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Article

FROM THE ICE TO THE COURTROOM: ANALYZING THE RELATIONSHIP
BETWEEN PROFESSIONAL ICE HOCKEY AND TORT LIABILITYDaniel S. Greene^{a1}

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One of the most pressing current issues in all major North American sports is player safety. Particularly, sports like football and baseball have been concerned with concussions. The same can be said for ice hockey, but this sport has a completely different element: the acceptance of extremely physical play and fighting. Fighting has been an accepted part of the sport for decades, mainly due to the professional leagues not assessing major punishment for participating in a fight and ice hockey's "unwritten code." These aspects have led to some brutal incidents in the game, including serious injuries. This Article is inspired by one of the most heinous incidents in the history of the National Hockey League (NHL): the Todd Bertuzzi-Steve Moore incident, which recently settled out of court in 2014. While very few on-ice incidents have led to court proceedings, some have.

This Article analyzes the difference between a physical hockey play where a penalty is assessed and a physical play that results in litigation. In doing so, it examines the relationship between ice hockey and tort liability. First, hockey in general will be discussed through narrating a typical hockey game and highlighting important aspects in the NHL's Official Rule Book and Collective Bargaining Agreement. Following this, the Article will examine hockey's "unwritten code," which includes a conversation about the self-policing nature of the game and the role of "enforcers," like veteran Trevor Gillies, on a hockey team. After the discussion on hockey, the correlation between contact sports, specifically hockey, and tort liability will be analyzed. Along with this Part, American and Canadian case law involving hockey participants and tort liability and how courts have decided on whether or not to hold an actor liable for his actions on the ice will be discussed, specifically looking at the standard the courts applied.

Finally, the Article will argue that due to the lack of a hockey-specific, comprehensive standard on how to examine the physical nature of hockey and connection with the law, all courts throughout North America must implement a specific standard. In doing so, the new standard includes the important idea of "targeting" during these incidents. It will argue that this standard will help plaintiffs recover for injuries outside of the realm of the game and limit the role of enforcers in professional ice hockey, while at the same time not opening the flood gates for litigation.

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*58 I. INTRODUCTION

Ice Hockey is an inherently physical and dangerous game, likely one where Judge Cardozo would tell the timorous to “stay at home.”¹ The game is filled with blood, broken bones, and gruesome injuries. However, these aspects have been said to be a “part of the game.”² But there are instances where assessing a penalty, fine, or suspension to participants does not hold them fully liable for their dangerous actions on the ice. There are some instances where someone’s life is so altered by one play that the self-regulation of the game cannot nearly compensate them for what occurred -- instances where “[h]ockey is not above the law.”³

This Article discusses the relationship between the physical nature of the game of ice hockey (also simply known as “hockey”) and the law, specifically when the self-regulation of professional ice hockey cannot sufficiently hold a participant liable for his actions. Part II discusses the game of ice hockey, the rules that govern it, and the “unwritten code” *59 abided by professional ice hockey players. This Part will also give a description of a hockey game, an in-depth look on what the “unwritten code” is about, and the role that “enforcers” play as a part of the code, including a look into one of the game’s most notorious enforcers in recent years. Part III first analyzes the relationship between contact sports and tort law and how it plays out in litigation. This Part also includes a study of an American hockey case, *McKichan v. St. Louis Hockey Club*, while delving into how Canadian courts have handled these types of issues, especially the different standards courts have applied. This includes an analysis of the Todd Bertuzzi-Steve Moore incident, which recently settled out of court in 2014. Part IV argues how both American and Canadian courts should set an overarching standard on how to handle liability in professional hockey games. Then, it argues that a new standard that emphasizes the factor of targeting in these types of on-ice situations be implemented. In doing so, it helps solve the puzzling connection between the inherently physical nature of ice hockey and its issues with tort liability and litigation.

II. HOCKEY, ITS RULES, AND “UNWRITTEN CODE”

Professional ice hockey is governed by its rulebook and collective bargaining agreement. Along with these written rules, there are “unwritten” rules that act as a player’s code, especially when it comes to the role of fighting in the game. While the league’s commissioner and staff enforce the written rules, participants, mainly the league’s most physical players, enforce the “unwritten” rules.

A. *Hockey in the NHL*

As mentioned earlier, the game of ice hockey is inherently physical and dangerous, and at higher levels, the athletes become faster and stronger. Every night in the NHL, the world’s premiere professional hockey league, eighteen skaters and two goaltenders for each team, dressed in protective equipment, take to the thin piece of ice that is 200 feet long and 85 feet wide surrounded by plastic boards and Plexiglas,⁴ essentially creating a high-speed human pinball machine. The athletes fly around on a thin metal blade attached to their boots in order to put a small rubber puck into the opposing team’s net.

On March 8, 2004, a typical regular season NHL game took place between the Colorado Avalanche and Vancouver Canucks in Vancouver, *60 British Columbia.⁵ Six minutes and thirty-three seconds into the game, Vancouver’s Brad May and Colorado’s Peter Worrell were each assessed five-minute major penalties for fighting.⁶ Three seconds later,

Vancouver's Matt Cooke and Colorado's Steve Moore engaged in a fight and were also given five-minute penalties.⁷ A little less than four minutes later, Vancouver's Todd Bertuzzi was penalized for two minutes for interference.⁸ Six more penalties were assessed during the first period, including two more fights.⁹

While this game had more penalties and goals than the average game, it wasn't anything out of the ordinary until the 8:41 mark of the final period. At this moment, an incident (which will be discussed in more detail later) occurred that led to more than just time served in the penalty box. It ended with fifty-two minutes in penalties being assessed to four different players, a career-ending injury, and an eventual lawsuit.¹⁰ While this incident was not typical in the NHL, it was for all intents and purposes a typical game. Colorado won the game 9-2,¹¹ and both teams moved on to their next opponents.

B. NHL's Official Rule Book and Collective Bargaining Agreement

All of the actions that took place in the Vancouver-Colorado game, as well as every NHL game, are governed by the NHL Rule Book, which is enforced by the league's referees, linesmen, officials, and off-ice officials.¹² The contents of the rulebook include: playing dimensions, equipment specifications, and penalties.¹³ Penalties range from minor to major penalties, depending on the infraction, and can lead to suspensions and fines. Physical penalties include: charging, checking from behind, fighting, head-butting, illegal checking to the head, kicking, and kneeing.¹⁴ Stick penalties include slashing and spearing.¹⁵

Many of these penalties may resonate with the nonhockey enthusiast as everyday incidents that are penalized by law enforcement with arrests, fines, and jail time, as well as the cause of lawsuits. Even *61 the descriptions of these penalties and fouls in the NHL Rule Book may sound familiar to a layperson, such as "fighting."¹⁶ Players can be fined or suspended for fighting depending on how many times the person has been found to be the aggressor in the past.¹⁷ Under rule 28 of the Rule Book, the league allows for supplemental discipline of its players:

[T]he Commissioner may, at his discretion, investigate any incident that occurs in connection with any Pre-season, Exhibition, League or Playoff game and *may assess additional fines and/or suspensions* for any offense committed during the course of a game or any aftermath thereof by a player . . . whether or not such offense has been penalized by the Referee.¹⁸

Supplementary discipline for on-ice conduct is codified under article 18 of the Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association (CBA).¹⁹ Stating, in accordance with article 18.1, "Supplementary Discipline for On-Ice Conduct" means:

any supplementary discipline imposed by the Commissioner or his designee for Player conduct either on the ice or in the Player or penalty bench areas vis-à-vis other participants in the game (i.e., other Players, coaches or on-ice officials) in violation of the League Playing Rules. *Supplementary Discipline for On-Ice Conduct may take the form of a fine or a suspension.*²⁰

*62 The issue of criminal investigations is also noted in the CBA, as stated in article 18.19:

A Player subject to Supplementary Discipline for On-Ice Conduct may seek a reasonable delay in the proceedings in order to retain and seek the advice of counsel in the event his conduct is also subject to criminal investigation by any governmental authority, or in the event of an ongoing civil proceeding where the Player has been named as a defendant. The League may suspend the Player pending the League's formal review and disposition of the matter where the failure to suspend the

Player during this period would create a substantial risk of material harm to the legitimate interests and/or reputation of the League.²¹

The important aspect to note regarding these sections of the NHL Rule Book and CBA is that the league cannot initiate any criminal or civil proceedings against a player for on-ice conduct. While this is not blatantly stated in either document, it must be implied considering the language of rule 28 of the Rule Book and articles 18.1 and 18.19 of the CBA, which only allows the Commissioner to institute supplementary discipline for on-ice conduct through fines or suspensions.²² So the NHL does not have the authority to bring a player to court for dangerous actions on the ice. It is presumed that someone else (presumably another player) could file a claim against another participant, but the league has no say about when or if this can occur. The only action the NHL can take regarding a criminal investigation or criminal proceeding where a player has been named a defendant is suspending the player when the Commissioner feels it would be in the best interests of the league.²³

A prime example showing who can initiate a court proceeding for on-ice incidents took place in 2011 after Boston Bruins' defenseman Zdeno Chára hit Montreal Canadiens' forward Max Pacioretty with a hard body check, causing Pacioretty to sustain a severe concussion and cracked vertebra.²⁴ While Chára was assessed a major penalty and a game misconduct, the league decided not to suspend or fine him.²⁵ But the Montreal police initiated a criminal investigation of the incident at the request of Québec's director of criminal and penal prosecutions to determine if there were grounds for a cause of action.²⁶ The Montreal *63 police began an investigation on their own initiative and presumably without any assistance or suggestion from the NHL.

