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Participant's Liability for Injury to a Fellow Participant in an Organized Athletic Event

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PARTICIPANT'S LIABILITY FOR INJURY TO A FELLOW PARTICIPANT IN AN ORGANIZED ATHLETIC EVENT

Nabozny v. Barnhill,
31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

As a result of an attempt in 1905 by the entire Pennsylvania football team to win a game by reducing the Swarthmore star lineman to a bloody pulp, President Theodore Roosevelt threatened to abolish football by executive order unless the game could be made less violent.[1] More frequently than is generally realized, a player will intentionally violate the rules of the game and intentionally inflict injury on another player[2] but litigation seldom arises from such sports injuries.[3] Where an intentional act can be established, the theoretical liability of the opponent is obvious.[4] Complaints are much more rarely founded on negligence, however, generally because there is a natural hesitancy on the part of the injured player or his parents to sue an opponent.[5] It is only when there is permanent and total disability that this reluctance against suing the player is likely to be overcome.[6] While participants[7] and spectators[8] of such recreational activities have often sued proprietors for injuries sustained, very few cases have involved one participant in a game or sport suing another participant for the negligent infliction of injury.[9]

In a case of first impression in Illinois, *Nabozny v. Barnhill,*[10] the Appellate Court for the First District considered whether one player is liable

1. Markus, *Sport Safety: On the Offensive*, 8 TRIAL 12 (July/August 1972).
2. 7 AM. JUR. TRIALS *Contact Sports Injury Cases* §§ 1-2 (1964).
3. *Id.* § 1.
4. *Id.* § 2.
5. *Id.* § 1.
6. *Id.*
7. *E.g.*, Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786 (D. Vt. 1951) (skiing); Thomas v. Studio Amusements, Inc., 50 Cal. App. 2d 538, 123 P.2d 552 (1942) (roller skating); Nierman v. Casino Arena Attractions, Inc., 46 N.J. Super. 566, 135 A.2d 210 (1957) (ice skating); Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 166 N.E. 173 (1929) (amusement park accident).
8. *E.g.*, Khanoyan v. All Am. Sports Enterprises, Inc., 229 Cal. App. 2d 785, 40 Cal. Rptr. 596 (1964) (destruction derby); Brown v. San Francisco Baseball Club, Inc., 99 Cal. App. 2d 484, 222 P.2d 19 (1950) (baseball); Thompson v. Sunset Country Club, 227 S.W.2d 523 (Mo. App. 1950) (golf); McFatridge v. Harlem Globe Trotters, 69 N.M. 271, 365 P.2d 918 (1961) (basketball); Cadieux v. Board of Education, 25 App. Div. 2d 579, 266 N.Y.S.2d 895 (1966) (football); Pierce v. Murnick, 265 N.C. 707, 145 S.E.2d 11 (1965) (wrestling).
9. Except in cases where one golfer is suing another for being hit with a golf ball, *e.g.*, Strand v. Conner, 207 Cal. App. 2d 473, 24 Cal. Rptr. 584 (1962) and cases collected in Annot., 82 A.L.R.2d 1183 (1962), very few cases have been found. *But see, e.g.*, Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966) (family softball game); McDaniel v. Dowell, 210 Cal. App. 2d 26, 26 Cal. Rptr. 140 (1962) (skiing); Hawayek v. Simmons, 91 So. 2d 49 (La. Ct. App. 1956) (fishing).
10. 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

for the negligent infliction of injury to an opposing player. It is unclear, however, from the court's holding under what circumstances such a player will be held liable. Three alternative interpretations result from the opinion. The court held that a participant in an organized athletic competition is charged with a legal duty to a fellow participant to refrain from conduct prohibited by a safety rule and is liable for injuries inflicted with deliberate, wilful or reckless disregard for the safety of a fellow participant. It is for this reason that this case comment will examine the facts upon which *Nabozny* was based, assess the development and scope of similar cases in other jurisdictions, and analyze the reasoning of this court's holding.[11]

Nabozny v. Barnhill

The injuries in the case arose out of an amateur soccer match between two high school teams. Plaintiff was playing the position of goalkeeper for the Hansa team and defendant was one of the forwards for the opposing Winnetka team. Defendant and a Hansa player were chasing a free ball downfield when the Hansa player passed the ball to plaintiff who bent down on his left knee, caught the ball and pulled it to his chest. The Hansa player turned away when plaintiff caught the ball but defendant continued to run toward the goal and kicked the left side of plaintiff's head causing plaintiff permanent skull and brain damage. Plaintiff, a minor, brought the action by his father to recover for the personal injuries which he alleged were caused by defendant's negligence.

