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Preventing and Punishing Player-to-Player Violence in Professional Sports: The Court System Versus League Self-Regulation*

WYATT M. HICKS
The University of Texas at Austin

EXECUTIVE SUMMARY

The four major professional sports leagues governing basketball (the National Basketball Association (NBA)), football (the National Football League (NFL)), hockey (the National Hockey League (NHL)) and baseball (Major League Baseball (MLB)), in the United States are faced with occasional violent acts during the course of league games. Addressing player misconduct first became a necessity in the period from the mid-1970s until the early 1980s; as civil and criminal court cases involving athletes hit the courtrooms. *Hackbart v. Cincinnati Bengals (1979)* and the criminal case of Dave Forbes (NHL) were the two key cases from this period. The biggest question when looking at the issue of player-to-player violence is whether acts committed within the context of a sporting event should be treated differently than those that occur in normal, everyday settings (i.e., non-sport settings). Legal measures have proven to be ineffective means to handle violent acts between players. Federal legislation has also been proposed in an attempt to provide a uniform standard for professional sport incidents, but both proposed Acts never made it to the floor of the United States House of Representatives for a vote.

League self-regulation has emerged as the most effective way to deal with on-field events. The reasons in favor of using this mechanism far outweigh the negative aspects of leaving sole responsibility up to the individual leagues. A recent case involving Marty McSorley (NHL) gave further credence to the ineffectiveness of the court system, and the considerable power league commissioners have in penalizing one of their

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players. The court system should be used as an incentive for leagues to internally create more specific and consistent measures for handling violence in their games. Since application of both civil and criminal laws have been ineffective in addressing violence in professional sport, league self-regulation is the best method for preventing violent acts and punishing offenders.

Still, the proper way to prevent and punish those players who commit a violent act against another player during a professional sports contest is an area of sport violence that has been hotly debated. By its very nature, the physicality of sport often creates situations of rough contact that are virtually unacceptable in society at large. In this context, the four major professional sporting leagues have been faced with player-to-player incidents that, if they had occurred outside of the sporting arena, would normally be addressed in a court of law. The recent *McSorley* case has reopened the debate on how to control violence in pro sports, and who should exert this control (Floyd, 2000).

This article will begin with the history of legal proceedings regarding violence in the four major professional sports, including a discussion of key cases and legal applications. Furthermore, the effectiveness of using civil and criminal law to respond to violence in the sport setting will be presented. A brief overview of proposed federal legislation is then included. Next, the ability of the leagues' to "police their own" and support for leaving the deterrence of in-game violence and punishment of offenders to the respective leagues will be analyzed. Lastly, recommendations for leaving the issue of violent acts between sport participants out of the courts and several recent trends will be presented. Due to the limited scope of this paper, only those cases involving professional athletes from the NFL, NHL, MLB, and NBA are mentioned.

HISTORICAL BACKGROUND

Professional sport in America has witnessed varying degrees of violent acts on the playing field throughout the history of the major sporting leagues. Aggression is viewed as a key element to successful play, especially in sports such as football and hockey where physical contact is inherent to the game. It is these two sports that have been questioned the most in terms of controlling player-to-player violence (Nielsen, 1989). Even in NBA basketball, where players are getting bigger, stronger and quicker, there are increasing situations where collisions and rough play can lead to violence.

While incidents of aggressive play and violence in sports have been around since the leagues began play in America, the mid-1970s through

the early 1980s saw a heightened concern for sport violence and several calls for action. During this period, a landmark case in both civil and criminal law emerged from the professional ranks. Commentary from experts from various sociological, legal and educational backgrounds attempted to explain why the violence had increased and how it should be stopped (Hanson & Dernis, 1996). At this time, criminal law, civil law, federal legislation and league self-regulation were introduced as the four main courses of action to deal with the problem.

The biggest questions when looking at the issue of player-to-player violence are whether actions carried out within the context of sports should be viewed as separate from normal society and to what extent violence in sport is "part of the game" (Hanson & Dernis). In answering these questions, it becomes clear that applying legal statues to actions that occur within professional sports is quite difficult. The next two sections review the use of civil and criminal law in handling sports violence between participants.

