ. App. 1981) (plaintiff's football helmet "caved in" on impact); *Arnold v. Riddell, Inc.*, 882 F. Supp. 979 (D. Kan. 1995) (allegation that the helmet was defective and not designed to minimize force to the neck despite manufacturer's knowledge that quadriplegic injuries were occurring and their awareness of other safer helmet designs—including another Riddell model). In attempting to prove a design defect, it may be the plaintiff's responsibility to show that a safer alternative design was available when the product was manufactured. *See, e.g., Everett v. Bucky Warren, Inc.*, 380 N.E.2d 653 (Mass. 1978). The Supreme Court of Arizona has itemized the factors which may be used in analyzing whether a product is defectively designed. These factors include: (1) the gravity of the danger; (2) the likelihood of injury; (3) the obviousness of the danger; (4) the feasibility of an alternate design; (5) common knowledge and normal public expectation of danger; (6) the ability to avoid injury by use of instructions and warnings; and (7) the ability to eliminate the danger without impairing the usefulness of the product or making it unduly expensive. *See Byrns v. Riddell, Inc.*, 550 P.2d 1065, 1068 (Ariz. 1976).

97. *See generally*, PROSSER, *supra* note 29, at 459-60.

98. This "deep pockets" view is supported by WILLIAM L. PROSSER & JOHN W. WADE, *TORTS* 554 (1971). *See also* Michael Uberol, *Does the Law of Torts Recognize the Concept of Individual Responsibility?* P.I. NEWS, Oct. 27, 2003, at 7.2(1).

99. *See* THOMAS BATY, *VICARIOUS LIABILITY* ch. 8 (1916).

100. *See, e.g.,* Robert Mednick, *Accountants' Liability: Coping with the Stampede to the Courtroom*, J. ACCT., Sept. 1987, at 118, 120; David A. Olsen, *Let's Have Fair Play for the C.P.A.*, N.Y. TIMES, Dec. 29, 1991, at 13.

beyond any incident of ownership of a master over his or her servant.

In determining whether or not a particular act occurred within the scope of employment, courts will focus on whether or not the conduct involves "those acts which are so closely connected with what the servant is employed to do, and so fairly and reasonably incidental to it, that they may be regarded as methods, even though quite improper ones, of carrying out the objectives of the employment."¹⁰¹

The *Restatement (Second) of Agency* gives us much guidance in applying the rule of respondeat superior, and may be summarized as follows:¹⁰²

- (1) Whether the act was authorized by the master or employer;
- (2) The time, place, and purpose of the act;
- (3) Whether the act was one commonly performed by employees on behalf of their employers;
- (4) The extent to which the employer's interest was advanced by the act;
- (5) The extent to which the 'private interest' of the employee was involved (sometimes analyzed under the doctrines of "frolic and detour");
- (6) Whether the employer furnished the means or the instrumentalities by which the injury was inflicted;
- (7) Whether the employer had reason to know that the employee would perform the act in question and whether the employee had ever performed the act before; and
- (8) Whether the act involved the commission of a serious crime.

Factors one, three, four, six, and seven tend to favor the application of respondeat superior; factors five and eight tend to militate against the application of the doctrine. Factor two is mainly informational and provides the necessary foundation and context for a proper determination of the issue.

In addition, the fact that an act of the employee may have been expressly forbidden by the employer, or may have been done in a manner that the employer has expressly prohibited, may be considered in determining the nature of the employment relationship; but even these facts are not necessarily dispositive and will not prevent the acts themselves from being judged "within the scope of employment" and "still the master's enterprise."¹⁰³ Thus, so-

101. PROSSER, *supra* note 29, at 460-61. In an interesting and particularly egregious case involving a team physician, normally considered to be an independent contractor, the court found a team liable for the tort of intentional infliction of emotional distress committed by the physician on the ground of *respondeat superior* when the physician alleged that a player had a fatal disease and released the story to the media. See *Chuy v. Philadelphia Eagles Football Club*, 431 F. Supp. 254 (E.D. Pa. 1977), *aff'd*, 595 F.2d 1265 (3d Cir. 1979).