As of 2014, the person in charge of discipline in the NHL has been former NHL player and current Senior Vice President of Player Safety, Stéphane Quintal.²⁷ As the league's "sheriff," it is Quintal's job to say "when the line has been crossed," and decide along with the Player Safety Department when to hand down suspensions.²⁸ Quintal has described his job as protecting the player that was harmed, stating, "When a player gets suspended, the only people who are fighting for the player who was injured is us . . . The player who got injured isn't there to defend himself. I'm not sure if the players realize that . . . that we're fighting for them."²⁹

C. Hockey's "Unwritten Code," Self-Policing, and the Role of "Enforcers"

The infamous incident that occurred in the Vancouver-Colorado game was the result of the game's "unwritten code." The code basically states that "a team's skilled players should not become targets of vicious bodychecks or 'cheap' shots. When that does happen, the victim's tougher teammates are expected to retaliate, usually by fighting or attacking the player who delivered the hit."³⁰ This is the players' way of self-policing to make sure that the league's best and most skilled players are able to play without feeling the full force of the game's physical nature. It is the role of the tougher teammates (also known as "enforcers," and sometimes "goons") to be the policemen.³¹ Pursuant to the code, "it is respectable to use honorable violence (the hockey fight) to deter dishonorable hockey violence (cheap shots and dirty plays). The belief is that the fear of getting 'beat-up' by the opposing team's enforcer *64 deters players from taking cheap shots and engaging in 'dirty' plays."³² "Unwritten rules" of the code include: captains are untouchable, don't check from behind, rules of engagement, and fight fairly.³³ Further, the code states that "premeditated fights should occur at the start of a game, period or shift."³⁴

The code came into play during the game in Vancouver as a result of Steve Moore allegedly "cheap shotting" Vancouver's captain and best player, Markus Näslund, in a game between the teams three weeks prior.³⁵ While Moore was not assessed a penalty in the game, and the NHL reviewed the hit and concluded that it was legal, Vancouver players and

officials were upset and wanted revenge.³⁶ Vancouver enforcer Brad May was quoted after the Näslund incident saying, “[t]here is definitely a bounty on [Moore's] head.”³⁷ In contact sports, the word “bounty” refers to “deliberate attacks on opposing players that were expressly designed to cause injury.”³⁸ The NHL took these threats seriously, which led to NHL Commissioner Gary Bettman and Executive Vice President and Director of Hockey Operations Colin Campbell to attend the next game between the two teams.³⁹ Moore had to answer to “the code,” and for all intents and purposes he did when he fought Matt Cooke, a small but scrappy, physical player, in the first period of the rematch.⁴⁰ But some Vancouver players, mainly six-foot, three-inch, 229-pound power forward Todd Bertuzzi did not think Moore was held fully accountable.⁴¹ What specifically transpired will be discussed in detail later.⁴²

***65 D. Case Study of a “Goon”: Trevor Gillies**

In recent memory, one of the most notorious policemen of the “unwritten code” has been tough-guy Trevor Gillies. While fights occur between different types of players, they mainly occur between teams' enforcers, like Gillies.⁴³

Gillies is the definition of a “goon”: he's a player with very limited skill but has made a career in professional hockey because he can fight.⁴⁴ Those like former NHL enforcer (and later referee) Paul Stewart, refuse to knock those like Gillies for earning a living by being an enforcer and making it in the NHL because of their fists.⁴⁵ But proponents of fighting in hockey, like Stewart, have become disgusted with Gillies because he “frequently crosses the line and not only tossed ‘the Code’ out the window, he's backed up and run over the remnants a few times for good measure.”⁴⁶ Gillies has played professional hockey in various leagues, including the NHL, since 1999,⁴⁷ but only had one prolonged stint in the NHL from 2009 to 2012 with the New York Islanders. There, he played fifty-six of his fifty-seven career NHL games and collected the only points (two goals, one assist) of his career, amassing 240 penalty minutes over three seasons.⁴⁸ His time with the Islanders was also highlighted by one of the most physical and notorious brawls in recent NHL history.⁴⁹

***66** Gillies has even found a way to be in the headlines as recently as October 14, 2014, while playing in the minor leagues for the Adirondack Flames in a game against the Rochester Americans.⁵⁰ With about three minutes left in regulation and the game fully out of reach, Gillies picked a fight with rookie William Carrier and then began throwing punches at Carrier, “who was ducking and doing his best to avoid the assault,” showing that he wanted no part of the fight.⁵¹ Carrier then dropped to his knees, but Gillies continued to throw haymakers despite referee Jamie Koharski telling him to stop.⁵² Then, Gillies “grabbed the neck of Carrier's sweater and his helmeted head, pulled him up a bit, then drove the helmet visor/forehead-first into the ice.”⁵³ Gillies was suspended twelve games for the incident.⁵⁴ While Carrier was not seriously hurt, it was still a truly repulsive incident and not consistent with the “unwritten rules.”⁵⁵

While Gillies was apologetic and tried to explain and defend his actions,⁵⁶ one just has to take a look at the video to see how deplorable and indefensible Gillies' actions were that day. A man can only apologize so much and continue to hurt people before things catch up to him.

III. ICE HOCKEY AND THE LAW

The game of ice hockey and its relationship with the law has generally been a confusing one. This is due to the fact that ice hockey is a naturally physical and brutal game, where normal actions that take place on the ice would be subject to criminal or civil liability if taken place off the ice. However, there have been many instances where courts have tried to grapple with this situation over many sports, leading to many different rulings.

*67 A. Sports and Tort Liability

For the most part, tort law is based on nonviolent interactions, which are different from contact sports like hockey where athletes are meant to engage in physical contact for tactical purposes.⁵⁷ For example, the act of checking in a hockey game, which is an integral and rule-abiding part of the sport, would be seen as an intentional tort (most likely battery or assault) outside of the hockey context.⁵⁸ So it has been difficult for courts to create a way to determine liability in the setting of contact sports.⁵⁹ This difficulty is due to the fact that “[m]ost human interaction is predicated upon nonviolence and due care; sports activities, however, often result in injury caused by one player to another. In some ‘contact’ sports, infliction of pain and injury is expected and even encouraged by coaches, fans, and the players themselves.”⁶⁰

Historically, sports participants suing for injury during a sporting event have sued under three theories of tort liability: negligence, recklessness, and intentional torts like assault and battery.⁶¹ It should also be noted that courts have had trouble discerning in assumption of risk cases “whether the plaintiff was barred from recovery because the defendant was not negligent or because the plaintiff knowingly and voluntarily encountered the risk.”⁶² Judge Cardozo explained this distinction in *Murphy v. Steeplechase Amusement Co.*, stating:

One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. . . . Visitors were tumbling about the belt to the merriment of onlookers when [the plaintiff] made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.⁶³

*68 Regarding sports and assumption of risk,⁶⁴ the doctrine “precludes liability for injuries arising from those risks deemed inherent in a sport; as a matter of law, others have no legal duty to eliminate those risks or otherwise protect a sports participant from them.”⁶⁵ When analyzing the duty at issue,

a court need not ask what risks a particular plaintiff subjectively knew of and chose to encounter, but instead must evaluate the fundamental nature of the sport and the defendant's role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk or harm.⁶⁶

The prevailing standard for assumption of risk in sports is “that a participant breaches a duty of care to a coparticipant ‘only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport.’”⁶⁷ Similar standards have applied throughout the United States.⁶⁸ The Restatement of Torts also states a comparable standard.⁶⁹

Also, courts have established that participants in a sporting contest “have a duty to not act recklessly, outside the bounds of the sport,”⁷⁰ and coaches and instructors have “a duty to not increase the risks inherent in sports participation.”⁷¹ The reason why courts have not recognized *69 safety-rule violations as a bright-line test for liability is likely due to the fact of “a judicial reluctance to review what occurs on the playing-field or, more likely, from an unarticulated disagreement with the Restatement rule” because of a feeling that the Restatement rule “goes too far in imposing liability.”⁷² But it must also be noted that different states have varying standards and that there is no one prevailing standard.⁷³

Conduct where sports participants have been held liable for their actions during a sporting event include: (1) the kicking of a soccer goaltender in the head when the defendant participant had time to avoid the contact with the plaintiff in a high school level soccer game;⁷⁴ (2) the forceful hitting of the back of a football player's head and neck in a National Football League game;⁷⁵ and (3) the punching to the face of a participant in a National Basketball Association game.⁷⁶ Conduct that has not been found to violate the standard includes: (1) the flipping of an opponent over one's back causing paralyzing injuries during a college lacrosse game and (2) the hitting of a batter in the head with an alleged retaliatory pitch in a collegiate baseball game.⁷⁷

