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Volume 18 | Number 3 Article 7

6-1-1996

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Geoffrey M. Moore

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Recommended Citation

Geoffrey M. Moore, *Has Hockey Been "Checked from Behind" North of the Border? Unruh, Zapf, and Canada's Participant Liability Standard*, 18 Loy. L.A. Int'l & Comp. L. Rev. 641 (1996).
Available at: https://digitalcommons.lmu.edu/ilr/vol18/iss3/7

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HAS HOCKEY BEEN "CHECKED FROM BEHIND" NORTH OF THE BORDER? *UNRUH, ZAPF,* AND CANADA'S PARTICIPANT LIABILITY STANDARD

I. INTRODUCTION

During a meaningless exhibition hockey game on March 7, 1990, Steve Webber checked[1] Melvin Unruh from behind, causing Unruh to careen headfirst into the boards.[2] Ultimately, Webber checked Unruh right into a wheelchair. Unruh broke his neck in the accident, rendering him a C_4 quadriplegic.[3] Webber's thoughtless act did far more than cripple a fellow competitor during an otherwise forgettable hockey game. Indeed, Webber's act may soon become the check heard 'round the Canadian hockey world.

Unruh is not the first athlete to sustain a major spinal injury while playing hockey.[4] Unruh, however, collected "perhaps the largest [damage award] in Canadian sports-injury history."[5] On

1. " '[C]hecking' refers to the act of impeding the progress of a player with the puck . . . by blocking his progress with your body . . . ." JACK FALLA, HOCKEY: LEARN TO PLAY THE MODERN WAY 125 (1994); *see* BARRY DREAYER, TEACH ME SPORTS: HOCKEY 85 (1995).

2. Unruh v. Webber, 98 D.L.R.4th 294, 295 (B.C. Sup. Ct. 1992).

3. Factum of the Respondent and Factum on Cross-Appeal at 29, Unruh v. Webber, 88 B.C.L.R.2d 353 (1994)(No. CA016412). A quadriplegic is a person who suffers from paralysis in all four limbs. STEDMAN'S MEDICAL DICTIONARY 1303 (25th ed. 1990). The term "C_4" refers to the fourth cervical vertebra. A C_4 quadriplegic suffers paralysis as a result of damage to his or her spinal cord at the C_4 vertebra. Patrick J. Bishop & Richard P. Wells, *Cervical Spine Fractures: Mechanisms, Neck Loads, and Methods of Prevention, in* SAFETY IN ICE HOCKEY 71, 71-73 (C.R. Castaldi et al. eds., 1989); JACOB GREEN, COMMON HEAD, NECK, AND BACK INJURIES 59 (1988).

4. Between 1966 and 1991, 182 hockey players suffered spinal injuries in North America. Ninety-four percent of these injuries occurred in Canada. Approximately 106 players suffered spinal cord injuries, and nearly half of these players sustained complete or partial paralysis. Charles H. Tator et al., *Spinal Injuries in Ice Hockey: Review of 182 North American Cases and Analysis of Etiologic Factors, in* SAFETY IN ICE HOCKEY: SECOND VOLUME 11, 11-15 (C.R. Castaldi et al. eds., 1993).

5. Rick Berg, *Canada Tries to Halt Checking from Behind in Hockey,* SPORTS LAW. (Sports Lawyers Ass'n, Racine, Wisconsin), July-Aug. 1995, at 7, 7. In 1992, Unruh's award represented the largest sports-based tort damage award in Canadian history. Don Campbell, *CAHA Faces Crisis in Rising Insurance,* OTTAWA CITIZEN, May 2, 1993, at B2, *available in* WESTLAW, 1993 WL 6837438. A subsequent case exceeded Unruh's award. *See infra* note 144 and accompanying text. One commentator notes that "[a]lthough sports activity sometimes causes severe injury requiring substantial awards, judgments in Canada do not approach the gargantuan dimensions of decisions in the United States, where the legal and social tradition is different." JOHN BARNES, SPORTS AND THE LAW IN CANADA

November 6, 1992, the court awarded Unruh a stunning verdict of approximately $3.75 million plus costs.[6] On March 2, 1994, the British Columbia Court of Appeals denied Webber's appeal and increased the award to approximately $4 million.[7] When the Supreme Court of Canada upheld the case six months later, Webber's hit threatened to radically alter the way amateur hockey is played in Canada.[8]

Participant liability presents tough issues for courts today.[9] Contact sports like hockey necessarily involve violent physical collisions. Indeed, one of the goals of hockey is to physically dominate and intimidate the opposing team as a means to achieving victory. One commentator notes that "[m]ost human interaction is predicated upon nonviolence and due care; sports activities, however, often result in injury caused by one player to another. In some 'contact' sports, infliction of pain and injury is expected and even encouraged by coaches, fans and the players themselves."[10] A well-executed check is an integral part of hockey, even though it may result in injury. Outside the sports context, the same act would constitute battery.

248-49 (2d ed. 1988).

6. Unruh v. Webber, 88 B.C.L.R.2d at 355. Unruh received exactly $3,761,090.81 plus costs. *Id.* *Paralysed Player Gets $4M*, EDMONTON J., Nov. 8, 1992, at C2, *available in* WESTLAW, 1992 WL 6785475. Four days after Unruh's victory in court, Bill Zapf met with a similar fate, suffering a broken neck after being checked from behind. The holding in *Zapf v. Muckalt* reaffirmed the *Unruh* court's rationale. Zapf v. Muckalt, 11 B.C.L.R.3d 296 (Sup. Ct. 1995); Chris Welner, *Hockey Hit Breaks City Teen's Neck*, EDMONTON J., Nov. 10, 1992, at D1, *available in* WESTLAW, 1992 WL 6785901.

7. Larry Still, *Hockey Player Liable for Paralysis of Opponent*, VANCOUVER SUN, Mar. 3, 1994, at B8, *available in* WESTLAW, 1994 WL 6233316. Composed of both federal and provincial courts, the Canadian court system is a blend of the "unitary system of England and the federal system of the U.S.A." PATRICK FITZGERALD & KING MCSHANE, LOOKING AT LAW: CANADA'S LEGAL SYSTEM 33 (1979). Each province contains a supreme court, which is divided into trial and appellate divisions. Cases are tried at the trial division and appealed to the appellate division. The Supreme Court of Canada hears final appeals. Slight variations exist in the judicial hierarchies in Quebec, Ontario, and Alberta. *Id.* at 33-40; GERALD L. GALL, THE CANADIAN LEGAL SYSTEM 150-51 (1990).

8. Unruh v. Webber, 93 B.C.L.R.2d xxxviii (Can.), *dismissing appeal from* 88 B.C.L.R.2d 353 (1994). Bruce Cheadle, *Settlement of $4 Million May Prompt Change in Hockey Insurance Practices*, OTTAWA CITIZEN, Sept. 9, 1994, at D6, *available in* WESTLAW, 1994 WL 6769304; Kevin Griffin, *Injured Hockey Player to Get $4.8 Million*, VANCOUVER SUN, Sept. 9, 1994, at B1, *available in* WESTLAW, 1994 WL 6234846.

9. "Participant liability" refers to tort liability amongst co-participants in sports. Daniel E. Lazaroff, *Torts and Sports: Participant Liability to Co-Participants for Injuries Sustained During Competition*, 7 U. MIAMI ENT. & SPORTS L. REV. 191, 194 (1990).

10. *Id.* at 194.

Participant liability cases involve inherent conflict. Confronted with these cases, Canadian judges must decide whether hockey players accept the risk of injury or whether simple negligence applies. A jurisdictional split in applying the negligence standard further confuses this issue. British Columbia applies a simple negligence standard.[11] The other Canadian provinces apply a negligence standard but combine it with a seemingly contradictory intent requirement.[12] Finally, policy issues cloud the participant liability issue as well.

This Note examines the split among Canadian jurisdictions on which standard to apply and recommends options for repairing the schism. Part II presents Canadian tort law and surveys case law defining the standard of care for co-participants in sporting activities. Part III documents the rash of spinal cord injuries in Canadian amateur hockey and looks at the Canadian Amateur Hockey Association's attempt to curb the problem. Part IV discusses the *Unruh* case and analyzes the court's application of the negligence standard. Part V analyzes the *Zapf* case and the consequences of the *Unruh* and *Zapf* decisions for Canadian amateur hockey. Part VI evaluates the Canadian courts' application of the participant liability standard in general. Part VII examines alternative approaches to participant liability, including the U.S. recklessness approach and the Canadian negligence standard. Part VIII concludes that Canadian courts should adopt the U.S. recklessness standard for participant liability cases.

II. BACKGROUND ON CANADIAN PARTICIPANT LIABILITY

Generally speaking, when a player is injured in the sporting arena, the injury is the result of either an intentional or a negligent blow. Thus, in participant liability cases, Canadian courts may apply either an intentional tort analysis or a negligence analysis.[13]

A. *Intentional Torts*

Intentional tort cases in sports usually involve incidents where players step outside their role as fellow competitors and

11. Unruh v. Webber, 88 B.C.L.R.2d 353, 368 (1994); *see infra* part II.B.

12. *See infra* part II.B.

