A Proposal for a Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests

Darryll M. Halcomb Lewis

Frank S. Forbes

Follow this and additional works at: https://via.library.depaul.edu/law-review

Recommended Citation
Available at: https://via.library.depaul.edu/law-review/vol39/iss3/6
A PROPOSAL FOR A UNIFORM STATUTE
REGULATING THE LIABILITY OF SPORTS OFFICIALS
FOR ERRORS COMMITTED IN SPORTS CONTESTS

Darryll M. Halcomb Lewis* & Frank S. Forbes**

INTRODUCTION

Sports officials1 often commit errors2 during sports contests which change
the outcome of the game. These errors affect a large number of individuals
both emotionally and monetarily. First and foremost, the players3 are de-
prived of their victory and its accompanying benefits. For example, the
participants and their principals may be eliminated from prestigious and
lucrative postseason games, bowls or television appearances.4 Second, a

---

* Assistant Professor, College of Business Administration, University of Nebraska at
Omaha; J.D., Creighton University, 1978; B.A., Dartmouth College, 1975. Member of Big
Eight Athletic Conference Basketball Referee Staff; Member of Big Eight Athletic Conference
Apprentice Program for Football Officials; Former member of Missouri Valley Athletic Con-
ference Basketball Officials Staff; President, Nebraska-Iowa Referees Association.

** Professor, University of Nebraska at Omaha; J.D., University of Iowa, 1963; B.A.,
University of Hawaii, 1959.

1. “Sports officials” are those individuals who officiate or are charged with the admin-
istration of a game or contest. The term “体育 official” is used interchangeably throughout
this Article with the terms “official” and “referee.”

2. The term “error(s)” does not include judgment decisions that allegedly result in physical
injuries to players or others. The scope of this Article includes the subject of judicial intervention
into the outcome of sports contests where the result of that sports contest has been influenced
by an officiating error. Also, the Article discusses officials’ exposure to personal liability for
monetary damages resulting from a clearly incorrect judgment decision. These situations may
include: (1) a referee’s misidentification of facts (e.g., a player clearly catching a football
inbounds, but the official ruling the player out-of-bounds); (2) a referee’s misinterpretation of
rules (e.g., allowing players to do what is prohibited, or, conversely, prohibiting what is
permitted); and, (3) assessing other than the prescribed penalty for misconduct.

3. Throughout this Article, reference is made to “players” or “participants” as potential
plaintiffs. On the amateur, high school and collegiate sports levels, players represent, without
legal compensation, the institutions for whom they perform. On the professional level, the
players are typically employed and compensated for their athletic services by professional sports
organizations, teams, owners, or franchises in an overall profit-making venture. Therefore, the
persons or organizations the players represent stand as principals in the principal-agent rela-
tionships and, as such, may also be plaintiffs. For this reason and the sake of simplicity, the
term “participants and their principals” will be used in this Article to denote the teams, schools,
owners, franchises, or professional organizations on whose behalf the players perform and who
may, in addition to the players, be real parties in interest.

4. Typically, the participants and their principals share in the large television revenue
proceeds from these events. Jauss, Independent Schools Grabbing Biggest Slice of Bowl Payoffs,
Omaha World Herald, Dec. 20, 1988, at 5. One newspaper article reported that the following
coach’s continued employment, often at a very high salary, may be influenced by, and in many cases hinge upon, his team’s win-loss record. Thus, an officiating error which affects a coach’s winning percentage or margin of a victory may well lead to his or her unemployment or diminution in income and reputation. Furthermore, those who legally wager on the outcome of the games may argue that they will suffer monetary losses as a result of an official’s game mistakes. Fans, spectators, and the press are also disappointed when the participants and teams whom they support lose as a result of officiating errors. The list of effected parties is lengthy. The persons affected by officiating errors are not, however, without recourse. Individuals who suffer a demonstrable monetary loss as a result of a game official’s mistake may have at least two options available: (1) seek to have the result overturned; or, (2) sue the errant official for damages proximately caused by the officiating error.

This Article begins by discussing the courts’ treatment of both these options, and explores the legal theories for and against either overturning the decisions of sports officials or holding them criminally and personally liable. It is argued that, in the proper case, there are sufficient legal grounds

post-season college football bowls pay the participating teams the following amounts: All-American, $630,000; Aloha, $500,000; California, $180,000; Citrus, $1,050,000; Cotton, $2,500,000; Fiesta, $3,000,000; Freedom, $500,000; Gator, $1,000,000; Hall of Fame, $750,000; Independence, $500,000; Liberty, $780,000; Orange, $2,650,000; Peach, $800,000; Rose, $6,200,000; Sugar, $2,700,000; and Sun, $750,000. Id. Some of these bowl monies are shared with conference members.

5. Sittler, Huskers Say Catch of TD Was Trapped, Omaha World-Herald, Sept. 26, 1982, at Cl. The headlines of the Herald’s sports section on this day read, “Disputed Calls Are Legacy of Classic Duel.” The “classic duel” referred to in the article was the 1981 college football game between the University of Nebraska and Penn State. An article, stated in part:

Did [the player] make a legal catch in the end zone in the final four seconds or didn't he? That was the question Nebraska's football team had to mull over and over after [Penn State's] [tight end's] 2-yard touchdown pass from [the Penn State quarterback] in the dying seconds of the fourth quarter gave Penn State a 27-24 win over the [Nebraska] Cornhuskers.

The play capped several controversial calls in Penn State’s successful drive to upset the No. 2 ranked Cornhuskers. The others included:

- A 15-yard unnecessary roughness penalty on Nebraska ... on the kickoff ahead of the final drive. — A 15-yard pass that [a Penn State] tight end caught close to the out-of-bounds marker on the Nebraska 2-yard line. The television replays appeared to show that [the tight end] was out of bounds.

Id.

Another article also quoted Nebraska Coach Osborne on not criticizing the call. “I can't comment. ... They're supposed to make the call. Once, it's ruled good, it doesn't make any difference.” Sinclair, Disputed Calls Are Legacy of Classic Duel; Blackledge Shoots Holes in NU's Armor, Omaha World-Herald, Sept. 26, 1982, at Cl.

6. Some may argue that players, teams, institutions, fans, wagerers, and others who have some interest in a sports contest assume the risk of the errors made by officials. This Article analyzes the sports official’s liability for officiating errors during a sports contest without dealing with this potentially legitimate defense. Therefore, for purposes of the Article, it is assumed that such a defense is not raised.
for imposing liability on a sports official who commits an error which results in a demonstrable monetary injury, and for overturning a sports official's clearly erroneous decision. In so doing, however, the Article recognizes that the role of a sports official is similar to that of an arbitrator, and that some of the same public policy reasons for immunizing arbitrators from personal liability can also be advanced to exempt sports officials from personal liability for ordinary officiating mistakes. In light of these facts, the authors recommend that sports officials should be immune from liability arising out of officiating errors based on an exercise of the official's discretion or judgment, except in cases involving intentional, wanton, or willful misconduct or mistakes which are the product of gross negligence. In this context, the Article notes that some states have already passed immunity statutes for sports officials who volunteer their services to nonprofit sports programs, and that at least one state has exempted sports officials from liability regardless of whether their services are rendered gratuitously, or the nature of the program in which the officials are involved. Finally, rather than awaiting the development of case law to address the issue, the authors propose a model statute entitled a "Uniform Sports Official Immunity Law," to partially shield sports officials from liability for officiating errors made during sports contests.

I. OVERTURNING THE DECISIONS OF REFEREES

One who believes that he or she has been wronged by the erroneous conduct or decision of a sports official may seek, through the judicial process, to have the decision overturned. The courts, however, are reluctant to disturb the decisions of those hired or placed in a position to decide a winner among competitors. Numerous cases reflect this reluctance, including cases involving horse racing stewards, arbitrators, those who judge contests and games.

7. See infra note 165.
8. See infra note 164.
9. E.g., Finlay v. Eastern Racing Ass'n, 308 Mass. 20, 30 N.E.2d 859 (1941) (purchaser of daily-double ticket claimed that the decision of the horse racing stewards was in error and that the horse on whom purchaser bet should be declared the winner); Shapiro v. Queens County Jockey Club, 184 Misc. 295, 53 N.Y.S.2d 135 (1945) (purchaser of pari-mutuel horse racing ticket claimed that stewards improperly started the race and that horse on whom purchaser bet should be declared the winner). But see Wellington v. Monroe Trotting Park Co., 90 Me. 495, 38 A. 543 (1897) (race judge's decision overturned because of fraud).
such as word-building and spelling contests,\textsuperscript{11} lottery judges,\textsuperscript{12} and those who officiate sports contests such as boxing,\textsuperscript{13} basketball,\textsuperscript{14} and football.\textsuperscript{15} Much of this reluctance is based on the belief that those hired to officiate sports contests are in the best physical position to observe the action, and based on their observations, to make decisions requiring an instantaneous exercise of judgment. Accordingly, courts generally refuse to intervene in these situations absent a clear showing of corruption, bad faith, or fraud. With the advent of video technology, however, this reluctance may be overcome. Video technology causes sports officials to no longer occupy the best nor sole position for decisionmaking, and can eliminate the need for second-guessing. Given the speed at which technology is advancing, there may even be a day when officials carry miniature viewing screens to "instantly" review the correctness of their decisions.

\section{A. Word-Building Contests and Lotteries}

In cases involving word-building contests or lotteries, the decisions of the contest judges have been upheld unless the decision rendered is fraudulent or involves bad faith.\textsuperscript{16} In \textit{Groves v. Carolene Products Co.},\textsuperscript{17} for example, the contest judges' ruling in a word-building contest was overturned due to the presence of fraud. The plaintiff in \textit{Groves} had entered a word-building contest, the advertised rules of which provided:

\begin{itemize}
\item \textit{Endres v. Buffalo Auto. Dealers Ass'n}, 29 Misc. 2d 756, 217 N.Y.S.2d 460 (1961) (contestant bound by decision of judges unless fraud, gross mistake or lack of good faith shown).
\item \textit{But see Groves v. Carolene Products Co.}, 324 Ill. App. 102, 57 N.E.2d 507 (3d Dist. 1944) (contestant entitled to first prize regardless of the decision of contest judges);
\item \textit{Ritz v. News Syndicate Co.}, 16 Misc. 2d 1013, 183 N.Y.S.2d 850 (1959) (judge failed to render a decision).
\item \textit{Groves v. Carolene Products Co.}, 324 Ill. App. 102, 108, 57 N.E.2d 507, 510 (3d Dist. 1944) (contest judge's ruling overturned because of fraud).\textsuperscript{18}
\end{itemize}

\textsuperscript{11} E.g., \textit{Endres v. Buffalo Auto. Dealers Ass'n}, 29 Misc. 2d 756, 217 N.Y.S.2d 460 (1961) (contestant bound by decision of judges unless fraud, gross mistake or lack of good faith shown). \textit{But see Groves v. Carolene Products Co.}, 324 Ill. App. 102, 57 N.E.2d 507 (3d Dist. 1944) (contestant entitled to first prize regardless of the decision of contest judges); \textit{Ritz v. News Syndicate Co.}, 16 Misc. 2d 1013, 183 N.Y.S.2d 850 (1959) (judge failed to render a decision).