B. Hockey and American Tort Law: McKichan v. St. Louis Hockey Club

Despite the difficulties in determining liability for actions by participants in hockey games, courts have attempted to analyze tort liability in regards to the game.⁷⁸ In *McKichan v. St. Louis Hockey Club*,⁷⁹ a professional minor league goaltender was hurt during a game and sued the opposing player that injured him (and the owner of the defendant's team).⁸⁰ The plaintiff argued that "the illegal hit caused a *70 severe neck strain, partial vision loss, and other injuries that ended his chances for a career in the National Hockey League."⁸¹

The incident took place on December 15, 1989, between Milwaukee Admirals' goaltender Steve McKichan and Peoria Rivermen enforcer Tony Twist.⁸² In the second period of the game, McKichan hit Twist in the face with his glove, causing Twist to need stitches.⁸³ McKichan was assessed a penalty on the play, and both players continued to participate in the game.⁸⁴ In the third period, a shot toward McKichan was deflected out of play, causing the referee to blow his whistle to stop play.⁸⁵ However, once the puck went over the glass, McKichan began skating away from the net and toward the boards, while Twist, who was near the blue line (approximately sixty feet from the boards behind the goal) when the puck went out of play, began skating toward McKichan and continued to skate, despite the referee blowing the whistle for the second time, and "[h]olding his stick, defendant player partially extended both arms and hit plaintiff with his body and the stick, knocking plaintiff into the boards. Plaintiff fell to the ice and was knocked unconscious."⁸⁶ Twist was assessed a "match penalty" for violating five separate rules of hockey, ejected from the game by the referee, and was also suspended by the International Hockey League (IHL) "for every game Peoria played while McKichan was injured and all subsequent games between Milwaukee and Peoria."⁸⁷

Here, the court was analyzing an allegedly aggressive, retaliatory hit by a self-proclaimed enforcer against a smaller unsuspecting goaltender after the play had ended.⁸⁸ In doing so, the court had trouble determining *71 what specific standard to apply, which was likely due to the lack of case law.⁸⁹ In particular, it struggled to see if the standard of recklessness was appropriate.⁹⁰ The court's hesitance to clearly apply a recklessness standard could have been due to the inherent physical nature of hockey and the possibility that "[e]xposing players to jury review in every instance that reckless would lead to anomalous results."⁹¹

However, the court noted that "the concepts of duty, assumption of risk, and consent must be analyzed on a case-by-case basis. Whether one player's conduct causing injury to another is actionable hinges upon the facts of an individual case."⁹² In assessing certain factors,⁹³ the court stated that violence is common in professional hockey, and "[p]layers regularly commit contact beyond that which is permitted by the rules, and, we are confident, do it intentionally."⁹⁴ The court also highlighted that "the game is played with great intensity because its players can reap substantial financial rewards. [We] also recognize that the professional leagues have internal mechanisms for penalizing players and teams for violating league rules and for compensating persons who are injured."⁹⁵ Despite the fact that the hit occurred after the play and violated the rules, the court found that the check "was not outside the realm of reasonable anticipation" and

ruled in favor of the defendant, noting that “[f]or better or for worse, it is ‘part of the game’ of professional hockey.”⁹⁶ In doing so, the court ruled that breaking many game safety rules and seriously injuring a player in an act not during the course of game play was not *72 enough to find liability for a professional hockey player because actions like fighting, slashing, and checking are an acceptable, though penalized, part of the game.⁹⁷

After the incident, Twist went on to have a relatively successful NHL career,⁹⁸ while McKichan never played professionally after that season.⁹⁹ Even though McKichan did not want the game to become less violent, he still felt the hit was out of line, noting, “The simple thing is when the play’s whistled dead, you can’t hit somebody who’s not looking.”¹⁰⁰ McKichan’s attorney further echoed that sentiment, stating, “Hockey is not above the law.”¹⁰¹

C. Hockey and Canadian Tort Law

The issue of a hockey participant’s liability for injuries during a game is equally (if not more) important in Canada, considering hockey is the country’s national winter sport.¹⁰² Just as in the United States, in Canada there is a discrepancy about what liability standard should apply in these cases.¹⁰³ Canadian courts, for the most part, have applied either an intentional tort or negligence analysis.¹⁰⁴ Intentional tort cases, mainly involving assault and battery, that take place in the sports context *73 “usually involve incidents where players step outside their role as fellow competitors and seek to inflict injury on an opponent.”¹⁰⁵ The assumption of risk doctrine is also accepted in Canada and is known as *volenti non fit injuria*.¹⁰⁶

1. Application of Intentional Tort Standard in Hockey

The case of *Agar v. Canning* is one of the seminal Canadian cases involving intentional torts and hockey.¹⁰⁷ In an amateur hockey game, the plaintiff hooked the defendant with his stick, causing him to hit the defendant in the back of the neck.¹⁰⁸ In retaliation, “[d]efendant thereupon stopped, turned, and holding his stick with both hands, brought it down on plaintiff’s face, hitting him with the blade between the nose and right eye,” which knocked the plaintiff unconscious.¹⁰⁹ The court noted that hockey is inherently violent, and “[a] person who engages in this sport must be assumed to accept the risk of accidental harm and to waive any claim he would have apart from the game for trespass to his person in return for enjoying a corresponding immunity with respect to other players.”¹¹⁰ But the court acknowledged that some limit must be placed on participant liability and stated that “injuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even when there is provocation and in the heat of the game, should not fall within the scope of the implied consent.”¹¹¹ The court ruled that the defendant was not only exempt from liability due to his intent to injure the opposing participant,¹¹² but also that the plaintiff provoked the defendant to retaliate, which led to the mitigation of damages.¹¹³ Following this decision, other cases found amateur hockey players to be liable in similar situations.¹¹⁴

***74 2. Application of Negligence Standard in Hockey**

In order for a plaintiff to prevail under the negligence standard, one “must show that the defendant breached a duty owed to the plaintiff and that the breach caused the resulting injury.”¹¹⁵ In *Herok v. Wegrzanowski*, the court stated that negligence “is not every careless act causing injury that will give rise to liability. It is only careless acts quite outside the risks assumed that could be a foundation of such liability.”¹¹⁶ In Canada, those being sued for negligence actions in the sports context can raise the defenses of voluntary assumption of risk (*volenti non fit injuria*) and/or inherent risk in sports.¹¹⁷ The assumption of risk defense only applies as a consent defense to negligence in “situations where parties’

implicit consent is not as obvious as within the sporting arena.”¹¹⁸ In regards to the inherent risk defense, one can assert this defense “if the injury arises from a normal and reasonable practice inherent in the game. . . . Such injuries are regarded as mere accidents whose costs must be borne by the victim.”¹¹⁹

D. The Bertuzzi-Moore Incident

Arguably the most famous recent Canadian incident regarding ice hockey and tort liability is the Bertuzzi-Moore case,¹²⁰ which was briefly *75 mentioned earlier.¹²¹ The incident that led to the assault charge occurred about a third of the way into the game on March 8, 2004 when Bertuzzi skated up to Moore, who did not have the puck, and began talking to Moore, who continued to glide away from Bertuzzi.¹²² Bertuzzi continued to talk to him, trying to engage him in a fight, but Moore continued to ignore Bertuzzi.¹²³ But as the play turned directions, “Bertuzzi reached out with his left hand and dropped his stick from his right hand and struck Moore very hard from behind and on the side, landing the blow, it looks like, in the right temple of Moore.”¹²⁴ Once Bertuzzi’s punch landed, Moore fell to the ice, with Bertuzzi on top of him, which caused players from both teams to join the pile.¹²⁵ Once the pile was cleared, Moore was seen lying on his chest in pain with blood around him.¹²⁶ Bertuzzi was given a ten-minute penalty for intent to injure, and the NHL suspended him for the remainder of the season, as well as the playoffs, causing Bertuzzi to suffer a loss of \$500,000 in salary.¹²⁷ Meanwhile, Moore suffered a cervical spine injury and neurological effects as a result of postconcussive syndrome.¹²⁸ Moore never played professional hockey again after that season, while Bertuzzi continued to play professionally until 2014.¹²⁹

*76 Shortly after the incident, Bertuzzi pled guilty to assault causing bodily harm against Moore in the British Columbia Provincial Court.¹³⁰ Considering the circumstances of the incident and the offender, the court looked at whether there were aggravating and mitigating factors that would make the ultimate sentence more or less severe.¹³¹ One aggravating factor that the court noted was “the prolonged period over which the accused attempted to get Moore to engage in this fight.”¹³² The court continued to emphasize that fighting is a part of hockey under certain circumstances but noted precedent that actions in the hockey arena are not immune from the law.¹³³ Further, the court listed mitigating factors such as (1) the fact that Bertuzzi pled guilty; (2) he was a twenty-nine year old man with no criminal record, and the act appeared to be out of character; (3) he was seen as a person of good character within his community; and (4) he expressed his remorse within two days of the incident.¹³⁴ In considering these factors, the court figured it would be in Bertuzzi’s best interest that he receive a conditional discharge.¹³⁵ The court noted the deterrent effect this ruling would have due to “the laying of the charge, by the public notoriety attracted by the charge, by the incredible disruption of one’s personal life who is the subject of the charge, and then by the significant financial consequences which already have flowed as a result of the charge.”¹³⁶

