

2012

Into the Red Zone: How the National Football League's Quest to Curb Concussions and Concussion-Related Injuries Could Affect Players' Legal Recovery

Amy L. Bernstein

Follow this and additional works at: http://scholarship.shu.edu/sports_entertainment

Recommended Citation

Bernstein, Amy L. (2012) "Into the Red Zone: How the National Football League's Quest to Curb Concussions and Concussion-Related Injuries Could Affect Players' Legal Recovery," *Seton Hall Journal of Sports and Entertainment Law*: Vol. 22: Iss. 2, Article 9. Available at: http://scholarship.shu.edu/sports_entertainment/vol22/iss2/9

Into the Red Zone: How the National Football League's Quest
to Curb Concussions and Concussion-Related Injuries Could
Affect Players' Legal Recovery

*Amy L. Bernstein**

INTRODUCTION	273
PART I: BACKGROUND ON CONCUSSIONS	277
A. What is a concussion?.....	277
B. When and why are concussions so threatening?....	279
PART II: A COMPLICATED HISTORY AND AN UNCERTAIN FUTURE—TRACKING THE NFL'S EVOLVING RESPONSE TO CONCUSSIONS.....	281
A. Rules of the Game.....	281
B. The 2007 NFL Guidelines for Concussion Management	283
C. The “Zackery Lystedt Law”	284
D. The 2009 NFL Concussion Guidelines.....	286
PART III: ALTERNATIVE AVENUES FOR RECOVERY	287
A. Workers' Compensation, Generally	287
B. The Special Case of California	288
C. Retirement and Disability Benefits	291
1. Bert Bell/Pete Rozelle NFL Retirement Plan	291
2. The 88 Plan	292
PART IV: LITIGATION OVER CONCUSSIONS: A MIXED BAG OF SUCCESS AND FAILURE	293
A. Hoge v. Munsell	293
B. Jani v. Bert Bell/Pete Rozelle NFL Player Retirement Plan.....	294
PART V: TORT LAW AND COMPARATIVE NEGLIGENCE	296
A. Introduction to Tort Law	296
B. Introduction to Defenses	298
1. Comparative Negligence.....	298
2. Assumption of the Risk	302

* J.D., 2012, Seton Hall University School of Law; B.A., 2009, Bennington College. Thanks to Professors Robert Schwartz and Charles Sullivan for their support, guidance, and knowledge. Thank you to my family and friends for their love and patience during law school and throughout the writing and editing process.

272 *Seton Hall Journal of Sports and Entertainment Law* [Vol. 22.2

- a. Express Assumption of the Risk303
- b. Implied Assumption of the Risk.....303
- 3. How Comparative Negligence and Assumption of the Risk Can Affect Damages Recovered by Players.....304
- CONCLUSION307

There is a new system and a new concern about the long-term health of the guys out there when we talk about concussions and head injuries . . . It's no longer, 'How many fingers am I holding up?' It's a lot more involved these days and every player must get used to this.

— Daryl “Moose” Johnston¹

INTRODUCTION

One could say that Owen Thomas was living out every teenage boy's dream. After “play[ing] every down of every game” during his high school football career, Thomas entered the Wharton School of Business at the University of Pennsylvania and joined the varsity football team as a defensive lineman in his sophomore year.² Despite accumulating accomplishments and records, he suffered a “sudden and uncharacteristic emotional collapse” during his junior year in April 2010.³ The people around Thomas could have easily dismissed his behavior as typical of a football player and student under immense pressure at an Ivy League college; however, what he experienced was much more serious. So serious, in fact, that Owen took his own life that month.⁴ It was not until researchers at Boston University examined tissue samples from his brain that they learned what could have led to such an unexpected, premature death.⁵ The samples revealed early signs of a disease that researchers had never seen before in a specimen from such a young donor—chronic traumatic encephalopathy (“CTE”).⁶ The disease had been previously linked to the suicides of two former National Football League (NFL or “the League”)

1. John Czarnecki, *5 Questions: Moose Tackles Concussions*, FOX SPORTS (May 24, 2010, 1:27 PM), <http://msn.foxsports.com/home/story/5-Questions%3A-Moose-tackles-concussions>. Johnston is a retired fullback for the Dallas Cowboys and is currently an analyst for the NFL on Fox. *Id.*

2. Alan Schwarz, *Suicide Reveals Signs of a Disease Seen in N.F.L.*, N.Y. TIMES, Sept. 13, 2010, at A1, *available at* <http://www.nytimes.com/2010/09/14/sports/14football.html>; *Penn's Owen Thomas Had CTE*, ESPN.COM, (Sept. 14, 2010, 11:08 AM), <http://sports.espn.go.com/nfl/news/story?id=5569329>.

3. Schwarz, *supra* note 2.

4. *Id.*

5. *Id.*

6. *Id.*

players and caused depression, impulse control issues, and dementia in other retired NFL players.⁷

The only known cause of CTE is repetitive brain trauma, something a football fan witnesses on any given Sunday.⁸ During the first week of the 2010 NFL season alone four players suffered from concussions, including Kevin Kolb, the quarterback for the Philadelphia Eagles.⁹ A tackle sent Kolb's head slamming into the field, although he managed to throw three more passes before leaving the game.¹⁰ An injury subsequently sidelined his replacement, Michael Vick, and the Eagles sent Kolb back onto the field just a few weeks after his own injury.¹¹