At the trial plaintiff's expert witnesses testified that according to F.I.F.A.[12] Official Rules of Soccer, under which the game was being played: (1) Even unintentional contact is an infraction of the rules because all players are prohibited from making contact with the goalkeeper when he has possession of the ball (i.e., has his hands on the ball) in the penalty area (a rectangular area between the eighteen yard line and the goal); (2) the only legal contact permitted in soccer is shoulder to shoulder contact between players going for a ball within playing distance; and (3) only the goalkeeper is allowed to touch a ball in play when he is in the penalty area. In addition, plaintiff's occurrence witnesses testified that plaintiff remained at all times within the penalty area, that plaintiff was in a crouched position on his left knee inside the penalty zone when he was struck by defendant (only one witness and plaintiff testified that he had possession of the ball when he was kicked), and that defendant had time to avoid contact with plaintiff. At the

11. This comment will not discuss the second issue before the court in *Nabozny*, namely, whether plaintiff was contributorily negligent as a matter of law. The court held that since the evidence indicated that plaintiff did not have any reason to know of any danger created by defendant, he could not have unreasonably exposed himself to such danger or failed to discover or appreciate the risk.

12. The Fédération Internationale de Football Association, the governing body of soccer.

close of plaintiff's case, the trial court granted defendant's motion for a directed verdict and plaintiff appealed from the order granting the motion.

The appellate court reversed the trial court's order and concluded that where a safety rule is contained in a recognized set of rules governing the conduct of athletic competition, a participant in such competition, trained and coached by knowledgeable personnel, is charged with a legal duty to every other participant to refrain from conduct proscribed by the safety rule and is liable in tort when his conduct is either deliberate, wilful or with a reckless disregard for the safety of a fellow participant.[13] The cause was then remanded to the trial court for a trial de novo.

CASES IN OTHER JURISDICTIONS

A review of the cases which have considered whether a participant in a game can be held liable to a fellow participant for the negligent infliction of an injury indicates that a universal standard of conduct has not been adopted. The earliest case to discuss this issue was *Mann v. Nutrilite, Inc.*[14] There an action was brought to recover for injuries sustained by the chaperone of a girls' softball team when she was struck while assisting the girls in a pre-game warm-up by a ball thrown by a member of the team. That action was based on the theory of *respondeat superior* and the question was whether the employer should be held liable for the alleged negligence of its player-employee in returning a ball hit into the outfield. This court saw no material difference between an accident occurring during a warm-up session and one in an actual ball game because, in its opinion, players customarily conduct themselves by the same rules in pre-game warm-ups as in actual games.[15] Therefore, *Mann* is applicable to a case where a participant in a team sport is suing a fellow participant.

The court found that the standard of care in such circumstances was not to throw the ball in a manner which the player knew would expose those in front of her to an unreasonable risk of harm.[16] Inasmuch as balls do not always follow the path the thrower intended, the court recognized that the state of mind of the player was of the greatest importance, that a certain margin of error was to be expected, and that if the state of mind was proper, the error would not be one of negligence.[17] Since there was no evidence that the state of mind of the team member included any reckless disregard for the safety of others because throwing the ball over the heads of other participants was the

13. 31 Ill. App. 3d at 215, 334 N.E.2d at 260-61.
14. 136 Cal. App. 2d 729, 289 P.2d 282 (1955).
15. *Id.* at 734, 289 P.2d at 285.
16. *Id.* at 734, 289 P.2d at 285.
17. *Id.* at 734, 289 P.2d at 285.

normal and usual conduct in a pre-game warm-up and in a softball game and because hitting another player with a thrown ball was the sort of mistake which naturally and frequently occurs in any ball game or warm-up, the court held that the team member was not negligent.[18]

