Texas Entertainment and Sports Law Journal

State Bar of Texas
Entertainment & Sports Law Section

Vol.12 No.2, Summer 2003

ANNUAL MEETING
Entertainment and Sports Law Section
June 13, 2003 2 P.M. - 4 P.M.
George R. Brown Convention Center

Featured Speaker:
OLIVER LUCK
Chief Executive Director, Harris County-Houston Sports Authority

FREE CLE! See you there!

In this Issue:

CHAIRMAN'S REPORT

If you haven't noticed, there's now more than a curricular basis for the linking of entertainment and sports law. For the spectator, sport has always been a form of entertainment to be sure, yet for the lawyer, there exists a team of entertainment law issues associated with any sporting event. Mechandising, personal appearances, Internet licensing and other intellectual property issues run across many desks in the name of sport. And no groups know better than our teams here in Texas how to squeeze those margins. By now you've probably guessed I've actually been doing a little thinking during the commercial breaks in the NBA conference finals.

Let's see if we can round up some of these topics for future journal and upcoming CLE programming. It would provide a logical way to unify and increase section membership. Typically our section has split entertainment and sports programming completely. But by putting them together and looking for the common ground, we'll find a number substantive law areas like consumer (ticketholders), employment (facilities and franchises) and even character/merchandising (bobbleheads) that would open our section to more than just the music lawyer. I would appreciate your e-mails on the subject.

Thank you for letting me serve as your Chairman. I hope to see you June 12-14 in Houston.

Evan M. Fogelman
evan@fogelman.com

USEFUL LINKS FOR THE PRACTICE OF ENTERTAINMENT, ART AND INTELLECTUAL PROPERTY LAW

COMPILED BY: TAMERA H. BENNETT - VICE CHAIR, LEGAL ASPECTS OF ART COMMITTEE, BENNETT LAW OFFICE, LEWISVILLE, TEXAS and YOCEL ALONSO - ALONSO, CERSONSKY & GARCIA, P.C., HOUSTON, TEXAS

Government
Federal Circuit
www.fedcir.gov

Federal Trade Commission
www.ftc.gov

Texas Commission on the Arts
http://www.arts.state.tx.us

Texas Film Commission
http://www.governor.state.tx.us/film/index.htm

Texas Music Office
http://www.governor.state.tx.us/music

United States Copyright Office
www.loc.gov/copyright

United States Patent and Trademark Office
www.uspto.gov

United States Trade Representative
www.ustr.gov/sectors/intellectual.shtml

Legislative
thomas.loc.gov

www.house.gov/judiciary

www.senate.gov/~judiciary

Scholarly & Research
Bureau of National Affairs
www.ipcenter.bna.com/

FindLaw
www.findlaw.com/01topics/23intellectprop

Franklin Pierce Intellectual Property Mall
www.ipmall.fplc.edu/

Intellectual Property Law Server
www.intelproplaw.com

IP Law Practice Center
http://www.law.com/jsp/pc/iplaw.jsp

IP News from Questel Orbit
www.questel.orbit.com/EN/Resource/index.htm

Kohn on Music Licensing
www.kohnmusic.com

MegaLaw
www.megalaw.com/top/intellectual.php

QuickLinks: Daily Update on IP and Internet Law
www.qlinks.net/quicklinks/index.shtml

Stanford University Libraries
www.fairuse.stanford.edu/

The Center for Popular Music (MTSU)
http://popmusic.mtsu.edu/research.html#top

The John Marshall Law School -
Review of Intellectual Property Law
www.jmls.edu/ripl

International
European Patent Office
www.european-patent-office.org

Japanese Patent Office
www.jpo.go.jp

United Kingdom Copyright Office
www.hmso.gov.uk/copyhome.htm

United Kingdom Patent Office
www.ukpats.org.uk

World Intellectual Property Organization
www.wipo.org

World Trade Organization
www.wto.org/english/tratop_e/trips_e/trips_e.htm

Interest Groups
American Bar Association – Section of Intellectual Property Law
www.abanet.org/intelprop/home

American Intellectual Property Law Association
www.aipla.org

American Society of Composers Authors and Publishers
www.ascap.com

Association for Independent Music
http://www.afim.org

Broadcast Music International
www.bmi.com

Computer Law Association
www.cla.org

Film Music (Online Magazine)
http://www.filmmusicmag.com

Intellectual Property Owner's Association
www.ipo.org

International Trademark Association
www.inta.org

Links to music publishers and record labels
http://www.writerswrite.com/songwriting/markets.htm

Motion Picture Association of America
www.mpaa.org

National Music Publisher's Association/Harry Fox
www.nmpa.org

Recording Industry Association of America
www.riaa.org

SESAC
www.sesac.com

Software and Information Industry Association
www.siia.net

Texas Accountants & Lawyers for the Arts (TALA)
www.talarts.org

2003-2004 OFFICER AND COUNCIL NOMINATIONS

In conformance with the By-Laws of the Entertainment and Sports Law Section of the State Bar of Texas, the following have been nominated as noted:

CHAIR-ELCT/TREASURER: Yocel Alonso, Houston
SECRETARY: Tamera H. Bennett, Lewisville
BOARD OF DIRECTORS/COUNCIL MEMBERS:

Term Expiring 2004

- Robert R. Carter, Jr., Austin

Term Expiring 2006

- Craig Barker, Austin
- Steven Ellinger, League City
- David Garcia, San Antonio

Section members will be asked to vote on the nominees at the next regularly scheduled general Section meeting to be held June 13, 2003, commencing at approximately 12:30 p.m. at the Geroge R. Brown Convention Center, Houston, Texas. Section members may nominate other persons at the general Section meeting.

The next regularly scheduled meeting of the Section's Council is scheduled for 11:30 a.m. to 12:30 p.m. After the Council meeting a general session of the Section will be held and the election of officers and Council members will be tabled for vote of the Section membership.

FOR THE LEGAL RECORD ...

SPORTS:

Raiders, Buccaneers & Panthers Brought Together By Al Davis!

Federal court is the proper venue ruled the Santa Clara County judge hearing Davis' claims that the uniforms of NFL teams 'Tampa Bay and Carolina violated Raider trademark rights! While not ruling on whether the Raiders could prevent the Bucs from using their pirate logo and the Panthers from using their team colors, the California court dismissed the case. The Raiders have reportedly spent over $33 million dollars in attorneys' fees over the last four years in asserting their various legal claims versus the NFL ...

University President Suffers From JC's Transfer!

The Atlantic 10 Conference imposed penalties on St. Bonaventure, and the university held president Robert Wickenheiser, Athletic Director Gothard Lane, and Head Coach Jan van Breda Koff responsible. Atlantic 10 officials ruled junior college transfer center Jamil Terrell was ineligible, causing St. Bonaventure to forfeit 6 wins and the team prohibited from playing in the conference tournament. While the head coach and athletic director were placed on administrative lease, school president Wickenheiser was forced to resign by the university's board of trustees. The board voted unanimously to remove Wickenheiser and replace him with Rev. Dominic Monti, a professor of church history at the school ...

Hootie Need Not Sing with the Blow-Fish!

The U. S. 11th Circuit Court ruled the sheriff could approve the situs for protesters and refused to allow the National Council of Woman's Organization's emergency request to protest outside the front gate at Augusta National Golf Club during this year's Masters. The court deferred to Sheriff Ronald Strength's argument that the protesters would create heavy congestion during the tournament and did not overrule his decision to require the picketers to voice their objections a half-mile from the club. "So the circle is complete cutting off our free-speech rights. ... This was our last shot!", lamented NOW President Martha Burk following the court's decision ...

Golfer's Career Dogged by a Bite!

An Alsatian was the culprit in ruining his golf career, so says an assistant golf pro at St. George's Hill Golf Club. Trying to stop a fight between his own dog and the Alsatian, Andrew Raitt claims the dog's bite resulted in a littler finger (the left hand little finger was 2/10ths of an inch shorter) and with little or no feeling. Raitt claimed the injury resulted in $1.5MM in damages to his golf career, which included a lost chance to play in the Ryder Cup ...