13. BARNES, *supra* note 5, at 247-48; *see also* 1 G.H.L. FRIDMAN, THE LAW OF TORTS IN CANADA 64, 364 (1989).

seek to inflict injury on an opponent.[14]

> Intentional or deliberate acts are those which achieve a desired purpose or which involve a consequence that is substantially certain. Battery and assault are torts involving deliberate interference with other people's bodily security. A person commits battery who intentionally makes direct or indirect physical contact, however slight, with the person of another, the offensiveness being in the eyes of the recipient. . . . The tort of assault involves the physical threatening of contact through actions which make a victim reasonably apprehensive that harm is about to follow . . . .[15]

In addition to civil suits, criminal prosecution for battery and assault is common.[16]

Defendants in intentional tort cases may raise the defense of consent (i.e. assumption of risk) in an effort to evade liability.[17] To prove plaintiff's consent, the defendant must show "that the plaintiff freely and with awareness of what was involved gave his agreement to the actions of the defendant."[18] One commentator notes that "[p]articipation in contact sports is taken to involve consent to the ordinary blows and collisions necessarily incidental to play, including contact which is in breach of game rules."[19] Consent is either implied from conduct or expressly stated or written.[20] A successful consent defense completely bars plaintiff's recovery.[21]

The leading Canadian case involving an intentional tort in sports is *Agar v. Canning*.[22] In *Agar*, the plaintiff hooked the

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14. BARNES, *supra* note 5, at 250; *see also* FRIDMAN, *supra* note 13, at 44-45.

15. BARNES, *supra* note 5, at 250; *see also* FRIDMAN, *supra* note 13, at 44-45.

16. BARNES, *supra* note 5, at 251; John Barnes, *Recent Developments in Canadian Sports Law*, 23 OTTAWA L. REV. 623, 680-89 (1991). *See generally* R.C. Watson, *Athletes Beware: Legal Reasons to Play Fair*, 3 EDUC. L.J. 167, 179 (1991) (arguing that the Canadian criminal code sets "limits to assaultive behaviour in sports"); Diane V. White, Note, *Sports Violence as Criminal Assault: Development of the Doctrine by Canadian Courts*, 1986 DUKE L.J. 1030, 1034-35 (noting that Canadian prosecutors have effectively used the criminal code to sanction violent behavior in sports).

17. BARNES, *supra* note 5, at 251.

18. FRIDMAN, *supra* note 13, at 63.

19. BARNES, *supra* note 5, at 251; *see also* FRIDMAN, *supra* note 13, at 64. *But see* ALLEN M. LINDEN, CANADIAN TORT LAW 62 (5th ed. 1993) (asserting that competitors only implicitly consent to contact that is *within* the rules).

20. BARNES, *supra* note 5, at 251.

21. LINDEN, *supra* note 19, at 61.

22. 54 W.W.R. 302 (Man. Q.B. 1965), *aff'd* 55 W.W.R. 384 (Man. 1966).

defendant around the neck, and the defendant responded by slashing the plaintiff in the face, rendering him unconscious.[23] The *Agar* court noted that hockey entails violent contact and that participants accept certain risks of injury.[24] The court indicated, however, that a player's immunity is limited: "[I]njuries inflicted in circumstances which show a definite resolve to cause serious injury to another, even if there is provocation and in the heat of the game, should not fall within the scope of implied consent."[25] Although the plaintiff was contributorily negligent for provoking the incident, the defendant's intentional act exceeded any implied consent and constituted battery.[26] According to one commentator, "subsequent cases have similarly found amateur hockey players liable for intentional violent blows to playing opponents."[27]

B. The Negligence Standard

Canadian courts may also review participant liability cases under a negligence standard.[28] One commentator notes that "[a]

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23. *Id.* at 302-03. Hockey players define "hooking" as swinging a hockey stick from the handle in an effort to snare an opposing player with the curved end. FALLA, *supra* note 1, at 21. Hooking allows defending players to slow and harass opposing players when they are carrying the puck. *Id.* Under the rules, a player may not "hook" an opposing player for more than a few seconds at a time. *Id.* Hockey norms dictate that hooking is proper below the waist, although the rules implicitly allow a player to hook above the waist if he does it in a repetitious harassing way and if he does not pull down the opposing player as a result. *Id.* Any attempt to hook a player above the waist is subject to a penalty for hooking or slashing. *Id.* "Slashing" occurs when a player swings his stick in an attempt to hit another player. *Id.* A referee may call slashing if he decides that the player possessed an intent to injure. *Id.*

24. *Agar*, 54 W.W.R. at 304.

25. *Id.*

26. *Id.* at 304-06; BARNES, *supra* note 5, at 252.

27. BARNES, *supra* note 5, at 252 & n.25; *see* Holt v. Vergruggen, 20 C.C.L.T. 29, 37-39 (B.C. Sup. Ct. 1982) (holding the defendant liable for slashing an opposing player); Martin v. Daigle, 6 D.L.R.3d 634, 635-36 (N.B. 1969) (imposing liability for blows struck in the course of a game); Pettis v. McNeil, 8 C.C.L.T. 299, 299-303 (N.S. Sup. Ct. 1979) (finding liability for an intentional stick blow to the plaintiff's head). *But see* Gaudet v. Sullivan, 128 N.B.R.2d 409, 423 (Q.B. 1992) (dismissing assault and battery claim where the defendant allegedly cross-checked the plaintiff in the face after finding no violation of the rules coupled with the intent to injure). The courts have also found participants liable for intentional blows in other sports. Colby v. Schmidt, 37 C.C.L.T. 1, 3, 6 (B.C. Sup. Ct. 1986) (holding the defendant rugby player liable for an intentional blow to the plaintiff's head after the play); Siebolts v. Wilson, 33 A.C.W.S.2d 130 (B.C. Sup. Ct. 1985) (finding liability for a retaliatory punch in a soccer game); Conger v. Gianoli, 88 Sask. R. 299, 301 (Q.B. 1991) (imposing liability for intentional acts outside the accepted customs in softball).

28. BARNES, *supra* note 5, at 247-48; *see also* FRIDMAN, *supra* note 13, at 364.

claim in negligence involves the allegation that the defendant failed to exercise due care towards persons who could reasonably be foreseen to be affected by his conduct."[29] To prevail, a plaintiff must show that the defendant breached a duty owed to the plaintiff and that the breach caused the resulting injury.[30] The circumstances surrounding the activity heavily influence whether courts apply an intentional tort or negligence standard.[31]

> With vigorous contact sports such as soccer, hockey and football, play necessarily involves heavy blows and collisions, so that it is difficult to define possible negligent acts between participants; similarly, the speed of play may make it hard to prove lack of due care in a particular incident. Liability has traditionally been limited to assaults that exceed the implied consent in the game, but some recent cases invoke negligence principles in respect of intentional or reckless acts.[32]

Defendants in negligence actions may raise two defenses: voluntary assumption of risk and inherent risk in sports.[33] Depending on the circumstances surrounding the injury, a defendant may raise either of these defenses or both. *Volenti non fit injuria*[34] (*volenti* or voluntary assumption of risk) is a consent defense to negligence.[35] To successfully raise this defense, a defendant must prove that the plaintiff "willingly ran a risk that was fully understood."[36]

One Canadian jurist, however, argues that the Supreme Court of Canada has narrowed *volenti* to apply only to situations of

29. BARNES, *supra* note 5, at 254. *See generally* STEPHEN BIRD & JOHN ZAUHAR, RECREATION AND THE LAW 33-35 (1993) (discussing negligence liability). For a discussion of participant liability in England, see Simon Gardiner & Alexandra Felix, *Juridification of the Football Field: Strategies for Giving Law the Elbow*, 5 MARQ. SPORTS L.J. 189, 206-09 (1995).

30. BARNES, *supra* note 5, at 254-55.

31. *Id.* at 258.

32. *Id.* at 261.

33. *Id.* at 255.

34. The term *volenti non fit injuria* means "[n]o wrong is done to a person who consents to being injured." FRIDMAN, *supra* note 13, at 352.

35. *Id.* *Volenti*, like consent, can be express or implied. Implied assumption of risk cases pose the greatest difficulty to courts because "mere knowledge of the danger is not enough for the *volenti* defence to be applied." LINDEN, *supra* note 19, at 458; *see also* BARNES, *supra* note 5, at 255.

36. BARNES, *supra* note 5, at 255.

express consent or where implied consent is clear.[37] Moreover, Professor Fridman asserts that the *volenti* defense is unavailable in participant liability cases.[38] Professor Fridman persuasively argues that a player consents to a number of inherent risks when that player steps into the sporting arena, but those risks that derive from another player's negligence are outside the scope of the consent.[39] Thus, *volenti* only applies to situations where the parties' implicit consent is not as obvious as within the sporting arena.[40] The plaintiff's contributory negligence, however, may still be a factor in reducing the defendant's liability, even if *volenti* is unavailable.[41]

The inherent risk defense is available if the

> injury arises from a normal and reasonable practice inherent in the game .... Such injuries are regarded as mere accidents whose costs must be borne by the victim. The value of sports derives from their inherent conflict, speed, exertion and physical contact. The occasional accident is the price paid by the player . . . for the benefits of sports.[42]

Although Canadian courts analyze participant liability under an ordinary negligence standard, the standard of care varies with the circumstances and nature of the sport. Conduct that would be deemed negligent if engaged in "on the street" may not constitute a breach of ordinary care in the sporting arena.[43] One commentator notes that "where a game is played at high speed in a

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37. LINDEN, *supra* note 19, at 459-60 (citing Lagasse v. Rural Municipality of Ritchot, [1973] 4 W.W.R. 181 (Man. Q.B.)). The *Lagasse* court held that "[n]othing will suffice short of an agreement to waive any claim for negligence." *Lagasse*, 4 W.W.R. at 189 (quoting Nettleship v. Weston, 3 All E.R. 581, 587 (C.A. 1971)). "This restrictive view of *volenti* means that courts rarely invoke the defence nowadays." LINDEN, *supra* note 19, at 460.