A twelve-year old participant in a baseball game was also found not to be negligent when a baseball bat slipped from his hands and struck a fellow participant in *Gaspard v. Grain Dealers Mutual Insurance Company.*[19] In that case, plaintiff argued that defendant was negligent because he used a heavy bat with a defective grip when his hands were dirty and wet with perspiration and that defendant should have known that the bat might slip out of his hands and injure someone. The court, however, found that defendant had exercised the degree of care reasonably to be expected from a boy of his age engaged in such an athletic contest and stated that:

> [t]o impose liability under such circumstances would . . . render the participation of the children of this State [Louisiana] in almost any game or sport a practical impossibility, and become a constant nightmare to parents throughout the State.[20]

Since this case involved a minor participant, his conduct was not judged by the standard of behavior which it is reasonable to expect of an adult, but instead by the standard to be expected from a child of like age, intelligence and experience.[21] *Gaspard* is especially significant in that it enunciates the primary public policy reason for not imposing liability upon either adult or minor participants—a natural reluctance to participate in a game or sport will arise if players are confronted with possible liability for injuries resulting from their participation.

Similarly, *Benedetto v. Travelers Insurance Company*[22] held that a thirteen-year old female softball player was not negligent in throwing a bat and hitting a fellow player sitting along the third base line. The court determined that the normal and natural thing for the batter to do was to drop or get rid of the bat so she could run to first base and that the injury resulted from the manner in which she dropped or threw the bat. Since the batter acted as any normal twelve or thirteen-year old child would in a softball game, the court found that this case was no different from one in which a player might have been hurt by a catcher chasing a fly ball or a foul ball hit in her direction and concluded that the accident was one of those unfortunate occurrences that happen daily throughout the United States on school grounds.[23]

18. *Id.* at 735, 289 P.2d at 285.
19. 131 So. 2d 831 (La. Ct. App. 1961).
20. *Id.* at 833-34.
21. *Id.* at 833.
22. 172 So. 2d 354 (La. Ct. App. 1965).
23. *Id.* at 356.

The same conclusion was reached in *Tavernier v. Maes*[24] where the court also described the injury as the result of an accident. The action was brought by a participant in a family softball game on an improvised field for injuries sustained when he was struck by defendant who was sliding into second base. The *Tavernier* court, however, expanded upon the analysis adopted by the earlier courts by pointing out that there are many hazards which develop from player errors which cannot be classified as negligent and that the known customs of the game must play some part in determining whether conduct is or is not negligence.[25] Defendant's conduct was found to be non-negligent toward the player because he did not owe the latter a duty to conduct himself in any other manner. It thus appears that the California appellate court indicated that the duty owed by a participant to his fellow participant in a team sport is not determined solely by the rules of the game. Rather, in order to determine whether a participant's conduct amounts to careless disregard for the safety of others, the jury must consider not only the rules and nature of the particular game but also the skill of the players and the risks which normally attend playing that game.[26] Since what the scorekeeper may regard as an "error" is not the equivalent, in law, of negligence,[27] the court then concluded that the accident and resulting injury were an unfortunate and unintended consequence of the normal pursuit of the game.[28]

In addition to *Mann, Gaspard, Benedetto* and *Tavernier*, there are two cases[29] which do not involve games where the players are divided into teams but are significant in that they do consider the liability of one participant for injury to a fellow participant. In the first of these cases, *Hoyt v. Rosenberg*,[30] plaintiff and defendant, both twelve years old, were participants in a game similar to hide-and-seek. If the person who was "it" strayed too far from the goal, represented by a coffee canister, any player could come out of hiding, run to the canister and "kick the can" before "it" returned. This action would entitle all players previously found by "it" to run away and hide again before "it" restored the can to its original position. In *Hoyt* defendant ran out of hiding, did not see anyone in the direction in which he intended to kick the can, and kicked the canister into plaintiff's eye thereby causing her serious injury.