Concussions in the NFL are not a new phenomenon. Extensive research addresses the damage that repeated hits on the field *can* and *have caused*—namely, from concussions that players sustain and leave unreported or untreated, or receive inadequate time to rest and heal before teams send them back on the field.¹² Such research focuses primarily on the risks of concussions, the complicated position of team physicians, and the liability of the NFL for the injuries sustained, including dementia (one of the risks associated with CTE).¹³ One sports writer in particular, Alan Schwarz, has spent the last few years chronicling the effects of concussions and the NFL's response to the controversy.¹⁴ Commentators have criticized previous policies that the NFL adopted to address concussion hazards for failing to protect players from concussions in the first place and putting the players at risk for future concussions and further neurological

7. *Id.* Researchers would not say that the CTE in fact caused Owen to commit suicide. *Id.*

8. *Id.*

9. *Four Concussions in Week 1 Not a Trend, NFL Doctor Says*, NFL (Sept. 13, 2010, 11:43 PM), <http://www.nfl.com/news/story/09000d5d81a81a39/article/four-concussions-in-week-1-not-a-trend-nfl-doctor-says> [hereinafter *Four Concussions*].

10. *Id.*

11. *Id.*; *Vick to Return After Eagles' Bye*, WASH. TIMES, Oct. 25, 2010, <http://www.washingtontimes.com/news/2010/oct/25/vick-to-return-after-eagles-bye>.

12. See discussion *infra* Part I.

13. *Id.*

14. *Archive of Columns by Alan Schwarz*, N.Y. TIMES, http://topics.nytimes.com/top/reference/timestopics/people/s/alan_schwarz/index.html?match=any&query=concussion&submit.x=8&submit.y=5&submit=Search (last visited Apr. 26, 2012). Given the extent of Mr. Schwarz's investigation of concussions in the NFL and his published articles on the topic, he will be cited extensively throughout this Comment.

damage by sending them back on the field too soon.¹⁵

In a departure from these earlier policies, and in partial recognition of the dangers posed by concussions, the NFL is actively attempting to make the sport safer. For example, the NFL has changed its Conduct Policy to allow fines and suspensions for illegal hits.¹⁶ Also, the NFL is providing players with information about concussions to encourage them to pay more attention to the hits they take and the effects the hits can have on their health.¹⁷

In addition to the policies implemented on the field and in the locker room, the NFL has gone to the United States Congress and to various state legislatures in the hopes of encouraging more states to adopt legislation that establishes a standard for identifying concussions for younger players and for managing their recovery and return to the field.¹⁸ Also testifying before Congress was a former player, Rich Caster, who described not only the recent initiatives undertaken by the NFL to educate players on the signs, symptoms, and risks of concussions, but also the League's work with youth football players.¹⁹ Given the extensive trauma found in Owen Thomas' brain tissue, a collegiate player who had yet to turn professional and had never reported suffering a concussion, such efforts by the NFL to connect with young players (who may become professional football players one day) are extremely important in preventing the damage leading to CTE from beginning during one's teens or twenties.²⁰ If the football community could take away anything from Owen Thomas' death, it is that the kind of hits inherent in football

15. See *infra* Part II.

16. William C. Rhoden, *Charging, Ever So Carefully, Into a New Era*, N.Y. TIMES, Oct. 24, 2010, at D5, available at <http://www.nytimes.com/2010/10/25/sports/football/25rhoden.html?ref=football>.

17. Alan Schwarz, *NFL Asserts Greater Risks of Head Injury*, N.Y. TIMES, July 26, 2010, at A1, available at <http://www.nytimes.com/2010/07/27/sports/football/27concussion.html>.

18. Alan Schwarz, *Despite Law, Town Finds Concussion Dangers Lurk*, N.Y. TIMES, Sept. 22, 2010, at B15, available at http://www.nytimes.com/2010/09/23/sports/23concussion.html?_r=3&hp.

19. *The Impact of Concussions on High School Athletes: The Local Perspective: Hearing Before the Subcomm. on Healthy Families & Cmty. of the H. Comm. on Educ. & Labor*, 111th Cong. 22–24 (2010) [hereinafter *Hearing*] (statement of Rich Caster, Former NFL Player).

20. Schwarz, *supra* note 2.

can have grave consequences on players of *any* age.²¹

The NFL previously faced legal trouble when former players demonstrated that the League failed to have adequate procedures in place for their medical professionals to identify players with concussions, allow adequate recovery time for them to heal before returning to the field, and recognize the connection between concussions, head trauma, and brain damage.²² In the intervening years, however, as described above, the NFL has taken, and continues to take, a much more active and vocal role in concussion awareness and management.²³ Knowledge breeds expectations, and with expectations, duties arise. Given the attention that the NFL and the media are placing on the damaging effects of concussions, it is difficult for players to argue that they were unaware of dangers posed by suiting up and stepping on to the field. Physicians have acknowledged that players are more vigilant about concussions as a result of the new policies the NFL has advocated.²⁴ These physicians posit that the multiple concussions reported during the infamous first week of the 2010–2011 season are a sign of how much more conscious the players are of the signs, symptoms, and dangers of the injury, rather than a sign of how much more dangerous the sport is becoming.²⁵

This Comment discusses the implications of the NFL's recent policy shift, the knowledge it instills in players, and the duty it places upon them. In light of the NFL's general acceptance that concussions must be managed to avoid long-term damage and the medical community's highly publicized opinion that concussions and repeated head trauma cause CTE (leading to dementia, seen frequently among retired NFL players), players seeking damages from the NFL for concussion-related injuries may be held comparatively negligent. However, this Comment in no way suggests that the players are to blame for their injuries and the devastating long-term side effects of those injuries.

Part I provides a background explaining concussions and

21. *Id.*

22. Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORT L. 17, 27-29 (2002).