\textsuperscript{13} E.g., \textit{Tilelli v. Christenberry}, 1 Misc. 2d 139, 120 N.Y.S.2d 697 (1953) (judge's decision reinstated after Boxing Commission attempted to change it); \textit{State ex rel Durando v. State Athletic Comm'n}, 272 Wis. 191, 75 N.W.2d 451 (1956).

\textsuperscript{14} E.g., \textit{Kerby v. Elk Grove Union H.S. Dist.}, 1 Cal. App. 2d 246, 36 P.2d 431 (1934) (plaintiff school district sued instructor alleging he failed to properly referee and supervise game); \textit{Bain v. Gillespie}, 357 N.W.2d 47 (Iowa Ct. App. 1984) (basketball referee sued by third party merchant for error committed in game).

\textsuperscript{15} E.g., \textit{Georgia High School Ass'n v. Waddell}, 248 Ga. 542, 285 S.E.2d 7 (1981) (parents of high school football players brought action against state high school association challenging referee's penalty call).

\textsuperscript{16} See, e.g., \textit{Groves v. Carolene Products Co.}, 324 Ill. App. 102, 108, 57 N.E.2d 507, 510 (3d Dist. 1944) (contest judge's ruling overturned because of fraud); \textit{Endres v. Buffalo Auto. Dealers Ass'n}, 29 Misc. 2d 756, 757, 217 N.Y.S.2d 460, 462 (1961) (where rules of contest provide that decision of judges is binding, contestants are so bound unless there is fraud, gross mistake or lack of good faith on part of persons conducting contest).

\textsuperscript{17} 324 Ill. App. 102, 57 N.E.2d 507 (3d Dist. 1944).
Whoever builds the most words [out of the letters contained in the phrase ‘Milnot Whips’] wins a U.S. Defense Bond worth $1,000 at maturity. Prizes will be awarded for the most complete list of words. . . . But remember if one contestant has the longest list of correct words, she will be declared the winner. . . . Decision of the judges will be final.18

The plaintiff believed that she had won the contest and sued. The defendant argued that the plaintiff had not established a legal basis for the suit because she neglected to allege fraud in her petition. The court first noted that, in the absence of fraud, the decision of the contest judges would be binding.19 Upon a finding that the plaintiff had submitted the most complete and longest list of correct words, however, the court held that the complaint had sufficiently charged fraud and misconduct on the contest judges’ part. Accordingly, the court overturned the decision of the contest judges.20

Similarly, in Endres v. Buffalo Automobile Dealers Association,21 the plaintiff had entered into defendant auto dealer’s drawing by writing his name and address on an entry form. The entry forms indicated that the contestants were required to personally fill out and deposit the entry form in a receptacle at each participating dealer’s place of business. The forms further indicated that all decisions of the contest judges were final, and that all entrants agreed to these rules. The first form drawn in the contest was that of a Marian Ott. The second form drawn belonged to the plaintiff. Ms. Ott, however, admitted that she had not personally deposited her ticket in a receptacle in the participating dealer’s place of business. Accordingly, the contest judge disqualified Ott as the winner, and instead declared the plaintiff the winner.22 The defendant business, however, refused to deliver the prize because Ms. Ott claimed that she was the winner. In finding for the plaintiff, the court emphasized that the contestants were bound by the judge’s decision

---

18. *Id.* at 103, 57 N.E.2d at 508.
19. *Id.* at 106, 57 N.E.2d at 509.
20. *Id.* at 109, 57 N.E.2d at 510. The court said that:

The acceptance by plaintiff and his agreement to abide by the decision of the judges binds him, in the absence of allegations of a fraudulent award, to accept [the judge’s] decision in the matters properly submitted to them under the terms of the offer, which became a contract by plaintiff’s compliance with its terms . . . . . . . [I]n our opinion the plaintiff was entitled to the first prize, regardless of the decision of the so-called judges. The rules of the contest did not give such judges any discretion in passing on or granting such award. . . . [I]n our opinion . . . the complaint sufficiently charges . . . fraud and misconduct on the part of the judges as to vitiate and make void their award.

*Id.*

22. *Id.* at 757, 217 N.Y.S.2d at 462. When the chairman of the judges contacted the interplead defendant, she told him that she did not personally deposit her ticket in a receptacle provided for in a participating dealer’s place of business. She stated that she had secured the entry form from an automobile salesman who had come to her workplace. She had typed her name and address on the ticket, signed it, and gave it back to the salesman. She did not know where the salesman deposited the ticket. *Id.*
unless there was fraud, gross mistake or lack of good faith on the part of
the persons conducting the contest. In the absence of any of these elements,
the court held the judge's decision, naming the plaintiff to be the winner,
was binding on all parties.

The court in *Ritz v. News Syndicate Co.*, overturned a contest judge's
decision because, quite simply, the judge failed to render any decision at
all. In *Ritz*, the defendant newspaper published a series of crossword-type
puzzles as part of a contest. The rules of the contest provided that only one
answer could be the best, that a committee of judges would select the winner
or winners, and that the decision of the judges was final and binding. The
plaintiff submitted a solution to the puzzle. However, the committee of
judges assigned to decide simply did not determine which answer was best.

In holding for the plaintiff, the *Ritz* court stated that the publication of the
puzzle and rules were an offer, and that a solution in accord with those
rules was an acceptance. Thus, the court reasoned, "the defendant does
not reserve to itself the right to decide what is best. It designated someone
else[, the judge of the contest]. If that person [does] not decide, the question
becomes one of fact and whether or not he decided is also a question of
fact."23

B. Horse Races

The horse racing cases have also held that a decision of one judging a
horse race is final and not reviewable absent fraud, corruption or bad faith.
This principle was recognized as early as 1897 in *Wellington v. Monroe
Trotting Park Co.*29 The case arose from some unusual facts. A horse trotting
race was held involving two horses named Combination and Hippona.
Although undisputed testimony established that Combination had come
under the wire two or three lengths ahead of Hippona, it was publicly
announced after the race that Hippona had won.30 In overturning the race
decision, the court held that normally the plaintiff would have to
bow to the decision of the judge if honestly given. However, the court
concluded that the judge's conduct here was fraudulent and unjustly barred
the plaintiff from recovering a premium which was clearly his.31

23. *Id.*
25. *Id.* at 1014, 183 N.Y.S.2d at 852.
26. *Id.* at 1015, 183 N.Y.S.2d at 852.
27. *Id.*
Queens County Jockey Club, 184 Misc. 295, 53 N.Y.S.2d 135 (1945); Wellington v. Monroe
Trotting Park Co., 90 Me. 495, 38 A. 543 (1897).
29. 90 Me. 495, 38 A. 543 (1897).
30. *Id.* at 499, 38 A. at 544.
31. *Id.* at 499, 38 A. at 544-45.
In *Finlay v. Eastern Racing Association*, the plaintiff wagerers challenged the steward’s decision as to who was the winner of a race. The stewards, on the day of the race, announced that Masked Gal had “officially” won the first race, and that Argoan had placed second. Upon review of a protest that Masked Gal had not been eligible to enter the first race, however, the stewards disqualified Masked Gal the following day and instead awarded first place to Argoan. The plaintiff wagerers, who had bet on Argoan, subsequently brought suit to collect the first place prize money that a winner would have collected had Masked Gal not been in the race. In denying the plaintiffs’ claim, the court held that the steward’s decision could not be challenged, even in a situation of such obvious error, reasoning that purchasers of race tickets had consented to be bound by the steward’s judgment.

Similarly, in *Shapiro v. Queens County Jockey Club*, the court upheld a steward’s decision in the face of challenges by wagerers. The plaintiff in *Shapiro* had bet on a horse race. At the start of the race, one of the stewards declared a false start by waiving his recall flag. Nonetheless, the race continued and the horse which the plaintiff wagered on won. The race, however, was repeated with a fair start and the plaintiff’s horse lost. The plaintiff argued that he should be declared the winner. In denying the plaintiff relief, the court opined that prompt and fair decisions by stewards were of utmost importance in preserving the integrity of horse racing. The court further emphasized that the officials were closer to the actual situation and characters involved, and that their decisions were therefore entitled to more credence than the remote observations of a court. Hence, the court held that the steward’s decision, absent an allegation of bad faith, would be allowed to stand.

**C. Boxing Matches**

The noninterventionalist stance of the courts is demonstrated in arenas other than contests and horse racing. The courts have also been quite reluctant to interfere with the decisions of boxing referees absent a showing of fraud, bad faith, or corruption. In *Tilelli v. Christenberry*, for example,
two boxers named Graham and Giardella fought in Madison Square Garden. Following the fight, Giardella was announced the winner. However, members of the New York Athletic Commission immediately called for the records of the judges and the referee. Upon review, the Commission concluded that one of the judges had failed to follow the Boxing Rules of the Commission. The Commission subsequently ordered the judge's decision to be changed, and Graham was declared the winner. In reversing the Commission's action, the court reaffirmed the long-standing judicial position that absent fraud, corruption or bad faith, the courts will not overturn the decisions of referees. The *Tilelli* court recognized that the Commission had the authority to change the decision of the referee and judges, but expressly pointed out that such authority could not be exercised in an arbitrary, unrestricted, or unsupported fashion. The court stated that judges and referees possess specialized skills and experience which are essential, because the scoring of a prize fight is not a routine nor mathematical process, but instead one which is influenced by numerous factors. In light of these factors, the court held that the Commission's allegation that one of the judges had failed to follow the proper standards became so vague as to be meaningless, absent any facts to buttress their conclusion. Accordingly, the Commission's action was annulled.

**D. Recent Decisions**

The noninterventionalist stance of the judiciary with regard to the decisions of sports officials remains prevalent. Several recent cases have confirmed this apparently well-accepted axiom. In *Georgia High School Association v. Waddell*, for example, the plaintiffs alleged that had the referee properly administered a roughing-the-kicker penalty, they would have won an important high school football game and advanced to the Georgia state playoffs. In refusing to interfere with the outcome of the game despite an admitted officiating error, the Georgia Supreme Court held that a high school football player had no right to participate in interscholastic sports, and therefore had no property interest in the game on which to bring a due process claim. Furthermore, the court held that "courts of equity in this state are without authority to review decisions of football referees because those decisions do not present judicial controversies." It is clear that the weight of existing authority indicates that courts will not overturn the decisions of sports officials or alter the outcomes of sports contests unless there is some proof of fraud, bad faith, or corruption. Sound
policy supports this approach. First, those who wager on sports contests for profit expect a quick determination of the winner. In Finlay v. Eastern Racing Association, the court agreed with this policy and stated that a great part of the interest and excitement in horse racing would be lost if the final decision could be delayed by protest. The necessity of immediate results, however, may not be as great for the participants as it is for wagerers. Undoubtedly, the participants are more than willing to delay the outcome of a sports contest if that delay could result in their obtaining a victory. This is even more true if the altered outcome results in a substantial monetary gain.