24. 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966).
25. *Id.* at 545, 51 Cal. Rptr. at 583.
26. *Id.* at 553, 51 Cal. Rptr. at 588.
27. *Id.* at 553, 51 Cal. Rptr. at 588; *accord*, McGee v. Board of Education, 16 App. Div. 2d 99, 102, 226 N.Y.S.2d 329, 332 (1962).
28. *Id.* at 554, 51 Cal. Rptr. at 589.
29. Hoyt v. Rosenberg, 80 Cal. App. 2d 500, 182 P.2d 234 (1947); Ogden v. Rabinowitz, 86 R.I. 294, 134 A.2d 416 (1957).
30. 80 Cal. App. 2d 500, 182 P.2d 234 (1947).

The court followed the traditional child standard of care and defined defendant's duty in this case to be the exercise of that degree or amount of care that is ordinarily exercised by a child of like age, experience and development.[31] Since it could not be reasonably inferred from the evidence that defendant on this occasion and under these circumstances did anything more or less than healthy boys of his age have always done and will continue to do so long as these games retain their activity, the court agreed with *Mann*, *Benedetto* and *Tavernier* and concluded that the serious injury was merely an unfortunate accident.[32] The court continued by stating that if the injury could have been anticipated at all, it could only be attributed to the natural danger inherent in this game and not to any lack of care which could reasonably be expected to have been exercised by defendant.[33]

To the same general effect is the second case, *Ogden v. Rabinowitz*,[34] where defendant was to attempt to obtain a paddle and to hit plaintiff on her buttocks as part of a college hazing event. Contrary to the object of the game, defendant struck plaintiff in the back and caused her serious injury. That court found that in a case where plaintiff and defendant were voluntary participants in a game, the duty of care is such that each participant assumes the risks ordinarily incident thereto and therefore, plaintiff had no right to recover.[35] The *Ogden* court thus adopted a slightly different approach from the California and Louisiana cases before it by defining the scope of the duty owed by a participant to a fellow participant in a game in terms of assumption of the risk. For this reason, *Ogden* has limited application in jurisdictions, such as Illinois, which have abolished assumption of the risk as a separate defense to negligence.[36]

Upon review of the above six cases, it is evident that a definitive standard of conduct has not emerged. Instead, the cases divide themselves into two

31. *Id.* at 503, 182 P.2d at 236.
32. *Id.* at 507, 182 P.2d at 238.
33. *Id.* at 507-08, 182 P.2d at 238.
34. 86 R.I. 294, 134 A.2d 416 (1957).
35. *Id.* at 301, 134 A.2d at 419.
36. In Barrett v. Fritz, 42 Ill. 2d 529, 248 N.E.2d 111 (1969), the Illinois Supreme Court quoted the following passage from Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5, 14 (1961):

> The expression, assumption of risk, is a very confusing one. In application it conceals many policy issues, and it is constantly being used to beg the real question. Accurate analysis in the law of negligence would probably be advanced if the term were eradicated and the cases divided under the topics of consent, lack of duty, and contributory negligence. Then the true issues involved would be more clearly presented and the determinations, whether by judge or jury, could be more accurately and realistically rendered.

42 Ill. 2d at 535, 248 N.E.2d at 115. Thus, cases in other jurisdictions which have found for a defendant on the basis that plaintiff "assumed the risk" are applicable in Illinois. The court, however, has indicated that it would be more accurate to discuss the results in terms of negligence and contributory negligence and has only applied this defense in master-servant relationships. J. MIRZA & J. APPLEMAN, ILLINOIS TORT LAW AND PRACTICE § 18:4 (1974) [hereinafter cited as MIRZA & APPLEMAN].

primary classes:[37] those which determine whether children of like age, intelligence and experience would understand that such conduct involves an unreasonable risk of harm to others[38] and those which determine whether the participant's conduct amounts to careless or reckless disregard for the safety of others.[39]

In determining whether, as Prosser phrases it, ". . . the interest of the plaintiff which has suffered invasion was entitled to legal protection at the hands of the defendant,"[40] the courts must distinguish between the standard of conduct expected of adult and minor defendants. Despite the difference in the quantum of care required in each standard, the factors considered by each court in either situation do indicate what duty or obligation an adult or minor participant in a game or sport should owe to a fellow participant. Consequently, an examination of these cases indicates that the courts have recognized that in determining what the standard of conduct should be, a certain amount of leeway must be given for what has been variously described as mistake, error, and accident.[41] Thus, if the player's conduct does not involve a reckless disregard for the safety of others or is reasonable for a child of like age, intelligence and experience, there will not be liability for the fortuitous infliction of injury.

