Legal Aspects of Big Sports Event Management

Part III: Risks Presented by Torts and Alcohol

BY VERED YAKOVEE

Sports events give rise to numerous liabilities, including torts that occur both on and off the field or court, as well as risks that flow from the sale of alcohol. This article describes some of them—from inside pitches, player and spectator fighting, to intoxicated patrons. A promoter or employer might be directly or vicariously liable. However, even when it avoids a large jury verdict or award, it still may be forced to incur substantial attorney fees and expenses in its defense. Thus, in addition to continued monitoring for safety, entities should be aware of the financial protection they have in their insurance policies. Part III's separate spotlight feature provides a policyholder's guide to disability insurance in the context of guaranteed player contracts (see page 10).

TORTS

The California Supreme Court recently addressed the scope of tort liability in baseball in a case involving a batter who was hit by an inside pitch.[1] The case involved a community college game, but the court acknowledged the similarity of professional and amateur baseball in this regard. In that case, Jose Luis Avila was up to bat when the pitcher threw the inside pitch, striking him in the head, cracking his helmet and injuring him. Avila contended that the pitch to his head was intentional and retaliatory, or at least negligent, based on the fact that in the prior half-inning, the pitcher on Avila's team also struck a batter. Avila brought suit against both community colleges, his manager, and the helmet manufacturer, among others.

The court held that California Government Code section 831.7, immunizing public entities for injury sustained during participation in recreational activity, does not apply to school sports or intercollegiate games. However, the court held that the host school did not breach the duty it owed to Avila. The court noted that "in interscholastic and intercollegiate competition, the host school and its agents owe a duty to home and visiting players alike to, at a minimum, not increase the risks inherent in the sport."[2] The school did not breach its duty when, as alleged in Avila's complaint, it failed to control the pitcher, provide umpires, or provide medical care.

In addition, the court opined that for a pitcher to hit a batter, even intentionally, does not give rise to tort liability:

> It is one thing for an umpire to punish a pitcher who hits a batter by ejecting him from the game, or for a league to suspend the pitcher; it is quite another for tort law to chill any pitcher from throwing inside, i.e., close to the batter's body—a permissible and essential part of the sport—for fear of a suit over an errant pitch. For better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball. It is not the function of tort law to police such conduct.[3]

Because it did not breach its duty of care to Avila, and because the pitcher did not act tortiously, the community college was not held liable to Avila for the injury he sustained from the pitch to his head.

The court likened its nontortious characterization of inside pitches to professional baseball:

> The laws of physics that make a thrown baseball dangerous and the strategic benefits that arise from disrupting a batter's timing are only minimally dependent on the skill level of the participants, and we see no reason to distinguish between collegiate and professional baseball in applying primary assumption of the risk.[4]

While the Avila case may not have been heavily publicized, the November 19, 2004, NBA brawl between the Detroit Pistons, Indiana Pacers, and spectators in the Pistons' Auburn Hills, Michigan, arena certainly was. Its repercussions have affected rules pertaining to various potential liabilities including increased supervision of spectators and sales of alcohol at sporting events. Although heavily publicized, it is neither the first incident of its kind nor the last.

The familiar episode began when Detroit Piston Ben Wallace shoved Indiana Pacer Ron Artest in response to a hard foul by the latter. An altercation ensued on the court between several players from each team, some of whom came off the bench to get involved, in violation of NBA rules. Among the chaos, Pacers Ron Artest and Stephen Jackson were caught on tape fighting with spectators in the stands—one of whom had previously thrown a beer at Artest. Meanwhile, Pacer Jermaine O'Neal was caught on tape punching a spectator that had entered the court and was in a scuffle with his teammate, Anthony Johnson. All in all, the melee resulted in injured fans, criminal charges, and player suspensions.

