

# SPORTS OFFICIAL LIABILITY: CAN I SUE IF THE REF MISSED A CALL?

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## INTRODUCTION

It is game seven of the World Series, the score is tied and your favorite team is batting in the bottom of the ninth. The bases are loaded with two outs as your star player steps to the plate. The hitter jumps on the first pitch, trickling a ball towards the shortstop. Checking to first base the shortstop realizes the only play is at home plate. The runner on third base is charging and dives head first to beat the throw home. He's safe by a mile! The stadium erupts. But, wait – the home plate umpire calls him out! The announcers are speechless as the televised replays show the runner clearly beating the tag. Unfortunately, without instant replay there is no chance of the umpire's call being overruled. Your team goes on to lose the World Series in extra innings.

The next morning, still in disbelief from your team's misfortune, you grab the paper and see the following headline: "Team Sues Umpire For Blown Call!" Can it be? Is there such a cause of action as negligent officiating or referee malpractice? Are courts willing to hold a sports official liable for an unintentional error in judgment? And, if courts do recognize such claims, what standard of care must the referee's conduct meet? This paper will discuss the claim of negligent officiating, and determine whether existing case law precludes such a cause of action. This paper will not discuss liability deriving from intentional acts of sports official misconduct, *i.e.*, tampering, bribery or fraud, as the States have clearly placed such conduct within the ambit of the courts.

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I. LIABILITY OF A SPORTS OFFICIAL FOR UNINTENTIONAL ERRORS MUST BE ANALYZED UNDER A THEORY OF NEGLIGENCE.

Modern professional sports are an industry of staggering financial size.<sup>1</sup> Players, owners, agents, retailers and cities all derive substantial revenue from professional sports.<sup>2</sup> Sports officials play perhaps the most important role supporting professional sports, yet they receive little to no attention until they have in fact erred, or the fans perceive error.<sup>3</sup> An official's error can cause a professional team significant monetary harm.<sup>4</sup> Liability of a professional sports referee, sometimes referred to as referee malpractice, has received significant academic commentary. However, while tort liability for referee malpractice is firmly grounded in negligence theory, jurisdictions differ as to the appropriate standard of care placed on referees. The current prevailing standard appears to be ordinary negligence. Standard defenses to negligence may present a bar to recovery. Contributory negligence, assumption of risk and lack of causation may all prove fatal to a claim.<sup>5</sup>

Numerous states have granted sports officials qualified tort immunity to civil suit.<sup>6</sup> When present, qualified immunity jurisdictions require a showing beyond simple negligence before liability is found. Rather, qualified immunity jurisdictions require a showing of either "recklessness" or "gross negligence" before the courts will recognize a claim for negligent officiating.<sup>7</sup> Qualified immunity statutes generally refer to liability for *physical* harm sustained during athletic contests, as opposed to *financial* harm resulting from an improper call.

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<sup>1</sup> Kenneth W. Biedzynski, Comment, *Sports Officials Should Only Be Liable For Acts of Gross Negligence: Is That the Right Call?*, 11 U. MIAMI ENT. & SPORTS L. REV. 375, 375 (1994).

<sup>2</sup> *Id.* at 376.

<sup>3</sup> *Id.* at 376-77.

<sup>4</sup> Shlomi Feiner, *The Personal Liability of Sports Officials: Don't Take the Game Into Your Own Hands, Take Them to Court!*, 4 SPORTS LAW. J. 213, 214 (1997).

<sup>5</sup> Biedzynski, *supra* note 1, at 384.

<sup>6</sup> *Id.* at 379.