If, however, the court employs the wilful and wanton standard of conduct, the two cases[42] which have limited liability to those situations where the player's conduct amounts to reckless disregard for the safety of others suggest that several additional factors must be taken into account. Therefore, in order to determine what constitutes wilful and wanton conduct, the court should consider: (1) The skill of the players, (2) the rules and nature of the game itself, and (3) the risks which normally accompany that game.[43] Consequently, the rules of the game are not the sole consideration in determining whether, in a team sport, the participant has engaged in conduct which amounts to careless or reckless disregard for the safety of others.

37. Since Ogden v. Rabinowitz, 86 R.I. 294, 134 A.2d 416 (1957), is the only case to define the standard of care in terms of assumption of the risk, it will not be considered as a third type of standard of conduct.

38. [Hereinafter referred to in the text as the "child" standard of conduct.] *See* Gaspard v. Grain Dealers Mut. Ins. Co., 131 So. 2d 831 (La. Ct. App. 1961); Benedetto v. Travelers Ins. Co., 172 So. 2d 354 (La. Ct. App. 1965); and Hoyt v. Rosenberg, 80 Cal. App. 2d 500, 182 P.2d 234 (1947).

39. [Hereinafter referred to in the text as the "wilful and wanton" standard of conduct.] *See* Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955); Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966).

40. W. PROSSER, THE LAW OF TORTS § 37, at 206 (4th ed. 1971) [hereinafter cited as PROSSER].

41. See text accompanying notes 17, 23, 28 and 32 *supra*. Prosser defines an unavoidable accident as ". . . an occurrence which was not intended, and which, under all the circumstances, could not have been foreseen or prevented by the exercise of reasonable precautions." PROSSER, *supra* note 40, § 29, at 140.

42. Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P.2d 282 (1955); Tavernier v. Maes, 242 Cal. App. 2d 532, 51 Cal. Rptr. 575 (1966).

43. See text accompanying notes 17 and 26 *supra*.

THE NABOZNY OPINION

The Illinois appellate court in *Nabozny* did not adopt either of the standards of care defined by the courts in the other jurisdictions when considering whether a participant in an organized athletic event is liable for the negligent infliction of injury to a fellow participant. The court began by acknowledging that there was a scarcity of case law involving the negligence of a participant in an organized athletic competition, that there were no Illinois cases on the subject, and that there were also no American cases dealing with the game of soccer. Instead of discussing any of the cases from the other jurisdictions, however, the court simply cited *Gaspard* and dismissed it because it prohibited recovery for public policy reasons.[44]

This court then proceeded to base its decision on its own completely different public policy reason. Judge Adesko, speaking for the court, stated that one of the educational benefits of organized athletic competitions to youth is the development of discipline and self control and that this could best be accomplished by abiding by the rules of the game. He then cited and relied upon Section 50, comment *b* of the Restatement (Second) of Torts[45] as standing for the proposition that such rules are designed both to secure the better playing of the game as a test of skill and to protect participants from serious injury. Although this conclusion appears to make sense, the court quoted this section of the Restatement out of context. Section 50 is in the chapter which addresses itself to the defenses to intentional torts and, more specifically, comment *b* is concerned with the bodily contacts a player "consents" to when taking part in a game.[46] Since *Nabozny* does not involve the possible liability of a participant for the consequences of his intentional actions, the court should perhaps have had a firmer foundation for its decision.

Nevertheless, for these public policy reasons, the court proceeded to conclude that

> [1] . . . when athletes are engaged in an athletic competition; all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule. . . . [and]

44. See text accompanying notes 19 and 20 *supra*.

45. RESTATEMENT (SECOND) OF TORTS § 50 (1965).

46. RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 50, comment *b* at 86 (1965) states:

> *Taking part in a game.* Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules or usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules.

> [2] . . . a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful or with a reckless disregard for the safety of the other player so as to cause injury to that player . . . .[47]

The problem with these conclusions is that it is unclear from the language used what standard of conduct should be applied in situations where the court is determining whether a participant in an organized athletic event is liable for injuries to a fellow participant. The court did not even consider whether the child standard of conduct should be employed[48] and there is no indication whether the court is following *Mann* and *Tavernier* by setting forth a wilful and wanton standard of conduct. As a result, future courts are likely to reach several different interpretations when construing *Nabozny*.