16 Year Old Player Iced!

After the boy's parents filed suit, claiming their son was "robbed" in not being awarded MVP and top playmaker honors, the New Brunswick Amateur Hockey Association suspended Steven Croteau from the youth league. Daddy Michael Croteau is seeking $300,000 in psychological and punitive damages from the league for his son not winning the awards ...

ENTERTAINMENT:

Grokster & Streamcast Networks are not Liable

U. S. District Court Judge Stephen Wilson ruled that Grokster and Streamcast distribute file-sharing software and are not liable for when users copy the movies and music using the software. The Los Angeles judge's ruling was appealed by lawyers for the studios and record companies. Despite the distributors also providing technical help, Wilson ruled that the two companies could not supervise and control users of their services. The ruling regarding file-sharing does not effect Sharman Networks' more famous Kazaa, which was not part of the case, nor did it effect Napster, which in a separate case was ordered to shut down. Grokster and Streamcast argued that unlike Napster, which hosted directories of users' files on its server, they "only provide software and technical assistance" and had no control over what the users did with the software ...

Verizon may be Liable

U. S. District Court Judge John Bates ruled that the 1998 Digital Millennium Copyright Act trumped First Amendment argument and Verizon was subject to subpoena to disclose the "music pirates" who offered downloaded free music from the Internet. The Act empowers music companies to require Internet service providers to give up the names of users alleged to have illegally offered and distributed free music online. Verizon's efforts to avoid turning over the names of two subscribers, failed to convince the court that customer privacy rights were jeopardized by mere allegations of illegal conduct stemming from free downloading and copying of the music ...

The journal can be accessed on-line at www.stcl.edu ...

Sylvester R. Jaime--Editor

With "questioned" jockeying at the Kentucky Derby and the "Pick Six" wire fraud conspiracy stemming from the Breeders Cup, two of the three legs of the famed Triple Crown have been in the legal sporting news. While Stewards at Churchill Downs vindicated Jose Santos' and his victory ride aboard Funny Cide at the Kentucky Derby, the Sport of Kings itself was vindicated when the sport showed it could monitor its races and Christopher Harn, Derrick Davis, and Glen DaSilva were caught trying to fix wagering on the Breeder's Cup.

In an effort to keep horse racing in the news and provide lawyers with a quick review of the allegations in the Pix Six case, the Complaint against the Defendants is published below. We are thankful to E. Eugene Palmer practicing law in Austin, Texas for forwarding the Complaint and hope that it proves an insightful read.

APPROVED:______________________________

BART G. VAN DE WEGHE
STANLEY J. OKULA, Jr.
Assistant United States Attorneys

BEFORE: HONORABLE GEORGE A. YANTHIS
United States Magistrate Judge
Southern District of New York

- x

UNITED STATES OF AMERICA : **<u>COMPLAINT</u>**

- V. - : violation of 18 U.S.C. §§ 371, 1343

CHRISTOPHER HARN, :
DERRICK DAVIS, and County of Offense:
GLEN DaSILVA, : Dutchess

Defendants.

- x

SOUTHERN DISTRICT OF NEW YORK, ss.:

JORGE PLATA, being duly sworn, deposes and says that he is an investigator with the New York State Police, and charges as follows:

1. From on or about September 1, 2002, up to and including the date of the filing of this Complaint, in the Southern District of New York and elsewhere, CHRIS HARN, DERRICK DAVIS and GLEN DaSILVA, the defendants, together with others known and unknown, unlawfully, willfully, and knowingly combined, conspired, confederated, and agreed together and with each other to violate Title 18, United States Code, Section 1343.

2. It was a part and an object of the conspiracy that CHRIS HARN, DERRICK DAVIS and GLEN DaSILVA, the defendants, and others known and unknown, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, unlawfully, intentionally and knowingly did transmit and cause to be transmitted by means of wire communication in interstate commerce, writings, signs, signals, pictures and sounds for the purpose of executing such scheme and artifice, in violation of Title 18, United States Code, Section 1343.

<u>Overt Acts</u>

3. In furtherance of the conspiracy, and to effect the illegal object thereof, the following overt acts, among others, were committed in the Southern District of New York and elsewhere:

a. On or about October 3, 2002, GLEN DaSILVA, the defendant, sent an application to open an Off-Track Betting ("OTB") account with Catskill OTB from Manhattan, New

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York, to Pomona, Rockland County, New York, via facsimile transmission.

b. On or about October 3, 2002, GLEN DaSILVA, the defendant, caused a "pick four" wager to be placed through his Catskill OTB account on horse races using a touch tone telephone wagering system routed to a number assigned to a Catskill OTB hub operated by Autotote Systems, Inc., in Poughkeepsie, Dutchess County, New York.

c. On or about October 3, 2002, approximately $1,757 was credited to the Catskill OTB account of GLEN DaSILVA, the defendant, as a result of the wager described in Overt Act (b) above.

d. On or about October 5, 2002, GLEN DaSILVA, the defendant, caused a "pick six" wager to be placed through his Catskill OTB account on horse races using a touch tone telephone wagering system routed to a number assigned to the Catskill OTB Autotote hub in Poughkeepsie, New York.

e. On or about October 5, 2002, GLEN DaSILVA, the defendant, caused approximately $107,608 to be credited to his Catskill OTB account as a result of the wager described in overt Act (d) above.

f. On or about October 7, 2002, GLENN DaSILVA, the defendant, sent a facsimile transmission from Manhattan to Catskill OTB in Pomona, New York, requesting an $80,000 check.

g. On or about October 15, 2002, GLEN DaSILVA, the defendant, deposited a check in the amount of $80,000, which represented most of the net proceeds of the wager described in Overt Act (f) above, into his Citibank account number 12886734 in Manhattan, New York.

h. On or about October 18, 2002, DERRICK DAVIS, the defendant, sent an application to open an OTB account with Catskill OTB from Maryland to Pomona, New York, via facsimile transmission.

i. On or about October 26, 2002, CHRISTOPHER HARN, the defendant, used a computer at his place of employment, Autotote Systems, Inc., located in Newark, Delaware, to access the Catskill OTB Autotote hub in Poughkeepsie via modem.

j. on or about October 26, 2002, DERRICK DAVIS, the defendant, caused a "pick six" wager to be placed through his Catskill OTB account on horse races held at the Breeders' Cup located at Arlington Park near Chicago, Illinois, using a touch tone telephone betting system routed to a number assigned to the Catskill OTB Autotone hub in Poughkeepsie, New York.

k. On or about October 26, 2002, DERRICK DAVIS, the defendant, caused approximately $3,067,821 to be credited to his Catskill OTB as a result of the wager described in Overt Act (j) above.

(Title 18, United States Code, Section 371.)

The basis for my knowledge and the foregoing charges is, in part, as follows:

4. 1 am an investigator with the New York State Police, and have been so employed for approximately sixteen years. For approximately the last two weeks, I have been assigned to what has evolved into a joint federal and state investigation into fraudulent wagering, specifically involving bets placed by wire (i.e., essentially, telephone and computer) on horse races. To date, the investigation has uncovered well over $3 million in winnings generated by bets fraudulently placed.

5. This affidavit is based on my conversations with other law enforcement agents and witnesses, and my examination of reports and records. Because this affidavit is being submitted for a limited purpose, I have not included details of every aspect of this investigation. Indeed, while providing the Court with enough information to establish probable cause that criminal offenses have been committed, I have been especially mindful of security concerns - i.e., of the need to limit unnecessary public dissemination of information that could be used by would-be perpetrators of fraud to attempt to compromise the integrity of the computer wagering system. Moreover, where the contents of documents and the actions, statements, and conversations of others are reported herein, they are not reported verbatim, but in substance and in part.