CIVIL LAW

In general, sport participants injured by the acts of another participant can base a legal action on three theories of civil law: intentional tort (assault & battery), negligence and recklessness (Yasser, 1985). Very few cases have involved intentional torts, based mainly on the fact that the consent defense has been strongly applicable. Under current law, participation in a sport infers consent, but this consent does not include contact prohibited by safety-rules. Still, in general courts have been reluctant to view violent acts as tortuous based on the idea of plaintiff consent (Doerhoff, 1999). Barbara Svoranos (1997) explained that courts believe there is an assumption of risk for unreasonable harm intrinsic in professional sports, which makes it very difficult to recover on a negligence claim. While the legal theory of recklessness may seem to be the most advantageous in a sport setting, the defenses of assumption of risk and reckless disregard for plaintiff's own safety while playing can mitigate the effectiveness of such a claim (Nielsen, 1989).

The reckless disregard of safety in a professional sports setting was evaluated in a key case involving the use of tort law for recovery of damages occurring during the course of a game. *Hackbart v. Cincinnati Bengals* (1979) is the landmark case for sports violence in general. In this case the plaintiff relied upon the theories of reckless misconduct and negligence in his suit seeking recovery for injuries resulting from a hit in the back of the head, while on the ground attempting to block a member of the opposing team.

The trial court found for the defendant based on the consent and assumption of risk defenses and upon the reasoning that tort principles were inapplicable to actions by professional athletes occurring during the course of a game. (*Hackbart,* 1977). The appellate court reversed stating that the recklessness standard does exist, and that a professional football player may be held liable for injuring another player if he acts with reckless disregard for an opponent's safety. (*Hackbart*, 1979, p. 524-525).

In commenting on the *Hackbart* case, the trial court directly mentioned the problems associated with applying tort law to the sports setting. (*Hackbart,* 1977, p. 357-358). Initially, there are difficulties in proving causation and the intent to commit acts of violence in professional sports. Also, there is a threat of "voluminous litigation" that would come forth from professional sports should a precedent for recovery be set. Lastly, there is a likelihood of courts following potentially conflicting legal principles, as evidenced by the differing opinions between the trial and appellate courts in the *Hackbart* case (Lazaroff, 1990).

The proponents for the use of tort law as a means to address co-participant violence cite distinct advantages over criminal prosecution. According to Barbara Svoranos (1996) tort law is more flexible than criminal law and does not require quite as high a standard of proof. For example, in the case of David Forbes, an NHL hockey player who knocked an opposing player down and proceeded to pummel his head to the ice, the criminal prosecution failed due to a hung jury, but he received $3.5 million as the result of an out of court settlement (Hanson & Dernis, 1996). Although a settlement is necessarily out of court and not connected to a civil case, a monetary award, which can still be prevalent in a civil case, or a settlement, may act as a financial deterrent in preventing player violence. Players forced to pay large sums of money may think twice before engaging in dangerous conduct. Civil judgments or monetary settlements have been awarded in cases from all four major sports (see Appendix A).

Hanson and Dernis (1996) also note that civil law provides the vicarious liability doctrine, whereby the employer or coach of a player may be named in the suit. Although civil suits have been successful in this area and would seem to be attractive for those looking for compensation if injured by excessive force, players have been reluctant to use this system against a fellow player or team.

Despite the difficulties in addressing sports violence cases within tort law, the *Hackbart* case seems to set the precedent that professional sport

is not immune to civil action. However, there are other obstacles to using tort law. The most prevalent is the fact that players are reluctant to sue each other for reasons including the need to settle the score on the field, and ostracism by players, coaches, owners, etc. Some leagues, such as the NHL, institute policies discouraging teams (through the use of fines) from taking a violent incident to the courts before initiating league review (Hanson & Dernis, 1996).

The civil system also has several procedural drawbacks in dealing with sports cases. For example, professional sports are played all across the country, outside of the United States, and by players of varying residences, making appropriate jurisdiction and the application of particular state laws a potentially complex proposition. Additionally, civil actions could take years before being heard, and proceedings could drag on for several more years (Nielsen, 1989).