102. RESTATEMENT (SECOND) OF AGENCY § 229 (1957).

103. RESTATEMENT (SECOND) OF AGENCY § 230 cmt. c (1957). But see *Gurley v. Southern*

called "private instructions," no matter how detailed, carefully constructed, emphatic, or prohibitive (for example, a written memorandum issued by conference athletic directors to the effect that that "all officials are required to conduct a thorough inspection of all game equipment prior to every contest") will not generally permit an employer to escape liability if the act complained of is found to be "within the scope of employment." The same social policy that places the risk of the negligent misconduct of the employee on the employer dictates that the employer will not be able to avoid liability by private instructions or otherwise.¹⁰⁴

An employee's conduct will also fall within the scope of employment if it is "the kind which he is employed to perform, occurs substantially within the authorized limits of time and space and is actuated, at least in part, by a purpose to serve the master."¹⁰⁵ At its core, however, it is the issue of control that determines the existence of the principal-agent relationship, and thus of the doctrine of respondeat superior. [The issue of control will be explored more fully under the heading of independent contractor, where the lack of control over the manner in which the work is to be done also militates against the application of vicarious or imputed liability.] It is thus a critical issue to determine whether an SCO is classified as an employee or an independent contract in order to determine the nature of any third party liability.

B. The Doctrines of Frolic and Detour

In the 1834 case of *Joel v. Morrison*,¹⁰⁶ Judge Parke authored the legal maxim that a master is not liable for the torts of his servant who is "not at all on his master's business," but rather "is on a frolic of his own."¹⁰⁷ Since then, courts have recognized that if the employee undertakes to perform some act outside of his regular or usual employment, there will be no legal responsibility for these acts on the part of the employer.¹⁰⁸ In general, the frolic must be accomplished in order to further the personal ends or purposes

Power Co., 90 S.E. 943 (N.C. 1916) (custodian of a private swimming pool instructed not to admit unauthorized swimmers; he nevertheless did so and the court held that the instructions were conclusive that this action was beyond the scope of employment).

104. *Cosgrove v. Ogden*, 49 N.Y. 255 (1872). "Private instructions or limitations not known to persons dealing with a general agent shall not affect them." Paul A. Quiros & Gregory M. Beil, *Business Associations*, 47 MERCER L. REV. 41, 82 n.376 (1995) (citing *Tifton Bank & Trust v. Knight's Furniture Co.*, 452 S.E.2d 219, 222 (1994)).

105. PROSSER, *supra* note 29, at 461. See also RESTATEMENT (SECOND) OF AGENCY § 229 (1957).

106. 6 C. & P. 501, 172 Eng. Rep. 1338 (1834).

107. *Id.*

108. *Dist. Certified TV Serv., Inc. v. Neary*, 350 F.2d 998 (D.C. Cir. 1965).

of the employee. Thus, as such, the act is not considered within the "scope of employment."

The problem is an especially difficult one for courts to sort out in cases where a detour occurs, as where the employee deviates from his or her proposed or assigned route and later returns to it. For example, an SCO leaves the site of a Memorial Weekend soccer festival to enjoy a "burger and a couple of beers" between games. On the way back to the tournament site, the official has an automobile accident, seriously injuring a young girl riding her bike near the field complex. The girl's parents sue the official and the town recreation committee that sponsored the tournament that had arranged and contracted for the services of the official.

In order to resolve the issue, courts have proposed various tests, the most practical of which focuses on the servant's purpose in the detour or deviation, holding that the servant is outside of his employment while he or she is off on his own concerns.¹⁰⁹ However, the actions of the servant may again fall within the scope of employment while the servant intends in whole or in part to serve his or her master by or during the departure, or as soon as the servant (employee) commences to return or actually returns to his or her assigned route.¹¹⁰ Suppose that in our prior example, the tournament committee had provided officials with meal and drink tickets that could be used at a local pub or restaurant. It might be argued that the SCO is in fact still "on the assigned route" of the employer, or is actually "serving the interests of the employer," and the town recreation committee may not be able to escape liability.

Again mirroring the viewpoint of Judge Cardozo, a second approach looks more to the issue of the foreseeability of the deviation. Under this approach, the employer will be held liable for the negligence of his employee if the negligent act occurs within the "zone of risk"—admittedly, an artificial boundary of space and distance¹¹¹—within which the employee might reasonably be expected to deviate, even for a purpose entirely of the employee's own.¹¹² According to this perspective on foreseeability, a court should consider the nature of the deviation in terms of distance and scope.