23. See discussion *infra* pp. 2–4.

24. *Four Concussions*, *supra* note 9.

25. *Id.*

the dangers that they pose. Part II tracks the NFL's approach to concussion management over the years and addresses in detail the significant advances recently implemented. Part III reviews the alternatives available for players in need of financial assistance rather than litigation based in tort law. Part IV identifies past and present litigation over concussions and their alleged long-term consequences. Part V provides a foundation in tort law and defenses to such actions, and argues that the increased attention the NFL has placed on concussion management and its new regulations on the subject pose a barrier to players' recovery under comparative negligence and assumption of the risk theories. This Comment concludes by reemphasizing that the NFL's new policies and any future policies can affect players' tort litigation and provides recommendations not only for the players but also the NFL.

PART I: BACKGROUND ON CONCUSSIONS

Football is an extremely violent sport, perhaps best exemplified by the fact that players can run approximately twenty miles-per-hour.²⁶ Combining the speed and size of the average football player, the impact that such a player can create at twenty miles-per-hour is the "equivalent to crashing a car into a brick wall going forty, forty-five miles an hour."²⁷ Predictably, there is mounting concern over the risks posed by hits that injure the head and potentially the brain as opposed to hits that injure ribs or ankles.²⁸ This Part provides an overview of concussions: what they are and when and why they pose a threat.

A. *What is a concussion?*

A concussion is a "brain injury that is caused by a sudden blow to the head or the body . . . [which] shakes the brain inside the skull . . . temporarily prevent[ing] the brain from

26. *60 Minutes: A Blow to the Brain* (CBS Worldwide Inc. production Oct. 11, 2009) (quoting Dr. Robert Cantu, a neurosurgeon who co-authored a study conducted at the University of North Carolina on retired NFL players and the correlation between concussions and degenerative brain diseases).

27. *Id.*

28. *Four Concussions*, *supra* note 9.

working normally.”²⁹ Immediate symptoms include “loss of consciousness, nausea, memory problems, confusion, lack of concentration, and blurry vision.”³⁰ Given how severe the immediate symptoms can be, immediate identification of a concussion is essential for treatment and keeping these symptoms (and the long-term consequences) at bay. To aid players, team physicians, and coaches in identification and treatment, various organizations have issued guidelines over the years.³¹

The American Academy of Neurology (“AAN”), an organization that issued one of the institutional guidelines, defines a concussion as the result of a blow to the head causing “alteration in mental status that may or may not involve loss of consciousness. Confusion and amnesia are the hallmarks of concussion.”³² AAN advises physicians to closely monitor the player and compare the player’s neurological functions following the concussion to those recorded under normal circumstances.³³ Such a test is referred to as “baseline” testing, and helps determine the levels of a player’s cognitive functions both before and after a concussion.³⁴ Following a diagnosis of a concussion, the results of each test are then compared to aid the team in determining when a player can return to the field.³⁵ In addition to advocating for baseline testing, the AAN also breaks a concussion down into grades, measuring the intensity of the injury on a scale from one to three, one being the least severe and three being the most severe.³⁶ Quite similar to the AAN guidelines are the Cantu guidelines, published by Dr. Robert Cantu (“Dr. Cantu”), which also advocate a grading system to identify the extent and threat of a concussion.³⁷ Finally, the National Athletic Trainers’ Association (“NATA”) guidelines developed a checklist to aid athletic trainers in identifying and

29. Jennifer Ann Heiner, *Concussions in the National Football League: Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan and a Legal Analysis of the NFL’s 2007 Concussion Management Guidelines*, 18 SETON HALL J. SPORTS & ENT. L. 255, 259 (2008).

30. *Id.*

31. *Id.* at 266-67.

32. Heiner, *supra* note 29, at 267.

33. *Id.* at 262.

34. *Id.*

35. *Id.*

36. *Id.* at 268.

37. *Id.*

managing players' concussions, with a grading system similar to those the AAN and Dr. Cantu developed and advocated.³⁸ The latter two guidelines also advocate for extensive testing and rest for players who suffer subsequent concussions.³⁹

While the institutional guidelines have provided a framework for evaluating and managing concussions, the NFL did not officially adopt a standard to deal with concussions until recently;⁴⁰ in the past, the teams separately determined the treatment that players received.⁴¹ As a result, the treatment a player received from one team could be drastically different from the treatment another player on a different team received for the same injury.⁴² The lack of uniformity across the NFL seemed to downplay the risks posed by concussions, whereas with other more visible injuries, the gravity of the situation is evident the moment the player is hit and slowly walks, or is carried, off the field. The NFL's recent adoption of a concussion standard, in the face of all the institutional guidelines and media attention, is a step in the right direction in making the sport as safe as it can be while still retaining the characteristics that keep millions of fans watching each season.⁴³

B. When and why are concussions so threatening?

Besides the immediate consequences that concussions pose—an injury resulting from an impact comparable to crashing a car into a brick wall at forty-five miles-per-hour—professional football players suffer long-term consequences associated with repeated concussions during their careers.⁴⁴ As Owen Thomas' story proves, severe damage can occur before a player ever reaches the NFL and could be extensive enough to lead to death.⁴⁵ The results of a survey that the NFL commissioned may come as no surprise to some given

38. Heiner, *supra* note 29, at 269.

39. *Id.* at 268–70.

40. NFL.com Staff, *League Announces Stricter Concussion Guidelines*, NFL.COM (Dec. 2, 2009), <http://blogs.nfl.com/2009/12/02/league-announces-stricter-concussion-guidelines/>.

41. Heiner, *supra* note 29, at 266.

42. *Id.* at 266.