*77 The Moore-Bertuzzi saga continued in 2006 with a civil suit in Ontario.¹³⁷ While the case was delayed due to complications and disagreements, a trial date was finally slated for September 8, 2014.¹³⁸ However, the trial never happened because the parties settled in August 2014.¹³⁹ Though the terms of the settlement have not been made available to the public, Moore released a statement through his lawyer: “The legal case for the loss of my NHL career is over While nothing replaces the loss of one’s dream . . . I am grateful to be able to move forward.”¹⁴⁰

IV. A NEW COMPREHENSIVE AND ICE HOCKEY-SPECIFIC STANDARD SHOULD BE INSTITUTED

Fighting will always be a part of hockey, even though fighting and the number of enforcers have decreased over the past few years.¹⁴¹ While fighting is a tactical move in professional hockey, it is not necessary in order to succeed.¹⁴² The recent decrease in fights is mainly due to the NHL's instigation penalties, the handing out of more severe suspensions, and the concussions issue.¹⁴³ Current enforcer Dan Carcillo explains the role of fighting in the NHL:

I don't think the mindless, senseless, go out and fight, rah-rah, for no reason, I don't think that has a place in the game anymore. If guys take runs at other players, I think those players that take the run at them, whether they fight or not, they have to know in the back of their mind that *78 there's still fighting in this game and they're going to have to answer the bell or respond to it if they're going to take dirty runs or cheap shots.¹⁴⁴

While the league and its rules do a good job at keeping the players in order and accountable for their actions, the Commissioner cannot impose criminal or civil liability for the on-ice actions of participants because, in reading the NHL Rule Book and CBA, there is truly no way for the league to impose criminal liability on a participant for that participant's actions in a hockey game, as well as initiate a court proceeding regarding an on-ice incident. The most that the Commissioner can assess a player for noncompliance with the rules of the game is a fine and/or suspension.¹⁴⁵ It is assumed that civil and criminal suits would need to be initiated by one of the parties involved in an incident in order for the NHL to implement some ruling in accordance with article 18.19 of the CBA.¹⁴⁶ A player that acts in a manner outside the realm of the game can only be punished to a certain extent by the NHL's governing body.

The same can also be argued for the "Unwritten Rules" of hockey. While they do keep the players "in check," they really only act as a strong deterrent for players from acting in a certain manner. So in many instances, the rules, written or unwritten, are not enough to hold a participant sufficiently liable for his actions.¹⁴⁷ Certain instances call for further action, meaning legal action. But it has been difficult to ascertain when the law comes into play regarding an on-ice incident. And when these incidents reach the courts, the biggest difficulty has been what standard of liability to apply.¹⁴⁸ The application of varying standards of liability by different courts throughout North America has led to anomalous results,¹⁴⁹ which do not give participants any idea whether their actions on the ice could be the cause of future litigation.

As noted many times, hockey is a dangerous and physical sport where instances occur during the game that would be seen as criminal off the ice. Typically, legal standards are difficult to apply to the game of hockey. For instance, punching someone in the face off the ice would be grounds for battery, while committing the same action during the course of a hockey game is a five-minute penalty and sometimes warrants the occasional suspension. As seen in the cases above, there are instances *79 during a game where participants act outside the realm of the game and further action must be taken outside of the internal punishments handed out by the NHL body, and "solved" by the unwritten code.¹⁵⁰ In instances like the McKiernan and Bertuzzi incidents, suspending an offender isn't enough when the person attacked not only suffers more than an injury, but also a loss of income and happiness.

For many years, the hockey community has looked down on the idea of court involvement in on-ice incidents due to the sentiment that punishment should be left to the league's internal discipline structure of fines and suspensions and should be considered a private matter.¹⁵¹ But courts have a role in regulating criminal conduct even within the realm of contact sports, because, as noted by the *Bertuzzi* court, the idea of keeping this form of conduct as a private matter was the predominant view on domestic violence for years but is now a view that is unthinkable today.¹⁵² Hockey players should not have free reign to act in a barbaric manner just because they are in hockey rinks and not on the streets. These on-ice actions are of public concern because the public views these games live and on television.

As demonstrated in Part III, courts have applied varying standards regarding liability for on-ice incidents. In *Agar*, the Canadian court applied an intentional tort standard where implied consent did not apply.¹⁵³ An example of an

intentional tort is battery, where an actor is liable if: “(a) “the author intends to cause a contact with the person of [another]; (b) the actor's conduct causes such a contact; (c) the contact (i) is offensive or (ii) cause bodily harm to another; and (d) the other does not actually consent to the contact.”¹⁵⁴ Also in Canada, the *Herok* court applied a negligence standard of liability and considered whether the attacker breached a duty owed to the victim.¹⁵⁵ “A person acts negligently if [he] does not exercise reasonable care under all the circumstances.”¹⁵⁶ In the United States, courts like the one in *Gauvin* have applied a recklessness standard,¹⁵⁷ while in *McKichan*, the court did *80 not particularly state a specific standard when it came to liability, but instead listed factors that influenced its decision.¹⁵⁸

Geoffrey M. Moore noted in his article the pros and cons of each standard of liability, stating that a negligence standard “could achieve the policy goals of tort law by compensating victims, punishing negligent participants, and forcing all competitors to act in ‘reasonable’ manner in the sporting arena,” but at the same time could “foster excessive litigation.”¹⁵⁹ Meanwhile, Moore said that while the recklessness standard “does not afford a bright line rule” and “may be inapplicable to contact sports,” he does feel the recklessness standard would be the best route for courts to take considering “[t]he recklessness standard promotes vigorous participation in sports by avoiding the chilling effect of a negligence standard.”¹⁶⁰ Overall, Moore felt that the recklessness standard “strikes the appropriate balance between permitting an injured player to seek compensation for a wrongfully inflicted injury and encouraging vigorous athletic competition without the threat of a participant being hauled into court for conduct which is a part of the game.”¹⁶¹

But recklessness is still not the proper standard of liability because, as mentioned by Moore, the standard speaks in generalities, so the process of deciding what is truly recklessness is difficult and could lead to anomalous results.¹⁶² Also this standard of liability does not adequately account for the speed and physicality of the game, as well as a player's mindset during the course of play. Participants are essentially allowed to play hockey recklessly because of the type of game hockey is and the fact that the rules allow for this type of play. This creates a conflict between being penalized for actions on the ice that are technically within the realm of the game and playing in a reckless manner. This is why traditional tort liability standards cannot apply to hockey. It is nearly impossible to compare the actions that take place on *81 the ice to actions that take place outside of the hockey arena. Traditional tort standards were not created with situations like hockey in mind. They were predicated on nonviolent interactions between everyday people in everyday situations. Hockey situations and everyday situations are incomparable because hockey is based on violence and typically interactions between people are not. This game is also different in the sense that breaking rules is essentially tolerated and accepted. When players are assessed a typical penalty for making “illegal” contact with another player, their lives aren't greatly altered in any way. Liability for hockey participants needs to be based on something more than duty, offensive contact, and disregard of safety, because the game is based on making deliberate and hard contact with others and playing with reckless abandon.

There needs to be a consistent and specific standard for participant liability in hockey. A factor test for contact sports like hockey that fully considers the nature of the game is needed. These factors can be based on the ones listed in Boggess's article in the American Jurisprudence Proof of Facts,¹⁶³ while adding one more necessary and deciding factor: “targeting.” Targeting should be defined as “consciously attacking a participant with intent to injure outside the rules of the game.” This places an emphasis on the intent of the actor, making it more like an intentional tort standard. It is here that the nature of hockey is taken into account because this factor is where a court distinguishes what is a “typical” physical hockey play and what is an “atypical” physical hockey play.

So the following five-factor test for participant liability in professional hockey should be applied in both American and Canadian courts:

- (1) Circumstances and prior threats/incidents leading to the incident;

- (2) Targeting of the plaintiff by the defendant, defined as consciously attacking the specific plaintiff with the intent to injure outside the rules of the game;
- (3) When the attack took place during the game;
- (4) Nature and extent of the injuries; and
- (5) Plaintiff's attempts to avoid conflict.

