Sports Torts in Wisconsin

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SPORTS TORTS IN WISCONSIN*

JAY A. URBAN**

I. Introduction

Millions of Americans engage in sporting events every year. Participation in sports by recreation-inclined individuals from youth to adult constantly rises by the season. Young athletes are playing their hearts out in countless organized events from soccer fields to hockey rinks. Many adults enjoy the exercise and competition from tennis courts to bike trails. Whatever the draw, recreational, amateur, and professional athletes rush to sporting endeavors as weekend warriors or scholarship winners as their love affair with various physical games runs hotter each season. Hand-in-hand with sports come injuries—which are unfortunately increasing with this sporting way of life. It is not a matter of whether you will be hurt if you participate in sports, but rather where, when, how, and why you will be hurt, given the physical nature of most athletic events. And, once saddled with an injury, an athlete often faces significant disability and pain due to the extension of personal physical limits and competitiveness which many athletic contests require.

This article focuses on the field of Wisconsin’s tort law which has been shaped by lawsuits from individuals injured in certain aspects of sporting life. The societal costs of these injuries are staggering. As damages including lost time from the workplace, medical bills, and lost enjoyment of life mount, injured athletes may be able to stride, limp, or wheel to the courthouse in growing numbers for compensation for these injuries. If the injured party is a highly compensated professional athlete, the economic damages may easily run into the seven figures. As athletes become bigger, faster, stronger—and more determined to win at any cost—the potential for injuries increases. If the percentage of Wisconsin

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appellate tort cases concerning recreational activities and the flurry of recent legislation are any indication, a developing complex area of sports tort law will evolve through the efforts of lawyers, judges, and legislators; well into the next century.

However, since there are only a small percentage of athletes who can and do choose to litigate (many individuals, like students, are reluctant to litigate), this area of law will likely be developed based on very few cases compared to other areas of civil law.

II. Causes of Action

Typical cases for sports torts can be delineated into specific categories involving injured parties and potential tortfeasors. For the purposes of this discussion, the focus will be on the particular issues and nuances of individual sports tort actions. It is conceivable that an injury will be produced by a combination of actions or inactions by individuals from a combination of the areas discussed herein, so a prudent trial lawyer should analyze the elements of each potential action.

When deciding whether to take on a sports injury case, obtaining the rules of the game or any standards should be the first priority. Taking photographs, researching a defendant’s background, obtaining weather records and injury reports, getting statements from witnesses, and applying statutes and case law to the facts comes next. After a factual background has been developed, it is time to consider the type of action.

A. Athlete/Participant vs. Co-participant

This action involves an injury sustained by one participant at the hands of another during an athletic contest. The prevailing judicial sentiment, nationwide, has allowed recovery for these types of sports injuries under certain circumstances with the standard of care as the primary focus. The “gut” issue in these cases is whether proof that ordinary negligence caused the injury is sufficient, or whether some degree of intentional or reckless conduct should be a condition precedent for recovery. That is, what degree of conduct by one athlete will permit suit


3. Id.
by a teammate or opponent while balancing the "societal" concerns of vigorous competition and opening the floodgates of litigation.4

The prevailing legislation in Wisconsin for co-participants in team contact sports now says recklessness is the standard, but the judicial foundations speak to negligence. Wis. Stat. §895.525 provides in pertinent part as follows:

(4m) LIABILITY OF CONTACT SPORTS PARTICIPANTS. (a) A participant in a recreational activity that includes physical contact between persons in a sport involving amateur teams, including teams in recreational, municipal, high school and college leagues, may be liable for an injury inflicted on another participant during and as part of that sport in a tort action only if the participant who caused the injury acted recklessly or with intent to cause injury. (b) Unless the professional league establishes a clear policy with a different standard, a participant in an athletic activity that includes physical contact between persons in a sport involving professional teams in a professional league may be liable for an injury inflicted on another participant during and as part of that sport in a tort actions only if the participant who caused the injury acted recklessly or with the intent to cause injury. (Emphasis added).

In essence, the legislature, in the 1995 session, established a reckless or intentional standard of care for participant liability. However, in 1993 the Wisconsin Supreme Court bucked the national trend and adopted negligence as its standard for participant injuries in recreational team contact sports.5 In Lestina v. West Bend Mut. Ins. Co., a case involving a co-participant in a recreational adult soccer game who injured another player by "side tackling" him (which was against the league rules), the Court adopted a factor intensive analysis of the team contact sport co-participant negligence standard:

The very fact that an injury is sustained during the course of a game in which the participants voluntarily engaged and in which the likelihood of bodily contact and injury could reasonably be foreseen materially affects the manner in which each player's conduct is to be evaluated under the negligence standard. To determine whether a player's conduct constitutes actionable negligence (or contributory negligence), the fact finder should consider such material factors as the sport involved; the rules and regulations

4. See Dean P. Laing, Liability of Contact Sports Participants, 66 Wis. Law. 12 (Sept. 1993).
governing the sport; the generally accepted customs and practices of the sport (including the types of contact and the level of violence generally accepted); the risks inherent in the game and those that are outside the realm of anticipation; the presence of protective equipment or uniforms; and the facts and circumstances of the particular case; including the ages and physical attributes of the participants, the participants’ respective skills at the game, and the participants’ knowledge of the rules and customs.6