38. FRIDMAN, *supra* note 13, at 364-65.

39. *Id.*

40. *Id.* "The Supreme Court of Canada has recently stated that concepts like *volenti fit non injuria* [sic] . . . are incompatible with the concept of apportionment." Factum of the Respondent and Factum on Cross-Appeal at 20, Unruh v. Webber, 88 B.C.L.R.2d 353 (1994)(No. CA016412) (citing Crocker v. Sundance Northwest Resorts, [1988] 1 S.C.R. 1186, 1202 (Can.)); *see also* Hall v. Hebert, [1993] 2 S.C.R. 159, 207 (Can.) (holding that "for the doctrine of *volenti* to apply, ... both parties to the activity must have agreed that they would participate in it regardless of the risk of injury and give up their right to sue should injury occur as a result of the agreed upon activity."); Dube v. Labar, [1986] 1 S.C.R. 649, 658 (Can.).

41. FRIDMAN, *supra* note 13, at 365.

42. BARNES, *supra* note 5, at 255.

43. *Id.* at 258.

confined area, a scrupulous standard of care defeats the nature and purpose of the activity."[44] Courts have not yet developed a specific standard to apply in these cases, and the rule is hardly a model of clarity when utilized in the rigorous sports setting.

In *Temple v. Hallem*,[45] the Manitoba Court of Appeals applied the negligence standard in conjunction with a seemingly inconsistent "intent to injure" focus and did not find liability. In *Temple*, the plaintiff was a female competitor in a co-ed softball league.[46] League rules allowed sliding into the bases and penalized players for blocking the base paths and obstructing runners from reaching any of the bases.[47] During a softball game, the plaintiff attempted to field the ball and tag the runner by standing approximately five to seven feet up the baseline.[48] The defendant, a male competitor, slid into the plaintiff and knocked her backwards, injuring her.[49] The trial court imposed liability on the ground that the defendant's "professional slide" violated league rules.[50]

The Manitoba Court of Appeals reversed on the basis that league rules permitted sliding.[51] The appellate court also noted that, even if the defendant had violated league rules, he could not be held liable unless he possessed an intent to injure.[52] To buttress its opinion, the *Temple* court cited *Agar*: "[O]nly a deliberate violation of the rules calculated to do injury will give rise to civil liability. Otherwise people who engage in sport are assumed to accept the risk of accidental harm."[53] Thus, the *Temple* court drastically reduced the defendant's duty of care in participant liability cases. One commentator agrees that the

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44. *Id.* at 259.

> It would be inconsistent with this implied consent to impose a duty on a player to take care for the safety of other players corresponding to the duty which, in a normal situation, gives rise to a claim for negligence . . . . The conduct of a player in the heat of the game is instinctive and unpremeditated and should not be judged by standards suited to polite social intercourse.

Agar v. Canning, 54 W.W.R. 302, 304 (Man. Q.B. 1965), *aff'd* 55 W.W.R. 384 (Man. 1966).

45. 58 D.L.R.4th 541 (Man. 1989).

46. *Id.* at 541.

47. *Id.* at 542-43.

48. *Id.* at 542.

49. *Id.*

50. *Id.*

51. *Id.* at 543-44.

52. *Id.*

53. *Id.* at 543 (citing Agar v. Canning, 54 W.W.R. 302 (Man. Q.B. 1965)).

Temple court "seemed to discount negligence liability between participants in vigorous contact sports."[54]

Although *Temple* involved a negligence claim, the court relied on *Agar*, which centered on an intentional tort claim. According to one observer, the *Temple* court strained mightily to deliver this pro-defendant opinion.[55] Namely, how could an intentional tort case be controlling authority in a negligence action?[56] Moreover, the *Temple* court gave little consideration to the intent and rule violation elements in finding no liability.[57] *Temple* presents the dilemma courts must confront when deciding where to draw the line in these cases: Does the injury stem from physical contact that is within the accepted norms of the game, or does it derive from unreasonable risks?[58]

Although the Canadian sports cases have emphasized a negligence standard, the aggressive nature of sports like hockey alters the standard of care to the extent that the cases turn more on reckless, rather than merely negligent, behavior. In other words, the preceding line of cases demonstrate that a court will find liability only if an actor consciously disregards an extreme risk. Mere negligent failure to perceive a risk will not establish liability.

On the other hand, courts in British Columbia tend to apply a simple negligence standard.[59] For example, the British Columbia Court of Appeals in *Herok v. Wegrzanowski*[60] applied a negligence standard in holding the defendant liable for hooking the plaintiff in the face. After stealing the puck, the plaintiff passed it

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54. Barnes, *supra* note 16, at 690; *see* Knockwood v. Cormier, 57 A.C.W.S.3d 1057 (N.B. Q.B. Sept. 9, 1995) (imposing no liability because "[d]efendant had no premeditated intention of causing bodily harm"). In *Conger v. Gianoli*, an intentional tort case, the court noted that negligence is inherent in the nature of sports and, thus, is not actionable. 88 Sask. R. 299, 301 (Q.B. 1991).

55. Philip H. Osborne, *A Review of Tort Decisions in Manitoba, 1989*, 20 MAN. L.J. 419, 436-37 (1991).

56. *Id.* at 436.

57. *Id.* at 437.

58. *Id.* at 433. Canadian courts usually apply the *Temple* court's philosophy in negligence actions stemming from hockey accidents. In *Sexton v. Sutherland*, the court abandoned the traditional negligence analysis and found for the defendant by focusing on the absence of an intent to injure or reckless behavior. 26 A.C.W.S.3d 472 (Ont. Gen. Div. 1991). The court held that a kidney injury suffered as a result of a check was not reckless conduct because the defendant was not "reckless . . . as to reasonable likelihood of injury from [a] body check." *Id.*

59. Here, "simple negligence" means negligence without the aforementioned "intent" requirement.

60. 34 A.C.W.S.2d 296, 296-97 (B.C. 1985).

to a teammate and skated toward his team's bench.[61] As the plaintiff was skating away, the defendant inadvertently hooked him in the eye.[62] The court assessed the case in terms of assumption of risk:

> Looking at the nature of the league in which the parties were participating, it is reasonable to assume the players accepted the consequences of an unintentional injury arising from a body check, or being struck with a puck. Occasionally a stick might fly up into the face of another player while the two were facing each other. These were the assumed risks.[63]

The *Herok* court defined the negligence test as follows: "[I]t is not every careless act causing injury that will give rise to liability. It is only careless acts quite outside the risks assumed that could be a foundation of such liability. But that is a question of fact for each case."[64] Accordingly, the court held that the defendant was indeed negligent for carelessly swinging his stick without considering the size of his target or the consequences of his action.[65]

The *Herok* opinion reveals the jurisdictional split in Canada on the issue of negligence. The British Columbia Court of Appeals consistently applies a negligence standard in participant liability cases.[66] *Unruh* and *Zapf* also impose liability based on this standard.[67] The other Canadian provinces, influenced by the *Agar* holding, apply a negligence standard vis-a-vis an intent or recklessness requirement. The negligence and intentional tort standards are inherently inconsistent, and their merger in this context produces a quasi-recklessness standard.[68]

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61. Unruh v. Webber, 88 B.C.L.R.2d 353, 366 (1994) (quoting Herok v. Wegrzanowski (Webster), Vancouver CA003074 at 3 (B.C. Oct. 7, 1985)).

62. *Id.*

63. *Id.* (quoting *Herok* at 4-5).

64. *Id.* at 367 (quoting *Herok* at 7).

65. *Id.* (quoting *Herok* at 6).

66. *See* King v. Redlich, 24 D.L.R.4th 636, 637-38 (B.C. 1985) (applying a negligence standard and not imposing liability on a defendant who struck a plaintiff in the head with a shot that ricocheted off a goal post during pre-game warm-ups).

67. Zapf v. Muckalt, 11 B.C.L.R.3d 296, 314-15 (Sup. Ct. 1995); Unruh v. Webber, 98 D.L.R.4th 294, 304 (B.C. Sup. Ct. 1992).

68. Recklessness is conduct that surpasses ordinary negligence. Lazaroff, *supra* note 9, at 199-200. Cases often give little or no guidance in clarifying the recklessness standard. According to one definition:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm

III. THE INCREASE IN SPINAL INJURIES IN CANADIAN HOCKEY

The Canadian Amateur Hockey Association (CAHA) is the governing body of youth amateur hockey in Canada.[69] Its many functions include the promulgation of safety rules and infractions designed to protect players from serious injuries.[70] From 1948 to 1975, head injuries were more prevalent than spinal cord injuries.[71] In 1975, CAHA instituted a mandatory helmet rule.[72] Although the number of head traumas plummeted, spinal cord injuries exploded at a rate of nearly fifteen per year over a twelve year period.[73] Many people attributed this trend to an invulnerability complex on the part of the heavily protected young hockey players; the additional protection of helmets and face shields encouraged players to check with reckless abandon.[74]

> to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

RESTATEMENT (SECOND) OF TORTS § 500 (1965); *see also* Ray Yasser, *In the Heat of Competition: Tort Liability of One Participant to Another; Why Can't Participants Be Required to Be Reasonable?*, 5 SETON HALL J. SPORT L. 253, 257 (1995).

69. In 1994, CAHA merged with Hockey Canada to form the Canadian Hockey Association. Cheadle, *supra* note 8, at D6.

70. Unruh v. Webber, 98 D.L.R.4th 294, 302 (B.C, Sup. Ct. 1992).

71. Robert M. Lee, *Playing in the Danger Zone: Before 1975, Spinal Cord Injuries in Hockey Were Rare. Then Helmets Became Mandatory: Hockey: No Equipment Will Prevent Injuries; It's Up to the Rule-Makers*, VANCOUVER SUN, Nov. 28, 1992, at B1, *available in* WESTLAW, 1992 WL 5954262.