One interpretation is that *Nabozny* enunciates an ordinary negligence standard of conduct. This construction results from the court's statement that a participant in an organized athletic event owes a duty to a fellow participant to refrain from conduct prohibited by safety rules only when the following conditions are present: the teams are trained by coaches and the game is conducted under an acknowledged set of rules which contains safety rules designed to protect the participants. It is unclear, however, whether the court is actually establishing an ordinary negligence standard of conduct because the opinion then continues to state that it is also the court's belief that a participant is liable when his conduct is either deliberate, wilful or with a reckless disregard for the safety of his fellow participants. Since the terms "deliberate," "wilful" and "reckless" apply to that form of aggravated negligence which lies between intentional action and ordinary negligence,[49] these two conclusions are in direct conflict with each other.

If the court did intend to set forth an ordinary negligence standard, then it was inadvisable for it to characterize the conduct being prohibited as deliberate, wilful and reckless because this form of aggravated negligence has some effects which are different from ordinary negligence. Such conduct has been held to justify an award of punitive damages, may justify a broader duty and more extended liability for consequences, and will avoid the defense of ordinary contributory negligence on the part of the plaintiff.[50] Another indication, however, that the court may have indeed intended to propose an ordinary negligence standard of conduct is that the court did discuss whether the plaintiff in *Nabozny* was contributorily negligent[51] and did not dismiss that

47. 31 Ill. App. 3d at 215, 334 N.E.2d at 260-61.

48. The court probably did not consider the "child" standard of conduct because Illinois and the majority of jurisdictions hold that children between fourteen and twenty-one are presumed to be capable of negligence. MIRZA & APPLEMAN, *supra* note 36, § 2:5; PROSSER, *supra* note 40, § 32, at 156.

49. PROSSER, *supra* note 40, § 34, at 184.

50. PROSSER, *supra* note 40, § 34, at 184-85.

51. See note 11 *supra*.

issue on the ground that contributory negligence is not a defense to wilful and wanton conduct.

On the other hand, the opposite approach could be taken and *Nabozny* could be construed as setting forth a wilful and wanton standard of conduct. If this interpretation is adopted, then it is unclear why the court so precisely enunciated the ordinary negligence standard of conduct that a participant owes a duty to refrain from conduct prohibited by safety rules. Two possible reasons for the court doing so are that the court intended the rules of the game to be either the sole factor or one of many factors which it must consider when determining whether the player's conduct was either deliberate, wilful or with a reckless disregard for the safety of the other player.

If the court is using the rules of the game as the sole consideration in a wilful and wanton negligence case, then this holding is clearly contrary to the decisions reached in the other jurisdictions.[52] In the latter cases, the rules of the game were merely one of several factors which a court might consider when determining whether a player's conduct amounted to reckless disregard for the safety of the other players.[53] If, however, the court did intend the rules of the game simply to be one of the factors which a court should take into account and the rules of the game were the only factor which this court found it necessary to consider in this particular case, then it was completely unnecessary for it to set forth an ordinary negligence standard of conduct at all. It would have been clearer if the court had stated instead that the trier of fact should consider not only the rules and nature of the game but also the skill of the players and the risks that attend the game in determining whether a player's conduct amounts to reckless disregard for the safety of the other players.[54]

It is also possible that future courts might arrive at a third interpretation of *Nabozny*. This construction would combine the court's two conclusions and suggests that since a participant owes a fellow participant the duty not to violate the rules of the game, the offending participant will be liable if the trier of fact finds that his conduct constituted a deliberate, wilful or reckless disregard of a safety rule. In effect this interpretation merges the other two possible constructions and therefore, the comments about the first two interpretations are applicable to this last one.

If the court intended to propose either an ordinary negligence or a wilful and wanton violation of safety rule standard, then it should also be noted that these two interpretations are clearly in conflict with Illinois cases which have

52. See text accompanying notes 17 and 26 *supra*.

53. Mann v. Nutrilite, Inc., 136 Cal. App. 2d at 734, 289 P.2d at 285; Tavernier v. Maes, 242 Cal. App. 2d at 553, 51 Cal. Rptr. at 588.