In the end, players are not using the remedies offered to them through the tort law system, even with evidence that significant monetary awards can be granted in a successful case. In the next section, the use of the criminal justice system will be analyzed in terms of its role in policing violent behavior in professional sports.

CRIMINAL LAW

Prosecution of individual athletes on criminal charges for committing violent acts in the sports setting is used very infrequently. The most common charge involves some type of assault and battery. Cases have been largely unsuccessful due to the difficulty of classifying what takes place on the field of play as "criminal" in the minds of prosecutors, judges and jurors. For example, in order to prevail in an assault and battery case, the prosecution would need to show that the person committing the act consciously intended to commit an assault and battery against the other individual (Hanson & Dernis, 1996).

The physical nature of sports makes this connection a gray area. Who is to say whether a baseball pitcher who hits a batter in the head, threw at him with intent to harm the player, used a brushback pitch that was misplaced, or just lost control of a pitch? Players fearing criminal prosecution could become tentative in playing their respective sports, thereby decreasing their effectiveness as athletes. Moreover, although criminal law has not been thoroughly pursued in the sports setting, there are defenses for the athletes.

Daniel Karon (1991) listed consent, self-defense and the definition of criminal conduct as defenses for players to use should they be charged with a crime for an on-field incident. According to Karon, the typical

criminal charge for athlete violence is criminal battery, but by definition it is an "unlawful application of force." Sports violence is often viewed as non-criminal because society and prosecutors treat it as lawful. The problem and thus a sort of built in defense is in drawing a line of demarcation between lawful conduct that is within the rules and penalties of the game, and conduct that is criminal. In terms of defining conduct, society typically treats sports violence as "lawful" behavior because the acts do not threaten society in the same way as violence that occurs on the street.

The key case from the United States courts involved an NHL hockey player who hit another player with his hand while holding the butt end of his stick, knocked him down and started pounding his head into the ice. A Minnesota grand jury charged Dave Forbes of the Boston Bruins with aggravated assault with a deadly weapon. The jury was split 9-3 in favor of a conviction, thereby acquitting Forbes.

Beyond this case, a majority of the criminal case law that is relevant to this issue comes from the Canadian courts and involves players from the National Hockey League (see Appendix B). The Canadian courts have had mixed success in getting convictions in these cases, however, more recent cases involving Dino Ciccarelli and Marty McSorley show that violent acts outside of the normal scope of the game are punishable by criminal law in Canada. Ciccarelli was found guilty of assault for an attack on an opponent during the game. He was the first professional athlete to receive jail time for an in-game incident, yet the "jail time" was nothing more than a glorified autograph session (Katz, 2000).

The most recent Canadian case resulted in the October 2000 conviction of Marty McSorley for using his stick to hit another player in the head. Players in the NHL feel that this decision only opens the door for increased scrutiny of their play, and do not feel that the guilty verdict has any long-term effect on hockey (Allen, 2000). Spokesmen for the major leagues in baseball, basketball and football do not see the verdict as having any impact on what they do in terms of controlling violence. (Floyd, 2000). The sentence exemplifies one ineffective aspect of the use of criminal law, as McSorley will serve no jail time, and after serving probation will not have a criminal record.

Putting athletes on trial in the United States for criminal charges is probably a long time off. Diane White (1986) noted that Canadian courts have developed a set of doctrines regarding offenses in the sport of hockey, whereas American courts have not yet defined such doctrines, and in doing so would have to consider how they would apply to all four major professional sports. Prosecutors in the United States are also hesi-

tant to bring suit due to the fact that they have enough "straight line criminal violence" to keep them busy, are concerned about the fairness of a trial involving a known athlete, and believe that leagues are better equipped to curb violence in the game (Katz, 2000).

The use of criminal law in dealing with violence in sports has not effectively served any purpose. Although Canadian courts have doctrines and standards in reviewing hockey incidents for excessive violence, the penalties imposed by the courts are far more lenient than those enforced by the NHL (Katz). Courts and juries have difficulty citing sports incidents as "unlawful" regardless of how gruesome the act.