109. Fleming James, Jr., *Vicarious Liability*, 28 TUL. L. REV. 161 (1954).

110. *Westberg v. Willde*, 94 P.2d 590 (Cal. 1939) (intending to serve the master by or during the departure). See also generally Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 587 n.58 (1988).

111. RESTATEMENT (SECOND) OF AGENCY § 234 (1957).

112. *Leuthold v. Goodman*, 157 P.2d 326 (Wash. 1945). See also William A. Wines, *Automobile Insurance Policies Build "Write-Away" Around Frolic and Detour, a Persistent Problem on the Highways of Torts*, 19 CAMPBELL L. REV. 85, 96-102 nn.79-128 (1996) (discussing the concept of a "zone of risk").

The employer will be liable at least for those slight departures or deviations in the performance of work which might reasonably be expected on the part of employees similarly employed, based on the foreseeability of such conduct. In the example, above, it might be important to determine if the officials had usually or traditionally "adjourned" to the local pub for their lunch. However, as with the initial question considering the existence of the principal-agent relationship, the determination and application of the frolic and detour doctrines may turn more on a question of social policy rather than the somewhat artificial concept of foreseeability of the deviation. It may also be important to remember that as in the case of vicarious liability, "the employer is to be held liable for those [acts or activities] which are fairly to be regarded as risks of his business"¹¹³ and for which the employer may obtain a policy of insurance to cover the risks. Once again, the specter of the party with the deepest pockets may still be the most critical in considering the doctrines of frolic and detour rather than an in-depth analysis based on Judge Cardozo's view of foreseeability.

C. Liability of the Principal for Intentional Torts

Consider this example. It is nearly midnight and the wrestling match official, having showered and dressed, is leaving the city civic auditorium, which doubles as the venue for the regional boys' wrestling tournament. He notices that a young boy (probably one of the contestants) is waiting by the door. The young man recognizes the individual as the person who had officiated his match just about an hour before. The official offers the young man a ride home, and the young boy gratefully accepts. On the way home, the official offers the young man one or two beers. The official then tells the young man that he is going to "take a short-cut" home. The official commits a sexual assault against the young man. Is the State Athletic Association who assigned the official to the "regionals" potentially liable for this sexual assault?

Early decisions in common law refused to hold a master liable for the intentional conduct or willful misconduct of a servant based upon the view that such intentional conduct or willful misconduct was never authorized.¹¹⁴ However, under a more modern view, based once again in substantial part on the allocation of risk and the application of social policy, the commission of an

113. PROSSER, *supra* note 29, at 463 (citing *Ryan v. Western Pac. Ins. Co.*, 408 P.2d 84 (Or. 1965)). It is interesting to note that even extreme deviations have been held not to take the servant-employee out of the scope of employment test where an automobile is in use.

114. Doyice J. Cotten, *Intentional Torts and Criminal Acts*, in *LAW FOR RECREATION AND SPORT MANAGERS* 200, 200 (Doyice J. Cotten et al. eds., 2001). "When injury results from an intentional tort, the doctrine of respondeat superior does not usually apply." *Id.*

intentional tort may be so inextricably connected with the incidents of employment so as to be considered within the scope of that employment, extending the employer's liability even for such intentional conduct.¹¹⁵ This view supports the idea that a master-employer may be held liable for an intentional tort committed by the servant-employee where its "purpose . . . is wholly or in part to further the master's business."¹¹⁶

However, it is also recognized that where the conduct of the employee is of a highly unusual character or is truly outrageous, there is a tendency to find that such behavior is in itself sufficient to indicate that the core motive of the employee was a personal one and thus the doctrine of respondeat superior will not be applied.¹¹⁷ Would that be a fair reading of the scenario described above? Or, considering the nature of the sexual assault, and where and when it had occurred, could the offending official be considered legally on a frolic or detour?