54. Tavernier v. Maes, 242 Cal. App. 2d at 553, 51 Cal. Rptr. at 588.

utilized the standards established by numerous quasi-public or private sources to measure the duty of an actor.[55] Safety codes and other forms of objective standards of safe construction, operation, and the like which have been issued or publicized by voluntary associations as informative or advisory standards and not as regulations having the force of law[56] have been introduced as evidence on the issue of negligence.[57] It is well established, however, that such standards perform much the same function as evidence of custom.[58] Therefore, evidence of such codes or standards of safety merely aids the jury in deciding what was feasible and what the defendant knew or should have known and does not conclusively determine the standard of conduct.[59]

Because *Nabozny* imprecisely defines the duty owed by a participant in an organized athletic event to a fellow participant, one of three possible interpretations might be adopted by future courts. Judge Adesko, speaking for the court in *Nabozny*, admitted to attempting to carefully define the duty in such circumstances in order to control a new field of personal injury litigation. The court, however, did not achieve this objective. Instead, it is likely that *Nabozny* will be broadly interpreted by plaintiffs' attorneys because it is unclear what standard of conduct the court was adopting.

This result would have been avoided if the court had held instead that a player is charged with a legal duty in an athletic competition not to engage in conduct which is either deliberate, wilful or in reckless disregard for the safety of the other players and that the rules of the game are merely one of the factors which a court should consider in determining whether a player had engaged in such conduct.[60] By so holding the court's decision would then have been consistent with both the case law in Illinois and the other jurisdictions. This observation does not suggest that courts of law should blindly follow previous judicial decisions but indicates instead that a court should only disagree with precedent when its departure is based upon a logical and well reasoned argument and, as previously indicated, that factor was not present in this case.[61]

There are many undesirable consequences which might result from a decision which sets forth an ambiguous standard of conduct. When discussing

55. MIRZA & APPLEMAN, *supra* note 36, § 3:18.

56. Illinois and the majority of courts in other jurisdictions hold that an unexcused violation of a statute is conclusive evidence of negligence, *i.e.*, negligence per se. MIRZA & APPLEMAN, *supra* note 36, § 3:1; PROSSER, *supra* note 40, § 36, at 200.

57. *See* Annot., 75 A.L.R.2d 778 (1961).

58. Darling v. Charleston Community Memorial Hosp., 33 Ill. 2d 326, 332, 211 N.E.2d 253, 257 (1965), *cert. denied*, 383 U.S. 946 (1966) (Joint Commission on Accreditation of Hospitals).

59. 33 Ill. 2d at 332, 211 N.E.2d at 257.

60. Tavernier v. Maes, 242 Cal. App. 2d at 553, 51 Cal. Rptr. at 588, suggests that other factors which the court might consider are the nature of the game, the skill of the players, and the risks that attend the game. See text accompanying note 26 *supra*.

61. See text accompanying notes 44 and 45 *supra*.

liability for injuries to a player by a fellow player in an organized athletic event, such an opinion may open the floodgates of litigation, breed inconsistent results, mislead juries, allow the loss to fall upon the wrong person, discourage people from participating in recreational activities and bury important policy questions. For these reasons it was crucial that the court precisely define the standard of conduct it was proposing and base its holding on a firm foundation but it did not do so.

CONCLUSION

It is more and more frequently being recognized that with the increase in violence in sports, it is socially desirable to hold participants in athletic events liable for injuries to fellow participants which occur as the result of the former's conduct, be it intentional or negligent.[62] The cases in the other jurisdictions indicate that a wilful and wanton standard of conduct should be employed when determining whether an adult participant is liable for injury to a fellow participant in a team sport. This court, however, did not precisely set forth the standard of conduct which it was adopting in similar situations and therefore *Nabozny* may well be interpreted by future courts as an aberration and not the opening of ". . . a new field of personal injury litigation."[63]

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62. Comment, *Violence in Professional Sports*, 1975 WISC. L. REV. 771.
63. 31 Ill. App. 3d at 215, 334 N.E.2d at 261.