BACKGROUND

6. During the course of my investigation, I have learned how certain types of wagers are placed and processed for horse races held around the country. A company known as Autotote Systems, Inc., headquartered in Newark, Delaware (hereinafter "Autotote"), processes a large percentage of wagers placed on horse races in North America. Numerous satellite or "hub" wagering franchises operated locally around the United States

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are affiliated with Autotote, which in turn acts as a central processing center for wagers that are placed by bettors through the hub franchises. These hubs provide wagering customers the opportunity to utilize open accounts for placing wagers through those accounts on horse races held throughout the country. one of the hub operations affiliated with Autotote is Off-Track Betting Company located in New York (hereinafter "OTB") . Catskill OTB is an OTB franchise headquartered in Pomona, New York. Autotote provides on-site services to Catskill OTB by maintaining a hub for Autotote in Poughkeepsie, New York, which is used for operating Catskill OTB's wagering system.

7. One of the ways in which OTB account holders can place wagers is through the use of an Interactive Voice Recognition system (hereinafter "IVR"). The IVR is operated primarily by using a touch tone telephone to dial the access number and place wages through customer accounts held at the hub locations using the touch tone numbers on the telephone to enter data. The wagers placed through the IVR system for the Catskill OTB accounts are electronically entered by the customer by calling a number routed to the Catskill OTB Autotote hub in Poughkeepsie, New York. The wagering data is then entered via the IVR system and is maintained in the Autotote computer system at the Poughkeepsie hub for a period of time.

8. At some point during the day of a particular horse racing event, the wagering data entered via the IVR system and maintained by the Catskill OTB Autotote hub in Poughkeepsie is "scanned" by Autotote, which in turn transmits the data related to any winning tickets to the entity hosting the particular racing event, or the host track. That data is then used by the host track to sort the data related to the winning tickets and, ultimately, to pay the winning customers.

9. CHRISTOPHER HARN, the defendant, was a senior computer programmer with Autotote in Newark, Delaware, until he was dismissed from his employment at Autotote on October 30, 2002. Prior to that, HARN was involved in upgrading Autotote's computer systems for the purpose of implementing the IVR wagering system installed at Autotote during April and May of 2002. HARN also had access, through his Autotote employment, to data collected via the IVR system and held at various Autotote hub locations, including Catskill OTB in Poughkeepsie, New York. HARN was able to access that data from Newark, Delaware, through a modem connection with the Catskill OTB location in Poughkeepsie.

THE INVESTIGATION

10. On Saturday, October 26, 2002, the annual Breeders' Cup horse races were held at Arlington Park located in the outskirts of Chicago, Illinois. The Breeders' Cup features a series of prominent horse races that attract international attention and widespread wagering, including off-track wagering through services such as OTB in New York. Because of a variety of unusual and suspicious circumstances (some of which are further described below), particular attention was drawn to a upick-six" bet - i.e., a wager that requires the bettor to pick the winning horse in six different races -which paid approximately $3 million dollars to the person who placed the bet, the defendant DERRICK DAVIS.

11. DAVIS's betting pattern for the Breeders' Cup races was highly unusual. In the first four of the six races, his bets featured "singles," i.e., the selection of only one horse to win each of the first four races of the six-race ticket. For the last two races, DAVIS picked every horse entered in each of those races to win, which is known as playing "the field". DAVIS bet $12 on a "pick six" ticket using that particular combination of picking the winning horses and strategy, which cost DAVIS a total of $1,152 based upon the number of combinations he played with that ticket. That "pick six" ticket attributed to DAVIS resulted in a winning combination for all six races purportedly selected on that ticket.

The payoff for that ticket was approximately $3,067,821. DAVIS, who had an account with Catskill OTB, placed his "pick six" bets using the IVR system.

12. Due to the unusual wagering pattern apparent from DAVIS' pick six tickets, investigators with the New York State Racing and Wagering Board, together with officers from several state and federal law enforcement agencies, including the New York State Police and the Federal Bureau of Investigation, began to investigate the circumstances surrounding DAVIS' alleged winning upick six" ticket as well as other potentially suspicious winning tickets in past races. In connection with that investigation, it was determined that CHRISTOPHER HARN reported to work at Autotote in Newark, Delaware, on October 26, 2002,

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even though he was not scheduled to work on that day. During the time that HARN was at Autotote on October 26, he accessed the Autotote system at the Catskill OTB hub in Poughkeepsie from Newark, Delaware, via modem connection. According to Catskill OTB Autotote hub and Autotote employees in Newark, Delaware, HARN had access to the Catskill OTB wagering data during the same time that the Breeders, Cup races for the "pick six" tickets that DERRICK DAVIS purchased via the IVR system were being electronically maintained at the Catskill OTB Autotote hub in Poughkeepsie.

13. Telephone records indicate that calls were placed from a cellular telephone number subscribed to in the name of DERRICK DAVIS to a cellular telephone number subscribed to in the name of CHRISTOPHER HARN on October 26, 2002, during the time that the Breeders' Cup races were being run. Records also establish that calls were made from HARN's cellular telephone phone to the IVR system routed to the Catskill OTB Autotote hub in Poughkeepsie at or near the time that the alleged winning wager was placed through DAVIS's Catskill OTB account. In addition, an Autotote employee in Newark, Delaware, has told investigators that he saw HARN receive one or more calls on his cellular telephone on October 26, 2002, during the same time period that HARN had accessed the Catskill OTB hub in Poughkeepsie via computer in Newark, Delaware.

14. Investigators have determined that CHRISTOPHER HARN, GLENN DaSILVA and DERRICK DAVIS all attended Drexel University in Philadelphia together during the early 1990s. All three defendants pledged at the Tau Kappa Epsilon ("TKE") fraternity in 1992.

15. The investigation further determined that GLENN DaSILVA, the defendant, had won bets on horse races by using unusual "pick four" (i.e., the bettor picks one winning horse in each of the first two races and all of the horses in each of the last two races) and "pick six" combinations similar to those used by DERRICK DAVIS in placing his wagers on October 26, 2002.

16. According to records obtained by investigators, GLENN DaSILVA opened a Catskill OTB account on October 3, 2002. DaSILVA opened the account by faxing an application obtained via the Internet from a number in Manhattan, New York, to Catskill OTB headquarters in Pomona, New York. DaSILVA then used the account to purchase a "pick four" ticket using the IVR system. The "pick four" combination allegedly reflected on DaSILVA's ticket resulted in a winning combination which paid $1,757 to DaSILVA's account.

17. On October 5, 2002, DaSILVA, again using the IVR system, purchased several "pick four" and "pick six" tickets through his Catskill OTB account. One of the "pick six" combinations allegedly reflected on DaSILVA's ticket was similar to that described above as to DERRICK DAVIS' allegedly winning "pick six" ticket on October 26, 2002, i.e., DaSILVA picked one winning horse in each of the first four races and bet on all of the horses in the last two races. That ticket allegedly resulted in a winning combination paying $107,608 to DaSILVA's account. On October 7, 2002, DaSILVA sent a facsimile transmission from a number in Manhattan to Catskill OTB headquarters in Pomona requesting payment of $80,000. On October 8, 2002, Catskill OTB sent DaSILVA a check for $80,000, which represented most of the net proceeds of his allegedly winning "Pick six" ticket (after deductions for taxes and fees). DaSILVA deposited the check into his Citibank account number 12886734, located at a branch in Manhattan, on or about October 15, 2002.,

WHEREFORE, deponent prays that a warrant be issued for the arrest of the above-named individuals and that they be arrested and imprisoned or bailed as the case may be.

JORGE PLATA
Investigator
New York State Police

Sworn to before me this
8th day of November, 2002

UNITED STATES MAGISTRATE JUDGE
SOUTHERN DISTRICT OF NEW YORK

Calendar of Events of Interest ...