This "personal motive" defense, available to an employee to fend off a suit based on vicarious liability, is not an all-encompassing bar to recovery. Should the master-employer have entered into a relationship in which he or she is contractually responsible for the protection of the plaintiff or a class of plaintiffs (for example, a common carrier, an innkeeper, a hospital, or perhaps a state athletic association or the NCAA that administers or conducts a tournament) a court can determine that the responsibility for the servant's acts may be attributed vicariously to the master-employer even for intentional conduct.¹¹⁸

D. Independent Contractor

In most states, SCOs are contracted for by individual authorities (a high school, athletic association, college, community, or recreation league, or perhaps for regional or state matches, by a state athletic association)—although in many cases, the SCO may be physically assigned to an individual contest by a central authority (the assignor) for ease of scheduling purposes. Is the SCO an employee or an independent contractor? As Professor Prosser noted:

[S]ince the employer has no right of control over the manner in which the work is to be done, it is to be regarded as the

115. Johnson, *supra* note 77, at 921 n.64. See also Price v. Viking Penguin, Inc., 881 F.2d 1426, 1446 (8th Cir. 1989).

116. PROSSER, *supra* note 29, at 464.

117. See especially Averill v. Luttrell, 311 S.W.2d 812 (Tenn. Ct. App. 1957) (fight between baseball players).

118. See RESTATEMENT (SECOND) OF AGENCY § 214 (1957).

[independent] contractor's own enterprise, and he, rather than the employer, is the proper party to be charged with the responsibility of preventing the risk, and administering and distributing it.¹¹⁹

A standard phrase that may appear in a contract entered into by an SCO and an individual contracting authority may be: "Said official, in the capacity as an independent contractor, agrees to be present and to officiate"¹²⁰ Legally, independent contractors are not considered employees because their employers have no control or no right to control the details of their physical performance.¹²¹ The *Restatement* defines an independent contractor as a "person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking."¹²² This definition would almost perfectly describe the position of an SCO, under most circumstances.

The following factors are most often cited by courts in determining if the relationship is in fact that of principal-agent (in which case, the court can apply the doctrine of respondeat superior, imputing the negligence of the agent-employee to the principal-employer) or that of independent contractor (in which case the principal-employer would not be held vicariously liable for any negligence on the part of the agent-employee).

(1) The extent of control that the employer can exercise over the details of the work;

(2) Whether the employee is engaged in an occupation or business distinct from that of the employer;

(3) Whether the work is usually done under the employer's supervision or

119. PROSSER, *supra* note 29, at 468.

120. Interestingly, a majority of cases deciding the status of an SCO as either an employee or an independent contractor have arisen in the context of an official attempting to collect workers' compensation benefits and not in the context of a negligence action. See Biedzynski, *supra* note 1, at 382 n.32. What may be of interest is the comment: "That control is control of how the employee performs the work. In the context of sports officiating, no one can control how a sports official works a game. To do so would be the antithesis of a sports official. Once armored with the rules of the sport, the sports official must then use reasoned judgment in the application of the rules to the players' action." SPORTS AND LAW, *supra* note 15, at 194-95. See also Darryll M. Halcomb Lewis, *After Further Review, Are Sports Officials Independent Contractors?*, 35 AM. BUS. L.J. 249 (1998) (looking at the issue of independent contractor in the context of the "right to control" rule by an individual with extensive "on-field" collegiate and professional football officiating experience).

121. See, e.g., *Logue v. United States*, 412 U.S. 521, 528 (1973).

122. RESTATEMENT (SECOND) OF AGENCY § 2 (1957). See Rodney L. Caughron & Justin Fargher, *Independent Contractor and Employee Status: What Every Employer in Sport and Recreation Should Know*, 14 J. LEGAL ASPECTS OF SPORT 47, 50 (2004). See also *id.* at 48-49 (outlining advantages and disadvantages of hiring independent contractors).

is the work done by a specialist or professional who undertakes to work without supervision;

(4) Whether the employer supplies the tools at the work place;

(5) The period of employment (limited or unlimited);

(6) The method of payment—by time or at the completion of a specific job or task;

(7) The degree of skill required of the employee; and

(8) The status that the employment contract confers on the employee.¹²³

If the responses to these questions or formulaics indicate a lack of control on the part of the employer, an employment of limited duration (for example, one contest, match, or session), payment at the conclusion of a task (for example, at the conclusion of one contest, match, or session), a high degree of independent skill imparted by a third party SCO, and the statement in the contract that the relationship is one of an employer-independent contractor, although less decisive, most courts would find that the relationship is one of an employer-independent contractor and would not apply respondeat superior.

It should also be noted that while many American courts have continued to repeat the general rule of non-liability in the case of an employer-independent contractor, the *Restatement* has placed no fewer than twenty-four exceptions on its list, generally grouped into four headings: negligent hiring, negligence of the employer, non-delegable duty, or inherently dangerous activity.¹²⁴ Might one or more of these exceptions apply concerning the SCO who otherwise would be considered an independent contractor?