These factors mainly focus on the idea of intent, specifically the intent to injure is found in the first, second, and third elements. The first factor, takes into account the circumstances leading to the incident. In *82 ice hockey, circumstances that can satisfy this factor include prior statements about seeking revenge on a player prior to a game, or altercations between players either during the course of that game or prior games. So if two or more players have a history leading up to the event that caused the injury, the first factor would be satisfied. Also considered in this decision is the prior history and reputation of the defendant as a hockey player. It should be noted that the reputation of the player off the ice should not be taken into account because his actions off the ice have no relevance to what occurs on the ice. Just because a hockey player is a “model citizen” off the ice, does not mean he cannot act in a different way in a different arena. Also included in determining this factor are fines, suspensions, and other incidents. In doing so, this factor goes against players that are traditionally enforcers or goons because if they have a tendency to act in this way, this factor would likely be met. This will be the area that will act as the biggest deterrent to overly physical hockey players and will lead to the further elimination of the existence of “goons.”

Regarding the second and most important factor, the court must determine if the defendant consciously made a decision to attack the plaintiff in a way that was outside the rules, both written and unwritten, of the game. This would be the most difficult element to determine, considering the physical nature of the game, so expert witnesses would likely be used. Actions that could be treated as within the rules of the game would include: mutual fighting, hard body checks, tripping, slashing, and other “typical” physical hockey plays where there is no clear intent to injure. Deciding what would be beyond these actions would likely be determined by the specific facts of each situation, and would include: fighting an unwilling participant, hitting an unsuspecting participant after the whistle has been blown, purposefully hitting someone in the face with your stick, and other instances where an attacker is trying to injure another participant outside of the general rules of the game as stated by the NHL Rule Book. Essentially, these are hockey plays where it cannot be truly said that a victim consented to partake in such actions and the attacker purposefully acted to injure the victim.

The third factor relates to the second factor in the sense that the court should take into account when the attack occurred because each part of a game calls for different actions. As a result, this factor considers the special situations that take place in a hockey game. For example, when one player hits another during the course of play, this would be considered a part of the game. However, if the whistle has *83 ended a play and an incident has occurred several seconds after, it could be argued that this was not within the realm of play. This factor would also cover incidents that take place during pregame and postgame activities. Because this element would likely be seen in conjunction with the previous element, expert witnesses would also be called to testify in determining this element.

The fourth element analyzes the extent of the victim's injury due to the attack. This part of the test acts as a safeguard for liability because if there is no real resulting injury, it would be difficult to show that a dangerous incident truly took place. If every dangerous hockey play could lead to liability in court without an injury, a floodgate to litigation would open.

Finally, the fifth element looks at the role of the victim in the incident. If the victim can be seen as the instigator, the attacker should not be held liable. This element helps defendants who argue that they were mutually engaged in the altercation.

These factors will help courts decide when liability should be placed on an attacker while at the same time not opening massive litigation for any incidents that cause injury during a hockey game. Under this test, injuries during mutual fights and typically aggressive hockey plays will not hold participants liable for injuries. For example, say Player *A* and Player *B* are racing for a puck toward the boards, but Player *A* hits Player *B* from behind, causing a concussion and spinal injury. While this incident would definitely be a sad and unfortunate incident, Player *A* should not be legally liable for the injury because this action was a part of a typical hockey game. This standard would still satisfy Moore's policy goal of not fostering excessive litigation,¹⁶⁴ while also creating a specific standard that can be applicable to an inherently physical contact sport that allows for vigorous participation within the scope of the game, including the self-policing through the "unwritten code" in a reasonable manner, meaning (for the most part) mutual fights.

Applying these factors would have found participants like Tony Twist and Todd Bertuzzi liable for their actions. All the factors of the proposed test in the Twist incident would be satisfied: (1) Twist and McKichan had an incident earlier in the game and Twist had a reputation of acting in an overly-physical manner, which is evident by his statistics and reputation in the league; (2) Twist deliberately went after McKichan despite there being a stoppage in play and the referee blowing his whistle seconds before the hit; (3) the attack took place several seconds after the *84 stoppage of play, which was the reason why McKichan was not expecting any contact; (4) McKichan suffered serious injuries, shortening his professional career; and (5) McKichan was not even looking in Twist's direction, so he had no idea the hit was coming.¹⁶⁵

The same can be said for the Bertuzzi incident: (1) after the Näslund incident, Vancouver players said Moore had a target on his back, and Moore fought Vancouver players in between the Näslund and Bertuzzi incidents in response to "the code," (2) Bertuzzi kept trying to engage Moore in a fight before approaching him from behind, punching him in the head, and driving his face into the ice, despite the fact that Moore never agreed to fight Bertuzzi; (3) the incident took place away from game play in the final period of a blowout game; (4) Moore suffered serious injuries and never played professional hockey again; and (5) while Moore did know that Bertuzzi was trying to engage him in a fight, Moore skated away from Bertuzzi and did not see when Bertuzzi initially punched him in the side of the head and drove Moore's neck into the ice. Under this factor test, both Tony Twist and Todd Bertuzzi would have likely been found liable for their actions in court. The question on how these types of offenders (and possibly their employers) should be punished is a discussion for another time, but the punishment would likely involve a major fine and/or jail time. This, along with the negative stigma associated with a lawsuit, would be the biggest deterrent for any hockey player not to commit such heinous acts, and would likely limit players like Trevor Gillies and other "goons" chances of finding a place on a professional hockey roster because organizations would not want to take the risk of employing such types of players. Even though Gillies' incident in 2014 would probably not have been found liable under this new standard, the fact that a standard like this is in place would likely make Gillies think twice before acting in a similar manner in the future. While "the code" has a place in the game, the actors that take it too far need to be severely punished for taking liberties on the ice. The fact that they are playing a game is not a valid excuse to act like a criminal.

V. CONCLUSION

This new standard that emphasizes targeting would help solve many issues regarding liability for professional hockey players and clear up confusion with the inherent nature of the game and tort liability. It would still allow for vigorous play, fighting, and the "unwritten code" to exist in professional ice hockey, but it would help limit the existence of enforcers *85 like Tony Twist and Trevor Gillies in the game. The standard would also allow for participants who are seriously injured during the course of a game to find retribution for vicious acts taken against them, but at the same time only limit recovery to those actions where the attacker acted outside the realm of the game and its rules. Finally, this standard would give everyone involved a fair opportunity to solve the issues of when the physical play of ice hockey has gone too far. It would notify players of when they could bring a claim (or be subject to one) for liability, which could drastically change the behavior of some participants. Hopefully, the United States and Canada can reach reciprocity

and maintain the same standard so all participants within professional hockey will be held to the same standard, which is important considering the NHL has teams in both countries, as well as participants.

Footnotes

- a1 © 2016 Daniel S. Greene. Daniel is currently a 3L at the Syracuse University College of Law where he is an Associate Notes Editor for the *Syracuse Law Review* and the President of the Entertainment and Sports Law Society. He graduated from Union College (NY) in 2011 and then served as the Coordinator of Hockey Operations for the Union College Division I Men's Ice Hockey program for two seasons before heading to law school. He would like to thank Andrew Kim, Associate Professor of Law at the Syracuse University College of Law, Darrin Simmons, former Senior Notes Editor of the *Syracuse Law Review*, and William Shotzberger, former Associate Notes Editor of the *Syracuse Law Review* for their assistance throughout the writing process. Daniel would like to dedicate this Article to his parents, Howard and Linda.

1 See *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929).

2 *McKichan v. St. Louis Hockey Club*, L.P., 967 S.W.2d 209, 213 (Mo. Ct. App. 1998).

3 See Jim Salter, *Jury Orders Blues To Pay \$175,000 to Goalie Hurt by Tony Twist*, ASSOCIATED PRESS (Nov. 15, 1996, 3:42 AM), [http://www.apnewsarchive.com/1996/Jury-Orders-Blues-to-Pay-\\$175-000-to-Goalie-Hurt-by-Tony-Twist/id-95d71254880b6aa50017a5b0ea881550](http://www.apnewsarchive.com/1996/Jury-Orders-Blues-to-Pay-$175-000-to-Goalie-Hurt-by-Tony-Twist/id-95d71254880b6aa50017a5b0ea881550).

4 *Official Rules 2014-2015*, NHL, <http://www.nhl.com/nhl/en/v3/ext/rules/2014-2015-rulebook.pdf> (last visited Jan. 27, 2016).

5 *GameHQ Scores for March 8, 2004-- Avalanche 9 Canucks 2*, ESPN (Mar. 8, 2004, 10:00 PM), <http://scores.espn.go.com/nhl/boxscore?gameId=240308022>.

6 *Id.*

7 *Id.*

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 See *Official Rules 2014-2015*, *supra* note 4.

13 *Id.* at vi.

14 *Id.* at viii.

15 *Id.*

16 “Fighting” is codified under rule 46.1: “A fight shall be deemed to have occurred when at least one player punches or attempts to punch an opponent repeatedly or when two players wrestle in such a manner as to make it difficult for the Linesmen to intervene and separate the combatants.” *See id.* at 69. Those engaged in fighting usually receive a five-minute penalty but can also receive an instigator penalty (two minutes), a ten-minute misconduct, or a game misconduct. *Id.* at 72-74.

17 *Id.* at 73-74.

