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*Torts and Sports: Legal Liability in Professional and Amateur Athletics* by Raymond Yasser

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**Torts and Sports: Legal Liability in Professional and Amateur Athletics**, By Raymond Yasser. Westport: Greenwood Press. 1985. Pp. xii, 163.

The demise of the National Football League (NFL) looms on the horizon. Why? Because successful tort claims against football helmet manufacturers threaten to force the NFL out of business. This “frightening” proclamation is only one of many interesting ideas which Raymond Yasser discusses in *Torts and Sports*. Yasser’s book is specifically directed at attorneys involved in liability cases stemming from player-participation in professional and amateur sports. *Torts and Sports* covers the gamut of legal claims arising from various sports, including the most publicized cases. Yasser utilizes both his legal skills and sports-enthusiast viewpoint to present the material in a manner which is both enlightening and interesting.

The first legal problem which Yasser delves into is the potential tort liability of sports participants resulting from playing-field interaction. Participation in sports includes substantial risks of physical harm. While most injuries are considered “part of the game,” a select few lie outside this liability-free zone. In general, an athletic participant who is injured by another participant can bring suit based on three theories: intentional tort, negligence, and recklessness. While intentional tort and recklessness claims enjoy a high rate of success, negligence claims are less successful. The main obstacle to these negligence claims is the assumption of risk defense. Courts are unwilling to find liability in cases in which a sports participant is believed to assume the risks created by the negligence of a co-participant. Proving that the injury was intentional or due to recklessness can overcome the assumption of risk defense because courts are willing to protect players from other players with unsportsmanlike motivations. The law does not condone the behavior of those who use sports to carry out personal vendettas.

The sports employer is not exonerated from intentional or recklessness tort claims. Yasser points out that the modern court view holds an employer vicariously liable if the intentional or reckless tort is regarded as within the scope of a participant’s employment. Moreover, there is a newly emerging cause of action which holds an employer liable if he created an atmosphere which encouraged violence, and/or condoned tortious conduct. Despite the presumed higher probability of success of intentional or recklessness tort claims, Yasser suggests pleading a negligence cause of action because the ground rules in the former cases are not clear, and a persuasive argument in the latter case could be successful. Yasser’s best advice to a lawyer representing an injured sports participant is to plead all three aforementioned causes of action.

*Torts and Sports* focuses on the spectator as the injured individual in Chapter Two. Yasser covers a wide range of sports in which spectators are injured, including hockey, auto racing, golf, and wrestling. Despite this broad range, baseball leads all sports in the number of reported cases of spectators injury. The most frequent fact situation involves a fan who is hit by a ball that has left the playing field. Because it is impossible to completely protect fans from foul balls, home runs, and errant throws, without significantly altering the presentation of the game, courts deny recovery in such instances; this result is supported by the theory that a spectator assumes the risk of sitting in an

unprotected seat. In general, a spectator assumes the risks inherent in attending a sporting event and the owner of the sports facility is bound to use *reasonable care* in constructing and maintaining such facilities. In Chapter Three, Yasser discusses a cause of action which has, arguably, reached destructive heights in its frequency of occurrence: medical malpractice in athletics.

While the existence of medical malpractice lawsuits in sports seems conclusive, several issues remain unresolved. Although generally the reasonableness of medical care is based on the minimum skills of doctors in the locality in which the care is provided, the modern trend is to consider such as only one factor in the determination. Other factors to be considered are the unique skills of the doctor and the patient's knowledge of all potential consequences prior to consenting to treatment. Despite these factors, the duty of the doctor to the team and to the player is the critical factor in resolving a medical malpractice cause of action. Most often, the team doctor is in an unenviable position when a star player is injured. The doctor must balance the interests of the coaches with those of the player. In most cases, these are not one and the same. In some cases, the doctor's dilemma is particularly tough because the injured player wants to play so badly that he fails to admit the extent of his injury. The pressure to "activate" a player is especially acute when his salary is very high. Because of the doctor's status as a "team doctor," the issue of vicarious liability often arises in medical malpractice suits brought by an injured player. Resolution of this issue is based on whether the doctor is or is not an independent contractor or an employee of the team. Most often, absent a showing that a doctor is literally on the staff of the team, he is considered an independent contractor. Therefore, the team is relieved of any liability for the doctor's medical malpractice. Chapter Four explores another aspect of tort in sports: products liability for defective athletic equipment.