72. *Id.*

73. Between 1966 and 1991, 173 Canadian hockey players received spinal cord injuries. Tator et al., *supra* note 4, at 11-15. Unruh suffered the most common injury, according to a study by SportSmart Canada. Webber checked Unruh from behind (33% frequency) and propelled him headfirst into the boards (59.9% frequency), damaging Unruh's cervical spine (75.8% frequency). *Id.* at 12-16. Tests indicate that a "cadaver when dropped on its head requires 150 foot-pounds of force to break its neck." Lee, *supra* note 71, at D6. Skating at ten miles per hour, the typical "skating speed," a hockey player launched into the boards headfirst will suffer an impact of six hundred foot-pounds of force. *Id.* "The most tragic figure in the statistics is the age of the players. Three-quarters of those injured were between the ages of 11 and 20." *Id.*; *see also* Bishop & Wells, *supra* note 3, at 71-79.

74. With the addition of protective helmets, hockey players do not need to worry about potential head injuries when they check other players. As a result, many young players now hurtle toward one another without any concern for personal safety. Spinal injuries ensued from the combination of these factors. Richard Parayre, *The Effect of Rules and Officiating on the Occurrence and Prevention of Injuries*, *in* SAFETY IN ICE HOCKEY, *supra* note 3, at 37, 40; Lois Kalchman, *Hitting from Behind Condemned*, TORONTO STAR, Nov. 13, 1993, at E3, *available in* WESTLAW, 1993 WL 7288194; Lee, *supra* note 71, at D6; Monte Stewart, *Check Stop: Millikin Calls for End to Hitting from Behind*, CALGARY HERALD, Mar. 24, 1994, at C7, *available in* WESTLAW, 1994 WL 7518190; Sheryl Ubelacker, *Injuries Take Harsh Toll in Hockey, 15 Players Suffer Spinal Damage Each*

Unruh suffered his injury at a time when spinal injuries were spiraling out of control in Canada. From 1988 to 1991, SportSmart Canada uncovered sixty-two spinal injuries, with one-third of the victims relegated to wheelchairs for life.[75] Dr. Charles Tator identified the factors contributing to the rise in spinal injuries: inconsistent enforcement of the rules, uninformed players and coaches, younger players' sense of invulnerability due to their protective equipment, and younger players mimicking the aggressive style of professional hockey players.[76]

CAHA did not wait until Unruh's injury and subsequent lawsuit to deal with the very serious problem that checking from behind presented. In response to the growing trend of spinal cord injuries, in 1984, CAHA enacted Rule 53, outlawing checking from behind:

> (a) At the discretion of the Referee, a Minor or Major penalty shall be assessed any player who intentionally pushes, body checks, or hits an opposing player from behind in any manner, anywhere on the ice.
> (b) A Major penalty plus a Game Misconduct penalty shall be assessed any player who injures an opponent as a result of "Checking that player from Behind."
> (c) Where a player is high sticked, cross-checked, body-checked, pushed, hit or propelled in any manner from behind into the boards, in such a way that the player is unable to protect or defend himself, a Major penalty plus a Game Misconduct penalty shall be assessed.
> (Note: Referees are instructed not to substitute other penalties when a player is checked from behind in any manner. This rule must be strictly enforced.)[77]

Year, MD Says, MONTREAL GAZETTE, Jan. 24, 1992, at A1, *available in* WESTLAW, 1992 WL 7155148.

75. Randy Starkman, *Amateur Hockey's Shocking Toll: Rash of Spinal Injuries Causing Panic*, TORONTO STAR, Dec. 19, 1992, at B1, *available in* WESTLAW, 1992 WL 6977834. CAHA catalogued seventeen neck or back injuries from September 1991 to May 1992. *Id.* Thirteen of the 17 back and neck injuries resulted from checks from behind that sent players into the boards headfirst. *Id.*; *see also* Ubelacker, *supra* note 74, at A1.

76. Tator et al., *supra* note 4, at 17-18; Parayre, *supra* note 74, at 38-42.

77. Unruh v. Webber, 88 B.C.L.R.2d 353, 356 (1994) (quoting CAHA rules). A "minor" penalty requires the offending player to sit out for two minutes, leaving his team short-handed. FALLA, *supra* note 1, at 23. If the opposing team scores during this two minute period, the penalty is over, and the player may re-enter the game. *Id.* A "major" penalty mandates the guilty player to sit out for five minutes. *Id.* During this period, even if the opposing team scores, the penalty does not expire. *Id.* A "game misconduct" penalty results in an automatic ejection of the player from the game. *Id.* at 24.

In 1989, CAHA rewrote and reinforced Rule 53.[78] For example, CAHA required players guilty of a Rule 53 infraction to "write to the [CAHA and] explain[] . . . why he made the illegal check and what injury to the opponent might have resulted . . . ."[79] In 1990, the Pacific Coast Amateur Hockey Association (PCAHA) adopted its own form of Rule 53, including an additional provision imposing automatic major and game misconduct penalties against players who hit other players from behind.[80]

CAHA took other measures to address the serious issue of checking from behind. In 1988, the organization sponsored a video, called "Smart Hockey," featuring former NHL star Mike Bossy.[81] CAHA intended to use the video to deter checking from behind.[82] In the video, Bossy says:

> Do not hit another player from behind, it's a gutless type of a check, it's very dangerous and it must be stopped. In fact, I believe players who hit from behind like this should receive very stiff penalties and even long term suspensions because the injuries they cause sometimes last for life.[83]

CAHA sent copies of "Smart Hockey" to minor hockey associations across Canada in an effort to spread Bossy's important

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78. Unruh v. Webber, 98 D.L.R.4th 294, 302 (B.C. Sup. Ct. 1992). By comparison, "the Amateur Hockey Association of the U.S. and Manitoba Amateur Hockey Association have had the checking from behind rule for quite some time." Parayre, *supra* note 74, at 41.

79. John Deverell, *Ontario Tops in Dirty Hockey, MD Says*, TORONTO STAR, Jan. 24, 1992, at A1, *available in* WESTLAW, 1992 WL 6522466.

80. *Unruh*, 98 D.L.R.4th at 302. Canada's Western Hockey League (WHL) adopted a similar policy in 1990. *WHL Cracks Down*, CALGARY HERALD, Sept. 6, 1990, at D3, *available in* WESTLAW, PAPERSCAN Database. *But see* John Lawrence, *Tacoma Pro Sports: WHL Needs to Take a Closer Look at Checking from Behind*, NEWS TRIB. (Tacoma, Wash.), Oct. 26, 1993, at C2, *available in* WESTLAW, 1993 WL 8766200 (urging WHL to strengthen its checking from behind rule). CAHA's tough stance on checking from behind coincided with the National Hockey League's (NHL) efforts to eliminate the dangerous act. In 1991, NHL star Wayne Gretzky suffered a career-threatening back injury after Gary Suter checked him from behind. Following this and other incidents, NHL officials began strictly enforcing the checking from behind rule by liberally imposing game misconduct penalties on infringers. *NHL Will Crack Down on Checks from Rear; No Change in Rule Book, But Referees Are Directed to Tighten Up*, MONTREAL GAZETTE, Jan. 25, 1992, at D3, *available in* WESTLAW, 1992 WL 7155325.

81. Larry Still, *Hockey Injury Ruined Life, Court Told*, VANCOUVER SUN, Sept. 15, 1992, at A1, *available in* WESTLAW, 1992 WL 5944196.

82. *Id.* "CAHA president James Costello . . . told the [trial] court [in *Unruh*] the association sponsored the video . . . in 1988 because it was concerned about the increasing number of spinal injuries caused by checking from behind." *Id.*

83. *Unruh*, 98 D.L.R.4th at 302.

safety message.[84] In the years following Unruh's injury, a number of hockey celebrities also campaigned against hitting from behind, in an effort to reduce spinal injuries.[85] As a result, spinal injuries declined following the 1992 season.[86]

IV. THE *UNRUH* DECISION

A. Facts

The March 7, 1990 exhibition game between the Aldergrove hockey team and the Arbutus Club was meaningless.[87] Simply put, Arbutus was out of its league. Aldergrove had recently topped its division (Midget "AA")[88] and had scheduled the exhibition game in an effort to hone its skills and to stay focused for the upcoming playoffs.[89]

Midway through the second period, Aldergrove defenseman Melvin Unruh chased down a puck in a corner to the left of the Aldergrove net.[90] Arbutus forward Steve Webber followed in hot pursuit.[91] The puck rested against the boards, and Unruh was

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84. *Id.* "Since 1984, a brochure entitled *Neck and Spine Conditioning for Hockey Players* has been made available to all hockey players by the Committee [on Prevention of Spinal Injuries Due to Hockey] . . . ." Tator et al., *supra* note 4, at 18; *see also* Reg Curren, *Tragedies Emphasize Need for Tougher Rules*, EDMONTON J., Mar. 19, 1994, at H2, *available in* WESTLAW, 1994 WL 8489768; Lois Kalchman, *Injury Data Sparks Call for Education*, TORONTO STAR, Jan. 25, 1992, at B2, *available in* WESTLAW, 1992 WL 6522686.

85. Don Cherry, a popular hockey commentator, has urged young players not to hit from behind. He instructs players to avoid becoming the next victim by staying out of "no man's land," the area roughly four to six feet from the boards where accidents like Unruh's often occur. In an instructional video, Cherry called checking from behind "the most cowardly act in hockey" and "the cheapest shot of all time." DON CHERRY'S ROCK 'EM SOCK 'EM 6 (Molstar Communications 1994). He also urged players to stay up against the boards and to keep their heads up to avoid injury. *Id.; see also* Kalchman, *supra* note 74, at E3; Tom Keyser, *Skating Away from Violence: Millikin Brothers Can Sense Dawning of Anti-Goon Mood*, CALGARY HERALD, Jan. 20, 1995, at G4, *available in* WESTLAW, 1995 WL 7285974; Stewart, *supra* note 74, at C7.