43. *See infra* Part II.

44. *60 Minutes*, *supra* note 26.

45. Schwarz, *supra* note 2.

the type and number of hits a player endures over the course of his career.⁴⁶ Among a sample of 1,000 retired players, the results (released in the fall of 2009) showed that “players under . . . fifty were nineteen times more likely to have been diagnosed with Alzheimer’s, dementia, and other memory-related diseases, compared to the general public.”⁴⁷ New research also shows a connection between ALS, commonly referred to as Lou Gehrig’s disease, and the head and brain trauma that NFL players endured.⁴⁸ A study published in the *Journal of Neuropathology & Experimental Neurology* in August 2010 identified fourteen former NFL players over the last fifty years who had been diagnosed with ALS.⁴⁹ While the researchers did not conclude that the players did not in fact have ALS, they found that brain trauma can cause brain degeneration resulting from an ALS-like disorder.⁵⁰ In an ironic twist, the study suggested that Lou Gehrig himself might have suffered from something other than ALS as a result of the multiple blows to the head he took during his career.⁵¹

In addition to the serious, immediate consequences of concussions, as well as diseases such as ALS and CTE that take many years (and many hits) to develop, there are other side-effects associated with concussions that either take longer to develop or are caused by subsequent concussions.⁵² For example, during post-concussion syndrome, the immediate symptoms associated with concussions can last for an extended period of time, affecting a player in a variety of ways such as “chang[ing] . . . mental capacity, memory loss, . . . sleep pattern, and long lasting vision problems . . .”⁵³ The consensus among the scientific community is that keeping players on the bench until their symptoms subside will go far in preventing second impact

46. *60 Minutes*, *supra* note 26.

47. *Id.*

48. Alan Schwarz, *Study Says Brain Trauma Can Mimic A.L.S.*, N.Y. TIMES, Aug. 17, 2010, at A1, available at http://www.nytimes.com/2010/08/18/sports/18gehrig.html?_r=2&hp. ALS, an incurable disease, causes muscles to atrophy leading to a loss of control of one’s body movements. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. Heiner, *supra* note 29, at 259.

53. *Id.*

syndrome (“SIS”).⁵⁴ SIS can occur when a player goes back onto the field before he has fully recovered from concussion symptoms and subsequently sustains more trauma.⁵⁵ Brain cells are in an extremely fragile state following a concussion.⁵⁶ If a player gets hit while the brain cells are in such a fragile state, the subsequent trauma can lead to herniation of the brain, a potentially fatal condition.⁵⁷

The evidence demonstrates that concussions are a condition that the NFL, teams, players, and physicians should not deal with lightly. The gravity of the situation within the NFL has led to the development of the guidelines discussed in the next Part, and the refinement of those guidelines over the years to make the game safer for players. These guidelines and the media attention focused on CTE and other concussion-related injuries also put players on notice as to the risks they face when they step onto the field.

PART II: A COMPLICATED HISTORY AND AN UNCERTAIN FUTURE—TRACKING THE NFL’S EVOLVING RESPONSE TO CONCUSSIONS

Research and progress within the scientific and medical communities is understandably slow, and the same could be said about the NFL’s response to concussions and the dangers they pose as research reveals new findings. However, some believe that it has taken far too long for the NFL to respond to the perceived crisis, and its attempts to regulate concussion treatment and management have allegedly misled players by downplaying the risks associated with concussions, which could possibly put them back onto the field before they are fully healed.⁵⁸ This Part outlines the NFL’s progress from its Rulebook to special studies commissioned to analyze the effects of concussions and develop a standard for managing them.

A. *Rules of the Game*

Just like other professional sports, play during a football

54. Hecht, *supra* note 22, at 24-25.

55. *Id.* at 24.

56. *Id.*

57. *Id.*

58. Schwartz, *supra* note 17.

game is heavily regulated.⁵⁹ The NFL rulebook already contains many rules designed to limit contact to or with a player's head, and more changes are being considered by the League.⁶⁰ If a player grabs another's facemask, the officials grant the offended player's team an automatic first down or an award of five yards.⁶¹ If there is "[t]wisting, turning, or pulling an opponent by the facemask," if a player uses a helmet to hit an opponent, or if a player uses the top of a helmet unnecessarily, there is a loss of fifteen yards.⁶² Additionally, a team loses fifteen yards and the officials can potentially disqualify a player who "[s]trik[es] [an] opponent on head or neck with forearm, elbow, or hands whether or not the initial contact is made below the neck area."⁶³ The team loses fifteen yards and the officials automatically disqualify a player for removing a helmet and using it as a weapon.⁶⁴ In response to the staggering number of concussions and other injuries sustained in the early weeks of the 2010 season as a result of particularly rough hits, the NFL announced that, in addition to yardage penalties, players could face large fines and suspension for helmet-to-helmet hits.⁶⁵

Whether or not the penalties, including the much harsher suspension that players now face, are successful in preventing head injuries remains to be seen. Todd Heap, a tight end for the Baltimore Ravens, took a particularly hard hit to the head the week before the new regulations went into effect; analysts viewed the hit as the "primary catalyst" for the new policy.⁶⁶ When asked how he felt about the new regulations and the \$50,000 fine assessed on the New England Patriots player who tackled him, Heap responded "it's not my job to monitor how justice is done, but I'm glad something was done."⁶⁷ Regardless of the rules' ability to prevent the injury rather

59. 2011 *Official Playing Rules and Casebook of the National Football League*, NFL.COM, available at http://static.nfl.com/static/content/public/image/rulebook/pdfs/2011_Rule_Book.pdf (last visited Sept. 14, 2012).