<sup>7</sup> *Id.*

Regardless of the standard of care, to recover for an action sounding in negligence, the standard tort elements must be demonstrated: duty, breach, causation, and harm.<sup>8</sup> The plaintiff must demonstrate that the “referee’s conduct deviated from a required standard of care and that such a deviation resulted in a different outcome for the game.”<sup>9</sup>

A. *Duty*

Before liability can attach to a sports official, breach of an affirmative duty must be demonstrated.<sup>10</sup> Duty arises in the context of sports officiating given statutes, common law,<sup>11</sup> or an “implied contractual obligation to officiate competently.”<sup>12</sup> The job of a sports official is to “possess and implement adequate knowledge of the rules and their application.”<sup>13</sup> To determine if a prospective plaintiff possesses interests which are entitled to legal protection, *i.e.*, whether the referee owes them a duty, courts consider many factors. Specifically, courts consider: the foreseeability of harm; the degree of certainty that plaintiff has suffered the alleged harm; the closeness of connection between the referee’s alleged misconduct and potential injury; any existing policy preventing future harm; and the external consequences of placing the burden of liability upon the defendant.<sup>14</sup> The factors balance both public policy interests and the practical implications of allowing sports official liability. It is likely the “duty” prong of the negligence inquiry is satisfied by explicit reliance on the referee as an impartial and competent on-field arbiter.

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<sup>8</sup> *Id.* at 381.

<sup>9</sup> Jason Loomis, *The Emerging Law of Referee Malpractice*, 11 SETON HALL J. SPORTS L. 73, 88 (2001).

<sup>10</sup> Feiner, *supra* note 4, at 217.

<sup>11</sup> Loomis, *supra* note 9, at 88.

<sup>12</sup> Feiner, *supra* note 4, at 217.

<sup>13</sup> Feiner, *supra* note 4, at 217.

<sup>14</sup> Darryll M. Halcomb Lewis & Frank S. Forbes, *A Proposal for a Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests*, 39 DEPAUL L. REV. 673, 690 (1990).

*B. Breach*

Once a duty has been found to exist, a prospective plaintiff must establish breach. Breach is commonly defined as a “failure to perform a duty or ‘failure to exercise that care which a reasonable [person] would exercise under similar situations.’”<sup>15</sup> If this duty is breached, only the non-breaching party is in a position to sue. Generally, the non-breaching parties include the league and athletic participants.<sup>16</sup> Third-parties, such as fans, retailers and gamblers, will be unable to demonstrate that they were intended beneficiaries of the contract between the referee and team, *i.e.*, there is no privity of contract.<sup>17</sup> Therefore, if a claim of negligent officiating is allowed, the most likely party to recover would be the team itself.

*C. Causation*

The plaintiff will typically face great difficulty when trying to prove that the harm was in fact *caused* by the referee’s negligent act or omission. Furthermore, the court may require a showing of proximate causation. Proximate cause is proven when the relationship between the “initial conduct and the ultimate harm” is not so disparate “as to discredit the imposition of liability.”<sup>18</sup> The negligent act must be the cause-in-fact of the monetary harm. In other words, but for the incorrect call by the official, the outcome of the game would have been different.<sup>19</sup> The causation element will prove fatal to most claims. The negligent decision *must* be outcome determinative. Therefore, the scope of plays eligible to satisfy this element is necessarily limited to plays occurring in the final seconds of a game.

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<sup>15</sup> Loomis, *supra* note 9, at 94 (quoting Shlomi Feiner, *The Personal Liability of Sports Officials: Don’t Take the Game Into Your Own Hands, Take Them to Court!*, 4 SPORTS LAW. J. 213, 215, 229 (1997)).

<sup>16</sup> Feiner, *supra* note 4, at 217.

<sup>17</sup> *Id.*

<sup>18</sup> Lewis & Forbes, *supra* note 16, at 691.

<sup>19</sup> Loomis, *supra* note 9, at 89.