Another area of potential regulation is federal legislation, which has been proposed to assist the current legal and league mechanisms in controlling violence in sport. The next section provides a brief overview of this proposed legislation, and discusses the reasons for its failure.

FEDERAL LEGISLATION

The Sports Violence Act of 1980 attempted to impose criminal liability on players who used "excessive physical force." Excessive physical force was defined as physical contact that had no reasonable relationship with the competitive goals of the sport, was unreasonably violent and could not be reasonably foreseen or was not consented to (Karon, 1991). The language of the act was vague and did not expressly detail such things as competitive goals (in any sport) or what behavior was considered "unreasonably violent." Karon also commented that the act was subject to interpretation in all of its subsections and did not clearly draw a line between professional and amateur sports. The Act never made it to the floor of the House of Representatives.

A subsequent act was proposed three years later. The Sports Violence Arbitration Act of 1983 called for the creation of an arbitration board to assist players in settling disputes involving conduct that was not consistent with the competitive goals of the sport. This board was to be created by management and players through collective bargaining agreements (Karon, 1991). The legislation assumed that leagues were open to regulation by an outside party and that athletes would bring forth grievances. Similar to its predecessor, this piece of legislation did not make it to a vote outside of the committee level.

Federal legislation has not been a viable option for dealing with sport violence at any point in time. Government officials, with notable exceptions such as former NBA star Bill Bradley and former NFL star Steve Largent do not have experience in professional sports. The leagues themselves are in a much better position to govern their own sport sim-

ply through their expertise relative to league rules, expected performance standards, tactics and personnel.

Regulating violent acts between athletes within a specific sport is best performed by the league governing that sport. The mere threat of federal legislation is incentive enough for leagues to take the appropriate measures to curb on-field violence (Lazaroff, 1990). In the following section, arguments are presented for leaving the responsibility solely with the league versus additional actions in legal proceedings.

LEAGUE SELF-CONTROL

The ability for leagues to control violence among their participants lies in the power vested in the commissioner's office and the authority provided in the individual collective bargaining agreements (CBAs) with the various players' unions. In each sport, a Uniform Player Contract (UPC) is part of the collective bargaining agreement, which in varying degrees of detail contains language allowing for league sanctions in the event of violence. Although each league office is usually named as the entity that can invoke penalties laid out in the UPC, the commissioners have differing powers across the leagues. The NFL, for instance, grants its commissioner more expansive powers to discipline players than any other league (Anderson, 1998).

Tenets of the CBAs are far more detailed than was attempted in federal legislation, yet also have blanket "conduct detrimental to the best interest of the league" statements. These statements allow the commissioner's offices to evaluate borderline conduct utilizing a subjective orientation. To be more objective, the league bylaws and UPCs specifically describe sanctions that will be imposed in the event of violent acts. Furthermore, the league bylaws and UPCs specifically describe sanctions that will be imposed in the event of violent acts (Anderson). The penalties are detailed in terms of fines and suspensions that will be levied in the event of certain conduct. Having this in writing, the players know up front what will happen for violent conduct outside the scope of play. Daniel Lazaroff (1990) points out that through collective bargaining and the acceptance of the UPCs, professional athletes themselves are in a position to negotiate for their own safety and protection. In essence, the actual participants who would be affected are making the rules and forcing each other to abide by them.

There are strengths and weaknesses relative to allowing the respective leagues to control the level of violence within their sport, however, the arguments in favor of doing so far outweigh those against. Opponents of league self-regulation argue that leagues are hesitant to police

their own, with rare and lenient punishments. A common theory in the NHL is that ending hockey violence completely would be detrimental to the game, as fans want to see aggressive play, and in some instances, fighting (Katz, 2000). Despite the double-edged sword the NHL faces, the suspensions imposed by the league in the *McSorley* and *Ciccarelli* cases have been more effective in dealing with player violence than the courts.