- **MAY 29, 30 & 31, 2003:**
  SPORTS LAWYERS ASSOCIATION 29TH ANNUAL MEETING
  JW MARRIOTT DESERT RIDGE RESORT & SPA, PHOENIX, AZ
  FOR MORE INFO CALL: 703-437-4377 OR FAX 703-435-4390
  SEE WEBSITE www.sportslaw.org
- **MAY 30 & 31, 2003, JUNE 27 & 28, 2003 HOUSTON, TEXAS**
  JUNE 6 & 7, 2003, DALLAS, TEXAS
  SEMINAR: "SPORTS & ENTERTAINMENT LAW IN A NUTSHELL"
  FOR MORE INFO CALL: 713-621-5522 OR 214-941-0200
- **JUNE 13, 2003: ANNUAL MEETING**
  ENTERTAINMENT AND SPORTS LAW SECTION OF THE STATE BAR OF TEXAS
  (FREE CLE) FEATURED SPEAKERS:
  OLIVER LUCK, EXECUTIVE DIRECTOR, HOUSTON SPORTS AUTHORITY AND
  JEFF LEWIS, CHAIRMAN CLEAR CHANNEL ENTERTAINMENT SPORTS DIVISION
  GEORGE R. BROWN CONVENTION CENTER, HOUSTON, TEXAS
  To REGISTER FAX 512-463-7388 OR 512-463-1475
  SEE WEBSITE www.TexasBarCLE.com
- **JUNE 23, 24, 25, 2003:**
  2003 INTERNATIONAL FILM & TELEVISION FINANCE SUMMIT
  REGENCY HOTEL, NEW YORK
  TO REGISTER CALL 914-946-4010 OR FAX 914-946-3495
  SEE WEBSITE www.atlasinform.com

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www.texsbarcle.com

JOURNAL LOOKING FOR WRITERS

The call is out for writers.

The *Journal* is looking for writers in the areas of women's sports and entertainment. With the wealth of subject matter, anyone interested in writing may contact the Editor with articles or ideas for an article.

Student Writing Contest

The editors of the TEXAS ENTERTAINMENT AND SPORTS LAW JOURNAL ("Journal") are soliciting articles for the best article on a sports or entertainment law topic for the fifth annual writing contest for students currently enrolled in Texas law schools.

The winning student's article will be published in the Journal. In addition, the student may attend either the annual Texas entertainment law or sports law seminar without paying the registration fee.

This contest is designed to stimulate student interest in the rapidly developing field of sports and entertainment law and to enable law students to contribute to the published legal literature in these areas. All student articles will be considered for publication in the Journal. Although only one student article will be selected as the contest winner, we may choose to publish more than one student article to fulfill our mission of providing current practical and scholarly literature to Texas lawyers practicing sports or entertainment law.

All student articles should be submitted to the editor and conform to the following general guidelines. Student articles submitted for the writing contest must be received no later than September 1, 2003.

Length: no more than twenty-five typewritten, double-spaced pages, including any endnotes. Space limitations usually prevent us from publishing articles longer in length.

Endnotes: must be concise, placed at the end of the article, and in Harvard "Blue Book" or Texas Law Review "Green Book" form.

Form: typewritten, double-spaced on 8½" x 11" paper and submitted in triplicate with a diskette indicating its format.

We look forward to receiving articles from students. If you have any questions concerning the contest or any other matter concerning the Journal, please call Andrew T. Solomon, Professor of Law and Articles Editor, Texas Entertainment & Sports Law Journal, at 713-646-2905.

Excessive Violence in Sports - Part II: The Hackbart Rule - Who got it Right, and Does it Even Matter?

Justin Reiner
Willamette University – College of Law
Salem, Oregon

(PART 2 OF 2. PART 1 OF THIS ARTICLE APPEARED IN JOURNAL ISSUE VOLUME 12 NO. 1, SPRING, 2003)

Justin Reiner is in his 2nd Year Student at Willamette University College of Law in Salem, Oregon. Following graduation from law school, he plans to return home to Maryland to pursue a law career in Washington D.C. In an effort to combine his legal studies with the sports world, he is interested in pursuing a career as a sports agent or a sports litigator. He is a graduate of the University of Massachusetts-Amherst.

IV) Hockey, A Comparative Sport for Applying *Hackbart*

Another sport that over the years has come under as much, if not more scrutiny pertaining to excessive violence than the NFL, is the NHL. While the reasoning and application of the appellate court findings of Hackbart can easily be transferred to hockey due to broad similarities between these two sports, hockey has a more extensive case law history, specifically with regard to the manner in which courts handle on-the-field (rink) violence. Following is a discussion of incidents of violence within the NHL (and its minor league affiliates), the difference in the way the U.S. and Canadian courts proceed with the causes of action and the relative effectiveness of both systems.

A) Excessive Violence in NHL (U.S.) Hockey

As a league, the NHL has struggled to find an identity within the popular sports culture of the United States. In this search, fighting has emerged as a part of the game and remains a primary appeal and lure to fans that are not always educated in the more technical intricacies of the sport. Fighting was (and remains) so instrumental to the growth of the sport from an economic standpoint, that a president/commissioner of the league has never denounced fighting.[42] Thus, one can only presume that this non-committal approach or failure to abolish or reduce fighting will only encourage further fighting and lead to increasingly assaultive behavior on the ice. While fighting remains an integral part of the game, how far does this premise of acceptance extend beyond the player or rink?

From the seventies until the late nineties, no player in the NHL or its minor league affiliates has been convicted in a criminal court for violence in the rink for conduct exceeding that either proscribed by the league or by the law. In addition, league sanctions that were imposed for violence were most often limited to one or two game suspensions and minimal fines.

Recently, however, the trend of hockey players getting off easily for actions accepted as "inherent to the game" is no longer a certainty. In fact, a few incidents that have occurred over the past couple of years suggest less tolerance for and a growing number of prosecutions for violent, on-ice behavior. However, the U.S. courts still remain a far second behind its compatriots in Canada, which have traditionally and more aggressively prosecuted acts of excessive violence on the hockey field.

B) NHL Canada Prosecution vs. NHL U.S. Prosecution

There is a significant difference between the prosecutorial treatment afforded players from the NHL (within the U.S. court system) and the NHL (within the Canadian court system) when dealing with excessive violence. The main difference is that the Canadian courts are not shy to prosecute NHL players nor a player from its minor league affiliates. Central to this difference, however, is the assessment of the relative effectiveness of Canada's prosecutions in contrast to selective prosecutions in the U.S. Even though Canada aggressively pursues prosecutions for on-ice violence, does this system provide enough convictions to serve as a deterrent to future actions? Another line of inquiry in evaluating the relative effectiveness of the two systems is the type of or severity of punishments imposed for similar offenses. For example, is conviction in Canada's courts likely to result in a fine and/or imprisonment or a more or less severe penalty than the more frequently exercised U.S. system of league self-regulation? To get to that determination, let us first examine the acts of excessive violence that have occurred within Canada.

i) Incidents Within Canada

As hockey is the national sport in Canada, excessive violence may be viewed as significantly more detrimental to the integrity of the game than in the United States and therefore prosecuted more extensively. Despite the fact that more court cases arise in Canada regarding on-ice violence, the number of adjudications are often slight in comparison to the number of league reprimands. The first case to arise in Canada resulting from an act of on-ice violence was *Regina v. Maki.*[43] This case resulted from an incident involving Chico Maki of the St. Louis Blues, and Ted Green of the Boston Bruins. After several encounters on the ice, the two began to scuffle in front of the Boston net, swinging their sticks at each other.[44] Green swung first, hitting Maki in the neck/shoulder area and then raised his stick again gesturing towards Maki. Maki then swung his stick at Green, which glanced off his stick, and struck him in the side of the head.[45] Maki asserted a claim of self-defense, and the charge was successfully dismissed.[46] However, since this was the first time criminal charges resulted from an athletic event in Canada, the court felt obligated in its opinion to articulate the courts role in policing excessive violence in sports.