86. Lois Kalchman, *Hockey Injuries Declining, Survey Shows*, TORONTO STAR, Sept. 17, 1994, at B1, *available in* WESTLAW, 1994 WL 7933849; Lois Kalchman, *Spinal Injuries in Hockey Are Declining*, TORONTO STAR, Nov. 30, 1995, at B1, *available in* WESTLAW, 1995 WL 6027921.

87. Still, *supra* note 81, at A1.

88. *Id.* Aldergrove won 22 games, lost only one, and had two ties. *Id.* Arbutus, on the other hand, finished with three wins, 20 losses and two ties in a lower division (Midget "A"). *Id.*

89. *Id.*

90. Unruh v. Webber, 98 D.L.R.4th 294, 295 (B.C. Sup. Ct. 1992).

91. *Id.*

about six to eight feet from the puck when Webber caught up with him.[92] Webber hit Unruh at full speed with his arms fully extended from his body.[93] With his back to Webber, Unruh was attempting to gather the puck either with his stick or his skates, and he was defenseless at the time of the collision.[94] The collision sent Unruh hurtling into the boards headfirst.[95]

When Aldergrove's Cory Burns reached Unruh, he asked Unruh if "he was okay."[96] Unruh's reply was chilling, Burns later recalled: "'[H]e [Unruh] said he couldn't move his legs.'"[97] Indeed, with his spinal cord severed, the injury rendered Unruh a C_4 quadriplegic.[98] Unruh retains some sensation in his extremities, but he is confined to a wheelchair for the rest of his life.[99]

B. Procedural Posture and the Trial Court Holding

Unruh sued Webber, Arbutus Club, Webber's coach, BCAHA, and CAHA for eight million dollars.[100] The defendants raised a defense of *volenti non fit injuria*.[101] They asserted that a mere violation of the rules did not result in per se liability.[102]

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92. *Id.* at 298.

93. *Id.* at 298, 300.

94. *Id.* at 296. When a hockey player has possession of the puck, opposing players may "check" or push the player off the puck. *See supra* note 1 and accompanying text. In this case, hitting Unruh from behind was illegal whether he had the puck or not. *See supra* note 77 and accompanying text (citing CAHA Rule 53).

95. *Unruh*, 98 D.L.R.4th at 296. Unruh's head crashed into "a spot where the side boards meet the corner curve" or the "end boards." *Id.* at 297.

96. Larry Still, *Mother Weeps as Check's Result Recalled*, VANCOUVER SUN, Sept. 23, 1992, at B3, *available in* WESTLAW, 1992 WL 5945347.

97. *Id.*

98. Larry Still, *Victim of Hockey Injury Tells Court What Life Is Like as a Quadriplegic*, VANCOUVER SUN, Sept. 24, 1992, at B4, *available in* WESTLAW, 1992 WL 5945511. *See* discussion *supra* note 3.

99. *Id.* Webber received a major penalty for checking from behind. Unruh v. Webber, 88 B.C.L.R.2d 353, 356 (1994).

100. Still, *supra* note 81, at A1.

101. Unruh v. Webber, 98 D.L.R.4th 294, 304 (B.C. Sup. Ct. 1992). One commentator noted that

> [*v*]*olenti* is being misused when it is invoked in sports cases, except where a plaintiff expressly contracts out of liability. When the courts say that the risk of [injury] . . . is assumed by the plaintiff, that is not what they mean, they should explain instead that there is no negligence in such a case. Hence, there can be no *consent* to negligence . . . . *Volenti* should not be invoked unless someone is negligent and wants to avoid liability on the basis of the consent of the victim.

LINDEN, *supra* note 19, at 464-65.

102. *Unruh*, 98 D.L.R.4th at 304.

> [T]here is no liability for an injury suffered during a sporting contest unless the act causing the injury was either intentional, in the sense that the defendant had a "definite resolve to cause serious injury" or was reckless in that he realized the substantial risk of injury, and nevertheless deliberately set out to run that risk.[103]

Rather, the defendants argued that Unruh participated in a violent, dangerous sport that necessarily involved a high risk of injury.[104] Thus, Unruh waived the right to sue for any unintentional injuries suffered while playing hockey.[105]

During the presentation of Unruh's case, a number of witnesses confirmed the plaintiff's allegations: (1) Unruh had his back to Webber at the time of the check; (2) Unruh was roughly six to eight feet from the end boards at the time of impact; (3) Webber deliberately checked Unruh; and (4) Webber could have avoided the collision.[106] Unruh testified that he knew Webber was pursuing him.[107] As Unruh reached the puck, he felt a "large contact" in his upper back, which he assumed was Webber hitting him with both hands.[108] The blow knocked him off balance and sent him into the boards.[109]

At the conclusion of the plaintiff's case, Judge Meredith upheld a "no evidence" motion and dismissed all of the defendants except Webber.[110] A number of defense witnesses presented conflicting evidence regarding the collision. Referee Howard Jampolsky testified that the collision was merely an unavoidable accident.[111] Other defense witnesses suggested differing theories

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103. *Id.* Webber's attorney, M. James O'Grady, practiced law in Ontario and argued the "intent" requirement of *Agar*, even though British Columbia used simple negligence. Telephone Interview with Robert D. Gibbens, Barrister, *Laxton & Company* (Feb. 8, 1996).

104. *Unruh*, 98 D.L.R.4th at 304.

105. *Id.*

106. *Id.* at 295-300.

107. *Id.* at 298-99.

108. *Id.* at 299.

109. *Id.*

110. Larry Still, *Coach, Club Cleared in Teen's Injury*, VANCOUVER SUN, Sept. 26, 1992, at A3, *available in* WESTLAW, 1992 WL 5945473; Larry Still, *Three Hockey Associations Cleared in Negligence Suit*, VANCOUVER SUN, Sept. 29, 1992, at B5, *available in* WESTLAW, 1992 WL 5946089.

111. Larry Still, *Disabling Check an Accident, Ref Testifies: Witness Uses Hockey Stick to Demonstrate What He Saw*, VANCOUVER SUN, Oct. 1, 1992, at B14, *available in* WESTLAW, 1992 WL 5946412; *see also Unruh*, 98 D.L.R.4th at 301 (noting that Jampolsky's testimony "is so at variance with the observations of the other witnesses that it

regarding the collision: (1) Unruh saw Webber advancing and intentionally turned his back to him at the moment of impact;[112] (2) Unruh was in the midst of executing a "spin-o-rama"[113] and Webber hit him at the perfect position to launch Unruh into the boards; and (3) Unruh, perhaps in an attempt to evade Webber, lost his balance and was already falling into the boards when Webber hit him.[114]

Ironically, Webber and another defense witness offered the most damaging testimony. The defendant testified that Unruh was facing the left side of his goal, not the boards, when Webber reached him.[115] Webber indicated that he legally "hip-checked" Unruh into the boards.[116] Mrs. Singbeil, a spectator at the game, corroborated the plaintiff's version of the incident. She also indicated that, while Webber did not maliciously attempt to injure Unruh, he could have avoided contact.[117] Unfortunately for Webber, Judge Meredith heavily relied on Singbeil's testimony. Singbeil's testimony, coupled with Webber's own admission on cross-examination that he was aware of the consequences of checking from behind, sealed Webber's fate.[118]

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cannot be accepted").

112. Some critics of CAHA Rule 53 insist that coaches instruct their players to "show their numbers" or turn their backs to advancing opponents in an effort to draw a penalty. *Problems Plague Amateur Hockey*, MONTREAL GAZETTE, Nov. 30, 1993, at B8, *available in* WESTLAW, 1993 WL 4161951.

113. A "spin-o-rama" involves making a quick and sharp 360 degree turn in an effort to evade an opposing player. *Unruh*, 98 D.L.R.4th at 297.

114. *Id.* at 299-302.

115. *Id.* at 299.

116. *Id.* To execute a "hip-check," a player must bend deeply at the knees and throw "his hip into the puck carrier's path." FALLA, *supra* note 1, at 138-39. The "hip-check" is "usually done into the boards as an opponent is about to slip away." DREAYER, *supra* note 1, at 85.

117. *Unruh*, 98 D.L.R.4th at 296. Singbeil testified, "I felt that it could have been avoided either by stopping or changing direction or by putting the arm around Mel and riding him into the boards. It would have been a holding penalty but they do it." *Id.*

118. Webber's colloquy with Unruh's attorney, John Laxton, was telling:

Q. You are aware though that if you push somebody from behind head first into the boards there is a real risk of injury?

A. Yes.

Q. And you were aware that the injury that could be caused could be a very serious injury?

A. Yes.

Q. And you were aware that the injury that could be caused could include even a broken neck?

A. Yes.

Q. So you knew that special care had to be taken when you are approaching

Judge Meredith based liability on a theory of negligence.[119] He found Webber's check to be "thoughtless, not vicious."[120] In addition, Judge Meredith indicated that Webber's awareness of both the illegal nature and the potentially tragic consequences of his act breached his duty of care to Unruh.[121] Judge Meredith awarded Unruh damages in the sum of $3,761,090.81 plus costs.[122]

C. *The British Columbia Court of Appeals Affirms*

Webber appealed to the appellate division of the British Columbia Supreme Court. The parties vigorously disputed the relevant standard of care and the appropriate application of the standard, given the circumstances of the case. Webber urged the court to adopt the aforementioned "reckless" definition of the negligence standard.[123]

Ultimately, the court adopted the plaintiff's proposed standard of care:

> The standard of care test is—*what would a reasonable competitor, in his place, do or not do.* The words "in his place" imply the need to consider the speed, the amount of body contact and the stresses in the sport, as well as the risks the player might reasonably be expected to take during the game, acting within the spirit of the game and according to standards

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somebody from behind when they're close to the boards?