Justice Abrahamson concluded that within the circumstances of a sport, the negligence standard offers the consideration and flexibility necessary to allow “vigorou s competition” while allowing an avenue for sports victim compensation.7 In the past, actions have been allowed to proceed for negligence of a co-participant in a non-contact team sport.8

Throughout the various stages of Wis. Stat. §895.5259 and the Wisconsin Supreme Court decision of Lestina,10 lawmakers, justices/judges, and attorneys in this state have wrestled with the standard of care issue involving co-participants in team contact sports. The current statute is really a “responsibility” law for indoor and outdoor recreational activities. The Wisconsin Supreme Court has not yet considered how team contact sport produced injuries will be treated by Wisconsin trial courts in the future. According to an analysis by the Legislative Reference Bureau, Wis. Stat. §895.525(4m) was intended to change the standard of care to “recklessness” in reaction to the Lestina decision (see 1995 Assembly Bill 628). As yet, no appellate court has considered the change. Further, the Lestina decision did not address the ramifications of the previous statute (since the plaintiff’s injury took place before the earlier revision of this statute went into effect).

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6. 176 Wis.2d 901, 913 (1993) (citing Niemczyk v. Burleson, 538 S.W.2d 737 (Mo. Ct. App. 1977)).
7. Id. at 913-14.
8. See, e.g., Cepina v. South Milwaukee School Board, 73 Wis.2d 338 (1976)(affirming the denial of defendant’s motion for summary judgment in negligence action of co-participant in a softball game where plaintiff was struck in the eye by a bat).
9. Wis. Stat. §895.525 became the law in 1988 and was amended twice by the legislature in 1995. See 1987 Act 377, §19, eff. May 3, 1988, which created the legislation. 1995 Act 223, §8 eff. May 1, 1996, amended the language to include actions for death. 1995 Act 447, §1, eff. July 9, 1996, created subsec. (4)(m). Subsection (4m) only applies to injuries occurring on or after the effective date.
10. 176 Wis.2d 901 (1993). Justice Shirley Abrahamson, writing for the majority, concluded that the rules of negligence, not recklessness or an intentional standard, govern liability for injuries incurred during recreational team contact sports.
If a potential client walks through the door having been injured after July 9, 1996, (the effective date of Wis. Stat. §895.525(4m)) by a co-participant in a team contact sport, a trial lawyer needs to immediately ascertain answers to these questions: Did the injury happen during a team sporting event? Was physical contact part of the sport? What rules apply to the game? How did the accident occur? Where did the accident take place? Is the plaintiff a participant or spectator? In addition to assessing the myriad of other considerations for sports torts, the threshold issue in sports torts by co-participants is whether the tortfeasor will be held to the negligence or recklessness standard, and thus what elements and degree of proof a jury will consider. The statute is extremely narrow, and many sporting events will not qualify because they fall outside the two basic requirements of team activity and physical contact (consider many two-person competitions involving no consent for physical contact). By default, the argument should be made that the ordinary negligence standard applies as set forth in *Lestina* for all cases where no “team” or “contact” is present because the recreational activity statute apparently would not govern the situation.

While assumption of risk has been abrogated in our jurisdiction,¹¹ a variation apparently exists within the recreational activity statute. Wis. Stat. §895.525(3) establishes a category of “appreciation of risk” by stating: “A participant in a recreational activity engaged in on premises owned or leased by a person who offers facilities to the general public for participation in recreational activities accepts the risks inherent in the recreational activity of which the ordinary prudent person is or should be aware.”

This is a statement of contributory negligence and not a bar to recovery. However, it is very questionable whether comparative negligence would apply for team contact sport participants at all, given the new reckless standard, since a jury would be forced to compare negligent conduct to reckless conduct.

In summary, a thorough evaluation of the *Lestina* factors and Wis. Stat. §895.525, coupled with a complete understanding of the rules of the sport, as well as the accident itself, provide the backdrop for case prosecution. As a final observation, even with the division of reckless versus negligent conduct as a precursor to liability, given the natural assumption of risk attitudes which people may have toward sports participants

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¹¹ See Polsky v. Levine, 73 Wis.2d 547 (1976) (conduct constituting an implied or tacit assumption of risk is no longer a bar to an action for negligence, but constitutes contributory negligence and is subject to the comparative negligence statute).
and the latitude given competitive co-participants, the egregiousness of the tortfeasor's conduct should almost be the litmus test in case selection. A comprehensive application of the rules of the game to the circumstances of injury is as important as any other analysis. Consulting a sports expert at the informal discovery stage is also advisable.