60. *Id.* at 68 (discussing legal and illegal player conduct on the field); *Penalty Summaries*, NFL.COM, <http://www.nfl.com/rulebook/penaltysummaries> (last visited Sept. 14, 2012); Schwarz, *supra* note 17.

61. *Penalty Summaries*, *supra* note 60.

62. *Id.*

63. *Id.*

64. *Id.*

65. Rhoden, *supra* note 17.

66. *Id.*

67. *Id.*

than punish the act causing the injury, this is yet another development by the NFL to manage concussions, putting players on notice that head injuries are possible, the consequences are dire, and the NFL will not tolerate intentional moves that put players at risk for serious head injuries.

B. The 2007 NFL Guidelines for Concussion Management

In response to the growing concern about concussions in the NFL and the long-term consequences associated with them, the NFL attempted to standardize concussion management by issuing guidelines in 2007 after convening what was referred to as the Mild Traumatic Brain Injury Committee (“MTBI”).⁶⁸ Established by former NFL commissioner Paul Tagliabue in 1994, the Committee published a thirteen-part study on concussions and their effects, providing the basis for the 2007 concussion guidelines implemented throughout the League.⁶⁹ The study and the resulting guidelines, however, were not met with approval by the medical community invested in studying concussions and their effects; these experts found the study extremely doubtful and potentially dangerous, conflicting with all other previously published guidelines.⁷⁰

For example, the study determined that mere rest was sufficient for players to return to play “quickly” and that those who had a history of concussions were not at a higher risk for future concussions, despite the information available on SIS.⁷¹ The study also reported that players with histories of concussions would not recover more slowly than others without such histories, despite findings to the contrary.⁷² This finding seemingly suggested to players that they could return to play immediately after sustaining a concussion and not face serious danger of harming themselves further.⁷³ Similar to the recommendations of the AAN, the MTBI also advocated conducting baseline testing, with one test occurring before the season begins and then another subsequent to

68. Heiner, *supra* note 29, at 259–60.

69. *Id.* at 260.

70. *Id.* at 260–61.

71. *Id.* at 261.

72. *Id.*

73. *Id.* at 261–62.

sustaining a concussion.⁷⁴ Despite the similarities to other guidelines, the MTBI results seemed to suggest that NFL players in particular were not as susceptible to concussion symptoms and there was no measurable difference in the baseline testing conducted before the season started and after the concussion occurred.⁷⁵ One recommendation that survived the 2007 guidelines and made its way into the current guidelines (discussed in more detail below) is that physicians would consider players safe to return to play once they were asymptomatic and their cognitive functioning was intact.⁷⁶ The MTBI's recommendations differed from experts' views and the current policy most sharply in suggesting that returning to play sooner than seven days post-concussion posed no risk of additional harm to the player.⁷⁷ Though heavily criticized, the MTBI studies showed progress in the NFL's recognition that concussions are dangerous and teams and physicians must properly manage them in order to minimize the damage to the player.

C. *The "Zackery Lystedt Law"*

On the heels of the MTBI results and the 2007 concussion guidelines, the NFL made a bigger push for uniformity in concussion management not only throughout professional football but also throughout the country in youth leagues.⁷⁸ In 2006, Zackery Lystedt, just thirteen years old, was playing football for his middle school's team in Washington when coaches sent him to the bench to recover after his helmet hit the ground hard.⁷⁹ Instead of staying out for the rest of the game, however, he went back into the game, making a tackle on the final play and subsequently collapsing, leaving him in a coma for a month due to a concussion.⁸⁰ Now confined to a wheelchair, Zackery inspired Washington to enact legislation,

74. Hecht, *supra* note 22, at 50.

75. Heiner, *supra* note 29, at 262.

76. *Id.* at 263.

77. *Id.* at 263–64.

78. See *Hearing*, *supra* note 19, at 23.

79. David Haugh, *Seattle-Area Teen Helps NFL, Others See Dangers in Concussions from Football*, CHI. TRIB., Oct. 17, 2010, http://articles.chicagotribune.com/2010-10-17/sports/ct-spt-1017-haugh-football-concussio20101016_1_concussions-zackery-lystedt-law-sarah-jane-brain-foundation.

80. *Id.*

effective since 2009, regulating concussion management in school districts.⁸¹ Specifically, the statute creates a framework for a school district to “develop . . . guidelines . . . to inform and educate coaches, youth athletes, and their parents and/or guardians of the nature and risk of concussion and head injury *including continuing to play after concussion or head injury.*”⁸² Once an athlete is suspected of having a concussion or other head trauma, he must be *immediately* removed from the game, and not allowed to return to the game until a medical provider trained in identifying and managing concussions has evaluated him and cleared him to return.⁸³

In 2008, approximately 150,000 high school athletes suffered concussions.⁸⁴ In response to Washington’s “Zackery Lystedt Law” and the staggering number of teenagers diagnosed with concussions, several other states have also passed similar legislation.⁸⁵ Some of the new laws are virtually identical to Washington’s legislation.⁸⁶ Some differences exist, for example in Oregon, which requires coaches to receive annual training in recognizing the signs, symptoms, and proper treatment of concussions.⁸⁷ Additionally, Oregon’s law specifically bars an athlete from returning to play during the same game in which the concussion occurred.⁸⁸ The NFL is actively encouraging states currently without legislation similar to the “Zackery Lystedt Law” to adopt such legislation.⁸⁹ Encouraging states to enact legislation to apply to youth leagues would, ideally, prevent damage at a young age. Hopefully, by the time the handful of current youth league players who will make their way to the NFL actually play in the League, the protections that this type of legislation provides (in conjunction with the NFL’s own guidelines) will have stemmed the tide of brain damage

81. WASH. REV. CODE ANN. § 28A.600.190 (West 2010); Haugh, *supra* note 79.

82. § 28.A.600.190(2) (emphasis added).