The court delved deep into the merits of consent as a defense for excessive violence because the defense asserted it as an alternative to self-defense. The judge stated, "If no doubt was raised in his mind regarding self-defense (if Maki had not acted in self-defense), he would not have hesitated to convict Maki.[47] Regarding consent and its application to cases of assault within sports leagues, the court rendered an opinion almost identical to the appellate court's opinion in *Hackbart*, which occurred nearly 10 years later in the U.S.

In Maki, the court went on to say, "No sports league, no matter how well organized or self policed it may be, should thereby render players in that league immune from criminal prosecution." [48] [49] Similarly to Hackbart but perhaps stated more concisely, the court noted that in deciding where players should be held liable for their actions, it is difficult, if not impossible, to decide how the line is to be drawn in every circumstance.[50] Again, as a further

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foreshadowing of the opinion yet to be decided in *Hackbart*, the district court concluded that the lines between reasonableness were impossible to draw. The court further realized that players assume the risks inherent in their respective sports and that consent should be barred as a defense "only where the act is malicious, unprovoked or an overly violent attack.[51]

As became true in *Hackbart* years later, the *Maki* court finding opened the door to the possibility of players being held liable for their actions on the field or rink. Since this landmark decision, the Canadian court system has continued to prosecute players for on-ice conduct.[52] Ironically, the next year, under circumstances ostensibly more violent than in *Maki*, (player checked opponent from behind, threw him to the ice, and continued to strike him while he was unconscious)[53] the player was nonetheless acquitted.

In *Regina v. Watson*,[54] a junior hockey player was convicted of assault causing bodily harm for pressing his forearm against an opposing player's throat until he lost consciousness. However, the court granted the defendant a sentencing discharge having decided that the defendant had already suffered agony as a result of the trial.

During the early years of excessive violence litigation in sports, the Canadian courts began to draw lines of reasonableness between conduct that took place in the heat of the moment and action that occurred after play ceased. In *Regina v. Gray*,[55] the player was found guilty of assault causing bodily harm when he came off the bench in order to join a fight. When determining whether the victim had implicitly consented to the defendant's conduct, the court determined that this assault was not inherent and reasonably incidental to the sport of hockey.[56]

Over the past decade or so, the courts have begun to convict players more frequently for on-ice assault. And, where the courts initially differentiated between conduct that was incidental to the game and in the heat of the moment (*Maki)*, with conduct occurring after the play was over (*Gray),* recent court decisions are now simply finding incidents that occur during the course of play to be excessively violent. Since the most common defense to excessive violence is consent, the court in *Regina v. Cey*,[57] developed a five-part test to determine if valid consent exists in the context of an athletic event. They are: "(1) Nature of the game; (2) nature of the act; (3) the degree of force employed; (4) the degree of risk of injury; and (5) the state of mind of the accused."

In applying the above test to the case of Dino Ciccarelli of the Minnesota North Stars (Ciccarelli struck an opponent in the head with his stick three times after the player checked him after the whistle had blown), the court found Ciccarelli guilty of assault, sentenced him to one day in jail and fined him one thousand dollars.[58]

By far the most publicized incident of excessive violence in the modern era of hockey is that involving Marty McSorley of the Boston Bruins, and Donald Brashear of the Vancouver Canucks on February 21, 2000. After fighting and losing to Brashear early in the contest, McSorley sought revenge later in the game by trying to goad Brashear into another fight, which Brashear would have no part of. With time winding down, and his team significantly behind, McSorley skated towards Brashear from behind and slashed at his head with his stick.[59] Brashear's head smacked the ice, sending him into convulsions.[60] The NHL immediately suspended McSorley for the remainder of the season. Later, he was convicted of assault and given an 18-month conditional discharge by the court[61] (Note: public outrage fueled the prosecution of McSorley, and Mattias Ohlund of the Canucks said the following (a rare opinion from a player as to whether athletes should be held criminally liable for their actions):[62]

> If McSorley plays another game in this league, than this league is a joke. That guy should be treated the same as if he tried to kill a guy on the street because that's what he could have done had his stick hit Brash across the neck.

Larry Wigged, *The Sporting News, Stick it to the Players who Swing their Sticks* http://www.findarticles.com/cf_0/m1208/10_224/60081446/print.jhtml (March 6, 2000).

Incidentally, Wayne Gretzky, perhaps the most respected NHL player of all time, in his position as President of the Phoenix Coyotes (NHL), hired McSorley as the head coach of their minor league affiliate team the Springfield Falcons in October of 2002.[63]

While Canada has shown general strides in the area of handling excessive violence in athletic events, many deficiencies remain in the court system's battle to deter excessive violence in sports. As can be seen, sentences given to the players have been minor in comparison to the league's own punishment system. McSorley, as noted above, was suspended without pay for about a quarter of the season (for all intensive purposes ending his hockey career because of his age), depriving him of his livelihood, and keeping him from the game he loved. This penalty went far beyond the court's "slap on the wrist" of an 18-month conditional discharge or probationary period. In this regard, the league sent a very clear message to other players. If a player does something that reflects poorly on the sport and puts another player at risk, the resulting action against the player will be done quickly, decisively and appropriately.[64]

In conclusion, the barriers that exist in the U.S. do not appear to be as prevalent in Canada, a likely reason that prosecutions in Canada are more frequent. For consent, unlike in the U.S., there is a five-part test to help draw lines as opposed to the recklessness standard for reasonable conduct and other implications of the *Hackbart* decision. Direct to the issue of prosecutorial hesitancy, Geoffrey Gaul, a spokesman for the Vancouver prosecutor in charge of the McSorley case, said the following: "The public interest does require a prosecution."[65] This is an obvious and clear contradiction to U.S. commentary suggesting that the purpose of criminal law is to protect the public, and that the athlete assumes the risk of their respective sport[66] (The implication being that the prosecution of athletes is not in the public interest).

From the preceding discussion, the Canadian courts have shown that the appellate courts holding in *Hackbart* (although football and not hockey, and the U.S. not Canada) that lines can be drawn between what conduct is reasonable, as opposed to unreasonable, and that violence is a proper subject for the courts was correct. Regardless, this question still remains: If lines can be drawn and conduct can be assessed for its reasonableness, has the system proven itself effective in achieving the objective of deterring sports violence?

ii) Incidents Within the United States

The most famous case in the United States involving the NHL followed a 1975 incident involving Dave Forbes, a player for the Boston Bruins. Forbes knocked down an opposing player and proceeded to punch him in the back of the head, and pummel his head into the ice.[67] This was the first U.S. case where a player was criminally prosecuted for on-ice violence. (The *Hackbart* case,

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which was decided around the same time as *Forbes*, was a civil action.) Although the evidence was overwhelmingly against Forbes, he was nonetheless acquitted by a split jury decision.[68]

Alarmingly, from the time of this incident until today, the criminal court system within the U.S. has deferred to league self-regulation within hockey. (Much like the aftermath of *Hackbart*). More noteworthy, is the case of Stephen McKihan of the Vancouver Canucks, in which the action for damages that was granted by the trial court was later reversed by the appellate court after the hit on McKihan was ruled an inherent part of the game (even though it took place after the whistle).[69] This decision came eight years after the incident, an action both in severity and speed that can hardly be considered a deterrent.

On a more optimistic note, there appears to be at least the trend for increased scrutiny or intervention by the courts although sentences remain lenient. Two incidents, which suggest this to be true, occurred in 1998 (although not in the NHL). The first incident involved Jason MacIntyre, a 25-year-old defenseman playing in the West Coast Hockey League (WCHL). MacIntyre hit an opposing player in the face with his stick causing multiple injuries.[70] MacIntyre was arrested between periods, banned from the league for life and placed on probation for two years as a result of his on-ice actions.[71] Although the probation imposed on MacIntyre by the court was the longest punishment received by a player for on-field violence within the U.S., this punishment paled in comparison to his being barred from hockey by the league for life.