Another sound policy underlying the courts' traditional reluctance to intervene in the outcome of sports contests is the belief that the referees are in a better position than the courts to observe and make decisions. The Shapiro court observed that the officials were the true judges of the facts because they were closer to the actual situations and characters involved. With the advent of video technology, however, the Shapiro court's belief that the "officials are truly the judges of the facts" may be unfounded. Video technology, commonly referred to as "instant replay," can place the courts in as good a position as the official on the field, and also serve as a superb evidentiary tool. With this in mind, courts may want to reassess their position of nonintervention in the outcomes of sports contests that are tainted by an officiating error. This may be particularly true when the results of an officiating error not only cause a player or team to lose the sports contest, but in addition inflict monetary injury on the participants and their principals. It is at this point, after all, when the officiating error assumes more than a frivolous and ostensibly laughable character. If, however, courts remain steadfast in their refusal to overturn the decisions of referees or to intervene in the outcome of athletic contests, then statutory change may be required to afford aggrieved parties a proper remedy.

43. 308 Mass. 20, 30 N.E.2d 859 (1941).
44. Id. at 25, 30 N.E.2d at 862.
46. Id. at 300, 53 N.Y.S.2d at 138-39.
47. In 1986, the National Football League adopted a "review" procedure to correct certain incorrect decisions made by game officials "when the Replay official has indisputable visual evidence available to him that warrants the change." National Football League Brochure, History of Instant Replay and Answers to Questions About the NFL's Instant Replay System (1986) [hereinafter NFL's Instant Replay Answers].
II. THE PERSONAL LIABILITY OF SPORTS OFFICIALS

A. Generally

Few courts have decided cases in which the specific issue was the liability of a sports official for economic loss due to an officiating error. Several courts have, however, addressed the liability issue in cases in which the official was sued for negligence by a player who was physically injured. In Carabba v. Anacortes School District No. 103., for example, a wrestler was seriously injured when an illegal hold was applied to him by his opponent. At the time of the hold, the referee was trying to close a gap in the wrestling mats and, in doing so, his attention was momentarily diverted from the match. The wrestler’s guardian ad litem brought an action against the school district on the injured wrestler’s behalf. Although the trial court ruled as a matter of law that the referee was an agent of the school district, the jury nonetheless held for the defendant. On appeal, the Supreme Court of Washington reversed the decision because of the defense counsel’s prejudicial conduct during the trial. More importantly, the supreme court ruled that the trial court had not erred in instructing the jury that if the referee was negligent, then the school district would be accountable for damages. Consequently, some argue the Carabba case shows that a supervisor will be held liable for failure to control a contest participant and that referees may be liable for their negligent acts or omissions.

Although the rule for which Carabba is cited is important, society is likely to be more concerned with the intentional conduct of sports officials designed to either harm the participants or their principals. This type of intentional conduct may be a violation of the criminal law.

B. Criminal Culpability of Sports Officials

In most states, it is a crime for a sports official to accept or agree to accept any consideration to influence the outcome of a sports contest.
Furthermore, many states have adopted "tampering" statutes similar to the one promulgated by the Nebraska legislature. Statutes of this sort raise the question of whether criminal liability lies where an official improperly performs his duties in connection with a publicly exhibited contest. The title of the Nebraska statute is directed at one who "tampers with" an official; the sports official, however, is also rendered criminally culpable where he affirmatively "solicits, accepts, or agrees to accept, directly or indirectly, any benefit from another person with intent that he will thereby be influenced . . . to perform improperly his duties." The statute therefore seems to envision an official with an inclination, predisposition or propensity to deliberately cheat in order to benefit one of the competitors or someone else with an interest in the outcome. Accordingly, the statute imposes criminal responsibility upon the official. Unfortunately, the Nebraska statute is fraught with ambiguity. For example, it appears that any game or contest in common understanding, such as a football, basketball or hockey game, would qualify as a publicly exhibited contest. However, the statute does not address the question of whether the contest requires prior notification to the public that such a contest will take place. Nor does the Nebraska statute expressly exempt a sports official from criminal liability where his services are rendered gratuitously. Furthermore, the

57. NEB. REV. STAT. § 28-614 (1985). The statute provides, in pertinent part, that:
   (1) A person commits the offense of tampering with a publicly-exhibited contest if:
   (b) Being a contest participant or contest official, he intentionally solicits, accepts, or agrees to accept, directly or indirectly, any benefit from another person with intent that he will thereby be influenced:
   (ii) In the case of a contest official, to perform improperly his duties in connection with a publicly exhibited contest;
   (2) In this section:
   (a) Publicly exhibited contest shall mean any professional or amateur sport, athletic game or contest, or race or contest involving machines, persons, or animals, viewed by the public, but shall not include an exhibition which does not purport to be and which is not represented as being such a sport, game, contest, or race;
   (c) Contest official shall mean any person who acts or expects to act in a publicly exhibited contest as an umpire, referee, or judge, or otherwise to officiate at a publicly exhibited contest.
   (3) Tampering with a publicly exhibited contest is a Class II misdemeanor.

59. Id. § 28-614(c)(i).
60. Id. § 28-614(3). The statute states that a violation is a Class II misdemeanor and imposes a maximum penalty of six months imprisonment or a fine of $1000, or both. Id.
61. See Davis v. Commonwealth, 564 S.W.2d 33, 34-35 (Ky. Ct. App. 1978) (court held that a beauty contest was not a publicly-exhibited athletic contest).
62. Cf. 18 U.S.C.A. § 224 (c)(2) (West 1969) (the federal anti-bribery in sports statute, requiring that a contest be "publicly announced before its occurrence").
63. Id. (under federal statute it is irrelevant whether the contestants are amateur or professional in status).
statute lends no guidance as to what constitutes an improper performance of an official's duties. 64 Surprisingly, participants and officials are treated differently under the statute. A game participant is subject to criminal liability if he or she "solicits, accepts, or agrees to accept not to give his best efforts" in a game, whereas a game official incurs responsibility where he or she "solicits, accepts, or agrees to accept to perform improperly his [game] duties." 65 Thus, an official could conceivably agree to "not give his best efforts," even though he or she technically "properly performs" those duties. Under the language of the statute, the official would not be liable for such conduct. 66 Finally, the Nebraska tampering statute does not expressly impose criminal liability on sports officials for actually and intentionally influencing the outcome of a contest in the absence of a third party's involvement. 67 Thus, the unscrupulous official who bets on the contest he or she is officiating and then "throws" the game, may not be committing an offense under this statute unless a third party's involvement can be shown.

In addition to tampering statutes, most states also have sports anti-bribery statutes. 68 These statutes, more clearly than the tampering statutes, generally make it illegal for a sports official to accept anything of value in exchange for that sports official to "perform his duties improperly;" 69 "to affect his decisions or the performance of his duties in any way;" 70 to "corruptly or dishonestly umpire . . . or referee [such that] the result of the sporting event, contest, or exhibition will be affected or influenced thereby;" 71 to "use his or her position or influence to affect the outcome of any sport, match, or contest or the score thereof;" 72 or to be influenced to "perform his duties improperly." 73 The states vary as to whether such crimes are felonies or misdemeanors. 74

64. NEB. REV. STAT. § 28-614 (1985) (statute simply states that a contest official commits tampering if he improperly performs his duties).
65. Id. § 28-614(b)(i).
66. Id. § 28-614(b)(ii).
67. Perhaps the legislature anticipated the difficulty in showing that a participant did not give his or her "best efforts." This difficulty is in contrast to the ease in proving that an official "improperly performs."
69. See, e.g., ALA. CODE § 13A-11-140-42 (1975); ARIZ. REV. STAT. ANN. § 13-2309 (1978); COLO. REV. STAT. § 18-5-403 (1989); FLA. STAT. § 838.12 (1973); GA. CODE ANN. § 16-12-33 (1968); IOWA CODE § 722.3 (1978); LA. REV. STAT. ANN. § 14:118.1 (West 1948); MINN. STAT. § 609.825 (1986); NEV. REV. STAT. § 207.290 (1967); N.M. STAT. ANN. § 30-19-13 (1988); N.C. GEN. STAT. § 14-373 (1979); R.I. GEN. LAWS § 11-7-9 (1988); TENN. CODE ANN. § 39-5-114 (1962); UTAH CODE ANN. § 76-6-514 (1973); WYO. STAT. § 6-3-609 (1983).
70. ALA. CODE § 13A-11-142(a)(2) (1982).
72. CAL. PEN. CODE § 337(d) (West 1980).
73. IOWA CODE ANN. § 722.3(2) (West 1979).
75. The following states view the crimes as felonies: ARIZ. REV. STAT. ANN. § 13-2309.
A sports official may also be subject to criminal liability under federal law. Where an official intentionally "throws" a game, he or she may be subject to prosecution under title 18, section 224 of the United States Code. Like the state-tampering statutes, this federal anti-bribery in sports statute fails to focus on the sports official who does not operate in concert with another. Again, if the official's conduct is not the product of a bribe, or if there is no third party involved, then the official's conduct in influencing the contest is technically beyond the reach of the statute. Although this


The following states view the crimes as misdemeanors: Ala. Code §§ 13A-11-140 to 142 (1975); Iowa Code § 722.3 (1978); Me. Rev. Stat. Ann. tit. 17-A, § 904 (1964). Although fines and imprisonment are provided for, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Oklahoma and Wisconsin do not specify whether the crime is a felony or a misdemeanor.

(a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(c) As used in this section —
(1) The term 'scheme of commerce' means any scheme effectuated in whole or in part through the use in interstate or foreign commerce of any facility for transportation or communication;
(2) The term 'sporting contest' means any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence;
(3) The term 'person' means any individual and any partnership, corporation, association, or other entity.

Id.

77. Perhaps, legislators are unconcerned with officials' conduct since it does not appear to be a problem of any magnitude. According to Jim Tunney, a NFL referee, "[s]ince [I have] been in the league [28 years], there's never been a scandal involving officials. The league gets the credit for this because it has a consistent standard of excellence in its selection process."
J. Tunney, IMPARTIAL JUDGMENT 46 (1988). However, Ron Luciano, an ex-major league umpire, gives a slightly different point of view. He states that:

Unfortunately, because umpires do appear to have sufficient power to affect the outcome of a game, [umpires] have to be extremely careful of the people we spend time with. The truth is that the only people who could possibly make a difference in a game are the starting pitcher and the manager. But that doesn't matter—people believe umpires can fix games and attempts have been made to force them to do so. In the early seventies[,] gamblers tried to blackmail two umpires. These men
conduct may not result in criminal liability under tampering or anti-bribery statutes, it may result in civil liability.