It also resulted in civil lawsuits. For example, the individual that sustained O'Neal's blow sued the Pacers, O'Neal, and Johnson jointly and severally. On October 19, 2006, a federal jury in Michigan found that O'Neal committed battery but that he was not liable because he was acting in defense of his teammates.[5] In response, the plaintiff's attorney stated that "[t]he message received is that if a fan goes onto the court he is subject to a beat down from a player."[6] The subsequently filed appeal was dismissed for want of prosecution because the plaintiff's attorney failed

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to file it by the April 9, 2007, court-imposed deadline.[7]

A subsequent action for assault and battery was filed by one of the fans accosted by Artest in the stands.[8] That lawsuit named Artest, Jackson, and the Pacers. The latter was charged with liability three ways: (1) vicarious liability as the players' employer, (2) liability for the team's own negligence in not preventing the brawl, and (3) the negligent hiring of Artest, who plaintiffs allege had a known history of aggressive acts. That case was dismissed as to Ron Artest on February 12, 2007, and as to Stephen Jackson and the Pacers on May 7, 2007.

In an unreported opinion flowing from the incident, the U.S. District Court for the Southern District of New York held that Roger Kaplan, the grievance arbitrator who reduced Jermaine O'Neal's suspension from 25 to 15 games, was acting within his jurisdiction when he did so.[9] The court found that the NBA commissioner did not have exclusive jurisdiction to hear appeals regarding player suspensions due to the brawl because the player's behavior did not occur "'on the playing court,' as the parties to the Collective Bargaining Agreement have used those terms."[10]

A SPECTATOR'S INJURY CAUSED BY A PROFESSIONAL ATHLETE IS NOT A NOVEL SCENARIO.

The day after the Detroit incident in 2004, another fight erupted on a playing field. This time it was at the college level, in a football game between Clemson University and the University of South Carolina. Clemson coach Tommy Bowden said that the NBA brawl described above had factored into his team's brawl. "They sat there and watched that for 24 hours . . . I think it did. By no way and means did it justify what happened."[11]

Two years later, violence on the college football field appeared to be growing. On the same Saturday in October 2006, two teamwide fights broke out in separate games, one in Florida and the other in New Hampshire.

In the third quarter of the game in which Miami was on its way to shutting out Florida International, both teams' players rushed the field in a sideline-clearing brawl that drew a police response. Thirteen players were promptly ejected from the game and 31 players were suspended for the following week's game, some of whom were disciplined further by their respective universities.[12]

The other fight that day broke out at Dartmouth, after Holy Cross beat the home team in overtime and then celebrated on the Dartmouth "D." Instead of handshakes after the game, there was a large-scale brawl. Although the game was not televised, police were present and involved, as were local and regional reporters.

While the Dartmouth game may not have been televised, the Miami game was—with its incident creating risk for the networks that were involved. During the Miami scuffle, one of the local broadcasters commented to the effect that the players should meet in the tunnel to settle the score after the game. That broadcaster was Lamar Thomas, a former University of Miami wide receiver, who stated that "you come into our house, you should get your behind kicked" and that he "was about to go down the elevator to get in that thing." Mr. Thomas was subsequently fired.[13]

Coaches, too, can engage in conduct exposing sports entities to risk. In just one incident of a highly publicized string of misbehavior by the longtime Indiana University basketball coach, Bobby Knight accosted Ron Felling, his then-assistant coach, in late 1999. Felling sued Knight for assaulting him and Knight in turn sued his insurance carrier for the attorney fees incurred in defending the lawsuit. On June 14, 2006, the latter court held that the carrier had no duty to defend Knight because of the policy's exclusion for "expected or intended" injury, which the court interpreted to mean "actual intent to cause harm" or an "awareness that harm was practically certain." The court found Knight's behavior to be "obviously deliberate" and that, therefore, defense of the underlying action was excluded from coverage.[14]

Even high school athletes can generate liability by injury to, or at the hands of, spectators. A former high school basketball star filed lawsuits against the school district and two students after he sustained permanent injuries on the court immediately after a game. After his two-handed slam dunk in the final seconds of the game, Joe Kay of Tucson High School in Arizona was pushed down and trampled by spectators who rushed the court. As a result, his carotid artery tore and he suffered a paralyzing stroke. Kay settled the lawsuits he filed and received $2.9 million from the school district and $600,000 from the parents of the two student-defendants.[15]