The second incident involved Jesse Boulerice, who while playing in a minor league hockey game "grabbed his hockey stick at the end of the handle with both hands, and swung his hockey stick, in a baseball type swing, at Andrew Long."[72] Similar in substance to the McSorley incident, which was prosecuted in Canada a couple of years later; the victim here hit the ice and went into convulsions.[73] However, the injuries suffered in this case were more severe than those reported in McSorley. Following the path of the NHL, the Ontario Hockey League (OHL) suspended Boulerice for a year.[74] In addition, Boulerice was suspended from the Philadelphia Flyers minor league team (to which he was assigned) for six months.[75] Also, formal assault charges were filed against Boulerice by Long in Wayne County, Michigan. Originally charged with assault with intent to commit great bodily harm, Boulerice was able to plea to a reduced charge of aggravated assault, no trial was held, and he was sentenced to 3 months probation.[76] Although deterrence for players as a result of the court's action in this case is not likely, the league suspension of one year and six months will certainly have a greater impact in that regard.[77] Despite the noted increased prosecution indicated above, to this day, no player in the NHL or its minor league affiliates has been sent to jail for conduct in an athletic event that occurred on U.S. soil.

iii) Whose Approach is More Effective?

The U.S. courts have taken a seemingly hands-off approach to incidents of on-ice (or on-field) violence, apparently following the district courts approach that these incidents are a reasonably foreseeable aspect of the game, not withstanding the case of Boulerice, where the victim actually filed the charge. On the other hand, case law seems to suggest that it is possible to judge the reasonableness of on-field (on-ice) actions, in direct contradiction of the district court's approach. However, the limited number of prosecutions and lenient sentencing results seem to confirm that too many barriers prevent the appellate court's approach from being implemented on a consistent basis. Unfortunately, it appears that many of the same considerations that prevented prosecution earlier in case law still exist. Perhaps reluctantly, prosecutors and the courts still turn to the leagues for self-policing, regulation and the awarding of penalty except in the most severe of cases.

Following the appellate courts reasoning in *Hackbart*, Canadian courts are not reluctant to draw a line between reasonable and unreasonable action in athletic events.[78] As such, Canadian courts prosecute more incidents of excessive violence than its U.S. counterparts. Still, the question remains as to whether this approach is really more effective than self-regulation by the leagues?

It should be noted that Canadian case law, while more extensive, does not show the requisite effectiveness to support the appellate decision, despite the growing initiative toward more immediate response and harsher penalties. In the United States, both the NFL and NHL have begun to increase league scrutiny towards violence, and this trend seems to give some hope for the future regarding this issue. However, in spite of *Hackbart* being a landmark decision, the practical application of the appellate court's approach remains less effective than league self-regulation. This is not to say that the district court had it right in *Hackbart,* since the only indication of that being so is in the *McKihan* opinion, which states "the professional leagues have internal mechanisms for penalizing players and teams for violating league rules and for compensating persons who are injured."[79]

Until the Canadian courts can convict players and implement punishments that will be a deterrent, even though its system gets more players into court, the effectiveness of the system is less than adequate. While the United States system has become increasingly willing to prosecute athletes for excessive, on-field violence, it continues to confront the same problem as its Canadian counterpart. That is, punishments are usually little more than a slap on the wrist as evidenced by no player having been sent to jail.

V) Conclusion

In essence, it does not matter who got it right in *Hackbart*, as the court systems in both Canada and the U.S. are inadequately prepared or not quite ready to utilize prosecutorial and sentencing means as an approach to deter the numerous occurrences of on-field violence. This is exemplified in Canada by the inadequate sentencing penalties given to players when convicted for on-ice violence, and epitomized in the U.S. by the dearth of criminal prosecutions against athletes for on-field violence. Until the court system can overcome the many barriers to prosecute athletes, and until they devise methods that include a criminal deterrent component with real teeth, league self-regulation will remain the single and most prolific method to battle on-field violence. The factors of consent, prosecutorial hesitancy and overcrowded dockets are all viable reasons why the leagues and not the court system should regulate excessive violence. Due to lack of definition and direction by the court, it is clear that too much ambiguity exists in case law to provide prosecutors with the confidence they need to pursue criminal charges in the many instances of on-field, excessive violence that pervades major league sports. Some of this reluctance belongs to pressure applied against prosecution by the public and owners who strongly argue that the leagues should be responsible for self-regulation. This argument is difficult to fight when leagues seem to have less difficulty and are therefore presently in a better position than the court system

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to draw the line of demarcation between criminal and non-criminal on-field violence. Further, the leagues seem to have a more favorable report card than the courts regarding the tests of certainty, swiftness, and severity regarding their response to excessive violence in sports. Self-regulation by the league remains the most effective deterrent to violence when the discipline the leagues employ hits the players where it hurts most, in their wallets—a result that can be achieved through either fine, game suspension or both. Certainly, depriving a person of their livelihood is not a matter that is taken lightly by the professional athlete.