In reality, the NHL and the other three leagues are vitally interested in what the general public thinks of their image, and will make changes to prevent fans from turning away from the sport. Before the mid 1980s, there were a minimal amount of rules, bylaws, and language in the CBAs that dealt with player misconduct, yet as violent acts became more of a black eye to pro sports, the leagues have started to address this issue (Hanson & Dernis, 1996).

The four major sporting leagues have taken great strides (e.g., rule changes, larger fines, longer suspensions) to address the violence issue, and today are in the best position to take action. Joseph Katz (2000) summed up the major advantages for using internal league control. For one, league reactions to violent acts can be uniform, swift and severe, where as the courts take longer to resolve incidents and are often subject to judicial review. Also, league officials know their sport better than any court of law or catchall legislation. In the *McSorley* case, the guilty verdict without jail time or a fine effectively did nothing to him as a hockey player, yet, the NHL's suspension of him for one year is the harshest penalty ever levied for an on-ice incident.

One prominent NHL general manager felt that the action by the league was more of a deterrent than the court verdict, sending the message to players to think long and hard before hitting an opponent with their stick (Elliott, 2000). Fines can be severe in civil cases, yet the individual leagues have the ability to fine and take away a player's livelihood (Hanson & Dernis, 1996).

Other than the *McSorley* case, there have not been many recent developments concerning the handling of player-to-player violence in professional sports. There are only a few cases involving player misconduct, with the effectiveness of such action somewhat muddled. Judicial decision making in the sports arena is inappropriate, as laws and doctrines do not easily cross over to the playing fields of professional sports. Imposing civil sanctions could subject players to liability even though their conduct did not break the customs of a given sport (Doerhoff, 1999). For example, a hard football hit that did not draw a flag in the game or

sanctions from the NFL could be construed by the injured player as cause to sue.

Paul Haagen, a professor of law at Duke University, felt the decision, albeit by a Canadian court, reminded professional sports in general that violent behavior is unacceptable regardless of where it occurs (Floyd, 2000). While criminal courts in the United States may be more likely to stay away from prosecuting athletes, there is greater incentive for leagues to impose more strict and clearly defined regulations against participant violence. League commissioners and players unions working in unison are in the best position to handle this misconduct.

To reiterate, the main recommendation for addressing player-to-player violence in the four major professional sports leagues is to let the leagues regulate themselves. There are just too many difficulties with applying civil and criminal law to the sports setting, and conflicting judicial stances from the cases that have made it to court thus far. Federal legislation has also failed in its blanket attempt to provide a uniform standard that all incidents could be tried against. The threat of legal proceedings should be used to ensure that leagues take the necessary steps to prevent player misconduct that is over and above the nature of the game. Unfortunately, legal sanctions against the players themselves for their actions could fundamentally change the way professional athletes play their respective sports.

CONCLUSION

The issue of violent acts committed between players during sporting events is back in the news after the trial of Marty McSorley. By imposing two suspensions and requiring a loss of salary, the National Hockey League utilized the most meaningful and effective mechanism for addressing player misconduct. Civil actions have been somewhat successful in providing plaintiffs with financial awards, or at least bringing the parties to out of court settlements, however, players are less inclined to sue each other as a result of in-game incidents. Criminal prosecution appears to be solely a Canadian phenomenon, and up to this point has only dealt with the NHL. It will be interesting to see what will happen if a violent act occurs during an NBA game held in Canada. Attempts to address this issue using federal legislation in the United States have failed miserably, due in part to the considerable resistance from the professional leagues. League self-regulation in all the four major sports has evolved considerably, demonstrating more consistent and swift methods to effectively deal with actions of their respective players, thereby eliminating the need for redress in the court system.

ABOUT THE AUTHOR

WYATT HICKS is working on his Masters of Education in Sport Management from the University of Texas at Austin. In addition, he assists in the successful completion of event promotions for the Athletic Marketing Department, and serves as a Graduate Assistant in the Kinesiology Department, heading projects on a Sport Management alumni directory, undergraduate internship contract form conversion, and departmental website. In the summer of 2000, Wyatt served as co-leader on a project team that studied the economic impact of the 20th Junior Olympic Taekwondo Championships in San Antonio, Texas. He graduated Phi Beta Kappa in 1993 from Randolph-Macon College, Ashland, Virginia, with a Bachelor of Arts, Cum Laude, in Economics and Business. He worked five years in the financial sector with Capital One Services, Inc, where he was instrumental in presenting economic viability of new systems, and upgrades of systems that were in operation. Wyatt was the lead project manager for Credit Systems in bringing up a new telemarketing vendor and for ensuring data quality from all of Capital One's telemarketing and Internet partners. Furthermore, he provided data analysis of system performance, including peak/non-peak performance, capacities, and operational statistics.