A spectator's injury caused by a professional athlete is not a novel scenario. In a 1975 game at Fenway Park against the Boston Red Sox, Baltimore Orioles pitcher Ross Grimsley threw an 80-mile-per-hour ball at a portion of the stands protected by a fence. The ball broke through the fence, injuring a spectator. The spectators in that area of the stands were previously heckling Grimsley; however, the injured patron was not one of those hecklers. In the ensuing litigation, the injured patron sued both Grimsley and the Baltimore Orioles, alleging that the injury was both battery and negligence for which he could recover damages.[16] The district court ruled that the patron did not present facts sufficient to sustain a cause of action for battery, but allowed the claim to proceed against both defendants. It held that in Massachusetts,

> where a plaintiff seeks to recover damages from an employer for injuries resulting from an employee's assault . . . [W]hat must be shown is that the employee's assault was in response to the plaintiff's conduct which was presently interfering with the employee's ability to perform his duties successfully.[17]

At trial, the battery claim never got to the jury; howev-

er, the jury found for both defendants regarding the negligence claim.

The question of whether a player's conduct occurs on the court or field leads to the question of whether the player's conduct occurs within the scope of his employment. Club or facility liability can arise under the doctrine of respondeat superior when a player injures a spectator, or another player, while acting within the scope of his employment.

For example, during a Denver Broncos home game against the Cincinnati Bengals, a Broncos player was the victim of an act that, barring any affirmative defense, would have given rise to civil liability, at the hands of a Bengals player. When the injured Bronco subsequently sued, the trial court found no liability on the part of the Bengals player, holding that even intentional torts are within the inherent risks of professional football.[18] It reasoned that professional football players assume those risks because the NFL "has substituted the morality of the battlefield for that of the playing field, and the 'restraints of civilization' have been left on the sidelines."[19] The appellate court reversed the trial court's decision, holding that there are no rules precluding recovery by a professional football player for tortious injury.[20] The club and the player were, however, proper defendants under the doctrine of respondeat superior. "The legal criterion for imposing such 'vicarious liability' on an employer is whether the harmful action on the part of [the player] was 'within the scope of employment' with the [team]."[21]

Similarly, the New Mexico Supreme Court held that the owner of the Harlem Globetrotters was vicariously liable for the act of a player who "intentionally or negligently" threw a basketball into the stands and into the face a spectator, injuring her.[22] The court stated that there were no grounds to conclude that "the act arose 'wholly from some external, independent, and personal motive . . . to do the act on his own account'" and noted that the act occurred while he was performing the defendant's business.[23]

These incidents of physical assault go hand in hand with the duty to protect spectators and provide adequate security at athletic events. In fact, after the Pacers incident in Detroit, the Pistons announced that the organization would increase security in and around its stadium and the NBA stated that it would review its security policies in the interest of spectator security.

However, sports liabilities arise well before participants reach the professional level. Just as playing sports begins in elementary school, so do the risks that flow from them. Recently, grade schools across the country have banned children from playing commonplace recess games such as tag "for fear they'll get hurt and hold the school liable."[24] Wyoming, Washington, South Carolina, and Massachusetts are all home to elementary schools that have banned one or more chase or contact sports, including tag, dodgeball, and touch football.[25] Grade schools in Colorado banned tag in 2005 and actively have continued to do so as recently as August 2007.[26]

Thus, these issues should be analyzed on a global level, and early on.

ALCOHOL SALES

In another action taken in response to the debacle in Detroit, the NBA implemented new rules with respect to the sale of alcohol at its games. The new rules require that alcoholic purchases be limited in size to 24 ounces, in quantity to two per person, and in time of sale to before the end of the third quarter.