D. *Harm*

Harm must be considered reasonably foreseeable to allow recovery.<sup>20</sup> Because modern professional sports involve tremendous sums of money, such high financial stakes make the harm reasonably foreseeable and the determination of monetary injury rather easy. When a team fails to make the playoffs, or fails to advance in the post-season, a team's lost revenue can be substantial.<sup>21</sup> Winning teams, and especially teams that consistently compete for championships, earn far more revenue than those that do not.<sup>22</sup> Each loss on the field may result in a decrease in team value.<sup>23</sup> Gate receipts, broadcasting rights, box sales, concessions, parking and license fees may all be affected by sports official negligence.<sup>24</sup> Wins, losses and championships have been found to significantly affect a team's value, as well as impact future earnings.<sup>25</sup> While many injuries in professional sport are quantifiable, others such as "team pride, emotional distress, and fan support" can be supported only by qualitative data.<sup>26</sup> Monetary harm becomes more difficult to ascertain the further removed the sporting contest is from the professional level.

II. COURTS AND COMMENTATORS DISAGREE AS TO WHAT STANDARD OF CARE SHOULD BE APPLIED WHEN JUDGING ALLEGEDLY NEGLIGENT ACTS

Referees are generally required to use reasonable care to ensure that the sporting contest adheres to the rules of competition.<sup>27</sup> Reasonable care requires acting with the diligence of a reasonable and prudent referee of similar training and experience: reasonableness equates to an ordinary negligence standard.<sup>28</sup> Published case law supports a finding that the perceived

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<sup>20</sup> Feiner, *supra* note 4, at 217.

<sup>21</sup> Loomis, *supra* note 10, at 84.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 86-87.

<sup>26</sup> *Id.* at 86.

<sup>27</sup> Biedzynski, *supra* note 1, at 385.

<sup>28</sup> *Id.*

standard of care by which referee conduct is measured is ordinary negligence.<sup>29</sup> In the context of referee negligence, an “error” is defined as a sports official’s misidentification of fact.<sup>30</sup> Under an ordinary negligence standard, the law would attempt to hold an official liable for such errors. However, courts have historically refused to interfere with an officiating decision unless it is “found to have been based on corruption, bad faith or fraud.”<sup>31</sup>

The “duty of care owed by a player *to an umpire* during the course of a game is the same as that owed *to another player*.”<sup>32</sup> Commentators argue by analogy that this rule should be applied conversely: since participants and competitors “owe their fellow players a duty to not act recklessly, recklessness and *not* ordinary negligence should define the sports official’s duty.”<sup>33</sup> Sports decisions are made instantaneously and under intense pressure.<sup>34</sup> Commentators therefore argue that referee conduct should be measured against a more lenient standard which does not restrict a referee’s discretion; referees should be free to properly officiate without fear of litigation.<sup>35</sup>

Assuming referees are acting in good faith and make an unintentional error in judgment, it seems reasonable that an ordinary negligence standard would suffice. However, for cases involving unintentional torts, commentators argue the proper standard of care is a gross negligence or recklessness standard: a referee will only be liable where their acts or omissions are reckless.<sup>36</sup> In line with this view, many states have enacted sports-specific laws limiting civil

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<sup>29</sup> *Id.* at 417.

<sup>30</sup> *Id.* at 418.

<sup>31</sup> *Id.*

<sup>32</sup> *Stewart v. D & R Welding Supply Co.*, 366 N.E.2d 1107, 1108 (Ill. Ct. App. 1977).

<sup>33</sup> Biedzynski, *supra* note 1, at 412.

<sup>34</sup> Feiner, *supra* note 4, at 229.

<sup>35</sup> *Id.*

<sup>36</sup> Biedzynski, *supra* note 1, at 387-88.

liability to reckless action.<sup>37</sup> States have adopted this view in part due to the aggressive campaigning of the National Association of Sports Officials (“NASO”). The NASO supports a gross negligence standard, and has set forth model legislation specifically dealing with the civil liability of a sports official. The NASO model legislation includes:

Section 1. Sports officials ... shall not be liable to any person or entity in any civil action for injuries or damages claimed to have arisen by virtue of actions or inactions related in any manner to officiating duties within the confines of the athletic facility at which the athletic contest is played.