18 *Id.* at 43 (emphasis added).

19 *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association*, NHL (2013), http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf [hereinafter *Collective Bargaining Agreement*].

20 *Id.* at 116 (emphasis added). Factors considered in deciding Supplementary Discipline for these types of conduct include:
(a) The type of conduct involved: conduct in violation of League Playing Rules, and whether the conduct is intentional or reckless, and involves the use of excessive and unnecessary force. Players are responsible for the consequences of their actions;
(b) Injury to the opposing Player(s) involved in the incident; (c) The status of the offender and, specifically, whether the Player has a history of being subject to Supplementary Discipline for On-Ice Conduct. Players who repeatedly violate League Playing Rules will be more severely punished for each new violation; (d) The situation of the game in which the incident occurred, for example: late in the game, lopsided score, prior events in the game; and (e) Such other factors as may be appropriate in the circumstances.

21 *Id.*

22 *Id.* at 123.

23 *Collective Bargaining Agreement*, *supra* note 19, at 143, 147.

24 *Cops Open Zdeno Chára Hit Probe*, ESPN (Mar. 11, 2011, 10:15 AM), <http://sports.espn.go.com/nhl/news/story?id=6201094>.

25 *Id.*

26 *Id.*

27 Damien Cox, *Meet the NHL's New Player Safety Sheriff*, SPORTSNET (Nov. 7, 2014, 9:14 PM), <http://www.sportsnet.ca/hockey/nhl/q-takes-over-the-sheriffs-job-with-the-nhl/>. Quintal played sixteen seasons in the NHL and was very familiar with the physical aspect of the game, having been involved in 113 fights in his career and also being suspended once for punching a player onto the ice and then kneeing him in the head. *Id.*

28 *Id.*

29 *Id.*

30 Josh Elliot, *Bertuzzi-Moore Settlement Gives Unwritten Hockey 'Code' a Pass in Court*, CTVNEWS (Aug. 21, 2014, 10:02 AM), <http://www.ctvnews.ca/sports/bertuzzi-moore-settlement-gives-unwritten-hockey-code-a-pass-in-court-1.1969463>.

31 R. v. Bertuzzi, 2004 Carswell BC 3066, (para 36 BCPC 2004) (stating that an enforcer is "a person whose sole task when being on the ice is to either settle scores or to focus on the physical aspect of the play, as opposed to the offensive scoring aspect of the play").

32 Garry C. Gray, *Concussions, Fighting, and the Hockey Code*, HARV. CRIMSON (Sept. 10, 2014), <http://www.thecrimson.com/article/2014/9/10/concussions-fighting-hockey-code/?page=1>.

33 Michael McCarthy, *The Fight Game: NHL's Rules of Engagement*, USA TODAY (Mar. 5, 2007, 1:19 PM), http://usatoday30.usatoday.com/sports/hockey/nhl/2007-04-04-fighting_n.htm.

34 *Id.*

35 Lester Munson, *NFL Cautionary Tale: Todd Bertuzzi*, ESPN (Mar. 15, 2012), http://espn.go.com/espn/commentary/story/_/page/munson-120315/todd-bertuzzi-hit-steve-moore-2004-cautionary-tale-new-orleans-saints-bounties.

36 *Id.*

37 *Id.*

38 *Id.*

- 39 Patrick K. Thornton, *Rewriting Hockey's Unwritten Rules*: Moore v. Bertuzzi, 61 ME. L. REV. 205, 207-08 (2009). Also, after the first period of the game, the NHL's Director of Officiating contacted game officials during the first intermission and warned them about a possible retaliation against Moore. *Id.* at 208.
- 40 Munson, *supra* note 35.
- 41 *Todd Bertuzzi*, HOCKEYDB, <http://www.hockeydb.com/ihdb/stats/pdisplay.php?pid=369> (last visited Jan. 27, 2016). Bertuzzi accumulated 822 penalty minutes over 518 games with the Canucks. *Id.*
- 42 See *infra* Part III.D.
- 43 McCarthy, *supra* note 33.
- 44 The terms "goon" and "enforcer" are generally inseparable. The term "enforcer" has been defined as a body guard that does "little to nothing offensively, fight, taunt, and spend most of their eight minutes per game [which is very little ice time for a player] in the [penalty box]." See *Finding a New Definition for "Enforcer,"* HOCKEY WRITERS (Jan. 7, 2011), <http://thehockeywriters.com/finding-a-new-definition-for-enforcer/>.
- 45 Paul Stewart, *A Tale of Two Gillies*, HOCKEYBUZZ (Oct. 16, 2014, 12:29 PM), <http://www.hockeybuzz.com/blog/Paul-Stewart/A-Tale-of-Two-Gillies/196/63128>.
- 46 *Id.*
- 47 *Trevor Gillies*, HOCKEYDB, <http://www.hockeydb.com/ihdb/stats/pdisplay.php?pid=25916> (last visited Jan. 27, 2016).
- 48 See *id.* The majority of Gillies' bruising came in 597 minor league games where he collected 40 points and 2,584 penalty minutes. See *Trevor Gillies*, HOCKEY-REFERENCE.COM, <http://www.hockey-reference.com/players/g/gillitr01.html> (last visited Jan. 27, 2016).
- 49 In response to Islanders' goaltender Rick DiPietro getting injured in a game against the Pittsburgh Penguins on February 2, 2011, the two teams played a penalty-filled affair just nine days later where Gillies was suspended nine games for "viciously elbow[ing] opponent Eric Tangradi in the face, continu[ing] to punch Tangradi as he laid prone on the ice and stood near the tunnel to the locker room, taunting the concussed player." After serving his suspension, Gillies returned to the lineup only to dish out a dirty hit and be suspended for another ten games. See Kevin Allen, *Penguins-Islanders Mayhem Bucks Fighting Trend*, USA TODAY (Feb. 15, 2011, 12:13 AM) http://usatoday30.usatoday.com/sports/hockey/nhl/2011-02-14-penguins-islanders-brawl-bucks-trend_N.htm; see also *NHL Levies Suspensions to Penguins and Isles*, NHL (Feb. 12, 2011), <http://www.nhl.com/ice/news.htm?id=552570>; Stewart, *supra* note 45.
- 50 Kevin Oklobzija, *AHL's Trevor Gillies Slams Player's Head On Ice*, USA TODAY (Oct. 11, 2014, 7:17 PM), <http://www.usatoday.com/story/sports/nhl/minors/2014/10/11/trevor-gillies-ahl-william-carrier-rochester-americans/17096589/>.
- 51 *Id.*
- 52 *Id.*
- 53 *Id.*
- 54 Diana C. Nearhos, *Trevor Gillies Sorry but Has Been Here Before*, POST STAR (Oct. 14, 2014, 11:45PM), http://poststar.com/sports/trevor-gillies-sorry-but-has-been-here-before/article_621369e4-540c-11e4-bdfb-43e02ff9c4db.html.
- 55 Paul Stewart noted that this incident was terrible considering, "[a] hockey enforcer is NEVER supposed to go after a non-fighter who hasn't done anything other than try to play the game [Y]ou should never fight an unwilling opponent." See Stewart, *supra* note 45.
- 56 Nearhos, *supra* note 54.
- 57 Heidi C. Doerhoff, *Penalty Box or Jury Box? Deciding Where Professional Sports Tough Guys Should Go*: McKichan v. St. Louis Hockey Club, 64 MO. L. REV. 739, 742 (1999).

- 58 Geoffrey M. Moore, *Has Hockey Been “Checked from Behind” North of the Border? Unruh, Zapf, and Canada’s Participant Liability Standard*, 18 LOY. L.A. INT’L & COMP. L.J. 641, 642 (1996).
- 59 *Id.*; see also Daniel E. Lazaroff, *Torts & Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI ENT. & SPORTS L. REV. 191, 216 (1990) (“All sports participants do not engage in their endeavors with uniformly shared values and identical expectations.”).
- 60 Lazaroff, *supra* note 59, at 194.
- 61 *Id.* at 195.
- 62 Doerhoff, *supra* note 57, at 751.
- 63 Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929).
- 64 Traditionally, there are two forms of the assumption-of-risk doctrine (depending on the jurisdiction): primary and secondary. Under primary assumption of risk, “the participant voluntarily enters into a relationship in which the plaintiff assumes well known, incidental risks,” and when the doctrine applies, the plaintiff is fully barred from recovery. Meanwhile, secondary assumption of risk allows for the apportionment of fault under comparative fault. See 100 AM. JUR. PROOF OF FACTS 3D 295 § 17 (originally published in 2008).
- 65 Avila v. Citrus Cnty. Coll. Dist., 131 P.3d 383, 391-92 (Cal. 2006).
- 66 *Id.*
- 67 Karas v. Strevell, 884 N.E.2d 122, 134 (Ill. 2008) (quoting Knight v. Jewett, 834 P.2d 696 (1992)); see also Lazaroff, *supra* note 59, at 195 (“The emerging legal standard requires either recklessness or specific intent to injure by defendant.”).
- 68 See, e.g., Turcotte v. Fell, 68 N.Y.2d 432, 441 (1986) (finding that liability will lie for “flagrant infractions unrelated to the normal method of playing the game and done without any competitive purpose”); Savino v. Robertson, 652 N.E.2d 1240, 1245 (N.Y. 1995) (holding that one can recover for injury in a contact sport “only where the other’s conduct is wilful or wanton or in reckless disregard to safety”).
- 69 Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts that are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM 0 cmt. b (AM. LAW INST. 2012).
- 70 *Avila*, 131 P.3d at 391-92 (citing *Knight*, 834 P.3d at 710).
- 71 *Id.* (citing Kahn v. E. Side Union High Sch. Dist., 75 P.3d 30, 39 (Cal. 2003)).
- 72 Doerhoff, *supra* note 57, at 744-45.
- 73 See *id.* at 748-50.
- 74 Nabozny v. Barnhill, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975).
- 75 Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 519 (10th Cir. 1979).
- 76 Tomjanovich v. Cal. Sports, Inc., No. H-78-243, 1979 WL 210977 (S.D. Tex. Oct. 10, 1979).
- 77 Hanson v. Kynast, 526 N.E.2d 327 (Ohio Ct. App. 1987); Avila v. Citrus Cnty. Coll. Dist., 131 P.3d 383, 391-92 (2006).