A. Yes.

Q. And you would also know, Mr. Webber, that if you had a choice between allowing an opposing player to get away with the puck or the choice of stopping him by using a careless check from behind which might cause him to go head first into the boards, you should let him get away?

A. I would use a different way of trying to stop him, yes.

Q. I take it that you knew that the rule against checking from behind was because players in that situation are generally unable to protect themselves?

A. Yes.

Id. at 303. To emphasize that Webber knew the consequences of his actions, Judge Meredith recounted the testimony of Aldergrove's Nathan Rempel, who stated that Webber was very distraught in the wake of the collision. Rempel testified that Webber told him, " 'I am such an asshole. I never should have done that.' " *Id.*

119. *Id.* at 295, 304.

120. *Id.* at 295.

121. *Id.*

122. Unruh v. Webber, 88 B.C.L.R.2d 353, 355 (1994).

123. The court considered the following cases in terms of their definition of the negligence standard in sports: Woolridge v. Sumner, [1963] 2 Q.B. 43, 66-69 (Eng. C.A.); Wilks v. Cheltenham Home Guard Motor Cycle & Light Car Club, [1971] 1 W.L.R. 668, 670-71, 673-74, 675-76 (Eng.); Condon v. Basi, [1985] 1 W.L.R. 866, 867-68, 869 (Eng.); and Herok v. Wegrzanowski (Webster), Vancouver CA003074 (B.C. Oct. 7, 1985). *Unruh*, 88 B.C.L.R.2d at 359-67.

> of fair play. A breach of the rules may be one element in that issue but not necessarily definitive of the issue.[124]

Webber argued that the court should not consider his breach of league rules because it was merely "neutral."[125] The appellate court disagreed, stating that violation of a rule is not definitive, but rather probative, and should be considered in the negligence analysis.[126]

Webber maintained that he had acted in the "heat of the moment" and did not have time to react to the situation.[127] He insisted that he had acted as a reasonable competitor under the circumstances.[128] In refuting Webber's contention, the appellate court recited Singbeil's testimony that Webber—even in the heat of the moment—could have avoided the fateful check.[129] The court stated:

> Webber also agreed (a) that great caution was required in approaching an opposing player from behind who was near the boards and (b) that given the choice of injuring the plaintiff by hitting him from behind or letting him get away with the puck, he should have let him get away.[130]

The appellate court specifically noted that the trial court deemed Webber's actions to be "reckless."[131] Accordingly, the appellate court agreed with the trial court's finding that Webber failed to act as a reasonable hockey player and, thus, dismissed Webber's appeal.[132]

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124. *Unruh,* 88 B.C.L.R.2d at 368 (emphasis in original).
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.* at 369.
132. *Id.* at 368-69. In the damages phase of the appeal, the appellate court increased Unruh's award to approximately $4.16 million. Griffin, *supra* note 8, at B1; Still, *supra* note 7, at B8. Webber appealed the damages portion of the ruling to the Supreme Court of Canada. That court rejected his claim without issuing an opinion on September 8, 1994. Cheadle, *supra* note 8, at D6; Griffin, *supra* note 8, at B1.

V. *UNRUH'S* PROGENY: *ZAPF* & SKYROCKETING INSURANCE RATES

A. *The* Zapf *Court and the Negligence Analysis*

On November 7, 1992, Bill Zapf, a defenseman for the Nanaimo Clippers, retraced Melvin Unruh's final skating strides and met a similar fate.[133] Zapf skated toward a puck near the boards when Merritt Centennial forward Bill Muckalt checked him from behind.[134] Zapf flew into the boards headfirst and suffered quadriplegia as a result.[135]

Zapf sued Muckalt in British Columbia.[136] The result in *Unruh* paved the way for a finding of liability in *Zapf*. The trial court discounted the testimony of defense witnesses (including the linesman and referee) who uniformly stated that "[t]he two players collided shoulder to shoulder, both facing 90 degrees to the end boards, and the plaintiff stumbled awkwardly into the end boards head first."[137] The court noted key distinctions between *Unruh* and *Zapf*: Zapf anticipated the check and turned slightly to engage in it; the referee did not assess a penalty against Muckalt for the incident; and the check (if from behind) was an accident.[138] The court reconciled these distinctions by finding that Muckalt hit Zapf from behind, a penalty should have been called, and the accidental nature of the incident did not excuse the negligent conduct.[139]

In finding Muckalt negligent, the trial court noted:

> [A]ny reasonable competitor, approaching another from the rear at high speed near the boards, would not administer a check that he knew or ought to have known was likely to hit a portion of

133. Larry Still, *Latest 'Hockey Tragedy' Triggers Lawsuit*, VANCOUVER SUN, July 13, 1993, at A1, *available in* WESTLAW, 1993 WL 7612996; Larry Still, *'Illegal' Hockey Hit Led to Paralysis*, VANCOUVER SUN, Apr. 25, 1995, at B1, *available in* WESTLAW, 1995 WL 3512897 [hereinafter Still, *'Illegal'*].

134. Still, *'Illegal' supra* note 133, at B1. Zapf v. Muckalt, 11 B.C.L.R.3d 296, 296-97, 309 (Sup. Ct. 1995).

135. Larry Still, *Courtroom Becomes 'Rink' in Replay of Bodycheck: Witness Tells of 'Brutal Hit' from Behind*, VANCOUVER SUN, Apr. 29, 1995, at A8, *available in* WESTLAW, 1995 WL 3513479. Zapf fractured his C_4 vertebra, "rendering him an incomplete quadriplegic. He . . . could move his arms in all directions, although his motor power was non-existent." *Zapf*, 11 B.C.L.R.3d at 297.

136. *Zapf*, 11 B.C.L.R.3d at 296.

137. *Id.* at 300-01.

138. *Id.* at 312-14.

139. *Id.* at 314-15.

> Zapf's back . . . . Given the standard of play expected in this league, and the overwhelming emphasis placed on the prohibition against checking from the rear in the area of the boards, it is unacceptable to make contact in the manner in which it was done.[140]

The trial court also noted that Muckalt was "at best, careless" and "at worst, reckless" and that "[e]ither is sufficient to found liability" on negligence.[141] The trial court has not awarded damages yet, but Zapf's award should rival or possibly exceed Unruh's award.[142]

B. *The Consequences of* Unruh *and* Zapf

The *Unruh* and *Zapf* cases render the future of Canadian amateur hockey uncertain. Although the *Unruh* court dismissed CAHA from the original suit, the organization carried insurance that paid, on Webber's behalf, all damages and costs of the suit.[143] As *Unruh* advanced through the appellate process, CAHA already owed $8 to $10 million on claims brought since 1987.[144] Prior to the *Unruh* ruling, CAHA "paid out about $500,000 a year to injured players."[145] As a result of the *Unruh* decision, CAHA's insurance premium per player nearly tripled from $7 to $20.[146] CAHA also established a $2 million cap on all

140. Larry Still, *Quadriplegic to Get Damages for Hockey Hit: $4 Million Award Predicted as Judge Asks Lawyers to Submit Arguments*, VANCOUVER SUN, Sept. 6, 1995, at B1, *available in* WESTLAW, 1995 WL 3527547.

141. *Zapf*, 11 B.C.L.R.3d at 314.

142. *Hockey Player Found Negligent for Hit*, EDMONTON J., Sept. 6, 1995, at A10, *available in* WESTLAW, 1995 WL 7372550.

143. Don Campbell, *CAHA Faces Crisis in Rising Insurance*, OTTAWA CITIZEN, May 2, 1993, at B2, *available in* WESTLAW, 1993 WL 6837438; *Insurance Hike May Price Youngsters Off Ice*, VANCOUVER SUN, Feb. 13, 1993, at B8, *available in* WESTLAW, 1993 WL 7595790 [hereinafter *Insurance Hike*].

144. Rick Mayoh, *Self-Insurance Debate to Dominate CAHA Meetings*, OTTAWA CITIZEN, May 20, 1993, at D2, *available in* WESTLAW, 1993 WL 6839815. In a 1993 premises liability case against the town of LaSalle, Quebec, a player won an $8.7 million judgment after he tripped in a hole in the ice and crashed into the boards. Rendered a quadriplegic in the accident, the plaintiff successfully proved that the town was negligent in maintaining the ice at the hockey arena. Blair Crawford, *Court Upholds $8.7 Million Award: LaSalle May Sue Insurance Company in Hockey Injury Case*, WINDSOR STAR, Feb. 23, 1995, at A1, *available in* WESTLAW, 1995 WL 3613079; THE 1974 CORPUS ALMANAC OF CANADA 115 (Margot J. Fawcett ed., 1974).

145. *Insurance Hike*, *supra* note 143, at B8.