...

Section 3. Nothing in this law shall be deemed to grant the protection set forth to sports officials who cause injury or damage to a person or entity by actions or inaction which are intentional, willful, wanton, reckless, maliciously or grossly negligent.<sup>38</sup>

The NASO has petitioned organizations to support its position to “limit the liability sports officials may incur as a result of the reasonable and customary decisions they make in fulfilling their duty.”<sup>39</sup> The gross negligence standard provides a “compromise between the reluctance of the judiciary to intervene and the concern for compensating parties injured by the negligent conduct of others.”<sup>40</sup>

### III. INSTANT REPLAY MAY SERVE AS A CATALYST ENCOURAGING COURTS TO RECOGNIZE CLAIMS OF NEGLIGENT OFFICIATING

Regardless of the standard used to judge sports official conduct, courts have been extremely reluctant to find a justiciable controversy: the decision of the referee is left on the field with those parties who are best trained, and in a position, to make the proper call; the court will

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<sup>37</sup> Legislation covering sports official liability have been enacted in Arkansas, Georgia, Indiana, Louisiana, Illinois, Maryland, Massachusetts, Minnesota, Mississippi, Nebraska, Nevada, New Jersey, North Dakota, Pennsylvania, Rhode Island and Tennessee.

<sup>38</sup> National Association of Sports Officials, Model Legislation, Limited Civil Liability for Sports Officials, *available at* <http://www.naso.org/legislation/page3.htm>.

<sup>39</sup> National Association of Sports Officials, Guidelines for Officials: A Covenant with Sports Officials, Preamble (2002), *available at* [http://www.naso.org/officiating\\_codes/Covenant.pdf](http://www.naso.org/officiating_codes/Covenant.pdf).

<sup>40</sup> Feiner, *supra* note 4, at 234.

not intervene.<sup>41</sup> Absent a showing of bad faith or corruption, courts routinely refuse to interfere and, rather, presume the official's on-field decision to be correct.<sup>42</sup> The immediate on-field reaction and decision of an official made in the midst of a sporting event is nearly *always* given impenetrable credence, deference and consideration. However, the recent phenomenon of instant replay, which would clearly allow a judge to evaluate and review the decision of an on-field official, may begin to persuade the court to entertain claims of referee liability in certain situations.<sup>43</sup>

Generally, instant replay allows in-game review of either questionable or critical referee judgment calls. Instant replay acts as a safety net.<sup>44</sup> However, when instant replay is available sports officials may be under an increased duty to *use* the instant replay to ensure the call is correct.<sup>45</sup> Although the courts have not addressed the issue, if the failure to use instant replay results in monetary loss to the team, officials may be liable for a negligent omission.<sup>46</sup>

Finally, instant replay may serve as an "evidentiary tool."<sup>47</sup> High-definition, multiple-angle video may provide sufficient evidence to persuade the courts to overcome their resistance to intervene in the decisions of sports officials. Instant replay was originally created to limit or stifle the effect of incorrect applications of in-game rules. However, over time and given the right set of facts, instant replay may provide the foundation for finding sports officials liable for "economic losses resulting from an incorrect" judgment.<sup>48</sup>

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<sup>41</sup> *Id.* at 214.

<sup>42</sup> *Id.* at 224.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 230.

<sup>45</sup> *Id.* at 231.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> S. Christopher Szczerban, Article, *Tackling Instant Replay: A Proposal to Protect the Competitive Judgments of Sports Officials*, 6 VA. SPORTS & ENT. L.J. 277, 322 (2007)

IV. LEADING CASE LAW CREATES A NARROW WINDOW IN WHICH A CLAIM FOR NEGLIGENT OFFICIATING MAY EXIST

A brief discussion of leading case law is helpful to understand how courts have historically approached the issue of referee liability.