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[1] *Hackbart v. Cincinnati Bengal's, Inc., 435 F. Supp. 352 (*D. Colo. *1977).*
[2] *Hackbart v. Cincinnati Bengal's Inc.,* 601 F.2d 516 (10th Cir. 1979).
[3] *Hackbart*, 435 F.Supp at 357.
[4] Justice O.W. Holmes, The Common Law (1881).
[5] *Hackbart*, 435 F. Supp. at 355.
[6] *Id*.
[7] *See id*. at 356.
[8] *Hackbart*, 435 F. Supp. at 358.
[9] The NFL rules of play are so legalistic in their statement and so difficult of application because of the speed and violence of the play that the differences between violations, which could fairly be called deliberate, reckless or outrageous, and those, which are "fair play", would be so small and subjective as to be incapable of articulation. *Id.*
[10] *Id.*
[11] *Hackbart*, 435 F. Supp. at 358.
[12] There have been two attempts to legislate for excessive violence within sports. The first, the Sports Violence Act of 1980 capped the liability of a player who uses "excessive physical force that posed a risk of significant injury" to a fine of $5,000, a jail term of one year or both. This attempt at holding players criminally liable ran into problems because of the ambiguousness of what acts of violence were "excessive" or "unreasonably" violent. The second attempt was to try and curb excessive violence (both in number and cost) through arbitration, not the court system in the Sports Arbitration Act of 1983. This bill also failed because of the ambiguous nature of the terms, which defined excessive violence. Since 1983 there have been no other legislative attempts at regulating excessive violence in sports, and the predominant to deter is league self regulation. Robert C. Berry, Glenn M. Wong, *Law and Business of the Sports Industries* Volume II, 693 (2d ed., Greenwood Publishing Group, Inc., 1993).
[13] The court came to this conclusion from the following excerpt from the district court: The difficulty with the view that some restraints of civilization must accompany every athlete onto the playing field is that, applied to professional football, to decide which restraints should be made applicable is a task for which the courts are not well suited…. The NFL has substituted the morality of the battlefield for that of the playing field, and the "restraints of civilization" have been left on the sidelines. *Hackbart*, 435 F.Supp. at 358.
[14] *Hackbart*, 601 F.2d at 520.
[15]That this is prohibited was supported by the testimony of all the witnesses. They testified that the intentional striking of a player in the face *or from the rear* (emphasis added) is prohibited by the playing rules as well as the general customs of the game. *Hackbart*, 601 F.2d at 521.
[16] Assault was defined by the court as "an attempt coupled with the present ability to commit a violent harm against another," and battery as "the unprivileged or unlawful touching of another." *Hackbart*, 601 F.2d at 520.
[17]*Hackbart*, 435 F. Supp. at 356.
[18] *Hackbart*, 601 F.2d at 524 (emphasis added).
[19] *Id*.
[20] *Hackbart,* 601 F.2d. at 526.
[21] In 1986, Charles Martin of the Green Bay Packers slammed quarterback Jim McMahon of the Chicago Bears to the ground (which was illegal). It was later found out that Martin kept a "hit-list" of player's numbers on his towel during games. Wayne R. Cohen, *The Relationship Between Criminal Liability and Sports: A Jurisprudential Investigation*, 7 U. Miami. Ent. & Sports L. Rev. 311, 312 (Spring 1990). In an incident with more serious ramifications, Jack Tatum of the Oakland Raiders hit Daryyl Stingley of the New England Patriots "legally", resulting in Stingley becoming paralyzed. In Tatum's biography, he stated that he made the hit viciously with the intent to put a player out of commission. Berry, *supra* n.12 at 693.
[22] Where the victim voluntarily undertakes an activity involving definite risks of injury because of his desire to achieve a certain end or goal, that individual is arguably willing to suffer all foreseeable consequences whenever he voluntarily places himself in a position where those consequences may result. C. Antoinette Clarke, *Law and Order on the Courts: The Application of Criminal Liability for Intentional Fouls During Sporting* Events, 32 Ariz. St. L.J. 1149, 1174 (Winter 2000).
[23] Walter T. Chapman, Jr., *Sports Law: In a Nut Shell*, 195 (West 1993).
[24] Assumption of the risk is where the plaintiff has given prior consent to what would normally be an un-permitted, potentially injury-causing action. This **consent** effectively relieves defendant's obligation of any standard of care toward the plaintiff. A participant in a contact sport assumes the risk of violent contact and **consents** (emphasis added). Berry, *supra* n.12 at 421, 684.
[25] Chapman, *supra* n. 23 at 97.
[26] Paul Tagliabue, the NFL commissioner, in recent weeks issued a warning to all coaches around the NFL, putting them on notice to end illegal hits around the league. This is in part to the leagues continuing efforts at a crackdown of league violence. This edict was delivered after a week in which several safeties around the league were either fined or suspended, including Darren Woodson ($75,000 for a helmet-to-helmet hit); Brian Dawkins ($50,000 for a hit); Gary Walker ($15,000 for a helmet-to-helmet hit); Rodney Harrison (1 game suspension, for 3rd helmet-to-helmet infraction) and Kenoy Kennedy (1 game suspension for 3rd helmet-to-helmet infraction). *Commissioner: Stop the Violence or Face Consequences*, http://espn.go.com/nfl/news/2002/1103/1455110.html (Nov. 3, 2000).
[27] "Players don't believe they should have to back off and argue that, in some cases, the physical laws of motion make it impossible to avoid helmet-first contact. Players insist that, in most cases, they are not intentionally attempting to initiate helmet-to-helmet collisions. But the *game's pace is so quick, the athletes so advanced, that it is impossible in some instances to avoid such hits* (emphasis added)". This quote supports the fact that these types of hits are an inherent part of the game, that speed and ferocity breed the conduct, and players know of the potential of injury from these type of collisions. Len Pasquarelli, *No Easy Answer to Helmet-to-Helmet Hits*, page 3.
[28] Michael E. Jones, *Sports Law*, 134 (Prentice Hall 1999).
[29] Daniel R. Karon, *Winning isn't everything, it's the only thing. Violence In Professional Sports: The Need for Federal Regulation and Criminal Sanctions,* 25 Ind. L. Rev. 147 (1991).
[30] The first and primary theory for criminal sanctions is the prevention theory—that is, punishment will keep a criminal from becoming a repeat offender. The theory's aim is to rehabilitate the offender in the criminal justice system. Second, the deterrence theory, which states that exacting punishment for bad conduct deters others from committing crimes, lest they suffer the same fate. Finally, they discuss the education theory of punishment. This states that the publicity that surrounds a criminal trial and the subsequent punishment of criminals serves to educate the public as to the nature of right and wrong. Berry, *supra* n.12 at 681-82.
[31] In the NHL, Article 18 of the league constitution, entitled "Commissioner Discipline" empowers the commissioner to implement supplemental discipline (in addition to fines/suspensions mandated in section b) under exhibit 8 which provides that players are responsible for their action where they undertake "excessive force in contact otherwise permitted by NHL rules. Contained in the UPC of the NHL under section 2(e), players are to "refrain from conduct detrimental to the best interest of the Club, the League or professional hockey generally. In the NFL under Appendix C section 15 of the UPC, entitled Integrity of Game, the player is to recognize the "detriment to the League and professional football that would result from impairment of public confidence in the honest and orderly conduct of NFL games or the integrity and good character of NFL players…If the player is guilty of any form of conduct reasonably judged by the League Commissioner to be detrimental to the League or professional football, the Commissioner will have the right to fine Player a reasonable amount; to suspend Player for a period certain or indefinitely; and/or terminate this contract."
[32] *McKihan v. St. Louis Hockey Club*, 967 S.W.2d 209 (E.D. Mo. Div. 1 1998).
[33] *See id.* at 212-13.
[34] The court further stated that players regularly commit contact beyond that which is permitted by the rules, and are positive that this is also intentional. *Id*. at 213.
[35] *Id.*
[36] Colvert Hanson, 6 Seton Hall J. Sports L. at 151.
[37] *See id*. at 162-63.
[38] The video game aspect of the sport is not all inclusive of the hypocritical acts of the league, but is just a small recent example of how the league says one thing regarding on-field actions and supports another off the field.
[39] Rick Reilly, *The Life of Reilly: Robbing Darren to Pay Paul*, Sports Illustrated (November 11, 2002).
[40] Darren Woodson of the Dallas Cowboys who was fined $75,000 touched on this issue with Washington stating, "you're fining me on one hand for something you promote with the other.' So, yes, from my side of things I'd like to see some consistency there." *Id.* Further, Donovan Darius of the Jacksonville Jaguars said, on the one hand, the NFL is trying to increase the safety of the actual game. But on the other hand, they're doing all these things with video games and stuff to promote and glorify the violence of the game. It doesn't make a whole lot of sense. Darren Rovell, NFL Reviewing Excessive Violence in Video Games, <http://sports.espn.go.com/espn/print?id=1464315&type=new> (accessed December 5, 2002).
[41] In hopes of sending a more consistent message about the importance of on-field safety, the league is talking with game makers in an attempt to ensure that violence isn't being advocated by the virtual stadium. Rovell, *supra* n.40 at 1.
[42] The second to last president of the NHL, John Ziegler, when asked whether fighting should be eliminated, responded that it "did not matter to him" as he was in the entertainment business…. so if it's not broke don't fix it. The last president, Gil Stein, notes he was not advocating the removal of fighting, "Because that was up to the 24 (the league has since expanded to 30 teams) businessmen who run this game in each NHL city." Finally, Gary Bettman, the current and first commissioner of the league added that his concern is not with getting "rid of fighting," but "determining how much fighting should be allowed." J.C.H. Jones, Kenneth G. Stewart, *Hit Somebody: Hockey Violence, Economics, The Law, and the Twist and McSorley Decisions*, 12 Seton Hall J. Sport L. 165, 194 (2002).
[43] *Regina v. Maki*, 1 C.C.C. (2d) 333, 334 (1970).
[44] *Id.*
[45] *Id.*
[46] *Maki*, 1 C.C.C. (2d) at 334.
[47] *Id.*
[48] *Id.*
[49] In its corresponding case *Regina v. Green*, the court followed the feeling of the court in *Maki* by stating that, "While a common assault is difficult to establish in an NHL game, an unprovoked savage attack that results in serious injury could lead to a successful charge of assault causing bodily harm. Kevin A. Fritz, *Going to the Bullpen: Using Uncle Same to Strike Out Professional Sports Violence*, 20 Cardozo Arts & Ent. L.J. 189 (2002).
[50] *Maki,* 1 C.C.C. (2d) at 336.
[51] *Id.*
[52] While most cases in the years after *Maki* have involved minor league players, a discussion of minor league incidents is helpful to set up the context of how prosecutions and convictions have evolved over the years.
[53] *Regina v. Maloney*, 28 C.C.C. (2d) 323, 329 (1976).
[54] *Regina v. Watson*, 26 C.C.C. (2d) 150, 151 (1975).
[55] *Regina v. Gray*, Sask. D. Crim. Lexis 288 (1981).
[56] *Gray*, Sask. D. Crim. Lexis at 288.
[57] *Regina v. Cey*, 7 W.C.B. (2d) 376 (1989).
[58] *R. v. Ciccarelli*, 9 W.C.B. (2d) 402 (1989).
[59] John Timmer, *Crossing the Blue Line: Is the Criminal Justice System the Best Institution to deal with Violence in Hockey?*, 4 Vand. J. Ent. L. & Prac. 203, 206 (2002).
[60] *See id*. at 207.
[61] *Id.*
[62] ….McSorley, a 36-year-old tough guy, lost even more. He lost the respect of a lot of folks around the NHL, people who defended his toughness over the years. He lost a chance to continue his NHL career. His reputation has been hit over the head – and no one will ever hire this hired gun again. *The Sporting News,* http://www.findarticles.com/cf_0/m1208/10_224/60081446/print.jhtml.
[63] Chris Stevenson, *McSorley: From Exile to Head Coach,* <http://msn.espn.go.com/minorlh/columns/stevenson_chris/1444521.html> (accessed October 13, 2002).
[64] Bill Daly, the NHL's chief legal officer (at the time of the incident) when commenting on the McSorley incident said, While the NHL pledges its "full cooperation" the league makes clear its disappointment over the prosecutors decision to get involved. The league dealt with the matter quickly, decisively and appropriately, and did not feel that any further action was warranted or necessary. DeWayne Wickham, *Treat Criminal Jocks Like Everyone Else*, http://www.usatoday.com/news/comment/columnists/wickham/wick0 (updated March 14, 2000).
[65] Daly, *supra* n. 64 at 2.
[66] Chapman, *supra* n.23 at 195-97.
[67] Wyatt M. Hicks, Student Author, *Preventing and Punishing Player-to-Player Violence in Professional Sports: The Court System Versus League Self-Regulation*, 11 J. Legal Aspects Sport 209, 212 (2001).
[68] *See id*. at 214.
[69] *McKihan*, 967 S.W.2d at 213.
[70] Jonathon Katz, *From the Penalty Box to the Penitentiary – The People Versus Jessie Boulerice*, 31 Rutgers L.J. 833, 841 (Spring 2000).
[71] *See id.* at 848
[72] *See id. at 847*
[73] Katz, 31 Rutgers L.J. at 841.
[74] *Id.*
[75] *Id.*
[76] E-mail from James Gonzalez, Assistant Prosecuting Attorney, Wayne County, Michigan, to Justin Reiner, Student, Willamette University—College of Law, Re: Jesse Boulerice (Nov. 4, 2000)
[77] Note: Boulerice continues to play in the NHL as an enforcer for the Carolina Hurricanes.
[78] By saying that Canadian courts follow the appellate courts opinion in *Hackbart*, the author is not trying to say that Canadian courts follow U.S. court law, merely that there is a close similarity between the views of the Canadian courts towards violence and those expressed by the appellate court in *Hackbart*.
[79] *McKihan*, 967 S.W.2d at 213.