146. BARNES, *supra* note 5, at 249; *see also* Don Bain, *Disability Insurance Hard to Come by for Canadian Athletes*, MANITOBA BUS., Apr. 1, 1987, at 22, *available in* WESTLAW, 1987 WL 2342510.

future lawsuits, leaving the players' parents liable for damages exceeding the cap.[147] Hockey has yet to feel the final repercussions of Steven Webber's check. If illegal checks continue to cripple hockey players, Canadian amateur hockey may ban checking altogether.[148] Although spinal injuries are declining, CAHA will be forced, by even a few cases per year, to refrain from insuring players, leaving participants to play at their own risk.[149]

VI. ANALYSIS OF THE *UNRUH* AND *ZAPF* DECISIONS

In spite of the uproar surrounding the potential consequences of the *Unruh* decision, British Columbia's negligence standard governs the case. As stated above, Webber failed to act as a reasonable hockey player when he hit Unruh from behind near the boards. Moreover, Webber was aware of the possibility of serious injury when he hit Unruh and admitted that, given the choice, he should have avoided hitting Unruh.[150] The trial court therefore noted that Webber's act was not only negligent, but reckless as well.[151]

Critics argue that the outcome in *Unruh* is policy based. Did the British Columbia Supreme and Appellate Courts intend to send a message to CAHA regarding the rash of spinal injuries in Canadian hockey? Unruh's case went through the courts during

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147. Bert Hill, *Caught in a Cash Squeeze*, OTTAWA CITIZEN, Nov. 24, 1993, at C3, *available in* WESTLAW, 1993 WL 6862972.

148. *Id.* The *Zapf* trial judge noted that her ruling "may restrict the fast-moving and physical nature of the game." Zapf v. Muckalt, 11 B.C.L.R.3d 296, 314 (Sup. Ct. 1995).

149. Another player who was paralyzed after being checked into the boards headfirst, John Millikin, has recently filed a "$13 million dollar lawsuit against hockey authorities in Saskatchewan." David Trigueiro, *Time's Come to Put an End to Hockey's Roughstuff*, CALGARY HERALD, Mar. 21, 1996, at A19, *available in* WESTLAW, 1996 WL 5072801.

150. Unruh v. Webber, 98 D.L.R.4th 294, 303 (B.C. Sup. Ct. 1992).

151. *Id.* at 304. The *Unruh* court appears to also confuse the terms of negligence and recklessness by using them together in the same opinion, much like the other provinces' use of negligence with intent. Unruh's attorney, Robert D. Gibbens, points out that

> [i]n theory negligence and recklessness are different concepts. Recklessness is in Canada a standard incorporating a form of intention (it is different yet again from gross negligence) which has no relevance to negligence. Ultimately, the rationale for a trial courts [sic] reliance on recklessness is probably appellate review. A trial court wants to support its liability finding on as wide a basis as possible.

Letter from Robert D. Gibbens, Barrister, *Laxton & Company*, to Geoffrey Moore, Staff Member, *Loyola of Los Angeles International and Comparative Law Journal* 1 (Mar. 18, 1996) (on file with author).

the time when spinal injuries were rampant.[152] CAHA Director Hal Lewis reacted to the outcome in *Unruh* by noting:

> [W]e've also come to the conclusion that in a lot of these situations, the court simply looks at an 18- or 19-year-old sitting in a wheelchair and the judge says to himself, 'Somebody's got to look after this kid for the rest of his life.' Then he puts together the arguments to support his decision.[153]

The *Unruh* decision may have been based on the desire to spread the sympathetic plaintiff's loss among the hockey playing population and to utilize the CAHA's "deep pockets."

It is worth noting that *Unruh*'s legal analysis is on solid ground and also achieves the policy goals of tort law. Webber's reckless act injured Unruh, and the goals of tort law dictate that Unruh's loss be borne by the one causing injury.[154] If there was an underlying policy motivation in *Unruh*, it should be applauded. Plaintiffs like Unruh should be compensated for paralyzing injuries suffered at the hands of reckless fellow participants. The standard is more difficult to apply when the injury results from negligent conduct.

Using *Unruh* as a springboard, the *Zapf* opinion stakes out new ground and threatens to alter the negligence framework for participant liability. The *Zapf* court found that defendant Muckalt was "at best, careless and at worst, reckless."[155] As indicated in part V.A, *Zapf* and *Unruh* are factually distinguishable. First, Zapf saw Muckalt coming and was turning to engage in the check.[156] In *Unruh*, the plaintiff had his back to the defendant and never turned to face his pursuer.[157] Second, the referee did not impose a penalty against Muckalt.[158] In *Unruh*, Webber received a major penalty for checking from behind.[159] Third, Muckalt did not intend to hit Zapf in the back. Rather, he attempted to check him

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152. *See supra* part III.
153. Cheadle, *supra* note 8.
154. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS §3, at 15 (5th ed. 1984).
155. Zapf v. Muckalt, 11 B.C.L.R.3d 296, 314 (Sup. Ct. 1995). *See supra* text accompanying note 151.
156. *Zapf*, 11 B.C.L.R.3d at 312-14.
157. Unruh v. Webber, 98 D.L.R.4th 294, 296 (B.C. Sup. Ct. 1992).
158. *Zapf*, 11 B.C.L.R.3d at 299.
159. Unruh v. Webber, 88 B.C.L.R.2d 353, 356 (1994).

from the side, and any contact on Zapf's back was accidental.[160] In *Unruh*, the defendant intentionally hit Unruh in the back.[161]

Imposing liability in *Zapf* requires an ability to discern the difference between questionable judgment and bad judgment. Webber exercised bad judgment when he hit Unruh. Muckalt, on the other hand, exercised questionable judgment, at worst, and took part in an accident, at best. If accidents like this are brought into the realm of participant liability, *Zapf* may raise the standard of care for fellow participants to an unreasonable level.

VII. ALTERNATIVES TO THE *UNRUH/ZAPF* METHOD

In the wake of *Unruh* and *Zapf*, Canadian sports law is left standing at a crossroads. The future of Canadian participant liability law lies in one of two possible standards, negligence or recklessness. Each standard has benefits as well as pitfalls.

A. *The Negligence Standard*

Canadian courts are familiar with the negligence framework. One commentator notes that "[t]he basis of negligence as a cause of action is conduct that results in an unreasonable risk of harm to another."[162] British Columbian courts currently apply a pure negligence analysis in participant liability and reach fairly consistent results. The success or failure of the negligence analysis turns on

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160. *Zapf*, 11 B.C.L.R.3d at 312-14. The court noted that

> [i]t is my understanding from plaintiff's counsel that they do not dispute that if the injury occurred as a result of a straight shoulder-to-shoulder check, the defendants are not liable. This would be an accepted risk in the game. They say a check from behind in any circumstances, however, is not. They take the position that the defendant was bound to avoid contact from the rear at all costs, once in the "danger zone," i.e., around the goal line. They say such contact could not be consented to.

Id. at 313.

161. *Unruh*, 98 D.L.R.4th at 303-04.

162. Yasser, *supra* note 68, at 262. According to Yasser,

> What is really going on in [participant liability] cases is that courts are struggling to figure out whether or not they will allow a simple negligence cause of action. . . . If the conduct can be declared intentional or reckless, its [sic] a slam dunk. If it is negligence at most, the situation is more comparable to shooting at a moving basket—a tough shot to make.

Id. Wisconsin recently made news in the participant liability area when it began utilizing the negligence analysis in limited cases. Lestina v. West Bend Mut. Ins., 501 N.W.2d 28, 33 (Wis. 1993); *see also* Hana R. Miura, Note, *Lestina v. West Bend Mutual Insurance Co.: Widening the Court as a Playing Field for Negligent Participants in Recreational Team Contact Sports*, 1994 WIS. L. REV. 1005, 1005-06; Dean P. Laing, *Liability of Contact Sports Participants*, WIS. LAW., Sept. 1993, at 13, 14-15.

whether the court appropriately considers the circumstances surrounding the case. These circumstances remove sports cases from the ordinary realm of negligence cases.

The *Zapf* court found that the circumstances in that case did not relieve the defendant of liability. The court relied on factors such as "speed and stresses of the game," "rules of the game," and "assumption of risk."[163] Here, the Canadian courts may wish to look to the leading U.S. participant liability case in negligence, *Lestina v. West Bend Mutual Insurance*.[164] In *Lestina*, the court considered an extensive list of factors in its negligence analysis:

> To determine whether a player's conduct constitutes actionable negligence . . . the fact finder should consider such material factors as the sport involved; the rules and regulations governing the sport; the generally accepted customs and practices of the sport (including the types of contact and the level of violence generally accepted); the risks inherent in the game and those that are outside the realm of anticipation; the presence of protective equipment or uniforms; and the facts and circumstances of the particular case, including the ages and physical attributes of the participants, the participants' respective skills at the game, and the participants' knowledge of the rules and customs.[165]

Using these factors, the *Zapf* court could have reached a more equitable result by focusing more on the customs of the game and less on the "reasonable" hockey player. The *Lestina* factors allow courts to fully consider the special circumstances inherent in participant liability cases.

The negligence standard provides courts with the tools to achieve outcomes consistent with public policy concerns. First, imposing liability in negligence cases would encourage sports organizations like CAHA to maintain enough liability insurance to cover all of its potential claims, thus spreading the loss among all participants.[166] Next, "negligence liability could create a strong incentive for safety."[167] Finally, a negligence standard would encourage participants to educate themselves regarding the

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163. *Zapf*, 11 B.C.L.R.3d at 312.
164. 501 N.W.2d 28 (Wis. 1993).
165. *Id.* at 33 (citing Niemczyk v. Burleson, 538 S.W.2d 737 (Mo. Ct. App. 1976)).
166. Osborne, *supra* note 55, at 440.
167. *Id.* at 441.

inherent risks in sports and how to avoid them.[168]

On the other hand, the negligence standard has a number of potential policy drawbacks. First, the prima facie case for negligence is easier to establish than for recklessness. The easier standard, in turn, may foster excessive litigation.[169] Second, this easier standard may lead to excessive verdicts.[170] Excessive verdicts, in turn, may severely hinder defendants with no liability insurance.[171] Finally, "fear of negligence liability" may reduce the number of participants and support staff involved in sporting events.[172]

The Canadian courts have always used a form of negligence in their analysis, and the application of a simple negligence standard would put them on the cutting edge in the participant liability area.