A. *Shapiro v. Queens County Jockey Club*

The *Shapiro* decision stands as one of the earliest opinions setting forth the general rule regarding interpretation of a referee's on-field decision.<sup>49</sup> The *Shapiro* court found that umpires, sitting closer in position and time to the questionable event, are in the best position to act as "judges of facts."<sup>50</sup> The *Shapiro* plaintiff sought an injunction, which the court denied. In essence, the *Shapiro* court gave the sports official's decision a presumption of correctness.

B. *Georgia High School Ass'n v. Waddell*

As in *Shapiro*, the Supreme Court of Georgia refused to find that it possessed the authority to review a call made by a high school football referee.<sup>51</sup> In addition, the court found that a high-school football player, as opposed to the team or school, had no property interest in the outcome of the game and, therefore, had no basis for recovery.<sup>52</sup> The *Waddell* court refused to grant an injunction ordering the game replayed. *Waddell* supposes that a *team's* property interest in the game's outcome is sufficient to allow recovery for a referee's negligent acts.

C. *Bain v. Gillispie*

*Bain* involved a third-party's attempt to recover due to an alleged error of a college basketball referee.<sup>53</sup> In *Bain*, a third-party marketer sued the referee because the plaintiff perceived the referee's error as the sole reason that the team failed to advance in the NCAA

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<sup>49</sup> 53 N.Y.S.2d 135, 136-37 (1945).

<sup>50</sup> *Shapiro*, 53 N.Y.S.3d at 138-9.

<sup>51</sup> *Georgia High Sch. Ass'n v. Waddell*, 285 S.E.2d 7, 9 (Ga. 1981).

<sup>52</sup> *Id.* at 8.

<sup>53</sup> *Bain v. Gillispie*, 357 N.W.2d 47 (Iowa Ct. App. 1984).

basketball tournament. The plaintiff argued he was denied the opportunity to produce and sell products branded with the team's logo. Under these facts, the court found that the tort of "referee malpractice" did not exist, but relied on the fact that the duty of a referee *did not* extend to third-parties, but can reasonably be read to assume that the duty was present *if* applied to the team itself.<sup>54</sup>

*D. Carabba v. Anacortes Sch. Dist. No. 103*

The leading case in support of setting a reasonableness standard for referee liability is *Carabba v. Anacortes Sch. Dist. No. 103*.<sup>55</sup> The *Carabba* decision involved referee liability where a referee's negligent omission resulted in severe and permanent physical injury. The *Carabba* court found that a sports official must exercise the care of an ordinary, prudent referee under similar circumstances: sports official liability should be measured against a reasonableness or ordinary negligence standard.

*E. Summary*

The foregoing decisions present the legal framework within which a claim for negligent officiating may lie. While it may seem that such a claim has been extinguished by the courts, all is not lost. The decisions in *Shapiro*, *Waddell*, and *Bain* are instructive and distinguishable. *Shapiro* and *Waddell* sought an injunction rather than money damages, while *Bain* involved attempted recovery by a third-party, as opposed to a party in privity. Therefore, these cases may be reasonably read to *allow* a claim of negligent officiating where *money damages* are sought by a party in privity with the referee. Of course, the elements of duty, breach, causation and harm must be present, but the case law does not wholesale preclude a claim.

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<sup>54</sup> *Id.* at 49.

<sup>55</sup> *Hays v. Robertson*, 435 P.2d 926 (Wash. 1967).