C. Civil Liability for Intentional Conduct by Referee

Some courts have recently imposed liability on participants in athletic contests for intentional conduct designed to inflict physical injury. Referees may similarly face liability for their intentional conduct aimed at causing monetary harm to the contest participants or their principals. The civil liability of an official who intentionally influences the outcome of a sporting event could derive from either a statutory violation or the commission of a prima facie tort. The problem is that a violation of a criminal statute may, but does not necessarily, constitute the commission of a tort. As stated by Prosser:

[T]here is . . . no compulsion by which a purely criminal statute must lead to any civil liability. . . . Once the statute is determined to be applicable—which is to say, once it is interpreted as designed to protect the class of persons in which the plaintiff is included, against the risk of . . . harm which has in fact occurred as a result of its violation . . . a majority of the courts hold that [absent a sufficient excuse] the issue of negligence is . . . conclusively determined, and that the court must so direct the jury. 79

If the only basis of the official’s legal duty is a criminal statute, it may be possible for a dishonest official to avoid liability by merely demonstrating the absence of a statutory violation. Notwithstanding a clear or even admitted intent to influence the outcome of a contest, the official might affirmatively

went directly to the league office with the entire story and the police were brought in. I’ve never been offered a bribe, or even a hint of a bribe . . . .


In light of a recent article, both Tunney and Luciano may have an undue confidence in the integrity of at least some officials. The article read:

Investigators are trying to determine if the fix was on in high school football in northwest Alabama. . . . Police Chief Rick Thompson said Tuesday that high school coaches and game officials might have manipulated outcomes by altering game clocks and yardsticks ‘to cover the point spread’. . . . Close to $1 million in cash and securities was confiscated when the FBI raided 11 houses in seven northwest Alabama cities Monday and began collecting money from safe-deposit boxes on Tuesday. . . . Former Florence Coffee High coaches Ganum Smith and William Floyd ‘Brub’ Hamilton were among those whose homes were searched. Smith resigned this year and Hamilton resigned in 1980. . . . Authorities are gathering videotape of football, basketball and baseball games. . . . Thompson wouldn’t name coaches or teams involved. He said a fan told him two years ago that ‘strange things were going on at high school games.’


assert that there was no third party involved, that he or she was not bribed to act, or that he or she performed his tasks properly, albeit dishonestly. Hence, the official would argue no violation of the statute has occurred, and avoid both criminal and civil liability.

This type of intentional, but legal conduct, was addressed in Porter v. Crawford.\textsuperscript{80} The court in Porter examined the question of whether a tort can exist where there has been no conduct in violation of a specific statute. The defendant in the case stopped payment on an insurance check to which the plaintiff was entitled. This stop payment resulted in insufficient funds being in the plaintiff’s account. The plaintiff sued the defendant, alleging that the defendant intentionally, willfully, wantonly, and maliciously injured the plaintiff.

The defendant argued that it had committed no wrong since it was not illegal to stop payment on the checks it issued. In holding that the defendant had committed a tort, the court reasoned that the intentional infliction of temporal damages is a prima facie cause of action, and that the defendant must therefore justify his action.\textsuperscript{81} The court further stated that the defendant had a duty to avoid intentionally causing harm to another without justification, and that in this case it was sufficiently demonstrated that the act was done with intent to injure and without justification.\textsuperscript{82}

The Porter doctrine suggests that anyone who intentionally causes monetary harm to another without justification, though not violative of a specific statute, is nonetheless liable for the harm caused. In adopting this doctrine, the Porter court described the judicial struggle of finding new and unnamed torts in the face of a changing complex world. The Porter court intimated that courts have dealt with novel legal queries by expanding traditional legal theories and introducing new ones, rather than remaining confined to the traditional writs.\textsuperscript{83} The court explained that resolution of the issue required balancing the defendant’s bad motive with any asserted justification for his actions.\textsuperscript{84}

As indicated above, it is possible that an official who acts solely on his or her own volition to influence the outcome of a contest may not have committed either a crime or violated a statute. However, under the Porter doctrine, the official may have committed an intentional tort if the plaintiff can establish that the defendant’s deliberate, albeit noncriminal, conduct

\textsuperscript{80} 611 S.W.2d 265 (Mo. Ct. App. 1980).
\textsuperscript{81} Id. at 268.
\textsuperscript{82} Id. at 273.
\textsuperscript{83} Id. The court stated that:

Many of the nominative tort theories, such as trespass, now rigidly defined, were evolved on a case-by-case basis. The development process tends to produce some confusion and uncertainty as to the courts’ struggle with new and different fact settings and as the circumstances and ingenuity of counsel raise new issues for resolution.

\textsuperscript{84} Id. at 270.
\textsuperscript{84} Id. (citing RESTATEMENT (SECOND) OF TORTS § 870 comment e, 281-83 (1977)).
caused monetary harm to the plaintiff. Imagine, for example, a sports official who has an interest in the outcome of the game. This sports official might intentionally “fix” or “rig” the outcome of a sports contest in order to affect the margin of victory (the point spread) or to determine the winner or loser. The sports official who deliberately sets out to achieve such an objective may cause harm to the participants or their principals. Under the Porter doctrine, where monetary or economic injury flows from such misconduct, the injured party may have a tort cause of action against the sports official if the plaintiff can plead and prove “an actual intent to injure.” Of course, if the defendant sports official has some other purpose for his conduct which amounts to justification, then he may plead and prove his justification.

Critics will undoubtedly argue, and with some accuracy, that Porter actions of the described type will flood the courts with litigation. They will argue that every time either disgruntled participants or their principals lose a contest, a lawsuit will be filed. The Porter court, however, maintained that this concern was unfounded. The court reasoned that the burden upon the plaintiff to show an actual intent to injure and the ability of the defendant to plead and prove any justification for his or her conduct made it unlikely that the theory would be abused. Confronted with these obstacles, it is unlikely that disgruntled participants and their principals will flood the courts with litigation.

D. Civil Liability of Referees for Unintentional Conduct

As one examines the conduct of sports officials, perhaps the most interesting kind of conduct which may lead to liability is the sports official’s unintentional conduct which results in monetary harm to a participant or its principals. Where an officiating error unintentionally affects the outcome of a sports contest and thereby causes a party’s economic injury, liability may be predicated upon traditional theories of either negligence or contract.

1. Negligence

Applying traditional negligence principles, a plaintiff must show that a sports official has a general or specific duty of care to the plaintiff, that the official breached that duty, and that the breach proximately caused injury to the plaintiff. In Bain v. Gillespie, a basketball official’s alleged error was the basis of
a negligence suit against the referee for economic damages. The plaintiffs, operators of a novelty store specializing in the University of Iowa sports memorabilia, complained that the referee's officiating was below the standard of competence for a professional referee. The plaintiffs claimed that this incompetence caused Iowa to lose the Big Ten Basketball Conference championship. They therefore argued that the referee's conduct denied them the monetary benefits of selling memorabilia touting Iowa as Big Ten champions, and constituted malpractice. The Iowa Court of Appeals, applying a contract-law analysis, held that the plaintiffs could not maintain a cause of action against the referee because they were only incidental beneficiaries to the officiating contract that existed between the Big Ten Conference and the referee. Moreover, the court held that the referee was not liable in negligence to the plaintiffs. Specifically, the court held that the referee owed no duty to the plaintiffs. The court reasoned that it was unforeseeable that the referee's error would injure the plaintiffs' business interests. As an additional basis for denying recovery, the court stated that there was no authority supporting an independent tort of referee malpractice.

The court did not say, however, that sports officials could never be liable for officiating errors, or that they are immune from suit. The court said only that a referee owed no duty of care to a merchandiser in the position of a third party incidental beneficiary. Moreover, the court's conclusion that there was no independent tort for referee malpractice was unnecessarily overbroad. As authority for its conclusion, the Bain opinion cited the decisions in Smith v. State, Georgia High School Association v. Waddell, and Shapiro v. Queens County Jockey Club. In each of those cases, the plaintiffs sought to have the courts overturn the decision of the official rather than to recover damages from the official. Furthermore, the court left open the question of whether a sports official could be liable to the participating teams and schools for his or her errors which cause monetary loss.

In order to impose such liability upon an official, a plaintiff must establish that the referee owes a duty of care to officiate in such a manner so as to

---

90. Id. at 48. Again, compare Bain to Carabba v. Anacortes School Dist. No. 103, 72 Wash. 2d 939, 943, 435 P.2d 936, 939 (1967), wherein damages for a physical injury were the focus of the lawsuit, rather than monetary losses as a result of a defeat caused by the referee's decision. See also Paramentier v. McGinnis, 157 Wis. 596, 147 N.W. 1007 (1914) (referee not liable for boxer's death).
91. Bain, 357 N.W.2d at 48.
92. Id. at 50.
93. Id. at 49.
94. Id. at 50.
95. 324 N.W.2d 299 (Iowa 1982) (court held that there was no tort of negligent investigation of a crime).
97. 184 Misc. 295, 53 N.Y.S.2d 135 (1945) (it is of practical importance to have officials' decisions be final and binding).
avoid causing monetary harm to the plaintiff. This question of whether a duty arises out of the parties' relationship is a matter of law for the courts to decide. It is a *non sequitur* to summarily conclude that a referee owes a duty to no particular plaintiff. Instead, several factors are to be considered in determining whether a duty exists. These factors include:

1. The foreseeability of harm to the plaintiff;
2. The degree of certainty that plaintiff suffered injury;
3. The closeness of connection between the defendant's conduct and injury suffered;
4. Moral blame attached to the defendant's conduct;
5. Policy of preventing future harm;
6. Extent of burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach; and
7. Availability, cost, and prevalence of insurance for the risk involved.

The above factors are a mix of public policy and practical considerations. Stated differently, the question of duty may be: whether a plaintiff-participant or principals possess interests which are entitled to legal protection from the defendant-referee's conduct? Where a sports official commits an obvious and gross officiating error which leads to a demonstrable monetary loss, has that official breached any duty to that participant or principal? This inquiry impacts on the ultimate determination of the issue of the existence or absence of a legally recognized duty owed by an official to a participant or principals. Thus, it is necessary to discuss some of the factors influencing the determination.

a. Existence of injury

Whether or not an injury has occurred must be decided on the facts of each case. Sports officials are aware that the higher the stakes, award or prize of an athletic contest, the more costly an officiating error is to the contest participants or their principals. Few will doubt that being eliminated from post-season play directly leads to financial loss. Therefore, if someone's conduct results in the elimination of a team from post-season play, the participants and the school are "harmed" or "injured" in an economic sense, and this harm or injury is foreseeable. In fact, one court has held

98. See, e.g., Bain v. Gillispie, 357 N.W.2d 47, 50 (Iowa Ct. App. 1985) (court held that the referee owed no duty of care to an incidental third party beneficiary merchandiser and therefore incurred no liability for merchandiser's monetary loss).
100. See Prosser, supra note 79, at § 42 (citing Vu v. Singer Co., 538 F. Supp. 26, 29 (N.D. Cal. 1981)).
101. See supra note 4.
102. Contra California State Univ., Hayward v. NCAA, 47 Cal. App. 3d 533, 121 Cal. Rptr. 85 (1975). In this case, the court noted that the interests that were damaged, namely the University's ability to recruit and the team's eligibility for post-season play, were interests of the University and not the student athlete because any benefit to the athlete was speculative.
that either elimination from lucrative post-season participation or a negative impact on recruiting is a "real and immediate injury."