B. Spectator/Athlete vs. Landowner or Sponsor

Ranging from sliced golf balls, to wayward pucks, to sloppy turf, potential actions involve persons injured due to the negligence of the sporting event host who may be required to provide warning and/or reasonably safe facilities for the event. In general, a landowner is not under a duty to protect the participant from a known or obviously dangerous risk unless it is anticipated or foreseeable that a participant could be injured.\(^1\)

Wisconsin has enacted a recreational use statute, Wis. Stat. §895.52, governing many cases.\(^2\) Contrasted with Wis. Stat. §895.525, this statute is an "immunity" law. Governmental bodies, persons, non-profit organizations, tenants and/or municipalities are immune from liability for outdoor activities causing injury on the premises.\(^3\) Immunity does not exist and thus liability may attach for government-owned property where an admission fee is charged, or there is a malicious act or failure to warn.\(^4\) Non-profit organizations likewise are not liable as long as no malicious act or failure to warn of an unsafe condition occurs.\(^5\) Further, private property owners are not immune from malicious acts, or if they derive over $2,000 per year income from the recreational activities.\(^6\) Finally, a landowner is not immune if sponsoring "any organized team sport activity."\(^7\)

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2. Wis. Stat. §29.62 commonly referred to as the "berry picking statute" was first enacted in 1963. Similar to Wis. Stat. §895.52, which repealed this statute, the immunity afforded to landowners has been for a relief from warning of potential dangerous conditions and keeping the premises safe absent willful or wanton conduct and a fee charged. Wis. Stat. §895.52 was enacted in 1983 (1983 Wis. Act 418) to provide limited liability for landowners who derive minimal profit for a plethora of recreational activities both identified and similar in circumstance.
6. Wis. Stat. §895.53(6). (Note: Wis. Stat. §895.52(3) does not provide a dollar minimum for state or other government-owned property).
7. Wis. Stat. §895.52(1)(g).
Wis. Stat. §895.52 has been arguably one of the most litigated pieces of legislation in our appellate courts over the past several years. In general, the provisions have been liberally construed in favor of landowner immunity according to express legislative intent. However, there are a variety of circumstances which flesh out the rules to be considered when analyzing a potential action. Cases of note include the following which attempt to define the statute’s requirements:

1. **Degree of Care Required.** Wilson v. Waukesha County defined “malicious” actions as those arising out of hatred, ill will, a desire for revenge or those inflicted under circumstances where insult or injury is intended.

2. **Fees Generated.** Nelson v. Schreiner held that the fact that a county campground generated fees of $18,000 annually should not negate liberal construction of immunity.

3. **Application of Safe Place Statute.** Douglas v. Dewey stated that if immunity could be negated then the safe place statute may apply to recreational premises.

4. **Constitutionality.** Kruschke v. City of New Richmond addressed the constitutionality under Wis. Const. Art. I §9 which entitles every person to a certain remedy for all wrongs, and found that the statute did not violate this provision. Szarzynski v. YMCA Camp Minikani determined the statute was not unconstitutional on equal protection grounds.

5. **Nature of Immunity.** Verdollak v. Mosinee Paper Corp. stood for two propositions—(a) immunity applies regardless of landowner’s permission, and (b) both non-recreational and recreational purposes fall within the statute’s purview.

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20. 157 Wis.2d 790 (Ct. App. 1990).


22. 161 Wis.2d 798 (Ct. App. 1991).

23. See also Moua, 157 Wis.2d at 186 (which held that the economic benefit must come from the recreational activity and not other business activities of the owner unrelated to recreation).


25. 157 Wis.2d 167 (Ct. App. 1990).

26. 184 Wis.2d 875 (1994).

27. 200 Wis.2d 624 (1996).
6. **Nature of Activity.** *Linville v. City of Janesville*\(^{28}\) focused on the nature and purpose of the activity in determining whether it was recreational.\(^{29}\)

7. **Spectator or Participant.** *Kostronski v. County of Marathon*\(^{30}\) found that attendance at a picnic as a spectator of a ball game qualified as a recreational activity for the purposes of the statute.

The best arguments for plaintiffs seeking compensation and avoidance of the recreational use statute’s immunity include: (1) discovering that the activity occurred indoors and/or as part of a sponsored team event; (2) finding that the landowner profited from the recreational activity; and (3) establishing that the precise activity causing injury was non-recreational in nature (for example, by proving that the injury occurred while in transit to or from a sports event). However, the courts have been reluctant to strike down the statute given the pro-landowner legislative purpose (no doubt due in part to Wisconsin’s commitment to outdoor recreation and tourism).

**C. Athlete/Student vs. School**

Usually the school itself is the primary party in a sports injury lawsuit due to the employer/employee relationship of its coaches, teachers, supervisors, or athletic directors, and the ownership of its facilities. This is often the party with insurance coverage, hopefully providing relief for the injury claims. If student-athletes are injured while participating in school sponsored athletic programs, the school district should be considered as a defendant since it owes a general duty of care to protect these students from reasonably foreseeable and preventable harms. Some jurisdictions have found a duty of supervision for various sporting events and practices. Age and maturity of the student-athlete are important factors to consider, and contributory negligence defenses need to be assessed. There may be a waiver or release of liability issues present. But overall, the conduct of the school as supervisor and the student as participant, should be closely examined and compared. Further, discovery should obtain the personnel files of any school employees alleged to be negligent in their duties in addition to typical investigatory measures.

28. 184 Wis.2d 705 (1994).
30. 158 Wis.2d 201 (Ct. App. 1990).
In Wisconsin, recent appellate decisions regarding school liability for sports injuries have dealt with governmental immunity. Since many schools are owned/operated by governmental entities, whether a defendant's conduct in discharging a duty of care is ministerial or discretionary, impacts the nature of the case. As an additional cautionary note regarding governmental entities, attorneys should prepare to meet the strongest notice of claim requirements of Wis. Stat. §§893.80 and/or 893.82.