83. § 28.A.600.190(4).

84. *60 Minutes*, *supra* note 26.

85. IDAHO CODE ANN. § 33-1625 (2012); OKLA. STAT. ANN. tit. 70, § 24-155 (West 2010); OR. REV. STAT. § 336.485 (2011); R.I. GEN. LAWS § 16-91-1 (2012); VA. CODE ANN. § 22.1-271.5 (2012); *Hearing*, *supra* note 19, at 23.

86. *See* OKLA. STAT. ANN. tit. 70, § 24-155; VA. CODE ANN. § 22.1-271.5.

87. OR. REV. STAT. § 336.485(2)(a).

88. § 336.485(3)(a).

89. *Hearing*, *supra* note 19, at 23-24.

that leads to CTE.

D. The 2009 NFL Concussion Guidelines

In 2009, the current NFL Commissioner Roger Goodell issued a press release announcing the League's new concussion guidelines.⁹⁰ These guidelines were technically a "supplement" to the controversial 2007 guidelines.⁹¹ The current guidelines provide that, when a player suffers a concussion, he should not be allowed to return to the game or practice *on the same day* if he shows the following signs or symptoms: loss of consciousness, confusion, amnesia/memory lapses, abnormal neurological examination, new/persistent headaches, or any other persistent signs/symptoms of concussions.⁹²

Once identified as suffering a concussion, a player will not receive clearance to return to the game or practice "until he is fully asymptomatic, both at rest and after exertion, has a normal neurological examination, normal neuropsychological testing, and has been cleared to return by both his team physician(s) and the independent neurological consultant."⁹³ The addition of an independent neurological consultant's clearance is perhaps a response to the criticism leveled at the NFL for the perceived conflicts of interest in employing physicians to care for players, who have not only the players' health on their minds but also concerns for their own jobs.⁹⁴

For any of these guidelines to be successful, however, it is up to the players, first and foremost, to be truthful for their own health and safety about their symptoms following hits.⁹⁵ The NFL has created an easy-to-understand chart to educate players on the signs and symptoms of concussions so they can be more proactive in their health and treatment.⁹⁶ By partnering with the Centers for Disease Control, the NFL

90. NFL.com Staff, *League Announces Stricter Concussion Guidelines*, NFL.COM (Dec. 2, 2009), <http://blogs.nfl.com/2009/12/02/league-announces-stricter-concussion-guidelines/>.

91. *Id.*

92. *Id.*

93. *Id.*

94. Michael Landis, *The Team Physician: An Analysis of the Causes of Action, Conflicts, Defenses, and Improvements*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 139, 148-49 (2003).

95. *Id.* at 152-53

96. Schwartz, *supra* note 17.

produced a poster, hung in all of the League's locker rooms, describing the seriousness of concussions, signs and symptoms, reasons for reporting signs and symptoms, and the process to follow when a player suspects that he has suffered a concussion.⁹⁷ As if the risk to their own personal safety and future was not enough encouragement for the players to take a more active role in their own health, the poster lets the players know that "[o]ther athletes are watching," surrounded by pictures of child athletes.⁹⁸

PART III: ALTERNATIVE AVENUES FOR RECOVERY

There are several ways for players to recover damages suffered as a result of the injuries sustained during their careers and after they retire.

A. *Workers' Compensation, Generally*

Typically, workers' compensation statutes (enacted on the state level) entitle employees to benefits when an injury "aris[es] out of and in the course of employment."⁹⁹ As employees of their individual teams, and not of the NFL itself, professional football players are entitled to workers' compensation; however, statutes of limitations (which vary from state to state) may limit a player's recovery, as well as prohibitions from bringing tort actions based on the team physician's negligence.¹⁰⁰ One exception to the bar on negligence actions is in states where workers' compensation benefits are not mandatory; a player could bring an action in tort against a team for its physician-employee's acts through vicarious liability.¹⁰¹ There is also an exception to the bar on tort actions when the team has intentionally injured a player, though it is a very difficult claim to prove.¹⁰²

97. *Id.*

98. *Id.*

99. LARSON'S WORKERS' COMPENSATION LAW § 1.01 (Matthew Bender & Co. 2010) [hereinafter LARSON'S].

100. *Brown v. National Football League*, 219 F. Supp. 2d 372, 383 (S.D.N.Y. 2002) ("The NFL is an unincorporated non-profit membership organization composed of the difference corporations owning professional football teams."); Matthew J. Mitten, *Emerging Legal Issues in Sports Medicine: A Synthesis, Summary, and Analysis*, 76 ST. JOHN'S L. REV. 5, 45 (2002).

101. Mitten, *supra* note 106, at 45.

102. *Id.*; see also Keya Denner, *Taking One for the Team: The Role of Assumption of*

Negligence is not (usually) needed for workers' compensation actions.¹⁰³ The sole inquiry made in workers' compensation actions is whether the injury arises out of the employment.¹⁰⁴ There is a limited exception to this "no fault" system, as employers can raise several defenses (recognized in all but three states), such as a player's violation of law leading to the injury or a safety violation leading to the injury.¹⁰⁵ These exceptions are extremely relevant to claims brought against teams and the NFL. The NFL has become more aggressive in its stance against concussions by enacting management and recovery standards and implementing tougher rules of the game to prevent concussions and punish players for engaging in activities that increase the possibility of head injuries.¹⁰⁶ Additionally, the NFL has pushed for tougher laws on the state level to regulate the management and treatment of concussions.¹⁰⁷ All of these changes to the rules of the game and the law mean that, in states that recognize fault, the NFL could raise the defenses above, limiting and possibly even preventing a player's recovery.