Furthermore, the court in Tilelli v. Christenberry held that a boxing commission's decision to reverse the decision of the ring-side judges caused the losing boxer an injury. The court reasoned that because the win-loss record of a prize fighter directly affects the purses he can command, any action affecting this record would foreseeably impair the fighter's economic rights and give him standing to sue.

Because these same consequences also flow from officiating errors, it appears that whenever contest participants or their principals can demonstrate that their economic rights and interests have been impaired, the injury requirement is satisfied.

b. Foreseeability of harm

It is well established that in order to recover for harm caused by an unintentional act, the injured party must demonstrate that the harm caused was foreseeable or should have been reasonably foreseeable.

The injured party must further demonstrate that the person on whom the harm was inflicted was also foreseeable. Precisely what and whom are foreseeable are judged by an objective standard. Under this standard, if an ordinary, reasonable and prudent person, under similar circumstances, would have foreseen the harm and would have taken precautions to avoid such harm, then the defendant will be held to do the same. This element of foreseeability defines the scope of a defendant's duty. Quite simply, if a risk of injury is foreseeable, then an actor must take precautions to minimize the likelihood of the injury. The concept of foreseeability involves a chain of events initiated by the defendant which ultimately causes the harm.

This "factual causation" is then limited by a judicial determination of whether the distance or time between the initial conduct and the ultimate harm are so separated as to discredit the imposition of liability. This latter determination of proximate causation is a policy choice of society, typically unrelated to the establishment of "factual causation." Whether a sports official is ulti-
c. Duty and breach

The requirement to avoid acts which are likely to result in injury to a foreseeable plaintiff or group to which the plaintiff belongs is the duty of care. Thus, the query then becomes whether a sports official owes a legally recognized duty to avoid conduct which will lead to the monetary harm or injury of the participants or their principals for whom he or she officiates. The ordinary and prudent official should at least have knowledge of the rules of the sport which he or she officiates. Such officials should also be versed in the officially sanctioned interpretations of those rules. An official who lacks sufficient knowledge of the rules breaches the official’s general duty to know the rules. Where the breach of this duty proximately causes harm to the plaintiff, the tort of negligence has occurred. In the instance of misapplication of a rule, the problem is not the official’s lack of knowledge of the rules, but rather his misadministration of the rules’ provisions. If the ordinary, reasonable and prudent official, under similar circumstances, would not have made the error, a breach of the standard of care occurs. This is often the situation in player injury cases where sports officials are sued for malpractice.

1. The referee’s duty to prevent player injuries.—It is interesting, and perhaps instructive, to consider the judicial treatment of cases where referees have been sued for player injuries. The issue in these cases is often the standard of care a referee owes to the players. Generally, the injured players allege that the referee owed a duty to take precautions to prevent player injury, and that the referee’s breach of this duty was the proximate cause of the player’s injury. The results of these cases have differed.

In Kerby v. Elk Grove Union High School District, a student sued his instructor for injuries sustained in a physical education class. The plaintiff was a sixteen-year-old high school student. While participating in a “free play” basketball game without strict supervision, he was struck in the forehead by the basketball and fell unconscious. The plaintiff died of his injuries the next day. The complaint alleged that the instructor was negligent for failing to properly supervise the game. In holding that the instructor was

111. See Prosser, supra note 79, § 32, at 185.
not liable, the court applied a but-for causation analysis. Specifically, the court reasoned that even if the instructor had been refereeing the game, it was not unlikely that the ball would still have struck the plaintiff.

The Kerby decision does not discuss a sports official’s appropriate standard of care since the court concluded, in essence, that any error by the official was not the proximate cause of the player’s injury. Nonetheless, the Kerby case is illustrative of the fact that even if a referee officiates a game in strict compliance with the rules, an injury to the plaintiff may still occur. In light of this fact, it is argued that a referee has no duty to take precautions against risks that he or she cannot prevent from occurring. In contrast to Kerby, the court in Carabba v. Anacortes School District No. 109 did discuss the standard of care required of a sports official. In Carabba, where the plaintiffs sued for damages for physical injuries, the court held that the sports official must exercise the care of an ordinary, prudent referee under similar circumstances. Although the standard articulated by the Carabba court has been criticized, it has also found substantial support.

Under the Carabba standard, if a professional community’s consensus is that the error would not have been committed by an ordinary and prudent

114. Id. at 251, 36 P.2d at 433. Also known as the sine qua non rule, which may be stated as follows: “The defendant’s conduct is not a cause of the event, if the event would not have occurred without it... if the event would not have occurred ‘but for’ the defendant’s negligence, it still does not follow that there is liability, since considerations other than causation... may prevent it.” W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 41, at 239 (4th ed. 1971).

115. 1 Cal. App. 2d at 253, 36 P.2d at 433. The Pape and Kerby cases deal with the issue of whether a referee’s conduct is negligent and, if so, whether that negligence causes or contributes to the physical injury of a participant. In that respect, the cases are not relevant to the issues discussed in this Article. However, concerning the question of proximate causation, the cases aid the analysis by illustrating that even in cases involving players who have sustained physical injuries, causation must be demonstrated.


117. Carabba is important in that, first, it raises the possibility of imposing liability on an official for failure to properly supervise an athletic contest. Although negligent conduct was sufficient for holding the referee liable in Carabba, recklessness would be the more appropriate standard. Second, and more importantly, the court in Carabba found a master-servant relationship between the school district and the referee. The court found that under these circumstances the school district owed a duty to the student participants. Note, Sports Violence: A Matter of Societal Concern, 55 NOTRE DAME LAW. 796, 808 (1980).

118. See G. SCHUBERT, supra note 110, at 232-33 (“[T]he referee [should] be judged by the reasonable person standard, and when the referee fails to exercise the judgment of a reasonable and prudent person, negligence will be found”); RESTATEMENT (SECOND) OF TORTS § 299 A, at 73 (1977) (“Unless he represents that he has greater skill or knowledge, one who undertakes to render services in the practice of a profession or trade is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities”). See also id. § 299A comment f (“where there are different schools of thought in a profession, or different methods are followed by different groups engaged in a trade, the actor is to be judged by the professional standards of the group to which he belongs. The law cannot undertake to decide technical questions of proper practice over which experts reasonably disagree”).
referee, then the errant official's conduct falls below acceptable norms. Since there is a duty to perform equivalent to acceptable norms, if the error falls below that norm, then there would be a breach of duty. If any of these types of mistakes are made, and it is determined that there has been a breach of the duty of care, an action in negligence may lie.

2. Sports officials' duty to render correct decisions.—There has been little written concerning the standard of care that sports officials owe to contest participants or their principals to make correct calls. Each prospective plaintiff, however, expects the game officials to maintain a competitive environment wherein the players can equally compete within the framework of the rules. It is further expected of the officials, and implied in their officiating contracts, that they will administer the game within the spirit of the rules, if not to the letter of the rules. These expectations demonstrate the special relationship that a referee has with the teams. Indeed, the

119. The most common errors made by sports officials can be placed in three categories: (1) misidentification of facts (for example, a football player legally catching a pass inbounds, however, the player is ruled out-of-bounds); (2) misinterpretation of rules (allowing players to do what is prohibited, or prohibiting what is allowed); and, (3) misadministration of penalties and fouls (assessing a penalty other than the prescribed penalty).

120. In comparison, Jim Tunney, an NFL referee, describes the expected level of competence of NFL officials, when he declares that "[f]or an official to miss a rule, mark off the wrong penalty yardage, or place the ball at the wrong spot is, to me, inexcusable." J. Tunney, supra note 77, at 119.

121. Contra California State Univ., Hayward v. NCAA, 47 Cal. App. 3d 533, 541, 121 Cal. Rptr. 85, 89-90 (1975) (court held that it was the university's interests, not the players' interest, that was being protected). Arguably, any duty that does exist is owed to the schools, not the players.

122. NFL referee Jim Tunney has stated that "The business of an official is impartial judgment. As an official, I don't care who wins. Officials want only to see the game played fairly. Not necessarily evenly, because some teams are better than others, but fairly, within the rules." J. Tunney, supra note 77, at 15.

123. Tunney explains that:

[R]ules appear contradictory unless you understand the intent and spirit that underlie the league's philosophy on player safety and game integrity. While the game of football is easily understood in the overall, the art of rules interpretation depends on years of study and application. I find it takes a good official coming from a major college conference three to five years to understand the NFL's thinking and direction well enough to make consistently correct distinctions.

Id. at 50.

124. One commentator has noted:

The referee's function in sports arenas is to ensure that the game is played within the rules and otherwise is adequately administered. When the referee is lax in game administration tasks, a possibility arises that players will be injured. If the referee allows the game to get out of control or otherwise allows it to be played outside the rules, a new peril arises: player injury due to conduct violative of the games rules. A new peril having then arisen, a cause of action for affirmative misconduct against the referee will exist. The referee's undertaking of the supervision of the game, then, provides the affirmative action that if negligently performed can lead to legal responsibility. Even if the referee's negligence is defined as within the realm of nonfeasance, however, a legal action still potentially can lie.

Note, supra note 54, at 944.
competitors trust that the performance of the referee will not affect the outcome of the game. When an official commits an error during an athletic contest, however, he or she departs from this position of neutrality and becomes a benign accomplice to the team that benefits from the error. This is true whether the error is the product of fraud, corruption, bad faith, or just an honest mistake.

The existence of this trust further emphasizes that a sports official should be obligated not only to perform his or her tasks in such a manner so as to reduce the risk of physical injuries, but also to reduce the risk of errors which may deprive a team of a victory or monetary gain. Such an obligation should vary with the importance of the contest and the stakes involved. Where the stakes are low, the expectation that error will be avoided will be less. Conversely, where there is a great deal at stake, the participants will expect the official to exercise more caution to avoid errors. But there still remains the question by what standard of care should an errant official be judged.