1. Negligent Hiring¹²⁵

It is generally accepted that where there is a foreseeable risk of harm to others because of circumstances surrounding the rendering of services by an independent contract, it is the duty of the employer, quite apart from any

123. See RESTATEMENT (SECOND) OF AGENCY § 220 (1957) (cited in Ann C. McGinley, *Functionality or Formalism? Partners and Shareholders as "Employees" Under the Anti-Discrimination Laws*, 57 SMU L. REV. 3, 27 n.145 (2004)). By way of contrast, the IRS has established twenty factors, called *Common Law Factors*, which attempt to assess whether an employee will be considered as an employee or an independent contractor for tax purposes. See Caughron & Fargher, *supra* note 122, at 51-54 (citing Barbara Apostolou et al., *The 20-Factor Worker Status Test: Would Seven Factors Work Just As Well?* 61 TAX NOTES 1389 (1993), available at <http://www.expertchoice.com/hierarchon/htmlfiles/taxques.htm> (last visited Feb. 14, 2005)).

124. RESTATEMENT (SECOND) OF TORTS §§ 410-429 (1965).

125. For an interesting overview, see *A Look at Negligent Hiring Law Suits*, at http://law.freeadvice.com/general_practice/legal_remedies/strict_liability.htm (last visited Aug. 26, 2004) (containing a definition, and discussing negligent retention, negligent supervision, and inadequate security).

finding of vicarious liability, to exercise reasonable care in selecting a "competent,"¹²⁶ "experienced,"¹²⁷ and "careful"¹²⁸ independent contractor—perhaps most especially in the contact sports—the SCO who arrives at the game site or contest, armed with the proper equipment and training. For example, it may be the duty of a high school or collegiate athletic director or of a youth tournament director to take an active role in the selection of the SCO¹²⁹ so that the individual who officiates a contest has at least the minimum level of competence required, based on the age, experience, and level of play of contestants.

2. Negligent Supervision

It is also the duty of the employer or contracting party to provide to the SCO, either in the contract or through detailed instructions otherwise provided, precautions and warnings as may be reasonably sufficient under the circumstances. The site administrator (normally an athletic director or tournament director) must inform the SCO of any special problems or dangers that may impact on the safe conduct of any contest. The contracting party should be actively engaged in the supervision of an official during his or her pre-game and game administrative duties, most especially those duties relating to the safety of the participants. Quite apart from any duty regarding hiring of the SCO, an employer must exercise reasonable care for the protection of others, as appropriate (for example, spectators or parents), and must intervene to put an end to any dangerous practices of which the employer becomes aware. Failing to discharge these independent responsibilities, the employer will be subjected to liability for his or her own negligence and not under a theory of respondeat superior. Failing in this supervisory role,¹³⁰ a contracting

126. *Huntt v. McNamee*, 141 F. 293 (4th Cir. 1905). Concerning the qualities of hiring a *competent, experienced, and careful employee*, see Rick Bales, *Investigating Employee Misconduct: A Private Sector Nonunion Employer's Guide to Controlling the Workplace Without Getting Sued*, 8 CORP. COUNS. REV. 219 (1994) (reinforcing the idea that "competent employers must hire competent employees").

127. *Ellis & Lewis v. Warner*, 20 S.W.2d 320 (Ark. 1929).

128. *Ozan Lumber Co. v. McNeely*, 217 S.W.2d 341 (Ark. 1949).

129. It is quite common, especially in scholastic sports, for an athletic director or coach to create a "no want" or "preferred" list of officials.

130. "Negligent supervision alleges that: (1) an employer had a duty to supervise its employees, (2) the employer negligently supervised an employee, and (3) such negligence proximately caused the plaintiff's injuries." *Van Horne v. Muller*, 691 N.E.2d 74, 79 (Ill. App. Ct. 1998) *modified on other grounds*, 705 N.E.2d 898 (Ill. 1998).