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APPENDIX A

Civil cases granting monetary awards, or out of court settlements for violence between participants in professional sport:

Basketball:

Tomjanovich v. California Sports, Inc. (1979). - Federal jury found that the defendant and his team were liable for battery, when defendant punched plaintiff in a 1977 NBA contest. The jury awarded $3.2 million ($1.5 million in punitive damages), with judgment entered for the plaintiff totaling $3.1 million. (Yasser, 1985, p. 26).

Baseball:

A major league baseball player hit the opposing team's catcher over the head with a bat while at the plate during a game in 1965. The plaintiff filed suit asking for $110,000.00 in damages a week after the incident. The dispute was settled for $7,500.00 five years later. (Hanson & Dernis, 1996, p. 144).

Hockey:

Polonich v. A.P.A. Sports, Inc. (1982) - A federal court awarded the plaintiff $500,000.00 in compensatory and $350,000.00 in punitive damages in recovery for injuries suffered during a hockey game when he was hit with an excessively forceful hit when the defendant used his stick to slash the face of the plaintiff. The game occurred in 1978. (Hanson & Dernis, p. 144).

Football:

Hackbart v. Cincinnati Bengals (1979) – This case was reportedly settled out of court for $200,000.00 before it could be retried on the appeals court finding that the plaintiff did have a cause of action based on reckless misconduct. (Berry & Wong, 1993, p. 459).

APPENDIX B

Examples of Canadian case law involving criminal prosecution of National Hockey League players for violent acts committed during games.

Regina v. Maki (1970), *Regina v. Green* (1970) – Wayne Maki retaliated with his hockey stick to a punch to the face thrown by Ted Green. Maki's blow resulted in a fractured skull for Green. Both players were charged with criminal assault, yet both were acquitted. The court decided that Maki acted in self-defense, and commented that there was no evidence to show that he intended to injure Green. Green was acquitted on an implied consent doctrine. The court noted that the injury to Maki was an "inherent risk of the game." The court also noted that players in the NHL assume certain risks and hazards, but there will always be a question of the degree involved and that no athlete accepts a "malicious, unprovoked or overly violent attack." (*Maki*, p. 167).

In 1988, Dino Ciccarelli of the NHL was convicted of assault for hitting an opponent in the head with his stick and punching him in the mouth. The court sentenced him to one day in jail and fined him $1,000.00. (Svoranos, pp. 506-507).

Minor League Professional Hockey cases tried in the criminal courts in Canada.

Regina v. Watson (1975) – Robert Watson was found guilty of assault for choking an opponent until he lost consciousness. The court rejected a consent defense. (Katz, 2000, p. 850).

Regina v. Gray (1981) – The court found Gray guilty of assault for striking an opposing player who was skating away from a fight that had stopped play. Gray's conduct in harming the other player was not viewed as a risk inherent to the game because he had to go out of his way to hit the opposing player. (Svoranos, 1997, pp. 504-505).

Regina v. Henderson (1976) – Key to this case was the court's noting that "no doubt whatsoever that fighting is part of the game of hockey." (*Henderson*, p. 123). Despite this stance, Henderson was convicted of assault for hitting another player who was simply waiting for play to resume. The plaintiff was not involved in any previous altercation with the defendant. (Katz, 2000, p. 851).

Regina v. McSorley (2000) - Marty McSorley, of the Boston Bruins, was convicted, in a Canadian court, of assault with a weapon after hitting Vancouver's Donald Brashear in the head with a two-handed swing of his hockey stick. He was given a conditional discharge and served no jail time.