If liability is to be imposed on referees in nonphysical injury officiating error cases, then a standard of care higher than the ordinary, reasonable and prudent referee should be imposed. In support of this position, it is noted that in safety related physical injury cases, the precautionary measures to be taken by officials typically occur before the contest begins in a leisurely environment. Conversely, decisions during the contest are usually made under enormous pressure and, unlike their pregame counterparts, are made instantaneously and often hotly debated by the competitors. In light of these factors, sports officials should be subjected to liability only when their mistakes are a result of gross negligence. Consider the dilemma in Carabba. The referee in Carabba diverted his attention from the match and fixed a gap in the mats so as to protect a wrestler from injury. During this time, the plaintiff was injured by an illegal hold administered by his opponent. The Carabba court adopted the ordinary and reasonable referee standard, and ruled that the referee, who all along was attempting to protect the wrestlers, could be liable if he failed to meet this standard.

The advent of video technology also weighs on an official's duty to render a correct decision. State of the art video technology affords sports officials

125. Id. at 944.
126. Jim Tunney, NFL referee, has commented that "[c]onroversy is always a concern of sportswriters; sometimes a concern of fans, coaches, and players—when the call goes against their team. You don't hear much from the coaches, players, and fans of the team which benefited." J. TUNNEY, supra note 77, at 15.
127. This is more an obligation arising out of the expectations of the parties, rather than a duty imposed by virtue of the parties' relationship. It is plausible that both the referees and the teams and schools expect more as the stakes increase. The more important the contest, the more critical the public, the more costly the mistake, the greater the embarrassment, and the greater the loss. It is in these situations that the referees expect more from themselves as well as those who hire them.
128. 72 Wash. 2d 939, 435 P.2d 936 (1967). See supra notes 51-54 and accompanying text.
the capability of correcting erroneous officiating decisions without substantially delaying the contests.\textsuperscript{129} However, some sports have restricted the use of video technology in aiding sports officials,\textsuperscript{130} and others have completely banned its utilization.\textsuperscript{131} The sport of professional football, however, implements the use of electronic video technology to "instantaneously" review certain questionable decisions of sports officials.\textsuperscript{132} Where available, and when the rules of the particular sport authorize or require its use,\textsuperscript{133} an

\textsuperscript{129} The timeliness of decisions and the length of the game have been expressed as concerns in Finlay v. Eastern Racing Ass'n, 308 Mass. 20, 24, 30 N.E.2d 859, 862 (1941).

\textsuperscript{130} \textit{E.g.}, The NCAA Official "Comments on the Rules, Section D" states:

Replay equipment or television monitoring may be used only in situations involved in preventing or rectifying a scorer's or timer's mistake or malfunctioning clocks and to determine those individuals who participated in a fight. Officials may not use replay equipment for judgment calls such as who fouled, basket interference or goaltending, release of the ball prior to the sounding of the horn, etc.


\textsuperscript{131} \textit{E.g.}, The Official "Comments on the 1988-89 Revisions" to the High School Rules provide:

There have been reports of officials viewing replays or television monitors to make decisions relating to administration of the game! Some officials felt replay use was permissible under the rules. Following extensive discussion as to the ramifications, the committee adopted specific coverage to prohibit the use of such equipment by the officials for making any decisions relating to the game. The specific prohibition makes it very clear and no confusion should exist relating to the fact that T.V. monitors or replay equipment cannot be used.

Officials must understand that even though other levels of competition allow limited use of such equipment, it is not permissible to use it for high school games. The committee felt that legalization of even limited use would open the door to more problems than it might solve.


\textsuperscript{132} \textit{E.g.}, NFL's, \textit{Instant Replay Answers, supra note 47}.

It is recognized that in most circumstances the on-field officials have the best vantage points involving fouls. It is for this reason that Instant Replay will not review a list of the following 26 fouls:

Clipping; encroachment and offside; grasp of facemask; false start; defensive pass interference; offensive pass interference; offensive holding and illegal use of hands; illegal batting or punching ball; illegal block on free kick or scrimmage kick; illegal crackback; illegal motion; illegal use of forearm or elbow; illegal use of hands by defense; illegally kicking the ball; illegally snapping the ball; intentional grounding; member of the punting team downfield early; illegal formation; palpably unfair act; piling on; roughing the passer; running into or roughing the kicker; striking, kicking or kneeing; unnecessary roughness; unsportsmanlike conduct; and use of the helmet as a weapon.

\textit{Id.}

\textsuperscript{133} \textit{Id.} This brochure asks and answers the question, "Why is the system referred to as 'limited' Instant Replay?" The reply states:

This system will concentrate on plays of possession or touchdown (e.g., fumbles, receptions, interceptions, muffis) and most plays governed by the sidelines, goal lines, end lines, and line of scrimmage (e.g., receiver or runner in or out of bounds, forward or backward passes, breaking the plane of the goal line). It also will be used to determine whether there are more than 11 men on the field.

\textit{Id.} (emphasis in original).
official may breach his duty when he fails to use video technology to review a potentially incorrect decision. Specifically, where the use of the video equipment is permitted, misfeasance occurs if the reviewing official fails to utilize the video equipment to correct an obvious officiating error. Malfeasance occurs if the responsible official refuses or neglects to utilize the equipment, or does so in an untimely fashion. As the use of video technology becomes more commonplace in sports officiating, ordinary care should require the use of the video procedures to correct erroneous officiating decisions. If failure to use this technology harms the participants, liability should attach to the tortfeasor.

At present, the implementation of video technology in most sports is not economically feasible, which partially explains the resistance to its implementation. Perhaps, however, this reluctance is because of the potential liability which the use of video technology creates. As pointed out, the use of video technology to correct officiating errors creates a duty to use it for its ostensible purpose. If the failure to use the technology results in a monetary loss to participants or their principals, then the officials should be liable. Participants and their principals should not be allowed to stand without a remedy simply because governing sports bodies do not want to incur additional expense. It has been said that “[e]ven an entire industry, by adopting careless methods to save time, effort or money, cannot be permitted to set its own uncontrolled standard.”

Unfortunately, certain segments of the sports world who have the economic capability to implement and utilize video technology to rectify certain officiating mistakes have refused to use video technology. This refusal is at the expense of the participants and their principals.

d. Proximate cause and policy considerations

In addition to determining the existence of an injury, a duty, and a breach of the standard of care, it must be shown that the officiating error was the logical and proximate cause of the plaintiff’s loss. Logically, a sports official may officiate a contest without error, and a plaintiff-school may still suffer defeat and be eliminated from post-season play. Conversely, an official may referee a contest incompetently and the team may nevertheless win and advance. In these situations, one would be hard pressed to show that the

---
134. The NFL’s Instant Replay procedures require that the play be reviewed “after the play is over” and before the commencement of the next play. Id.
135. PROSSER, supra note 79, § 33, at 194 (quoting T. J. Hooper, 60 F.2d 737, 740 (2d Cir.), cert. denied, 287 U.S. 662 (1932)).
136. One can logically construct a chain of events where an official’s error starts a sequence of events that results in harm to the university. However, there are numerous influencing factors in a loss, the least of which is the participant’s own detrimental performance. A typical football game, for example, consists of 100 offensive plays per team, translating into as many opportunities to score and an equivalent number of defensive opportunities to prevent the opponent from scoring. An officiating error may affect one of these opportunities. A plaintiff must show that but for the error, the loss would not have occurred. A team’s inadequate performance may well have “caused” a loss rather than the officiating mistake.
official's conduct bore a causal connection to the outcome. However, if the
official's error was a substantial factor in a team's loss, it may be demon-
strated that the error proximately caused the school's elimination from post-
season competition and the concomitant monetary entitlements.

The element of proximate causation involves significant policy consider-
ations. First, imposing liability on sports officials for their unintentional
mistakes may discourage their participation in athletic events. Sports
officials need to make reactive and instantaneous decisions, and this quality
would be chilled if the official was exposed to liability for his or her calls.
In this respect, sports officials are much like arbitrators, who have been
accorded a general immunity from suit. This concern was expressed in a
recent case dealing with a sports official's liability for officiating errors. In
Bain v. Gillespie, the court was concerned with a sports official's liability
to unintended third parties. However, the court also expressed concern over
the official's ability to adequately perform his or her job if the official was
exposed to liability for his conduct. The court stated that "[h]eaven knows
what uncharted morass a court would find itself in if it were to hold that
an athletic official subjects himself to liability every time he might make a
questionable call. The possibilities are mind boggling." A related concern
is the courts' inability to hear all of the requests to review sports officials'
decisions. It is feared that the requests would simply flood the courts.

Another policy consideration is that the cost of liability insurance would
dramatically increase with increased official liability. Presently, liability in-
surance is available to sports officials through national sports officials
organizations, such as the National Association of Sports Officials ("NASO")
and the National Federation of State High School Association ("NFHS")
at nominal fees. This would likely change if sports official liability were
to dramatically increase.

Alternatively, organized athletic conferences and leagues are more capable
than the courts to handle the complaints of its member teams concerning
the substandard performance of officials. This is because the conferences
typically hire and fire the officials, establish criteria for acceptable perform-
ances, and employ a full-time supervisor of officials. Further, the conferences

137. See Note, supra note 117, at 808. The author notes that few officials would be willing
to officiate if their negligence could result in personal liability. However, the author maintains
that an official should be liable when he or she acts in willful or reckless disregard of his or
her duties to enforce safety rules. Id.
must be free from the fear of reprisals by an unsuccessful litigant).
140. Id. at 49.
141. In Bain, for example, the court feared that "[i]t is bad enough when Iowa loses without
transforming a loss into a litigation field day for 'Monday Morning Quarterbacks.'" 357
N.W.2d at 49.
142. For example, the NFHS presently provides one million dollars ($1,000,000) of liability
coverage for a fee of $10.00 per sports official.
can respond to complaints more quickly than any court, and remove incompetent or inadequate officiating personnel.\textsuperscript{143} Moreover, conference commissioners have the power to affect any necessary changes, such as altering the outcome of any game where the results may have been tainted.

2. Contractual Responsibilities

Sports officials either contract with a conference for whom the officiating services will be provided, or contract directly with one of the two competing schools to provide officiating services. Typically, these contracts are drafted in a sketchy manner.\textsuperscript{144} The lack of detail makes it difficult to analyze the parties' intent respecting sports officials' liability. Nevertheless, a sports official has at least an implied contractual obligation to officiate, in a competent manner, a game for which he or she is contracted.\textsuperscript{145}

Whether the sports official contracts with a conference, an individual school, or is an employee of a professional organization, the obvious contractual intent of both parties is that the official is to provide competent officiating services. Thus, if an official acts to alter or unfairly influence the outcome of a contest, he has breached the officiating contract. This breach gives the contracting party or parties standing to sue.