B. *The Special Case of California*

In stark contrast to most states' handling of workers' compensation claims, California's benefits system has a quirk that makes it a haven for professional football players' workers' compensation claims.¹⁰⁸ The law has no residency requirement and instead requires only that the player have played at least one game in the state during his career.¹⁰⁹ Though California initially enacted the law to protect the state's transitory workers, *retired* football players now bring claims under the law for injuries whose effects did not manifest until long after the statute of limitations for

the Risk in Sports Torts Cases, 14 SETON HALL J. SPORTS & ENT. L. 209, 231 (2004).

103. LARSON'S, *supra* note 99, at § 1.03(1).

104. *Id.*

105. COMPARATIVE NEGLIGENCE LAW AND PRACTICE § 7.20(1)–(3) (Matthew Bender & Co. 2010). Arkansas, Illinois, and Montana are the three states that disregard fault in their workers' compensation statutes.

106. *See supra* Part II.

107. *Id.*

108. Alan Schwarz, *Case Will Test N.F.L. Teams' Liability in Dementia*, N.Y. TIMES, Apr. 6, 2010, at A1, available at <http://www.nytimes.com/2010/04/06/sports/football/06worker.html>.

109. *Id.*

workers' compensation claims in their home states expired.¹¹⁰ The statute of limitations in California, however, begins to run only when the employer advises the employee of his or her rights to seek workers' compensation.¹¹¹ Because advising players of those rights is a rare occurrence in the NFL, the statute of limitations may not even begin to run until the twilight of some players' careers or even after their retirement.¹¹² Players who have been retired for several decades filed some of the pending cases in the California system.¹¹³ Given how lax the California system is, it is no surprise that several teams, including the Cincinnati Bengals and the Tennessee Titans, have placed provisions in player contracts that require players to file any workers' compensation claims in the state where the team is located.¹¹⁴

On behalf of her husband, retired player Ralph Wenzel, Dr. Eleanor Perfetto filed one recent complaint that the football community is watching with great anticipation on one side and apprehension on the other.¹¹⁵ Dementia has left Ralph unable to communicate, and getting the court to hold that playing football caused his condition would be a major victory for retired players afflicted by degenerative brain disorders.¹¹⁶ An argument can be made, however, that the recognition of brain damage as a work-related disorder would lead to its designation as a hazard of the job and a risk that a player must assume when entering the NFL. Coupled with the efforts described above, that may allow the NFL to argue a defense to workers' compensation claims, recognition of brain damage as a work-related injury could in fact be detrimental to players' ability to bring not only negligence claims, but workers' compensation claims as well.

Players, however, may not need to resort to filing claims all the way across the country, due to a recent decision from the Court of Appeals of Maryland.¹¹⁷ Darnerien McCants was

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Alan Schwarz, *Teams Dispute Workers' Comp Rights*, N.Y. TIMES, Apr. 6, 2010, at B11, available at <http://www.nytimes.com/2010/04/07/sports/football/07bengals.html?scp=33&sq=&st=nyt>.

115. Schwarz, *supra* note 108.

116. *Id.*

117. *Pro-Football, Inc. v. McCants*, 2012 Md. LEXIS 478 (Md. Aug. 23,

a wide receiver for the Washington Redskins between 2002 and 2004.¹¹⁸ As part of his employment with the Redskins, McCants was contractually obligated to “report for ‘all pre-season, regular season, and post-season football games’ and to ‘report promptly for and participate fully in [the team’s] official mandatory mini-camp(s), official preseason training camp, all [team] meetings and practice sessions.’”¹¹⁹ McCants alleged that he injured various parts of his body during games held in Pennsylvania, New York, and at his home stadium in Maryland, and at practice sessions held at the team’s training facility in Virginia.¹²⁰

The Maryland Workers Compensation Commission found McCants to be a “covered employee” under §9-203 of the Maryland Code, and thus entitled to benefits, for just one of his claims – all claims based on injuries that occurred out of state were denied.¹²¹ Under the Maryland Code, a person is considered a “covered employee” if he works for an employer in Maryland or if he works for an employer “outside of this State on a casual, incidental, or occasional basis if the employer regularly employs the individual within this State.”¹²² At issue in this case, then, was whether the work McCants did for the Redskins outside of Maryland was on a “casual, incidental, or occasional basis.”¹²³

One of the most important determinations, and usually the first one made, in a workers compensation case is whether a person is in fact a covered employee and thus eligible for workers compensation benefits.¹²⁴ Before making a determination on the incidental or casual nature of McCants’ work outside of Maryland, the court first had to decide on his status as a regular employee.¹²⁵ The Redskins attempted to argue that the bulk of a player’s time is spent practicing, and

2012)(hereinafter “McCants”).

118. *Id.* at *1.

119. *Id.* at *5.

120. *Id.* at *5-6. While the team name “Washington Redskins” seems to imply that the team plays in Washington state or in Washington D.C., neither is actually true; the team’s home base is located at FedEx Field in Landover, Maryland, and the team trains at a facility in Ashburn, Virginia. *Id.* at *4.

121. *Id.* at *7.

122. McCants, *supra* note 117, at *8. A third option exists for employees working outside the United States, but that was not at issue in this case. *Id.*

123. *Id.* at *9.

124. *Id.* at *13.