D. Athlete vs. Coach/Teacher

This cause of action is often part of the claim against the school or sponsor. Claims involve negligent supervision, failure to properly train for the sport, inadequate rule instruction, or other common tort claims (e.g., assault). In addition, there may be claims for "forcing" an athlete to compete despite a physical condition or condition of the facility. On the end of the spectrum, coaches may also be sued for defamation and tortious interference with contract in certain circumstances.\textsuperscript{31}

The focus is usually on the degree of foreseeability of harm and the duty owed by the coach/supervisor to the athlete. Due to the degree of control and responsibilities of a coach, these actions have been quite successful in past litigation.\textsuperscript{32} In short, a coach has the legal responsibility to minimize the risk of injury to athletes under his or her control.\textsuperscript{33} Moreover, coaches' responsibilities encompass a wide range of supervisory and judgment areas from player traveling, to team physician diagnoses. Due to the broad level of supervision, an investigation into potentially negligent actions or inactions is a threshold necessity in most injury cases involving team athletics. Perhaps another reason why coaches are found liable is due to the wealth of information in sports literature at their disposal regarding injury prevention. Obtaining this literature in a focused coaching negligence action is imperative.

E. Athlete or Spectator vs. Official/Referee

If a sports game official or referee fails to act or acts unlike a reasonably prudent official should, he or she may be held liable for injuries sustained by a player during the course of an athletic contest. Specific duties include; enforcing the rules of the sport, supervising the athletes, and checking the integrity of the field or court surface. Careful officials

\textsuperscript{31} See e.g., Bauer v. Murphy, 191 Wis.2d 517 (Ct. App. 1995).
\textsuperscript{33} Id. at 15.
should inspect playing topography for hazards before play as well as weather conditions and game equipment. In particular, during play it is important for referees to enforce disciplinary rules against problem athletes, and to keep spectators in appropriate viewing areas. Finally, an injured athlete should be attended to immediately by stopping play until the athlete's safety may be guaranteed.

In Wisconsin, lawsuits have been brought against referees for some time, as evidenced by a 1914 Wisconsin Supreme Court decision upholding a jury verdict exonerating a boxing referee from any negligence in failing to stop a fight.\(^{34}\) Using a negligence standard of care, the circumstances of injury, and the rules of the game, an action against sports officials should be investigated and evaluated, if the circumstances of injuries warrant.

\section*{F. Athlete vs. Product}

Products used in competitive sports are subject to state products liability laws governing defective or unsafe equipment manufactured or sold as sports equipment. Companion claims may also be brought against the organizing institution which supplies and owns the equipment.\(^{35}\) Key evidence includes prior claims, known defects, state of the art information, witness statements, photographs/film, modification, and instruction factors. Attorneys should keep in mind the following focus with experts to decide: (1) whether the product caused the injury; (2) whether the product was proper for the ordinary needs of participants; and (3) whether the product design was unsafe or defective.\(^{36}\)

Potential cases can involve football and batting helmets, protective masks, ski bindings, gymnastic equipment (i.e., trampolines), gym equipment, and other recreational devices.\(^{37}\) In Wisconsin, a reported decision in \textit{Wussow v. Commercial Mechanisms, Inc.}\(^{38}\) involved a baseball pitching machine which crushed the skull of the plaintiff. A jury found the machine to be defective and unreasonably dangerous to the point of awarding punitive damages. Certainly, a product-intensive study should be made concerning an injured person's sporting equipment, especially protective gear, for possible claims.

\begin{footnotes}
\footnote{34. Paramentier v. McGinnis, 157 Wis. 596 (1914).}
\footnote{36. \textit{Id.} at 212.}
\footnote{37. \textit{Id.}}
\footnote{38. 97 Wis.2d 136 (1980).}
\end{footnotes}
As an example, on a national scale, according to a 1991 *Sports Illustrated* article\(^{39}\) “lawsuits brought against helmet manufacturers have forced them to make their products even safer.” This article was in response to the 1990 football season, the first in which no one died from a football-related injury. Presumably, trial lawyers helped to make those products safer for participants.

### G. Athlete vs. Medical Provider

While the term “team physician” may imply a conflict of loyalty, generally a sports medicine practitioner seeks to treat and prevent sports injuries. This duty to treat includes medically clearing athletes for participation in athletics and rendering appropriate care after a sports injury (i.e. MRI’s, CT scans, x-ray’s, etc.). Although there are few reported cases involving athletic medical malpractice litigation, injured parties may make these claims under the circumstances of sport, which would include fraud and misrepresentation of condition. Physicians can rely on appreciation of risk or contributory negligence defenses in addition to the standard medical malpractice defenses.\(^{40}\) This is due to the fact that many competitive athletes will choose to play hurt—just pick up any sports page. Certainly, injured athletes have the right to play hurt against medical advice. With the growth of sports medicine practice concurrent with athletics, the medical literature on the topic may also afford specific standards of care for sports injuries and medical/legal responsibilities.