In an interesting and widely viewed and reported case involving professional sports (NFL football), Orlando Brown, a former professional football player whose career was cut short when he sustained eye injuries when an NFL referee threw a penalty flag weighted with "BB" pellet, argued

authority may be held liable for the negligence of an otherwise independent contractor. ensure

3. Non-delegable Duty

In certain cases, courts have held that because of the nature of an activity itself, the employer cannot delegate the duty of performance or the assurance of safety to an independent contractor. Thus, the employer will be liable for the negligence of the independent contractor who performs a non-delegable duty in an unreasonable or negligent manner. The doctrine is at its essence a restatement of vicarious liability based on a strict liability status. A non-delegable duty may be imposed by a statute, as in California, Rhode Island, New York, and Illinois, or by contract, or in most cases, by the common law.¹³¹

The concept of a non-delegable duty is also rooted in social policy, in that the duty or responsibility is so vital or important to the community that the employer should not be permitted to transfer or delegate it to an independent contractor.¹³² An application of this principle may lead to a conclusion that certain aspects of sports—especially those relating to the safety of individual contestants—may impose a duty on the contracting party, which may not be assigned or delegated to the contest official under the guise of the status of an independent contractor. Thus, an attempt by contract or otherwise to rely on the status of independent contractor in order to insulate an employer from liability may be ineffective, especially as it relates to the physical condition of the field or premise, or the physical ability of individual contestants to safely participate in a match or contest. Thus, for example, while the rules clearly require a high school soccer official to check for illegal or improperly padded casts and to prohibit individuals from playing who have such casts, it may also be the responsibility of the home management athletic director or coach to ensure that a player from its own school does not attempt to participate in a

that the NFL, as the employer of the on-field official, breached its duty to him and to the general public to hire and employ competent referees for NFL football games, to train and supervise its referees, to ensure that its referees not throw penalty flags directly at a person when calling an infraction, to ensure that penalty flags not be unsafely weighted in violation of NFL rules, and to train its employees on the proper [non-negligent] manner in which penalty flags should be thrown. See *National Football League Owes Common-Law Duty to Ensure Safety of General Public*; Brown v. National Football League, N.Y.L.J., Apr. 1, 2002, at 17 (discussing *Brown v. National Football League* in the context of NFL Rules and the NFL Officials Mechanics Manual). See also Darryll M. Halcomb Lewis, *An Analysis of Brown v. National Football League*, 9 VILL. SPORTS & ENT. L. J. 263 (2002). The facts of the incident are outlined in Adam Rubin, *Ref Blamed for Eye Injury*, N.Y. DAILY NEWS, Mar. 30, 2001, at 108.

131. See PROSSER, *supra* note 29, at 470.

132. *Id.* at 471.

contest sporting such illegal equipment. The duty may be held to be non-delegable.

4. Inherently Dangerous Activities

The doctrine of an "inherently dangerous activity" is one that incorporates elements of the theory of non-delegable duty with the English common law notion that certain categories of work might result in injury or which might be especially dangerous unless "means are taken to prevent them" or "unless special precautions are taken."¹³³ American courts have adopted the phrase "inherently dangerous" to include a wide variety of activities which are dangerous in spite of any and all reasonable care.¹³⁴ The application of the doctrine of inherently dangerous activities is limited to those types of activities in which there is a high degree of risk due to the particular surroundings or some rather specific risk that calls for specific and definite precautions or safety measures.

Sports themselves are not generally considered inherently dangerous¹³⁵ (with the possible exception of the more severe contact sports). However, it may be argued that at least concerning certain types of sports equipment and aspects of field maintenance, a special duty may arise. Should a player be permitted to participate with dangerous equipment (a faulty or dangerous helmet or a splintered or taped bat), or permitted to play in a venue where a dangerous condition exists (an unpadded blackboard, a field with dangerously exposed sprinkler heads, or an unconnected ice rink divider), the employer or contracting authority may not seek to absolve him or herself of liability based on the defense that the SCO, who was negligent in failing to detect or attempt to remedy these dangerous conditions, was acting as an independent contractor.

133. See *Bower v. Peate*, 1 Q.B. 321 (1876). See also RESTATEMENT (SECOND) OF TORTS § 416 (1977). The failure to require specific precautions establishes the negligence of the hiring party independent of the contractor's act. See also *Toland v. Sunland Hous. Group, Inc.*, 955 P.2d 504, 513 (Cal. 1998).