RECENT CASES OF INTEREST

Prepared by the South Texas College of Law Students
South Texas College of Sports Law & Entertainment Society

Florida Boxing Tax Does Not Violate First Amendment

In *Top Rank, Inc. v. Florida State Boxing Comm'n,* 837 So. 2d 496 (Fla.Dist. Ct. App. 2003), the court addressed whether a Florida statute, which imposed a five percent tax on total gross revenues from boxing events, violated the freedom of speech rights of boxing promoters. Many of the boxing events were provided through pay-per-view access and were made available to viewers through local cable TV operators in exchange for a fee. The Florida statute at issue requires a promoter to pay a tax on these boxing events in the amount of five percent of the total gross receipts. Fla. Stat. ch. 548.06 (2000). The Florida Boxing Commission sent demand letters to the two boxing promoters, Top Rank, Inc. and America Presents, Ltd., for the amount due under the Florida Statute after both promoters had refused to pay the tax. The boxing promoters then filed a complaint seeking declaratory and injunctive relief based on allegations that the statute was unconstitutional under the First Amendment. The trial court found the Florida statute facially valid under the First Amendment and granted summary judgment against the boxing promoters. The boxing promoters appealed.

The boxing promoters argued that the Florida statute violated the First Amendment because it was an illegal content-based regulation of speech. The promoters argued that the interviews and commentary associated with the boxing matches mandated the protection of the First Amendment. The appellate court first agreed that taxation does implicate the First Amendment if it discriminates against members of the media or if discriminates based upon the content of the speech. However, the court then recognized that it was not dealing with members of the media, but rather boxing promoters. Furthermore, the court found that the activity being taxed was the promotion of the boxing matches, not the interview and commentary that accompanied those matches. Thus, even though the statute used receipts from the cable television broadcasts to calculate the tax on the promoters, the court found that the activity being taxed was the privilege of promoting those matches, which was not protected speech under the First Amendment. The court emphasized that the judicial review of content-based regulation of speech only ensures that the government does not attempt to limit dissemination of a particular message or idea. Here, no evidence showed that the government limited the dissemination of any message or idea.

by Sean G. McMullen

ANNUAL MEETING GUEST SPEAKER:

OLIVER LUCK
Executive Director, Harris County-Houston Sports Association

FREE CLE

June 13, 2003 from 2p.m. to 4p.m.

National Hockey League Did Not Violate Antitrust Law

A recent opinion issued by the Sixth Circuit Court of Appeals dealt with the rules affecting a professional hockey player's free agency. *National Hockey League Players' Assoc. v. Plymouth Whalers Hockey Club*, _____ F.3d _____ (6th Cir. 2003), 2003 WESTLAW 1720096. In that case, the National Hockey League's Players' Association (NHLPA) brought suit alleging that the Ontario Hockey League (OHL) and its member teams conspired with the National Hockey League (NHL) to violate the Sherman Act by enacting a rule that essentially barred 20 year-old United States collegiate hockey players from participating in the Ontario Hockey League. The case arose after a Canadian citizen, Aquino, was drafted by an OHL team named the Owen Sound Attack. Instead of playing for the Attack, Aquino chose to attend college in the United States. During Aquino's second collegiate season, an NHL team, the Dallas Stars, drafted him. At the same time, the Owen Sound Attack traded the rights to Aquino to another OHL team—the Oshawa Generals. After a third collegiate season, Aquino decided to quit college and explore his options for professional hockey. If he signed with the Dallas Stars, he would become a restricted agent for the next eleven years. Conversely, if Aquino played in the OHL for the Oshawa Generals, he would become a free agent after one year. However, the "Van Ryn" Rule, which essentially prevents U.S. collegiate hockey players twenty and older from playing in the OHL, barred Aquino from playing in the OHL and provided the basis for this lawsuit.

The NHLPA brought suit against the OHL for conspiring with the NHL in adopting the Van Ryn Rule, which it alleged violated Section 1 of the Sherman Act. The Sherman Act makes illegal any contract that unreasonably restrains trade. The trial court granted the NHLPA's preliminary injunction and this appeal ensued.

The Sixth Circuit first found that the NHLPA's claim should have been evaluated under the "rule of reason" analysis, not under the "per se" approach. Under the "rule of reason" analysis, the NHLPA was first required to "demonstrate significant anticompetitive effects within the relevent product and geographic markets." Here, although the NHLPA idenified the relevant product as amateur hockey, the NHLPA failed to identify a relevant market or show any economic injury. The NHLPA identified the market as the competition for player services between the OHL and another amateur hockey league, the Canadian Hockey League (CHL). The NHLPA argued that the Van Ryn Rule limited competition in this market. However, the Sixth Circuit noted that the Van Ryn Rule only limits options for players, such as Aquino, in this market; it did not restrain economic competition between the leagues. Thus, while the application of the Van Ryan Rule might be a detriment to Aquino, the NHLPA failed to show it would be a detriment to a definable market which is a requirement under the "rule of reason" Sherman Act analysis.

by Chad Riley

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