Wisconsin statutory legislative exemptions have immunized volunteer team physicians for emergency care provided to athletes immediately before or after an injury.\(^{41}\) In order to qualify for immunity, a physician cannot accept compensation or act within the scope of his or her usual and customary practice in rendering emergency care to an athlete.\(^{42}\) In addition, ski patrol members, nurses, chiropractors, dentists, physician assistants, and emergency medical technicians will be afforded civil liability immunity if the emergency health care is rendered at, or in transportation to or from, an athletic event, and if no compensation for services is contemplated.\(^{43}\) In general, the law of sports medicine and

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42. Wis. Stat. §895.48(1).
regulation of team trainers and physicians continues to develop.\textsuperscript{44} Courts usually apply medical malpractice principles to tort actions brought by athletes against physicians and trainers.\textsuperscript{45} Legal research of Wis. Stat. §895.48 and related provisions contemporaneous with a factual and medical record investigation should be completed early in the case investigation.

In competitive sports, there is likely to be a contributory negligence component to a sports medical malpractice claim. This involves an athlete's decision to return to play after sustaining an injury. In fact, the Americans with Disabilities Act (hereinafter “ADA”) may provide the athlete with the legal right to participate in a sport against a physician's advice.\textsuperscript{46} The investigation then turns to the degree of information and testing provided by the physician prior to the athlete making the choice to return to play. Claims regarding a failure to diagnose, inappropriate medical clearance, failure to disclose the extent of injury, and false information may also weigh on an athlete’s decision to compete.\textsuperscript{47}

There are two final considerations worthy of discussion. First, sports medicine itself is an area for which many physicians hold themselves out as “specialists.” Medical associations and related physician groups have been developing certification requirements in the sports medicine area in the 1990s, thus current standards must be researched on a case-by-case basis.\textsuperscript{48} Obviously, this would be critical to a potential case investigation. Second, there could be a situation where a team physician and a coach together provided information which made the athlete decide to play hurt. This scenario should be examined in light of the new joint and several liability law.\textsuperscript{49}

\textbf{H. Combination Actions}

As discussed earlier, these causes of action are not exclusive. Each category may be combined into an action against more than one potential producer of injury, but each cause of action necessitates separate

\textsuperscript{44} See Matthew J. Mitten, \textit{Medical Malpractice Liability Of Sports Medicine Care Providers For Injury To, Or Death Of, Athlete}, 33 A.L.R.5th 619 (1995).
\textsuperscript{45} Id. at 627.
\textsuperscript{46} Mitten, supra note 39, at 138.
\textsuperscript{47} Mitten, supra note 43, at 628.
\textsuperscript{48} Mitten, supra note 39, at 138-39.
\textsuperscript{49} See Wis. Stat. §895.045(2)(1995-96) which provides: “\textit{Concerted Action.} Notwithstanding sub.(1), if 2 or more parties act in accordance with a common scheme or plan, those parties are jointly and severally liable for all damages resulting from that action, except as provided in s. 895.85(5).”
legal requirements and strategies and a careful evaluation of potentially diverse standards of care. Given the current joint and several liability law in Wisconsin, great care in selecting and pursuing a “target” defendant, while keeping in mind contributory negligence concerns, is paramount.

III. COMMON DEFENSES

When deciding whether to accept a sports tort case, and eventually considering a decision on litigation, several defense arguments and strategies should be reviewed. The legislature and the courts have carved out limitations on certain claims; juries may be influenced by other arguments such as assumption of risk or knowingly confronting open and obvious dangers in the sports setting. Certainly, in the vast majority of cases, contributory negligence and other defenses will necessitate a thorough review of the facts. Following are some of the defenses in sports injury cases:

A. Governmental/Charitable Immunity

In the recent case of *Kimps v. Hill*, the Wisconsin Supreme Court considered the acts of a teacher and the duty to provide safe equipment for student-athletes in a volleyball game. While the court did not disturb the finding of negligence against the teacher, it determined that the teacher’s actions were discretionary rather than ministerial (that is, “absolute, certain and imperative”) in nature, thereby providing immunity.51 Depending on the governmental sponsorship nature of the athletic contest, especially where state and local public schools are involved, anticipating and analyzing the sovereign immunity defense under the ministerial and discretionary case definitions is a must. In the even more recent case of *Bauder v. Delavan-Darien School District*, the Court of Appeals affirmed the dismissal of a case when presented with a claim from a student who suffered eye injuries when struck by a deflated soccer ball kicked indoors. In short, recently Wisconsin courts have been reluctant to find exception to the government immunity, afforded to school employees, in finding the teacher’s actions or inactions in *Kimps* and *Bauder* to be “discretionary” rather than “ministerial.”

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50. 187 Wis.2d 508 (1994).
52. 207 Wis.2d 312 (1996).
Further, under Wisconsin's recreational use statute, a specific defense bar for all claims is afforded to charitable hosts of sporting events. As discussed earlier, a charitable landowner/host will not be liable if the qualifications of Wis. Stat. §895.52 are met. Given the hostile environment for these claims, attorneys should anticipate such defenses whenever and wherever the possibility exists.