If the contract is between the school and the official, the school is in privity with the official and the breach gives the school standing to sue the official as a party to the contract. If an athletic conference contracts with an official to provide officiating services, then the conference is in privity with the official and may have a cause of action against the official if a breach by the official can be established. The officiating contract, however, is also for the benefit of the competing schools. By the terms of the agreement, the official officiates the game between, and for the benefit of,

\begin{itemize}
  \item \textsuperscript{143} Omaha World Herald, July 13, 1989, at 41.
  \item \textsuperscript{144} For example, the standard Big Eight Conference contract between the Conference and basketball officials provides simply, in pertinent part:
  \begin{itemize}
    \item In consideration of the mutual undertakings of the Conference and the official, it is agreed as follows:
      \begin{itemize}
        \item 1. Official accepts the assignments listed below and will notify the Conference immediately if unable to report for any game listed.
        \item 2. This schedule and acceptance is limited to the \textit{[year]} season.
        \item 3. Official shall serve as an independent contractor and not as an employee of the Conference.
        \item 4. Compensation shall be paid promptly after each game by the host institution.
      \end{itemize}
    \end{itemize}
  \end{itemize}

\end{itemize}
the conference and the competing schools. When an official fails to fulfill
the expectations of the conference, he or she has committed a breach of the
conference-official agreement. Since the purpose of the conference-official
agreement is to benefit the two schools involved, the team who suffers
detriment as a result of the breach also has standing to sue as a third party
donee beneficiary.

The third party donee beneficiary principle is well recognized in this
country. In an oft-cited 1859 New York case, Lawrence v. Fox, a debtor
owed the plaintiff $300. The defendant suggested that he would deliver
the money to the plaintiff, but upon receipt of the money the defendant did not
pay the plaintiff. The plaintiff asserted that he was a third party beneficiary
of the agreement between the defendant and the debtor, and sued the
defendant. In ruling for the plaintiff, the court reasoned "that when one
person, for a valuable consideration, engages with another, by a simple
contract, to do some act for the benefit of a third, the latter, who would
enjoy the benefit of the act, may maintain an action for the breach of such
engagement."1

This principle recognizes that parties other than those in privity of contract
may maintain an action if the party seeking relief is intended by the con-
tacting parties to receive the benefit of performance. If, however, the party
seeking relief is not intended by the contracting parties to be a beneficiary
of the performance, then the party seeking enforcement has no standing to
sue. The law deems this latter party as merely an incidental, rather than an
intended, beneficiary.

In Bain v. Gillespie, this principle was applied to an officiating contract.
In Bain, a merchant complained that a college basketball referee's mistake
denied him certain benefits. The court held the merchant had no standing
to sue, reasoning that it was clear that the purpose of the contract between
the referee and the conference was not to confer a gift upon the merchant.
The Bain opinion arguably eliminates any standing that parties other than
those to an officiating contract or for whose benefit the contract is intended
could assert. Furthermore, in contract law, one must look to the intent of
the parties to determine if the expectations of the private parties have been
reasonably satisfied. This reality potentially poses yet another obstacle for
those seeking redress for a contest official's mistake. Specifically, in the
school-referee context, an official might argue that the parties did not
contract "in contemplation of legal consequences." In other words, a
sports official might assert that neither party intended any legal consequence
to result from a breach.

146. 20 N.Y. 268 (1859).
147. Id.
150. Id. at 26-28.
However, if a breach of contract occurs, then contract law "seeks to place the aggrieved party in the same economic position he would have had if the contract had been performed." If the sports official’s performance, although deficient, falls only slightly below what is reasonably expected, then, he or she has substantially performed his or her obligations, and the plaintiff is not excused from his or her obligations to perform. If, on the other hand, the referee’s performance is far below the reasonable expectations, a major breach of the contract has occurred and the nonbreaching party is excused from performance, i.e., the nonbreaching party does not have to pay the referee for his or her services.

The rule of Hadley v. Baxendale, however, could severely limit any recovery to which a nonbreaching party is entitled. In Hadley, the court specified two instances in which an aggrieved party could recover damages. The court stated that an aggrieved party could recover those damages "as may fairly and reasonably be considered . . . arising naturally, i.e., according to the usual course of things, from such breach of contract itself" and those damages "such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the possible result of the breach of it."

Unless clearly specified by both parties in a written instrument, the scope of what "may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract" is undoubtedly quite limited. Nonetheless, one might argue, at the time of contracting, that an untimely or wrong call that led to the plaintiff being eliminated from post-season play was an entirely foreseeable consequence. Under this reasoning, the plaintiff would be entitled to consequential damages.

III. LIMITATIONS ON SPORTS OFFICIALS’ LIABILITY

In light of the potential liability of sports officials, some states have enacted legislation to partially or completely protect them from liability. For example, Arkansas, Georgia, Illinois, Indiana, Louisiana, Massachusetts, Mississippi, Minnesota, Nebraska, New Jersey, North Dakota, Rhode Island and Texas have recently passed statutes which immunize or partially exempt sports officials from liability for their negligence. In some states, the immunity is granted if the sports official renders the officiating services gratuitously. In other states, the exemption applies regardless of the amount

151. A major breach of a service contract would occur when a party fails to substantially perform.


153. Id. at 410-12.


155. Id. at 151.

of compensation received for the officiating services.\textsuperscript{157} Furthermore, Texas has a “Charitable Immunity and Liability Act” which most likely excludes sports officials from liability.\textsuperscript{158} None of the immunity statutes, however, protect malicious, willful, wanton, or grossly negligent conduct.

Even in those states which provide immunity without regard to compensation, the exemptions are not without their limitations. For example, in Arkansas, a sports official enjoys immunity only if the officiating services are provided "during the officiating of an interscholastic, intercollegiate, or any other amateur athletic contest being conducted under the auspices of a nonprofit or governmental entity."\textsuperscript{159} In order to qualify for protection in Mississippi, the sports official must be “duly registered or [a] member of a local, state, regional or national organization which is engaged in part in providing education and training to sports officials.”\textsuperscript{160} New Jersey removes the shelter if a “sports competition or practice [is] conducted without supervision,”\textsuperscript{161} or if the sports official “provides services or assistance as part of a public or private education institution’s athletic program.”\textsuperscript{162} Finally, Rhode Island grants an exemption from liability, but only if the sports official renders the officiating services “in an interscholastic or intramural sports program organized and conducted in accordance with and subject to the rules, regulations and jurisdiction of the Rhode Island Interscholastic League, the Committee on Junior High School Athletics, and/or the Board of Regents for Elementary and Secondary Education.”\textsuperscript{163}

Mississippi provides the broadest immunization to sports officials from lawsuits based on their negligence.\textsuperscript{164} The statute applies to any “duly

\begin{itemize}
  \item \textsuperscript{158} Tex. Civ. Prac. & Rem. Code Ann. § 84.003(1)(A) (Vernon Supp. 1989). The Act does not specifically mention or may not even contemplate immunizing “sports officials.” The Texas Code, however, defines a “charitable organization,” as “any bona fide charitable . . . youth sports and youth recreational, or educational organization . . . organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community.” Id. A “volunteer” is described as “a person rendering services for or on behalf of a charitable organization who does not receive compensation in excess of reimbursement for expenses incurred, and such term includes a person serving as a director, officer, trustee, or direct service volunteer.” Id. § 84.003(2). The Act goes on to make the volunteer “immune from civil liability for any act or omission resulting in death, damage, or injury if the volunteer was acting in good faith and in the course and scope of his duties or functions with the organization.” Id. § 84.004(b). Arguably, a sports official could fit into any of these definitions.
  \item \textsuperscript{159} Ark. Stat. Ann. § 16-120-102(b) (Supp. 1987).
  \item \textsuperscript{160} Miss. Code Ann. § 95-9-3(2) (Supp. 1989).
  \item \textsuperscript{162} Id. § 2A:62A-6(f).
  \item \textsuperscript{163} R.I. Gen. Laws § 9-1-48(b) (Supp. 1988).
  \item \textsuperscript{164} The Mississippi statute provides that:

  \begin{enumerate}
    \item Sports officials who officiate athletic contests at any level of competition in this state shall not be liable to any person or entity in any civil action for injuries or
registered" sports official officiating a contest in the state of Mississippi regardless of the "level of competition," and prohibits any suit based on "actions or inactions related in any manner to officiating duties." The statute's reach is sufficiently wide to encompass most sports officials officiating in the state of Mississippi notwithstanding if, or how much, they are paid for the officiating services. However, the statute is not so broad as to protect sports officials who perform in a grossly negligent, wanton, or reckless manner or who act intentionally or willfully to harm a team, participant, or school.

The Nebraska statute typifies the sports official statute which conditions immunity on the official's not receiving compensation in exchange for his or her services. In 1988, the Nebraska Legislature exempted sports officials damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties within the confines of the athletic facility at which the athletic contest is played.

(2) For purposes of this section, sports officials are defined as those individuals who serve as referees, umpires, linesmen, and those who serve in similar capacities but may be known by other titles and are duly registered or members of a local, state, regional or national organization which is engaged in part in providing education and training to sports officials.

(3) Nothing in this section shall be deemed to grant the protection set forth to sports officials who cause injury or damage to a person or entity by actions or inactions which are intentional, wilful, wanton, reckless, malicious or grossly negligent.

(4) The provisions of this section shall apply only to actions the cause of which accrued on or after July 1, 1988.


Arkansas, in contrast, limits the exemption to "interscholastic, intercollegiate, or any other amateur athletic contest being conducted under the auspices of a non-profit or governmental entity. Ark. Stat. Ann. § 16-120-102(b) (Supp. 1987) (emphasis added). Also, the language of the Arkansas statute does not immunize sports officials officiating at the professional level in the State of Arkansas. The language of the Mississippi statute seems to include sports officials such as those who officiate in the nationally recognized professional sports leagues, e.g., the Association. Arkansas, however, limits the plaintiffs to any "player, participant or spectator." Id. The team or school for whom the player or participant represents are not mentioned.

None of the statutes providing immunity without regard to the sports official's compensation specifically define "sports official." In fact, the Louisiana, Minnesota and New Jersey statutes refer so ambiguously to an "official for sports teams" or "sports team official" that it is unclear whether reference is being made to someone employed by or acting on behalf of the team or one actually officiating a sports contest. The Mississippi statute gives the definition of "sports official" some context by relating the nouns "referees, umpires, [and] linesmen" to "those who serve in similar capacities." Id.


Any individual who renders services without compensation as a member of a qualified staff of nonprofit sports program shall not be liable under the laws of this state for civil damages resulting from any negligent act or omission of such qualified member occurring in the performance of any duty owed such qualified member.

Id. The Act defines "member of a qualified staff" as "any individual who . . . is a manager,
from liability based on negligence if they gratuitously performed services in nonprofit sports events. The definition of a nonprofit sports program in the Nebraska statute would seem to only encompass the typical program created for children's recreation where the employees of those entities, the parents of the minor participants, or other persons often volunteer their services as referees. It may also include adult athletic programs sponsored by city recreation departments, provided that the officials are not compensated more than a total value of one hundred dollars in any twelve consecutive months. Like the other state sports official statutes, the Nebraska statute does not protect officials who perform in a reckless, willful, wanton, or grossly negligent manner.