B. The Recklessness Standard

A recklessness standard offers perhaps the closest fit to the Canadian participant liability tradition.[173] First, recklessness sets a higher "threshold for tort liability,"[174] requiring sports participants to engage in conduct beyond mere negligence before imposing liability.[175] Second, a recklessness standard virtually mimics the analysis in most of the Canadian participant liability

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168. *Id.* at 440-41.

169. *Id.* at 439. One commentator counters that, while fears of mass litigation are justified, these fears are exaggerated. In his view, juries are

> less likely to allow recovery for a plaintiff unless they consider the conduct of a defendant severe and a violation of the rules or a blatant disregard for the ordinary care of co-participants. Moreover, jurors who also participate in sports tend to maintain a preconceived notion that assumption of the risk will bar liability of defendants.

Ian M. Burnstein, Note, *Liability for Injuries Suffered in the Course of Recreational Sports: Application of the Negligence Standard*, 71 U. DET. MERCY L. REV. 993, 1021 (1994).

170. Burnstein, *supra* note 169, at 1021.

171. Osborne, *supra* note 55, at 438. Ultimately, judgments against uninsured defendants may not be satisfied. *Id.*

172. *Id.* at 439.

173. Recklessness is the majority standard in the United States. Yasser, *supra* note 68, at 254-55; *see also* Mel Narol, *Sports Participation with Limited Litigation: The Emerging Reckless Disregard Standard*, 1 SETON HALL J. SPORT L. 29, 30 (1991). *Cf.* Gerald J. Todaro, *Allocation of Risk Based on the Mechanics of Injury in Sports: A Proposed Presumption of Non-Fault*, 10 HASTINGS COMM. & ENT. L.J. 33, 35 (1987) (proposing a rebuttable presumption of non-fault in participant liability cases).

174. Lazaroff, *supra* note 9, at 198.

175. *See* Hackbart v. Clark, 601 F.2d 516, 524 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979); Nabozny v. Barnhill, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975); Turcotte v. Fell, 50 N.E.2d 964, 969-70 (N.Y. 1986).

cases. The courts in *Temple*, *Sexton*, *Conger*, and *Knockwood* premised their rulings on the presence or absence of the defendant's recklessness or intent to injure.[176] Although these courts utilized a negligence framework, they refused to impose liability for negligence alone.

The Massachusetts Supreme Court employed the recklessness standard in a hockey case, *Gauvin v. Clark*,[177] and reached a result strikingly similar to the aforementioned cases. In *Gauvin*, the defendant and the plaintiff were jostling for position following a face-off.[178] As the action moved up the ice, the defendant "butt-ended"[179] the plaintiff in the abdomen.[180] Gauvin lost his spleen as a result of the blow.[181]

Gauvin won $30,000 in damages following a jury trial.[182] The jury found that Clark merely acted negligently, not recklessly, and the trial court entered judgment in favor of Clark.[183] On appeal, the Supreme Court of Massachusetts needed to select a standard of care in this case of first impression.[184] They chose the recklessness standard and reversed the lower court's judgment.[185]

> Allowing the imposition of liability in cases of reckless disregard of safety diminishes the need for players to seek retaliation during the game or future games .... Precluding the imposition of liability in cases of negligence without reckless misconduct furthers the policy that "vigorous and active participation should not be chilled by the threat of litigation."[186]

The language of the Massachusetts Supreme Court mirrors the Canadian majority approach to participant liability. The adoption

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176. *See supra* part II.B.

177. 537 N.E.2d 94 (Mass. 1989).

178. *Id.* at 95. A "face-off" occurs after stoppages of play. DREAYER, *supra* note 1, at 13. The referee drops the puck between two opposing players, and they attempt to "knock the puck to a teammate." *Id.*

179. "Butt-ending" occurs when "[a] player attempts or actually makes contact with an opponent by jabbing the gripped-end of the stick into him. The result is a major and a game misconduct penalty." DREAYER, *supra* note 1, at 63.

180. *Gauvin*, 537 N.E.2d at 95.

181. *Id.*

182. *Id.* at 96.

183. *Id.*

184. *Id.* at 96-97.

185. *Id.* at 96.

186. *Id.* (citing Hackbart v. Clark, 601 F.2d 516, 521 (10th Cir.), *cert. denied*, 444 U.S. 931 (1979); Kabella v. Bouschelle, 672 P.2d 290, 294 (N.M. 1983)); *see* Lazaroff, *supra* note 9, at 212; Yasser, *supra* note 68, at 259.

of a similar recklessness standard would allow a smooth transition for Canadian courts in this area. The recklessness standard provides sound footing for the Canadian courts, as opposed to the self-contradictory negligence coupled with intent standard.

The drawbacks inherent in the recklessness standard are indicative of the dilemma confronting sports torts in general. First, the standard does not afford a bright line rule. It is riddled with general terms that are subject to judicial manipulation. For example, if the defendant in *Gauvin* was not reckless for butt-ending the plaintiff in the abdomen, what constitutes recklessness in Massachusetts?[187]

Second, the standard may be inapplicable to contact sports. One commentator notes that "[i]f players are permitted by the rules of the game to pursue their goals with reckless abandon, how can they be held legally accountable in a civil action for the inevitably injurious results of their unbounded enthusiasm?"[188] Indeed, physical contact is inherent in sports like hockey, and this conflicts with the definition of recklessness: knowledge that an action will create danger.[189] One author states that "[a]lthough established rules exist within the games to regulate rule infractions, courts that adopt the recklessness standard tend to hold rule violations as inherent in the game. The failure to provide recovery for blatant rule violations produces an inconsistent standard as well as inconsistent recoveries."[190]

On the other hand, the recklessness standard avoids the policy pitfalls inherent in the negligence standard. The recklessness standard promotes vigorous participation in sports by avoiding the chilling effect of a negligence standard.[191]

> The "reckless disregard" standard is the correct approach for courts to take in deciding when and in what matter to become involved in sports injury litigation. It strikes the appropriate balance between permitting an injured player to seek compen-

187. One critic of the *Gauvin* opinion asks, " '[W]hat type of conduct would provide recovery under a reckless disregard standard?' This decision exemplifies the failure of jurisdictions that accept the recklessness standard to formulate a consistent and viable standard." Burnstein, *supra* note 169, at 1003.

188. Lazaroff, *supra* note 9, at 214.

189. *Id.*

190. Burnstein, *supra* note 169, at 1013.

191. Lazaroff, *supra* note 9, at 198 (citing Nabozny v. Barnhill, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975)).

> sation for a wrongfully inflicted injury and encouraging vigorous athletic competition without the threat of a participant being hauled into court for conduct which is a part of the game.[192]

Also, in setting a lower standard of care, the recklessness standard arguably protects participants from a wave of litigation under a more liberal negligence standard. This, in turn, would discourage excessive verdicts. Despite its shortcomings, the recklessness standard is the closest fit for the majority of Canadian jurisdictions[193] and is the best alternative for the Canadian participant liability field.

VIII. CONCLUSION

Steven Webber's check on Melvin Unruh, like the first domino in a long sequence, initiated a chain of events that would forever alter amateur hockey in Canada. Large damage awards and rising insurance costs threaten to eliminate checking from junior hockey. A flood of spinal injuries plagued Canadian hockey for more than fifteen years. Around the same time that Unruh collected on his lawsuit, such paralyzing injuries decreased.

Today, Canadian courts are at a crossroads, with British Columbia's negligence standard pitted against the other provinces' intent requirement. Each standard has advantages and disadvantages. The negligence standard threatens to foster excessive litigation. Clearly, if courts continue to punish defendants like Muckalt for exercising questionable judgment, then participant liability cases will flood the dockets. On the other hand, the negligence standard, if applied with a focus on the unique circumstances inherent in sports, could achieve the policy goals of tort law by compensating victims, punishing negligent participants, and forcing all competitors to act in "reasonable" manner in the sporting arena.

The negligence standard coupled with the intent requirement is inherently inconsistent and tends to deny recovery to legitimate claimants. For example, under an intent to injure standard, Unruh would have been unsuccessful, because the trial court specifically found that Webber did not intend to hurt Unruh.[194] Lowering the standard of care from negligence to recklessness may resolve

192. Narol, *supra* note 173, at 40.
193. *See infra* part II.B.
194. Unruh v. Webber, 98 D.L.R.4th 294, 294-95 (Sup. Ct. 1992).

the intent requirement problem. Recklessness affords defendants with more protection by requiring that they disregard the high probability of serious injury before imposing liability. This standard attempts to balance the need for vigorous athletic competition with the need to compensate injured participants. The adoption of a recklessness standard would help put Canadian participant liability on a level playing field.

Geoffrey M. Moore[*]

* J.D. candidate, Loyola Law School, 1997; M.A., California State University, Fullerton, 1994; B.A., University of California, Los Angeles, 1992. I thank my wife, Gia, and my family for their love and support, and my Godson, Gavin Augustine Nieto, for his inspiration. I am indebted to Mel Unruh and Bill Zapf's attorney, Robert D. Gibbens, for his insights on Canadian law and for supplying me with the appellate factums from the *Unruh* case. Professor Daniel E. Lazaroff provided invaluable comments on earlier drafts, especially regarding the frequent misapplication of the negligence and recklessness standards in participant liability cases. I also thank Dr. Gordon Morris Bakken, Dr. Samuel Y. Kupper, Kevin Leung, Richard Yee, Jeffrey Lewis, Gregory Townsend, Thomas E. Nieto, and the *Journal* editors and staff members whose help proved immeasurable.