B. Statutory Exemptions

As previously discussed, there are several legislative enactments creating recreational immunity for charitable organizations, governmental employees, and health care professionals. Expect these defenses early in litigation. In addition, the Wisconsin legislature recently passed a civil liability exemption for “equine activities.”\(^\text{53}\) Under the horse-related civil liability exemption statute, injured participants cannot sue sponsors or professionals for the “inherent risks” of equestrian events excluding faulty equipment, warning signs, and safe ability actions—or wilful, wanton, or intentional actions. Spectators are not precluded from bringing suit. Given the legislative trend, it is a good practice to search for any future enactments which attempt to give tortfeasors exemptions from liability. Challenges to these statutes should also be considered, but the better strategy is to find a case specific way to remove the facts from within the reach of the statute.

C. No Duty of Care/Public Policy

Due to the multitude of factors involved in producing many sports injuries, and due to the corollary that multiple defendants may be named in a suit, a typical defense may be that a particular defendant did not have a duty toward the injured party. In Cirillo v. City of Milwaukee,\(^\text{54}\) the court found that a teacher of a gym class had a duty to supervise students, and this duty should be measured by reasonable care. While in athletic cases there may be intervening or superseding cause issues, the duties of each responsible party need to be assessed to defeat common defenses. In certain other recreational instances, the defense may allege that the defendant did not owe the participant, official, or spectator a duty of care. As the supreme court stated in A.E. Investment Corp. v. Link Builders, Inc.,\(^\text{55}\) “[T]he duty of any person is the obligation of due care to refrain from any act which will cause foreseeable harm to others

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54. 34 Wis.2d 705 (1967).
55. 62 Wis.2d 479, 483-84 (1974).
even though the nature of that harm and the identity of the harmed person or harmed interest is unknown at the time of the act.” In applying this duty concept, recently the Wisconsin Supreme Court used public policy grounds to decline holding an adult responsible (in spite of a jury’s supportable finding of negligence) for failing to snuff out a campsite fire before bed, and thus denied recovery for a child who was burned.\textsuperscript{56} The court found that the recreational use statute does not create a higher duty than common law.\textsuperscript{57}

In a recreational or sporting event setting, some courts may be reluctant initially when it comes to duty and standard of care issues. Therefore, a resourceful attorney should carve duty arguments out of the standards, rules, and accepted practices of a sport, and then apply this logic to a traditional negligence, recklessness, or intentional analysis.

\textbf{D. Contributory Negligence—“Open and Obvious Danger” and “Assumption of Risk” Revisited}

Even though the common law immunity of the concept of open and obvious danger has been abrogated in Wisconsin,\textsuperscript{58} the argument is often made when it comes to sports torts premises liability cases, especially in higher risk or contact sports such as skiing or football. Likewise, the concept of assumption of risk has been quashed in this state.\textsuperscript{59} However, it has resurfaced in the “inherent risk” language in some of the recreational statutes. The statutes do refer to the comparative negligence statute, but where wilful, wanton, or reckless conduct is involved, do these defenses really apply? Does a participant in a sport assume the risks of a co-participant competing outside of the rules? There are numerous factors and considerations to evaluate. As always, the case facts will control thereby allowing attorneys to make distinguishing arguments.

Recently, the court of appeals decided \textit{Moulas v. PBC Productions Inc.}\textsuperscript{60} involving a plaintiff who was a spectator at a Milwaukee Admirals hockey game when she was struck by a puck flying over a plexiglas screen. The trial court granted summary judgment for the defendants and the court of appeals affirmed. The appellate court’s opinion held that two grounds supported dismissal of the action: (1) the evidence

\begin{itemize}
  \item \textsuperscript{56} Rockweit v. Senecal, 197 Wis.2d 409 (1995).
  \item \textsuperscript{57} \textit{Id.}
  \item \textsuperscript{58} See Antoniewicz v. Reszczynski, 70 Wis.2d 836 (1975).
  \item \textsuperscript{59} See Lestina, 176 Wis.2d at 901.
  \item \textsuperscript{60} 213 Wis.2d 406 (Ct. App. 1997). (NOTE: Judge Fine dissented from the majority. The Wisconsin Supreme Court accepted the plaintiff-appellant’s petition for review and scheduled oral arguments on April 7, 1998.)
\end{itemize}
failed to create a genuine issue of material fact (essentially because the plaintiff’s did not produce a liability expert on the standard of care); and (2) the plaintiff’s contributory negligence as a matter of law was at least one percent more than any of the defendants. The appellate court considered “assumption of risk” as an element in considering a spectator’s contributory negligence rather than leaving this matter for a jury. The court also relied on the so-called “baseball rule” espoused in Powless v. Milwaukee County wherein a spectator at a baseball game was precluded from making an injury claim from a flying baseball. However, the Powless case on its face is accurately distinguished from Moulas because of the plaintiff making an effort to sit behind a safety screen as observed by Judge Fine in his dissent. By “plucking” this case from a jury that could assess the facts, testimony, and inferences from those facts, based not just on affidavits, including the eighty-seven prior similar incidents, and the photographs showing higher plexiglas screens at other ice rinks, the court of appeals demonstrated a willingness to apply negligence as a matter of law to a plaintiff who, according to her police officer brother eyewitness, bought tickets close to the rink behind the screen for greater protection.