The statutory immunity provided by the various state sports official statutes does not avail the typical sports official. Usually, sports officials will be compensated for their services far in excess of the statutory immunity limits provided by the Nebraska-type statute. Furthermore, it is not un-

The statutes which immunize sports officials provided that the services are rendered "without compensation" differ on what is considered "compensation." In Indiana, "compensation does not include a payment to an individual of fifteen dollars ($15) or less for performing one (1) or more functions during a day." IND. CODE ANN. §§ 34-4-11.8-1 to 11.8-7 (West 1987). In Illinois, Massachusetts, and Rhode Island "compensation does not include reimbursement for reasonable expenses actually incurred or to be incurred or, in the case of umpires or referees, a modest honorarium." ILL. REV. STAT. ch. 70, para. 701(d) (1987); MASS. GEN. L. ch. 231, § 85V (Supp. 1989); R.I. GEN. LAWS § 9-1-48(d)(ii) (Supp. 1988).


166. In some states, such as Illinois, the definition of "sports program" excludes persons older than 18 years. ILL. REV. STAT. ch. 70, para. 701(d) (1987) provides that:

"Sports program" means baseball (including softball), football, basketball, soccer or any other competitive sport formally recognized as a sport by the United States Olympic Committee as specified by and under the jurisdiction of the Amateur Sports Act of 1978 (36 U.S.C. 371 et seq.), the Amateur Athletic Union or the National Collegiate Athletic Association. The term shall be limited to a program or that portion of a program that is organized for recreational purposes and whose activities are substantially for such purposes and which is primarily for participants who are 18 years of age or younger or whose 19th birthday occurs during the year of participation or the competitive season, whichever is longer. There shall, however, be no age limitation for programs operated for the physically handicapped or mentally retarded.

Id. (emphasis added).

167. See supra note 165 for the differences in the state definitions of "compensation."
common that officials are contracted to officiate amateur age programs which certainly do not constitute "not-for-profit sports programs." Therefore, under the Nebraska-type statute, for most of the persons engaged in officiating, either as an avocation or professionally, there is little, if any, protection.

IV. PROPOSAL AND CONCLUSION

Case law demonstrates a judicial reluctance to interfere with the outcome of sports contests unless there is a showing of bad faith, fraud or corruption. The same resistance has been met in holding sports officials personally liable for monetary injuries resulting from officiating mistakes. This general rule has served the judiciary well, but it is a disservice to the participants and their principals who are the victims of either intentional conduct by sports officials or gross officiating errors which lead to a demonstrably significant monetary injury.

This noninterventionalist position has been based on the belief that the officials’ immediate reactions and decisions warrant more credence than the remote observations of a court. With the advent of video technology, however, this position is in need of reexamination. It is now possible to review the events of a sports contest as clearly as the attending official. Video technology allows the reviewer to slow down the action to obtain a more clinical analysis of what transpired. This technology can be used not

169. However, video replay has its critics, too. As former NFL referee Jim Tunney points out:

Television technology is as imperfect as people. Dazzling as it is, the screen has only two dimensions, height and width. It can't see in depth, as the human eye can. Television creates illusions. It looks real, but it doesn't show what actually happened. . . . The fact that cameras don’t capture the third dimension . . . is a disadvantage on the sports field. The networks' solution is multiple angles.
J. Tunney, supra note 77, at 203.
170. Tunney observes that:
Operating the instant-replay monitors and communication equipment in the booth is more complicated than operating your VCR by remote in your living room. . . . The procedure is the Instant-Replay Official ("IRO") views the game and the monitor simultaneously. When he sees a call or play that might be questionable, he immediately reviews it on [an] “A” tape, which is the live network feed . . . The IRO reviews it quickly as play continues. If he needs another view, he can request a replay of [a] “B” tape, which may or may not include the circumstance in question. . . . If the IRO believes a call or play needs further review, he communicates by wireless Telex to the umpire, who serves as the liaison to the referee. . . . If, after review, the IRO decides that the call or play should stand, he says to the umpire, "Continue play. Continue play. Continue play." Always three times. League procedure.

Id. at 206-07.
only as an evidentiary tool171 designed to determine the facts of the controversial play, but also to overturn the decision of the on-field official.172 Therefore, video technology should be utilized to avoid officiating errors which can lead to significant monetary loss.

The question remains, however, whether the courts should intervene in the officiating controversies of sporting events in the absence of fraud, corruption, or bad faith. A court is a capable body to review decisions which result in irreparable and substantial monetary injury to participants and their principals. Athletic conferences or leagues, when sufficiently organized or inclined, may be more able to quickly alter unfair outcomes, and should do so when the facts so require. However, when these conferences or leagues are not adequately organized nor inclined to handle these types of issues, or they decline to address such issues, an avenue to the judicial system should be available.

If a participant is successful in changing the outcome of a sports contest as a result of an officiating error, the official may not be liable. However, if the flawed result remains unaltered, then the official should be liable for any damages. The sports official’s liability will vary with his or her conduct. Clearly, where a sports official intentionally influences the outcome of a game, whether the referee’s act is done in cooperation with or by the direction of a third party, or is performed autonomously, criminal as well as civil liability should be imposed. The federal government and the states should be allowed to determine the appropriate penalties for such crimes. The determination of criminal culpability for intentional acts should not pivot on whether the sports official has accepted bribes, whether the official is part of a conspiracy to tamper with an athletic contest, or whether the sports

171. "[M]otion pictures and videotapes are treated similarly for evidentiary purposes and ... both types of film are generally admissible if they have been properly authenticated and if they are relevant to the issues." Annotation, Admissibility of Visual Recording of Event or Matter Giving Rise to Litigation or Prosecution, 41 A.L.R.4TH 812, 817 (1985).

172. In the Step-By-Step of a Play Review by Replay Official, paragraphs 4 through 7 indicate that:

4. If Replay Official believes an error may have been made, he will instruct Communicator to contact the Umpire (via a paging device worn at the beltline), who will then use a walkie-talkie for further communication with the Replay Booth.

5. Replay Official will watch replay(s) on one or both monitors and complete his review with a reasonable period (probably 15-20 seconds) after the play is over. If there is a time out, the Replay Official would not necessarily be restricted to the 15-20 second period.

6. Replay Official will inform Umpire, and, if there is reversal, the Communicator will inform the Press Box and TV truck of the decision.

7. Whenever a call is reversed, the Referee will use the wireless microphone to explain. In most cases where the call is confirmed or the replay is inconclusive, the Referee will not use the microphone. If, however, such a circumstance results in an inordinately long stoppage, the Referee will get on the microphone and explain that "after discussion with the Replay Official, the call was confirmed." NFL, Step-By-Step of a Play Review by Replay Official, ¶¶ 4-7 (1986) (emphasis added).
official's performance is gratuitous. Those referees who intentionally influence the outcome of an athletic contest should be personally liable for any damages which directly flow from the breach of an officiating contract.

The circumstances under which a sports official may be held liable for unintentionally influencing the outcome of an athletic contest, however, should not be without limit. Specifically, an official should be subject to liability only for those unintentional mistakes that are recklessly committed. An example of this type of reckless conduct would be where an official is not aware of an applicable rule or where an official misapplies a rule. Of course, in each case, injury must be proved.

The authors propose the following model statute that would encompass the above-described beliefs:

PROPOSED MODEL STATUTE: UNIFORM SPORTS OFFICIAL IMMUNITY ACT

In sporting events involving an amount in controversy not less than one hundred thousand dollars ($100,000):

(1) A sports official shall not be liable while exercising judgment or discretion while officiating any sports contest whether the sports official renders his or her officiating services gratuitously, for pay or profit, or whether the sports contest is publicly exhibited.

PROVIDED, nothing heretofore stated shall immunize a sports official from suit:

(a) for gross negligence or malicious, reckless, willful, wanton, or intentional conduct designed to harm or injure a team, participant, an institution, or a professional sports organization represented by such team or participant involved in an athletic contest;
(b) for conduct in violation of any criminal statute; or
(c) for conduct constituting a breach of any contract between the sports official and (1) any athletic conference or league, or (2) any school, team, or participant or any institution or professional sports organization represented by such team or participant or participants; or
(d) conduct or performance which falls substantially below that expected of an ordinary, reasonably prudent sports official under similar circumstances.

(2) Definitions.

(a) "Sports official" shall mean referee, umpire, judge, arbiter, or any person contracted, employed, hired for compensation, or who gratuitously renders or volunteers officiating services in an interscholastic, intercollegiate, or professional athletic contest.
(b) One is "officiating" when exercising independent judgment while performing in the capacity of a referee, umpire, judge, or neutral party engaged to resolve disputes, make decisions, or to assure compliance with the rules of the contest in question.

This proposed legislation recognizes that legal theories presently exist to impose liability on sports officials for errors they commit during sports contests. Contracting parties legitimately expect the intent and terms of their agreements to be fulfilled, and an equitable remedy should be provided to an offended party when those expectations are not substantially performed. This should be no less true when the party who fails to substantially perform
is a sports official, or the factual transaction is a sports contest. The concern that codification of sports official liability will lead to a flood of litigation is eased because the proposed law sets a jurisdictional limit of one hundred thousand dollars. This jurisdictional floor will limit the cases to those involving significant dollar amounts. In such cases, the expectations of the parties are greater, and the effect and costs of an officiating error are more severe. Hence, the imposition of liability on sports officials for obvious and gross officiating mistakes should be mandated.

Liability on sports officials for mere and inconsequential errors in judgment, however, is not being proposed. Such potential liability would cause officials to hesitate and would seriously impede their ability to function properly. Furthermore, this liability might discourage many individuals from becoming sports officials.

Instead, personal liability should attach only in limited situations. First, personal liability should attach where obvious and gross errors in rules administration lead to a demonstrable monetary injury. This type of obvious and gross error occurs where an official deviates from a prescribed course of conduct and this deviation results in a monetary injury. For example, an official would commit a gross error where a clear penalty is provided for by the rules, but the official administers an improper penalty. This error would also be obvious if evidence showed that a reasonable and prudent referee under the same circumstances could not differ as to what properly should have been done.

Personal liability should also attach where it can be shown that an official intentionally acted or refrained from acting, with the purpose of harming a school, team, or player, or with the purpose of affecting the contest's outcome. If the official's plan is carried out, and the contest's outcome is altered, then the official should be personally liable.

In sum, officials should be liable for errors resulting from their intentional conduct or conduct which results in an obvious and gross error. The liability imposed, however, should be limited and care should be exercised so as not to "chill" officials' performances. Sports officials typically perform in a pressurized and intense environment notwithstanding the possibility of liability for errors they may make in their games. Their ability to exercise independent judgment should not be unduly infringed by threat of suit. Furthermore, to ease the potential burden on the courts, state legislatures should impose a minimum jurisdictional amount in controversy, and grant sports officials immunity from suits under this minimum. Where immunity is granted because of a failure to meet the jurisdictional requirement, organized athletic conferences and leagues should handle officiating errors, incompetence or negligence, as well as general disputes arising from sports contests.