134. See RESTATEMENT (SECOND) OF TORTS § 427 (1965).

135. The traditional list of activities developed under the common law includes the construction of reservoirs, the use or keeping of vicious animals, high tension electric wires, blasting, crop dusting, and the exhibition of fireworks. In *Caparo Plc. v. Dickman*, 2 A.C. 605 (2003), it is interesting to note that the English House of Lords had rejected the idea that because rugby was an "inherently physical game," a duty of care should not be imposed. *Duty of Care Owed on the Playing Field: A Further Incremental Step?* MONDAQ BUS. BRIEFING, Mar. 13, 2003, at <http://www.mondaq.com> (last visited Aug. 25, 2004)).

IV. SOME PRACTICAL APPLICATIONS FOR THE SPORTS CONTEST OFFICIAL

Section four of this article moves from an academic exercise to a more practical one. Section four is directed primarily at the SCO—or an attorney who is called upon to give advice to an athletic or officials' association, school, or college or to sponsoring authority—or perhaps even the vigilant SCO.

It is important that an SCO have specific guidance in performing his or her pre-game and game responsibilities. It is also important that the SCO follow these or similarly constructed steps or guidelines in every contest in which he or she assumes the role of arbiter. In this regard, officials' associations and state or national athletic associations must begin to play a more proactive leading role. These organizations have until recently paid insufficient attention to safety standards of SCOs and to issues of legal liability, but instead have focused on other important areas such as student-athlete participation, disqualification procedures, physical examinations, assessment, injury reporting, protecting officials from on-field assaults,¹³⁶ recruiting,¹³⁷ or other aspects of official-player-coach relationships. Professional organizations must now assume their pivotal role in ensuring safety before, during, or after a sporting event in order to protect both the SCO from unnecessary exposure and liability, and participants and others from unnecessary and preventable injuries.

Ten Suggestions for SCOs

The following specific guidelines are offered as suggestions to the SCO in carrying out his or her responsibilities:

136. See, e.g., John Patterson, *Penalties Get Tougher for Attacking Sports Officials*, CHIC. DAILY HERALD, July 10, 2004, at 9 (reporting on a newly signed state law in Illinois that provides for stiffer sentences (up to a year in jail and a fine up to \$2,500) against those who attack an SCO). A similar approach has been adopted in Florida. See Scott Purks, *Bill Aims to Rein In Attacks on Officials*, ST. PETERSBURG TIMES, May 18, 2004, at 1C. However, the law would protect only certified officials. *Id.*

A narrative description of violence against officials might include the following well-known examples: Roberto Alomar of the Baltimore Orioles spitting on umpire John Hirschbeck; Los Angeles Laker guard Nick Van Exel knocking referee Ron Garretson into the scorers' table; a 17-year-old Little League Umpire being hit in the face with an aluminum bat being swung by a coach; and a high school wrestling official being head butted into unconsciousness by a losing wrestling contestant. See Christopher M. Chiafullo, *From Personal Foul to Personal Attack: How Sports Officials Are the Target of Physical Abuse from Players, Coaches, and Fans Alike*, 8 SETON HALL J. SPORT L. 201, 228 (1998) (cited in Hums, *supra* note 79, at 207).

137. See David King, *Help Wanted; A Few Good Men, Women Officials*, SAN ANTONIO EXPRESS-NEWS, Oct. 17, 2003, at 1C (discussing the difficulty in recruiting high school SCOs).

(1) Know the rules—especially those that deal with the safety of participants and basic game control. There is no substitute for a thorough and complete knowledge of all rules that relate to player safety! Frequent reviews must be undertaken by individual officials and officials' associations in order to ensure that SCOs are well-versed in the areas of player safety, sportsmanship, and game control.

(2) Know the specific responsibilities of game officials regarding player equipment, situs inspection, and any special circumstances (lightening, rain, thunderstorms, deteriorating field conditions, provisions if a fight breaks out on the field, and aspects of crowd control)¹³⁸ during a contest. Carry out pre-game responsibilities (checking equipment and the field) with precision and care and in full view of responsible parties. Have any problems corrected prior to the start of the contest. Let everyone know that you are safety conscious and that safety of the participants is your first priority.

(3) Carry out a physical checklist of what you are supposed to be looking for and perform your duties carefully according to that schedule. For example: check helmets; check bats; check for jewelry; check shoes for the proper length of studs; check lacrosse sticks for the proper length; check boxing gloves for hardness or sharp projections. As an SCO, you need to be specifically aware of the specialized safety issues involved in your sport.