While the Wisconsin Supreme Court debates the Moulas case further, the real concerns for counsel are whether sports torts plaintiffs are treated the same as other plaintiffs by the courts and what proof is necessary to defeat such a popular defense threatening many potential claims.

E. Liability Release/Waiver

Wisconsin cases have acknowledged that an exculpatory contract, exempting a party from tort liability for harm caused intentionally or recklessly, is void as against public policy. Wisconsin appellate courts have also determined that some waivers and liability releases can be enforceable in the potential negligence action. Further, Wisconsin decisions have found that some exculpatory contracts are not consistent with public policy regarding spectators when there is a mere awareness of danger without a full contemplation of risk, before the form is signed. The facts surrounding the negotiation and signing of the document control, and the focus is on the knowledge, understanding, and experience of the

61. Id. at 419.
62. 6 Wis.2d 78 (1959).
63. 213 Wis.2d at 423.
65. See Kellar v. Lloyd, 180 Wis.2d 162 (Ct. App. 1993).
injured party before the release was signed. The courts must consider each situation under the facts, keeping with public policy, that does not favor upholding such contracts. The prescribed "balancing test" is between the individual's freedom to contract, and the principle that individuals should be compensated for injuries sustained as a reasonable result of another's negligence. However, exculpatory contracts as a rule are not favored by the law.

In the ambit of sports, these types of contracts, and releases are as prevalent and common as recreational activities. A full analysis of the knowledge of the parties, the conditions of the release, the ambiguity or uncertainty of any terms (the breadth and generalness), and the risks contemplated are all factors which will affect the validity of the contract. In a most recent case involving a recreational release, *Yauger v. Skiing Enterprises, Inc.*, the Wisconsin Supreme Court evaluated a skiing liability waiver and held (after reviewing the recent Wisconsin law and exculpatory contracts):

Among the principles that emerged from these cases, two are relevant to our determination in this case. First, the waiver must clearly, unambiguously and unmistakably inform the signer of what is being waived. Second, the form, looked at in its entirety, must alert the signer to the nature and significance of what is being signed. The waiver in question fails in both respects. Thus, the Court finds this waiver void as against public policy under either of these principles.

It is clear that the courts do not uphold exculpatory contracts with ambiguous terms or with any deficiencies in the communication of the nature and significance of the document being signed.

**F. Statute of Limitations**

Attorneys need to be particularly cognizant of time bars to sports torts claims since different conduct standards may be at issue and thus impact time calculations. For example, intentional torts have a two year statute of limitations, and a jury may determine that what appeared to be reckless conduct, was intentional. Early case selection and investiga-

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68. See *Merten*, 108 Wis.2d at 212.
70. *206 Wis.2d 76* (1996).
71. *Id. at 84.*
72. See *Wis. Stat. §893.53.*
tion is necessary, and if borderline conduct is involved, then suit should be initiated early rather than too late.

IV. Hot Issues

A. Discovery of Rules of Game/Facts

Because sports injuries occur on a playing field, the rules of the game should control. One of the *Lestina* negligence factors specifically refers potential litigants to the rules of the particular sport in order to determine whether an infraction occurred outside of the parameters of play. It is an excellent practice to obtain any handbook, league rules, code of conduct, or other sport requisites for analysis by an expert liability witness. Statements should be obtained from spectators, supervisors, and/or participants. Photographs or videotape should be taken of the accident scene depicting a specific defect or condition. Associations within a sporting discipline may need to be contacted for potential information. Since the law is in a state of flux on many issues, thorough research will provide insight toward recovery.

B. Jury Instructions

Wis. J.I.-Civil §2020 is the new jury instruction for co-participant liability in recreational sporting events, including team contact sports. The standard embodies the new Wis. Stat. §895.525 language as well as the *Lestina* case factors. Since gross negligence is no longer a standard in Wisconsin, the recklessness instruction required a definition which came from Justice Wilcox's dissent in *Lestina* (see also *RESTATEMENT 2D OF TORTS* §500). Negligence, safe-place, products liability, medical malpractice, and/or duty of supervision instructions, if modified, may suffice for other causes of action without a specific instruction. Using an advocate's imagination, the official sport's rules, and the developing case law, individualized jury instructions may need to be crafted for a particular fact scenario. If the circumstances fit the case, an instruction referring to a rule of the game, as a "safety standard," would be appropriate, followed by incorporation of those rules into an instruction to reflect a particular case pattern.

C. Insurance Coverage

While many schools, coaches, referees, doctors, landowners, businesses, and participants may have various forms of liability insurance, providing potential coverage for the elements of sports torts, a lawyer cannot be too careful and complete in obtaining and analyzing all poli-
cies. Intentional conduct may be excluded by homeowners or liability umbrellas, and the language may lead to an argument by defense counsel that recklessness is also excluded. Subrogation language should also be scrutinized for a failure to provide for the recovery of payments made due to another party's recklessness. Some liability insurance policies contain provisions excluding coverage for injury to a person while playing an athletic event sponsored by a named insured.73

Because in Wisconsin, ambiguities in insurance contracts are generally construed against the insurer, a factual case analysis, keeping in mind the exclusionary language, may disclose a way around such bars to recovery. Wisconsin has some appellate law on both sides of this issue. In Scott v. Min-Aqua Bats Water Ski Club,74 the court found that a water skier's injuries were covered under the policy language since the accident occurred while the skier was not “preparing” or “actually participating” as defined as exclusions for the sporting event. In Ruppa v. American States Ins. Co.,75 the court held that a horseback rider's injuries and death were excluded under the policy because “cutting” was an excluded-sporting event in a horse show contest.