78 See 100 AM. JUR. PROOF OF FACTS 3D 295 § 8 (originally published in 2008) (stating that two reasons why it is difficult to determine liability for hockey participants are “(1) the speed and physical aggressiveness of the play, and (2) the frequency of infractions, penalties, of the rules”).

79 *McKichan v. St. Louis Hockey Club, L.P.*, 967 S.W.2d 209 (Mo. Ct. App. 1998). McKichan originally sued in the Circuit Court of the City of St. Louis where the jury awarded McKichan \$175,000 in compensatory damages. The St. Louis Blues appealed. See Doerhoff, *supra* note 57, at 741.

80 *McKichan*, 967 S.W.2d at 210.

81 Salter, *supra* note 3.

82 *Id.*

83 *Id.*

84 *McKichan*, 967 S.W.2d at 210.

85 *Id.* at 211.

86 *Id.* Milwaukee head coach Mike Murphy said that Twist “went full-bore with the intent to blind-side him.” See Cathy Breitenbucher, *McKichan Brutalized in Defeat*, MILWAUKEE SENTINEL (Dec. 17, 1990), <http://news.google.com/newspapers?nid=1368&dat=19901217&id=d3xQAAAIBAJ&sjid=7BIEAAAAIBAJ&pg=6917,5292579>. Twist remembers the play slightly differently, stating, “[McKichan] went up to play the puck, and I hit him with a body check chest-to-chest I didn’t hit him from behind or with a high stick. It was payback from his interceding in a fight the period before, when he smoked me in the head and cut me open.” See Ben Westhoff, *Twist of Fate*, RIVER FRONT TIMES (Oct. 4, 2006), <http://www.riverfronttimes.com/2006-10-04/news/twist-of-fate/>.

87 Doerhoff, *supra* note 57, at 741.

88 Twist was also known as “the Twister” due to “his hell-on-ice exploits.” He explained his role as “[y]ou stick me on the ice and make sure that, if you [expletive] with him, I take your best player out. I took it very serious, and I became the best at what I did.” See Westhoff, *supra* note 86. Twist’s statistics also prove that Twist was the stereotypical enforcer: 445 NHL games, ten goals, eighteen assists, twenty-eight points, and 1121 penalty minutes; 141 IHL games, five goals, twenty-three assists, twenty-eight points, and 756 penalty minutes. See *Tony Twist*, HOCKEYDB, <http://www.hockeydb.com/ihdb/stats/pdisplay.php?pid=5509> (last visited Jan. 27, 2016). Twist was six-feet, one-inch tall and 230 pounds. *Id.* McKichan was five-feet, 11-inches tall and 180 pounds. See *Steve McKichan*, HOCKEYDB, <http://www.hockeydb.com/ihdb/stats/pdisplay.php?pid=3597> (last visited Jan. 27, 2016).

89 Doerhoff, *supra* note 57, at 755.

90 *McKichan v. St. Louis Hockey Club, L.P.*, 967 S.W.2d 209 (Mo. Ct. App. 1998).

91 Doerhoff, *supra* note 57, at 755.

92 *McKichan*, 967 S.W.2d at 212.

93 Factors included: the specific game involved, the ages and physical attributes of the participants, their respective skills at the game and their knowledge of its rules and customs, their status as amateurs or professionals, the type of risks which inhere to the game and those which are outside the realm of reasonable anticipation, the presence or absence of protective uniforms or equipment, the degree of zest with which the game is being played, and other factors. Doerhoff, *supra* note 57, at 748; see also 100 AM. JUR. PROOF OF FACTS 3D 295 § 28 (Originally published in 2008) (listing factors in considering when attempting to prove intent or reckless behavior to include circumstances leading to attack, prior threats of defendant, aggressiveness of defendant, nature and extent of injuries inflicted, plaintiff’s attempts to avoid conflict, time at which attack took place, blows as not contemplated within rules or customs of game, and disciplining of defendant for attack).

94 *McKichan*, 967 S.W.2d at 212-13.

95 *Id.* at 213.

96 *Id.*

97 See also *Gauvin v. Clark*, 537 N.E.2d 94, 96-97 (Mass. 1989) (ruling that even though the defendant “butt-ended” the plaintiff in a college hockey game, which is prohibited in all levels of hockey, in the midsection with his stick, causing serious injury and surgery to the plaintiff’s spleen and bladder, the court did not find the defendant to be liable since he “did not act with reckless disregard of safety”). But see *Overall v. Kadella*, 361 N.W.2d 352, 255-56 (Mich. 1984) (finding that in an incident where a fight broke out on the ice after an amateur hockey game ended that led to the defendant punching the plaintiff in the face, knocking him unconscious and fracturing bones around his eye, the defendant was liable for intentional battery for breaking the rule against fighting because “it is arguable that the battery did not even occur during the hockey game”).

98 Twist played in 445 NHL games and made approximately \$2,961,960 over that span. See *Tony Twist*, HOCKEYZONEPLUS, <http://www.hockeyzoneplus.com/salaries/3968> (last visited Jan. 27, 2016).

99 McKichan played in one period with the NHL’s Vancouver Canucks but was released at the conclusion of the season. It was reported that in the four years after his hockey career abruptly ended, McKichan earned \$48,000 while working as a part-time second grade teacher and as an instructor of hockey clinics. See Salter, *supra* note 3.

100 *Id.*

101 *Id.* (internal quotation marks omitted).

102 National Sports of Canada Act, S.C. 1994, c. 16, <http://laws-lois.justice.gc.ca/PDF/N-16.7.pdf>.

103 Moore, *supra* note 58, at 643 (noting that the Canadian province of British Columbia applies a simple negligence standard, while “other Canadian provinces apply a negligence standard but combine it with a seemingly contradictory intent requirement”); see *Herok v. Wegrzanowski*, 34 A.C.W.S.2d 296, para. 7-8, 15 (B.C. 1985) (applying a negligence standard and holding defendant liable for hitting plaintiff in the face with his stick since he was carelessly swinging his stick).

104 *Herok*, 34 A.C.W.S. 2d at para. 15-16.

105 Moore, *supra* note 58.

106 See *Dubé v. Labar*, [1986] S.C.R. 649 para. 2, 6 (Can.) CarswellYukon 4 (stating that the defense applies in an action in negligence only if the circumstances are such that it is clear that the plaintiff, knowing of the virtually certain risk of harm, agreed expressly or by necessary implication to exempt the defendant from liability); see also Moore, *supra* note 58, at 644 (“Consent is either implied from conduct or expressly stated or written. A successful consent defense completely bars plaintiff’s recovery.”).

107 *Agar v. Canning*, 1965 CarswellMan 59, para. 1, 1.

108 *Id.* para. 2.

109 *Id.*

110 *Id.* para. 6.

111 *Id.* para. 8.

112 *Id.* paras. 8, 11.

113 *Id.* paras. 11-13.

114 Moore, *supra* note 58, at 645 (citing *Holt v. Vergruggen*, 1981 Carswell B.C. 582 paras. 9-10 (B.C. Sup. Ct. 1981)) (holding the defendant liable for slashing an opposing player); *Martin v. Daigle*, 6 D.L.R.3d 634, 635-36 (N.B. 1969) (imposing liability for blows struck in the course of a game); *Pettis v. McNeil*, 8 C.C.L.T. 299, 299-303 (N.S. Sup. Ct. 1979) (finding liability for an intentional stick blow to the plaintiff’s head). But see *Gaudet v. Sullivan*, 1992 Carswell NB 177 para. 25 (Q.B. 1992)

(dismissing assault and battery claim where the defendant allegedly cross-checked the plaintiff in the face after finding no violation of the rules coupled with the intent to injure).