Given the increasing number of successful products liability judgments against football helmet manufacturers, and the resulting increased costs for the consumer, it is not preposterous to predict the demise of professional football. Most product defects involve design, marketing, or manufacturing flaws. In general, a person injured by an allegedly defective, commercially supplied product can file a suit based upon negligence, breach of implied warranty, breach of an express warranty, or strict liability in tort. The defendant can counter with contributory negligence, assumption of risk, and intervening acts of negligence as affirmative defenses. Under the theory of implied warranty, the Uniform Commercial Code avers that a warranty of merchantability accompanies the sale of goods by a merchant; but the assumption of risk and misuse of product defenses can defeat a claim based upon a breach of this warranty. It is of key importance that this warranty only extends the liability of the seller to the buyer, members of the buyer's family, and guests in the buyer's home. This protects the seller against unlimited liability. In suits involving a breach of an express warranty, the injured person must show a misrepresentation of material fact regarding the nature and quality of the product which causes the injury. Under the Uniform Commercial Code, the injured person need not have relied on the express warranty and the seller's liability is restricted to a specific class of persons. Under the Restatement (Second) of Torts, a seller is liable for injury to *anyone* who relied on the misrepresenta-

tion.<sup>1</sup> In a suit involving strict liability in tort, a seller is liable if he sells a defective product which is unreasonably dangerous to the user or consumer. This condition is determined by what a reasonable consumer would expect. When compared to contributory negligence and assumption of risk, the defense of intervening acts of negligence is relatively unused. Under a theory of intervening acts of negligence, the general rule is that such acts do not supersede the liability of the seller unless they are extremely negligent.<sup>2</sup> Defamation and the invasion of privacy are torts which have become more numerous in sports in recent years, and this is the topic of Yasser's discussion in Chapter Five.

The tort of defamation is essentially one of strict liability in which the only requirement is a false statement that injures a person's reputation. Libel, written or printed defamation, and slander, oral defamation, are the two forms of this tort. A libelous statement which is defamatory in itself is actionable *per se* while a libelous statement which is defamatory in light of extrinsic facts is actionable *per quod*. The phrase "actionable *per quod*" means that there is no presumption of general damage to reputation; therefore, the plaintiff has the burden of proving special damages.<sup>3</sup> The success of a defamation suit may depend on whether the allegedly injured person is considered a "public" or "private" figure.<sup>4</sup> Proving defamation of a "public" figure is more difficult than proving defamation of a "private" figure, and in most cases, modern sports celebrities are considered "public" figures in written and verbal accounts that focus on their performances.

Truth and privilege are the available defenses to defamation causes of action. While truth is self-explanatory, privilege is a complete defense if it can be proven that defendant acted in furtherance of a socially useful interest. Invasion of privacy is a cause of action when the defendant invades the plaintiff's right to privacy in a manner objectionable to a reasonably sensible man. This cause of action can involve intrusion, misappropriation, public disclosure of private facts, and false light invasion of privacy. Frequent defenses to invasion of privacy suits are the constitutional rights provided by the first and fourteenth amendments. Yasser explores worker's compensation laws and applicable torts in Chapter Six.

The key issue in this chapter is to determine whether an athlete is an "employee" for worker's compensation purposes. While a professional athlete is regarded as an "employee," the issue is unresolved involving individual performers such as promoters and, most notably, scholarship athletes. Yasser believes that any person rendering service for another, other than as an independent contractor, is presumed to be an employee. The key point is that the service must not be gratuitous. While a scholarship athlete fulfills the requirements of an employee under this standard, Yasser believes courts are unwilling to accept this honest appraisal because it is unsettling and uncomfortable. Such an appraisal would destroy the innocent spirit of college athletics. Yasser advocates an open move to the professionalization of college athletics

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1. R. YASSER, TORTS AND SPORTS: LEGAL LIABILITY IN PROFESSIONAL AND AMATEUR ATHLETICS, 66 (1985).

2. *Id.*

3. *Id.* at 88.

4. *Id.* at 101.

and the acknowledgment of scholarship athletes as "employees" in order to eradicate the rampant cheating in college athletics. Individuals with special talents in sports cause further problems because of their ability to change the athletic and financial success of a team. The demand for their services often results in interference with their present contracts. Yasser addresses this issue in Chapter Seven.

In a suit alleging intentional interference with an existing contract, the plaintiff must prove that the defendant intentionally interfered with a contract known to exist, and that such interference adversely affected the performance due under the contract. A common defense is that the right to compete with the plaintiff for an individual's services outweighs the plaintiff's interest in contractual stability; therefore, contractual interference is justified. This issue of interference has become acute in recent years due to the high premium on winning and the resulting financial rewards. Yasser believes that negotiating for future services is not tortious and that the resolution of most cases is dependent upon whether the conduct of the rival employer is considered proper or improper by the Court.

*Torts and Sports* is an enlightening book which meticulously analyzes an aspect of the law that is rapidly expanding with the increased growth of sports in our society. Yasser presents the subject in a readable manner and offers important information concerning legal tactics in liability cases arising from player participation in amateur and professional athletics. At the conclusion of each chapter, Yasser includes an extensive bibliography of additional reading material on the subject covered by that chapter. *Torts and Sports* is a practitioner's dream: concise, thorough, and enlightening.

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