The NFL also reacted to the brawl by sending a memorandum to each of its franchises, reminding them of the league's safety rules and specifically reminding them to comply with the already-existing rule precluding the sale of alcohol at NFL games after the end of the third quarter.[27]

Despite its efforts, the NFL recently dealt with liability issues pertaining to the sale of alcohol. In an August 2006 decision, a New Jersey court addressed claims based on a drunken spectator leaving a game at Giants Stadium who drove into another car, injuring a mother and partially paralyzing her infant daughter.[28] The plaintiffs brought suit against multiple defendants, including the driver, the concessionaire, the New York Giants, Giants Stadium, the NFL, and then-NFL commissioner Paul Tagliabue. Evidence presented at trial included the driver's admission that he was drunk at the game, that he had purchased more than two beers at a time, and that he did so while he was drunk, in violation of the concessionaire's and the NFL's policies. The jury awarded the mother and daughter a combined total of $60,450,000 in compensatory damages and $75,000,000 in punitive damages.

Reversing that award and remanding for new trial, the appellate court confirmed that the defendants were not subject to dram shop-type, strict liability laws. In other words, the court held that there is no strict liability for the purveyor of alcoholic beverages when an intoxicated patron subsequently injures someone. Rather, statutory regulations based on negligence applied. However, the court did not have to address these substantive points because it reversed the decision on procedural grounds. It reasoned that the trial court allowed defendants to be added later in the proceedings than was fair in order for them to appropriately defend themselves and that prejudicial evidence was presented to the jury without instructions to disregard it. The court also held that some defendants, including the NFL and Tagliabue, had been granted summary judgment, thereby erroneously eliminating them from potentially bearing any portion of the liability. Thus, in reversing the damages awards, the court relied on these procedural points.

Other governing bodies also face risks related to alcohol sales. For example, in a 2004 incident at MLB's Colorado Rockies' home stadium, a spectator and his son were assaulted by intoxicated spectators seated behind them, who were subsequently convicted of misdemeanor assault. The victims brought suit against the Rockies, alleging that the organization was responsible for the drunken behavior of the spectators because it failed to provide adequate security in the stands and also failed to implement adequate policies regarding the sale and service of alcohol at the game.[29] That case is pending, and its

docket inactive, since July 11, 2006.[30]

Similar issues exist for owners and operators of amateur and recreation sporting venues, as illustrated in a recent case involving injury sustained by a patron of an outdoor baseball venue consisting of five softball fields upon which adults regularly play in organized leagues. In a Connecticut lawsuit, plaintiff Hopkins alleged that the facility was negligent in serving alcohol to patrons who "may have been intoxicated already."[31] Hopkins specifically alleged that the facility allowed them to consume an overabundance of alcohol and failed to provide adequate security when he was subsequently beaten up by those patrons. The court rejected the proposition that laws analogous to the old Dram Shop Act apply. However, it did find that there is a duty of care to be met to avoid liability in negligence. In this case, Hopkins failed to allege facts sufficient to support his claim of negligent sale of alcohol and lack of supervision. For example, he did not allege that his assailants were intoxicated. Rather, he alleged that they "may have been" intoxicated. Additionally, he did not allege that the facility was on notice of the requirement for supervision, nor did he show that proximate causation between his injury and the lack of security. For these reasons, the trial court granted the defendant's motion for summary judgment.

A different conclusion was reached in a lawsuit involving the University of Notre Dame.[32] In that case, the plaintiff was knocked down by an intoxicated fan as she walked to her car at the end of a football game, suffering a broken leg as a result. Reversing the trial court's summary judgment for the defendant, the court held:

> The University is aware that alcoholic beverages are consumed on the premises before and during football games. The University is also aware that "tailgate" parties are held in the parking areas around the stadium. Thus, even though there was no showing that the University had reason to know of the particular danger posed by the drunk who injured Mrs. Bearman, it had reason to know that some people will become intoxicated and pose a general threat to the safety of other patrons. Therefore, Notre Dame is under a duty to take reasonable precautions to protect those who attend its football games from injury caused by the acts of third persons.[33]

Therefore, the court opined, there is at least a question of fact as to whether the university met its duty of care.

CONCLUSION

Exposure to liabilities from torts and the consumption of alcohol at and around sports events cannot be entirely avoided—but it can be minimized. Risk management measures should include both safety precautions as well the maintenance of proper insurance. ■

Vered Yakovee is an associate in the Los Angeles office of Dickstein Shapiro LLP. She is the co-founder and co-leader of the firm's sports insurance initiative. Her e-mail is yakoveev@dicksteinshapiro.com.