(4) During the actual contest or event, be watchful regarding issues of player safety—especially the condition of equipment specifically designed for safety (baseball and football helmets; mouth protectors; shin guards and pads; etc.).

(5) Do not let players participate who have failed to meet safety requirements. Improper or missing equipment means "no participation." *Period!* Do not play matches or games on or in venues that fail to meet safety requirements.

(6) If an injury should take place during a contest, generally do not take steps to treat any injury yourself. The responsibility for diagnosing, moving, transporting, and treating an injured player is that of a competent medical professional, under the direction of or with the cooperation of the coach, athletic director, or designated athletic trainer.¹³⁹ Insist that competent

138. The New Jersey State Interscholastic Athletic Association has published a detailed set of guidelines concerning pregame sportsmanship, guidelines for lightening safety, procedures before a game may be terminated, procedures when officials fail to arrive or are unable to continue a contest, and guidelines for use of a prosthesis. See NJSIAA, 2003-2004 NJSIAA HANDBOOK (6th ed. 2004).

139. Of special note should be *Welch v. Dunsmuir Joint Union High School District*, 326 P.2d 663 (Cal. Dist. Ct. App. 1958) (school district held vicariously liable for the negligence of the football coach and team doctor who used improper techniques in the removal of an injured player from the playing field who was suspected of having a fractured neck exacerbating the original injury).

medical help be called in to deal with an injury, and insist that a player not be moved in any close case, except by professional medical help or by members of a qualified athletic training staff. Simply remember: No good deed goes unpunished!

(7) Make careful personal note of the injury for yourself immediately after the contest, preferably at the contest site, and secure the input of any fellow official(s). If an injury requires 'outside' medical attention or a significant stoppage of time, you may wish to inform a designated individual in your officials' association of the basic facts—but avoid any personal characterizations or commentary!

(8) Do not speak to parents or make any public statements to the press in case of a serious injury.

(9) Encourage your officials' associations to discuss and treat the issues of safety and injury seriously at meetings, seminars, discussions, etc.

(10) If possible, insist that your officials' associations carry a general malpractice insurance policy and that each official be covered by a personal malpractice insurance policy that will protect the organization and the individual official from personal liability in case of a negligence or professional malpractice suit.

V. CONCLUSION

The area of an SCO's responsibility for an injury that may occur prior to, during, or immediately following a contest is a complicated and important one. The purpose of this paper has been fourfold:

(1) To clearly delineate the prevailing standard of due care and a possible alternative standard¹⁴⁰ to which an SCO, as a professional, will be held accountable in cases where his or her conduct, actions, or failure to act is alleged as a cause or a contributing factor in the injury to a contestant or some other person associated with a contest;

(2) To outline the defenses that might be available to the SCO in warding

140. In analogizing the alternative standard to one adopted in player- to- player situations to those in cases where an SCO is sued, a proper test may be based on a careful combination of recklessness and rules violations. "An alternative approach to an objective standard based exclusively on a rule violation is the adoption of a tort standard that combines the traditional recklessness test with the rules and customs violation approach. A sports participant would be liable in tort to another participant if 1) the conduct causing personal injury constituted a violation of safety rules and "common law" customs of the sport (an objective standard); and 2) such injurious conduct constituted a reckless act (a more subjective act.)" Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI ENT. & SPORTS L. REV. 191, 223 (1990). See also Mel Narol, *Sports Participation with Limited Litigation: The Emerging Reckless Disregard Standard*, 1 SETON HALL J. SPORT L. 29, 39-40 (1991).

off a suit based upon alleged negligence;

(3) To describe the relationship between the SCO and the competent contracting party that may result in the finding of liability against the contracting party as well as or in addition to the SCO, based on the doctrine of respondeat superior; and perhaps most importantly,

(4) To suggest specific guidelines and procedures that an SCO might follow in the course of carrying out his or her pre-game, game, and post-game responsibilities in order to minimize the chances of injury; or, should any injury take place, to deal professionally and efficiently with such a situation.

It is only when an SCO knows and understands the total scope of his or her responsibilities concerning the prevention of injury to contestants and others and the rational steps that can be undertaken to carry out intelligently measures designed to ensure the safety of all concerned in an athletic contest (players, spectators, coaches, and the officials themselves), that the SCO can proceed to assume his or her rightful and critical place in the arena of sport.