115 Moore, *supra* note 58, at 646; *see, e.g.*, Zapf v. Muckalt, 1995 Carswell BC 598 paras. 63, 65-68 (B.C. Sup. Ct. 1995); Unruh v. Webber, 1995 Carswell BC 1135 paras. 3-4 (B.C. Sup. Ct. 1992).

116 Herok v. Wegrzanowski, 34 A.C.W.S. 2d at paras. 5, 16 (holding that a participant was liable for plaintiff's injuries for negligently swinging his stick "carelessly without regard for the consequences" and striking the plaintiff in his left eye, causing blindness in that eye).

117 *Id.*

118 Moore, *supra* note 58, at 647; *see also* Hall v. Hebert, [1993] S.C.R. 159, para. 77 (Can.) (stating that there are certain requirements in order for the doctrine to apply).

[T]here must be either an express or implied assumption of the risk of the activity which caused the damage. That is to say both parties to the activity must have agreed that they would participate in it regardless of the risk of injury and give up their right to sue should injury occur as a result of the agreed upon activity.

Hall v. Hebert, [1993] S.C.R. 159, para. 77 (Can.).

119 Moore, *supra* note 58, at 647; *see, e.g.*, Temple v. Hallem, 1989 Carswell 177 paras. 11-12 (Man. 1989) (relying on *Agar*, despite being a negligence claim, to find that a male defendant that slid into a female plaintiff during a co-ed softball game was not liable for injury because he did not intend to injure).

120 R. v. Bertuzzi, 2004 CarswellBC 3066 paras. 3-5; *see also* R. v. Ciccarelli, 1988 CarswellOnt 2396.

121 *See supra* Part II.C.

122 *Bertuzzi*, 2004 Carswell BC paras. 10-15.

123 *Id.* para. 13.

124 *Id.*

125 *Id.* para. 15.

126 *Id.*

127 *Id.* paras. 22, 42. Bertuzzi was also suspended by the International Ice Hockey Federation (IIHF), hockey's governing body outside North America, barring him from playing in Europe during the 2004-05 NHL lockout, in accordance with an IIHF statute that allows the organization to suspend any participant "whose participation would be 'detrimental to the best interest of the sport.'" *See Notebook: IIHF Rules Bertuzzi Can't Play in Europe*, SEATTLE TIMES (Dec. 18, 2004), <http://www.seattletimes.com/sports/notebook-iihf-rules-bertuzzi-cant-play-in-europe/>.

128 *Bertuzzi*, 2004 Carswell BA para. 29.

129 Katie Strang, *Canucks settle with Steve Moore*, ESPN (Aug. 20, 2014, 5:19 PM), http://espn.go.com/nhl/story/_/id/11375870/steve-moore-lawsuit-todd-bertuzzi-vancouver-canucks-settled-court. Years after the incident, Moore reflected on the effect the incident had on him, saying:

I lost my entire career in my rookie year I think any player put in that situation would do the same thing. I can't recover anything else. I can't recover my career, the experience of living out my dream from the time I was 2 years old of playing in the NHL.

See Bertuzzi, 2004 Carswell BC para. 29; Mike Davies, *Bertuzzi Catches Coaching Bug After Retirement*, PETER BOROUGH EXAMINER (Jan. 15, 2016), <http://www.thepeterboroughexaminer.com/2016/01/05/Bertuzzi-catches-coaching-bug-after-retirement-bringing-his-oakland-grizzlies-from-michigan-to-peterboroughs-midget-tournament-of-champions-this-weeked>.

130 Bertuzzi, 2004 Carswell BC paras. 3-5, 40. Moore also filed suit in Colorado, but Denver district Judge Shelley Gilman threw out the case because she felt that the case would be better handled in Canada because that is where the incident

occurred. *See Moore Plans To File Appeal in Civil Case*, TSN (Nov. 8, 2005) http://web.archive.org/web/20070929173940/http://www.tsn.ca/nhl/news_story/?ID=142413&hubname=nhl.

131 *Bertuzzi*, 2004 Carswell BC paras. 34-35, 40, 44.

132 *Id.* para. 35.

133 *See R. v. Watson*, 1975 Carswell ONT 1059 para. 19 (Ont. Prov. Ct. 1995) (“Patently when one engages in a hockey game, one accepts that some assaults which would otherwise be criminal will occur and consents to such assaults. It is equally patent, however, that to engage in a game of hockey is not to enter a forum to which the criminal law does not extend. To hold otherwise would be to create the hockey arena a sanctuary for unbridled violence to which the law of Parliament and the Queen's justice could not apply.”); *R. v. Maki*, 1970 CarswellOnt 7 para. 13 (Ont. Prov. Ct. 1990) (“No sports league, no matter how well organized or self-policed it may be, should thereby render the players in that league immune from criminal prosecution.”).

134 *Bertuzzi*, 2004 Carswell BC para. 40.

135 *Id.* paras. 47, 54-62. The conditions included a year's probation, eighty hours of community service, and Bertuzzi not being allowed to play in a game involving Moore -- and if the conditions were met, Bertuzzi would avoid a criminal record. *See Bertuzzi Receives Conditional Discharge, Probation*, CBC SPORTS (Dec. 22, 2004, 12:02 PM), <http://www.cbc.ca/sports/hockey/bertuzzi-receives-conditional-discharge-probation-1.477217>.

136 *Bertuzzi*, 2004 Carswell BC para. 51.

137 *Moore v. Bertuzzi*, 2012 ONSC 5008, 2012 CarswellOnt 11371 para. 6 (ONT. 2012) (Section 6). In his statement of claim, Moore claimed that he “suffered permanent brain injury that ended his NHL career, and prevented him from pursuing other gainful employment.” *Id.* Moore sought \$15 million in lost wages, \$1 million in aggravated damages, and \$2 million in punitive damages, while his parents sought \$1.5 million for “‘the nervous shock and mental distress’ caused by the attack.” *See Acrimonious Lawsuit Drags On and On*, VANCOUVER PROVINCE (Nov. 27, 2007), <http://www.canada.com/theprovince/news/sports/story.html?id=b0fc60f1-8ff0-4a05-b3b3-605c21fc2453>.

138 Terry Frei, *Trial for Todd Bertuzzi Attack on Former Avalanche Steve Moore Set for 2014*, DENVER POST (Oct. 26, 2013, 12:01 AM), http://www.denverpost.com/avalanche/ci_24391981/justice-moore-ice.

139 Chris Peters, *Steve Moore's Settlement With Todd Bertuzzi, Canucks Finally Official*, CBS SPORTS (Sept. 4, 2014, 4:08 PM), <http://www.cbssports.com/nhl/eye-on-hockey/24694603/steve-moores-settlement-with-todd-bertuzzi-canucks-finally-official>.

140 *Id.*

141 Dan Gelston, *Enforcers Going Down Without a Fight as NHL Hands Out Stiffer Penalties*, GLOBE & MAIL (Dec. 10, 2014, 9:02 AM), <http://www.theglobeandmail.com/sports/hockey/enforcers-going-down-without-a-fight-as-nhl-hands-out-stiffer-penalties/article22020621/?cmpid=rss1&click=dlvr.it>.

142 Dhiren Mahiban, *Enforced Out*, NBC SPORTS http://sportsworld.nbcsports.com/hockey-fighters-enforced-out/?utm_network=facebook&utm_post=3256663&utm_source=FB%20-%20NHL%20on%C20NBC%20Sports&utm_tags= (last visited Jan. 27, 2016) (noting that the Red Wings have made seventeen consecutive playoff appearances without having a true enforcer).

143 Gelston, *supra* note 141.

144 *Id.*

145 *Collective Bargaining Agreement*, *supra* note 19, art. 18.

146 *Id.* at 123.

147 Elliot, *supra* note 30.

148 Moore, *supra* note 58, at 664.

149 *Id.* at 643.

150 Elliot, *supra* note 30.

151 *Bertuzzi*, 2004 Carswell BC paras. 36-37.

152 *Id.*

153 *Agar v. Canning*, 1965 CarswellMan 59, para. 8.

154 RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERS. § 101 (AM. LAW INST., discussion draft Apr. 3, 2014).

155 See *Herok v Wegrzanowski*, 1985 CarswellBC 3074.

156 RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 (AM. LAW INST. 2010).

157 See *Gauvin v. Clark*, 537 N.E.2d 94, 96-97 (Mass. 1989). Reckless disregard of the safety of another has been defined as when an actor

(a) ... knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the [actor's] situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the [actor's] failure to adopt the precaution a demonstration of the [actor's] indifference to the risk.

See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 2 (AM. LAW INST. 2010).

158 Doerhoff, *supra* note 57, at 755.

159 Moore, *supra* note 58, at 669.

160 *Id.* at 668.

161 *Id.* at 668-69.

162 *Id.* at 668.

163 See 100 AM. JUR. PROOF OF FACTS 3D 295 § 28 (2008).

164 See Moore, *supra* note 58, at 669.

165 See *R. v. Bertuzzi*, 2004 CarswellBC 3066.