V. PUBLIC POLICY STRONGLY MILITATES AGAINST IMPOSING LIABILITY UPON A SPORTS OFFICIAL

Commentators argue that public policy is strongly against imposing liability on a sports official for negligent acts.<sup>56</sup> Clearly, if sports officials and referees become yet another target of our society's litigious nature, few men and woman would be willing to officiate athletic contests. Even at the professional level, where the financial rewards are substantial, the risk is simply too high.<sup>57</sup> While potential financial risk to professional referees is staggering, it is likely any such risk would be mitigated. For example, union officials may require teams to subsidize the cost of insurance to cover claims of negligence. The practical impact would likely be an increase in ticket cost for the fans. This is perhaps a small price to pay to ensure access to one of America's favorite modes of entertainment. But, if official conduct were to be measured against a negligence standard, the sports official would be forced to "not only ... perform his or her tasks in such a manner so as to reduce the risks of physical injuries, but also to reduce the risk of errors which may deprive a team of a victory or monetary gain."<sup>58</sup> Clearly, the job of a referee is difficult enough without adding a likelihood of suit should they unintentionally err in judgment.

If the courts become amenable to actions against sports officials, the true impact will not be felt at the professional level. Rather, high school, club sports and under-funded college programs may feel the true impact. Such programs, already lacking sufficient funds, would likely be unable, or even unwilling, to absorb the financial cost required to mitigate against the risk of referee liability. Furthermore, referees at this level, participating truly for the love of the game, would no longer be willing to officiate for this nation's children and young adults. If courts were to find officials liable for negligent officiating, any impact would be

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<sup>56</sup> Biedzynski, *supra* note 1, at 414.

<sup>57</sup> *Id.*

<sup>58</sup> Lewis & Forbes, *supra* note 16, at 694.

disproportionately felt at the lower levels of sport. Parties would stretch to find financial harm and, even if unsuccessful, would place the enormous burden of litigation on parties ill equipped to fund the fight. However, if the cause of action were limited to a very specific set of facts, as discussed below, a proper balance may be met, and sport would not suffer.

## VI. OPINION

My opinion is that while sports official liability may technically present a valid cause of action, absent a “perfect storm” of available facts, I believe the decision of the referee should be left on the playing field. In most situations there is simply no need to arm litigants with another cause of action. Good-faith referee conduct should normally receive a near impenetrable presumption of correctness, or be measured against a gross negligence or recklessness standard. Thus, such a presumption would shield our courts from the vast majority of allegedly negligent acts. However, litigants should obviously be free to recover for intentional acts or omissions and, arguably, any act or omission resulting in *physical*, as opposed to monetary, harm.

Nonetheless, I argue that when only monetary relief is requested and where the allegedly negligent call is an: (1) on-the-spot judgment, (2) made in good faith, (3) absent instant replay, and (4) is outcome determinative, the court should allow such a cause of action and measure the referee’s conduct against an *ordinary negligence* standard. Consider the fictional baseball scenario set forth above: the team *should* have won on the final play before extra innings *but for* the negligent act of the referee. While I argue that a cause of action exists only in an exceedingly narrow area of judgment-call situations, I feel a cause of action exists nonetheless.

Clearly, indisputable video evidence must exist to prove the claim. The on-field call must be made instantaneously without the benefit of *any form* of instant replay. So, if a league

uses, either discretionary or mandatory, instant replay to review the type of call allegedly made in error, the proposed cause of action would be unavailable. The only major American sport which may be presented with liability under this rubric is Major League Baseball (“MLB”) and some collegiate sports. The NFL, NHL and NBA all utilize some form of instant replay to review, either through a coach’s challenge or referee discretion, a potentially negligent call. Baseball largely stays true to tradition and uses a team of umpires without access to instant replay to determine most on-field decisions. However, MLB now allows the use of instant replay for disputed boundary calls, *e.g.*, home runs and fan interference.<sup>59</sup> Time will tell if baseball limits its use of instant replay to home run calls or, perhaps facing a lawsuit for an unintentional missed call, at home plate for example, expands the use of instant replay to protect referees from a claim of negligent officiating. In sum, while I feel there is a valid legal basis to support a claim of sports official liability, I believe the “perfect storm” of facts will likely never be presented to the court.

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<sup>59</sup> ESPN.com, MLB approves replay in series that start Thursday, Aug. 27, 2008, *available at* <http://sports.espn.go.com/mlb/news/story?id=3554357>.