[Part IV, the final part of this series, will appear in the Fall 2007 issue of *Entertainment and Sports Lawyer*.]

1. Avila v. Citrus Cmty. Coll. Dist., 38 Cal. 4th 148 (2006).
2. *Id.* at 162.
3. *Id.* at 165 (footnote omitted).
4. *Id.* at 164–65.
5. Haddad v. Ind. Pacers, No. 04-CV74932 (E.D. Mich. Oct. 19, 2006).
6. http://www.sportslaw.org/members/news/nov12006.cfm#story4.
7. http://casedocs.justia.com/michigan/miedce/2:2004cv74932/197253/112/0.pdf.
8. Ryan v. Artest, No. 2:06-CV-13968 (E.D. Mich. Sept. 8, 2006).
9. Nat'l Basketball Ass'n. v. Nat'l Basketball Players Ass'n, No. 04 Civ. 9528 (GBD), 2005 WL 22869 (S.D.N.Y. Jan. 3, 2005).
10. *Id.* at *11 (the court's holding affirming the proper jurisdiction of the grievance arbitrator did not extend to an analysis of the award itself).
11. Pete Thamel, *Inside College Football; Brawl-to-Brawl Action*, N.Y. TIMES, Nov. 22, 2004, at D9 (quoting Tommy Bowden).
12. Charlie Nobles, *College Football; 31 Players Suspended for Miami-F.I.U. Brawl*, N.Y. TIMES, Oct. 16, 2006, at D5.
13. Charlie Nobles, *College Football; Coker's Job Safe for Now; Suspensions Continue*, N.Y. TIMES, Oct. 17, 2006, at D6.
14. http://www.sportslaw.org/members/news/julynl2006.cfm#story5 (last visited Sept. 10, 2006).
15. Gary Roberts, Materials from the 32nd Annual Sports Lawyers Association Conference, June 2006, at 51.
16. Manning v. Grimsley, 643 F.2d 20 (1st Cir. 1981).
17. *Id.* at 24 (citation omitted) (holding that the heckling did in fact constitute conduct interfering with Grimsley's ability to perform his duties).
18. Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352 (D. Colo. 1977).
19. *Id.* at 358.
20. Hackbart v. Cincinnati Bengals Inc., 601 F.2d 516, 520 (10th Cir. 1979) (player assumes the risk of injury, but not the risk of injury as a result of intentionally tortious conduct in direct violation of NFL rules).
21. Paul C. Weiler & Gary R. Roberts, SPORTS AND THE LAW: TEXT, CASES AND PROBLEMS 950 (West 2d ed. 1998).
22. McFatridge v. Harlem Globe Trotters, 365 P.2d 918, 919 (N.M. 1961).
23. *Id.* at 921.
24. Associated Press, *Not It! Mass. Elementary School Bans Tag: Mass. School Bans Playing Tag at Recess over Fears of Injuries and Lawsuits*, Oct. 19, 2006.
25. *Id.*
26. http://www.thedenverchannel.com/news/14005207/detail.html (last visited Sept. 5, 2007).
27. Damon Hack, *Pro Football; NFL Issues Reminder on Conduct and Safety*, N.Y. TIMES, Nov. 25, 2004, at D1.
28. Verni *ex rel.* Burstein v. Harry M. Stevens, Inc., 903 A.2d 475 (N.J. Super. Ct. App. Div. 2006).
29. Roberts, *supra* note 15.
30. *See* Colorado Court database, Black v. Colorado Rockies Baseball Club Ltd., No. 2005CV002162 (filed March 22, 2005).
31. Hopkins v. Conn. Sports Plex, LLC, No. CV044002547S, 2006 WL 1738369, at *1 (Conn. Super. Ct. June 9, 2006).
32. Bearman v. Univ. of Notre Dame, 453 N.E.2d 1196 (Ind. 1983).
33. *Id*. at 1198.