Given the policy language intensive analysis, it is imperative to dissect the exclusion after the facts are established and the sporting standards are defined. Sports and insurance language experts may also prove helpful for defeating summary judgment.

D. Joint & Several Liability

The recent joint and several liability law is potentially vexing to many sports torts cases. Given the multitude of factors which may apply to sports injury claims, including contributory negligence and multiple tortfeasors, a complete case analysis in light of Wis. Stat. §895.045 is mandatory. For example, if a claim for reckless conduct is supported against a co-participant, then joint and several liability and contributory negligence may not apply. The statute requires on its face that comparisons only apply to “negligent” parties. However, if a negligence claim is maintained, pleadings and arguments should take into account the number of tortfeasors and their respective roles in causing the injury.

73. Tracy A. Bateman, Construction and Application of Provision in Liability Insurance Policy Excluding Coverage for Injuries Sustained During Athletic or Sports Contest or Exhibition, 35 A.L.R.5th 731, 739 (1996).
74. 79 Wis.2d 316 (1977).
75. 91 Wis.2d 628 (1979).
Also, there is the potential for making a "concerted action" claim against multiple co-participants. This theory may also be used in other scenarios.

E. Comparing Negligent & Reckless Conduct

As mentioned earlier, the recent Wis. Stat. §895.525 responsibility standard for team contact sports participants is fraught with an inherent conflict because it requires "recklessness" to pursue a tortfeasor, but only requires an "appreciation of risk" and several other factors (all of which are ordinary care concerns under the comparative negligence statute, Wis. Stat. §895.045) from the plaintiff. In deciding the negligence of the injured party, it is uncertain how a factfinder would "compare" this to the reckless conduct required of a co-participant. It is this author's opinion that if recklessness of a co-participant is proven, then contributory negligence, if any, is not a limit to recovery.

F. The American with Disabilities Act (ADA)

According to the ADA, which was signed into law in 1990, interscholastic athletes can force reasonable accommodations for an athlete's disabilities. Not only may certain individuals now be permitted to participate in athletic events, but spectators, coaches, referees and the like must be afforded the protections outlined in the ADA from antidiscriminatory facilities, seating, and programs. The ADA should be reviewed and analyzed for potential claims on a per case basis.

G. Constitutional Challenges

Lately, several groups of potential tortfeasors have been granted legislative liability exemption or immunity by statute. These statutes may be constitutionally challenged on equal protection or other grounds. However, the recreational use statute was found valid when constitutional substantive due process, equal protection, and right to access to the courts, and to obtain justice under the law challenges were brought. Constitutional challenges should at least be considered given the breadth of the new laws.

77. See Szarzynski, 184 Wis.2d 875 (1994).
H. Punitive Damages

In the participant in team contact sports setting, and in any other recreational activity where injury may occur, the constant focus has been on the standard of care owed to others. Given the recklessness burden for some co-participants and the nature of certain game rule infractions, it is a good practice to evaluate, and perhaps pursue a punitive damage claim under the right fact scenario. In a professional athletic setting, this claim may not only have merit, but substantial economic power.

I. Offers of Settlement

_Cue v. Carthage College_79 deals with the problems with statutory offers of settlement directed to multiple defendants by the plaintiff football player in an action against his college, coaches, trainer, and their insurer. The plaintiff directed separate Wis. Stat. §807.01 offers to the insureds and to the insurer. The verdict exceeded each of the individual offer amounts, but not the aggregate. The appellate court refused to uphold the offers because they did not state with clarity the sum it would take to settle the case, and the confusion regarding the two offers “doomed” the plaintiff’s claim. In making offers of settlement for sports claims with multiple defendants, an insurer and its insureds may be grouped together on one offer as to those claims.80 Great care and research as to the exact amount of settlement for each defendant on each claim should also take place in the event that there are multiple claims against multiple parties which may necessitate separate offers.81

J. Psychological Studies

Emotional distress law in Wisconsin has been evolving throughout the last half of this century. Mental damages have long been a part of the damages recovery scheme in this state. Competitive athletes have unique psychological make-ups. When facing a career-altering injury, an athlete’s psyche may be affected differently than others. Several renowned university scholars have studied the mental components of athletics and injuries, and this information may prove valuable in forwarding all claims on behalf of injured athletes.

79. 179 Wis.2d 175 (Ct. App. 1993).
81. See generally David M. Skoglind, Making the “Right” Offer Under 807.01, Stats., THE VERDICT, p. 12 (Fall 1991).
V. Conclusion

Sports tort law is a small but developing and challenging field which is changing through legislative and judicial definition in Wisconsin. Some areas of legislation and causes of action will gain further interpretation by the appellate courts as the judiciary dives into these cases and establishes the frontier of personal injury law involved in bringing sports torts to the courts.