125. *Id.* at *14-15.

thus, McCants was not regularly employed in Maryland, but rather Virginia, where the team practiced.¹²⁶ The court's decision on this issue would not come as a surprise to any football fan – a football player is not employed to practice, but rather to play in the games that millions of people watch each week.¹²⁷ Having decided that McCants was regularly employed in Maryland, the court was then able to decide that he was in fact a covered employee as “presence in other jurisdictions for practice or playing purposes necessarily was merely incidental or occasional, respectively.”¹²⁸

Although the court in *McCants* interpreted only Maryland's workers compensation law, the impact of the decision could be far-reaching. If the work a football player does outside of his home state is considered ancillary and incident to the work done in his state of employment, players will no longer have to file claims in “safe haven” states like California for injuries sustained during away games.

C. Retirement and Disability Benefits

Like many employers, the NFL offers its retired players a variety of retirement and disability benefit options depending on the disability's severity.

1. Bert Bell/Pete Rozelle NFL Retirement Plan

All NFL players are enrolled in the Bert Bell/Pete Rozelle NFL Retirement plan and are entitled to collect from this plan should they suffer from disabilities.¹²⁹ The first type of benefits under this plan are Active Football Benefits, and a player qualifies for such benefits when “the disability(ies) results from League football activities, arises while the Player is an Active Player, and causes the Player to be totally and permanently disabled ‘shortly after’ the disability(ies) first arises.”¹³⁰ The Board that evaluates retired players' applications has interpreted “shortly after” to be within six months of the injury and has discretion to determine that

126. *Id.* at *15.

127. *Id.* at *24-25.

128. McCants, *supra* note 117, at *26-27.

129. *Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 209 F. App'x 305, 306 n.1 (4th Cir. 2006).

130. *Id.* at 308.

anything between six and twelve months qualifies as “shortly after.”¹³¹ Less lucrative than the Active Football Benefits are the Football Degenerative Benefits, for which a player qualifies when “the disability(ies) arises out of League football activities, and results in total and permanent disability before the later of (1) age 45, or (2) 12 years after the end of the Player’s last Credited season.”¹³²

To qualify for both the Active and Football Degenerative Benefits, a player must be totally and permanently disabled, meaning “he has become totally disabled to the extent that he is substantially prevented from or substantially unable to engage in any occupation or employment for remuneration or profit.”¹³³ Given how restrictive these plans are,¹³⁴ the NFL has another plan specifically for players suffering from neurological degenerative disorders.¹³⁵

2.The 88 Plan

John Mackey, a retired Hall of Famer, played most of his career with the Baltimore Colts (nine years) and finished with the San Diego Chargers for one season in 1972, missing only one game in ten years.¹³⁶ Sadly, Mackey started showing signs of dementia in his early fifties, a diagnosis not usually made until someone is at least twenty years older.¹³⁷ His wife, Sylvia, became his caretaker, and in May 2006, wrote to the NFL commissioner regarding her husband’s condition, its effect on the family and their finances, and the struggles facing other retired players just like him.¹³⁸

In response, the NFL created a new form of benefits available specifically for players with Alzheimer’s disease and dementia—the 88 Plan.¹³⁹ The benefits plan, named after

131. *Id.* at 309.

132. *Id.* at 308.

133. *Id.* at 309.

134. See discussion *infra* Part IV.

135. Alan Schwarz, *Wives United by Husbands’ Post-N.F.L. Trauma*, N.Y. TIMES, Mar. 14, 2007, at A1, available at <http://www.nytimes.com/2007/03/14/sports/football/14wives.html?pagewanted=all>.

136. *Hall of Famers: John Mackey*, PRO FOOTBALL HALL OF FAME.COM, http://www.profootballhof.com/hof/member.aspx?PLAYER_ID=138 (last visited Aug. 25, 2012).

137. *60 Minutes*, *supra* note 26.

138. Schwarz, *supra* note 135.

139. *Id.*

Mackey's jersey number, gives a player's family \$88,000 per year if the player receives care outside the home and \$50,000 if the player receives care within the home.¹⁴⁰ By February 2007, the NFL had mailed applications for benefits to twenty-two former players.¹⁴¹ By December 2009, the plan had distributed over \$1 million and was also funding dementia research.¹⁴²

PART IV: LITIGATION OVER CONCUSSIONS: A MIXED BAG OF SUCCESS AND FAILURE

As this Part will illustrate, it is difficult for an active or retired player to bring a negligence action against the NFL, a player's own team, or the team physician. In the last decade, however, there were two actions brought against a team physician and the unit within the NFL responsible for administering retirement benefits.¹⁴³

A. *Hoge v. Munsell*

Merril Hoge, a running back, played eight seasons for the Pittsburgh Steelers.¹⁴⁴ After playing 112 consecutive games for the Steelers, Hoge finished his career with the Chicago Bears for one final season.¹⁴⁵ Barely even out of the pre-season, Hoge suffered an "earthquake"-like hit while playing for the Bears and remained in the game for two more plays before removing himself and sitting out the following week.¹⁴⁶ When he returned to play six weeks later, Hoge suffered another concussion.¹⁴⁷ After suffering his second concussion in six weeks, Hoge retired at just twenty-nine years old, an age when players are thought to be in their "prime."¹⁴⁸ Hoge claimed that the Bears coaching staff and team physician, Dr. John Munsell ("Munsell"), cleared him to return to play too soon, before he had adequate time to recover from his first

140. *Id.*

141. *Id.*

142. *60 Minutes*, *supra* note 26.

143. See Hecht, *supra* note 22; *Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 209 F. App'x 305, 306 n.1 (4th Cir. 2006).

144. Hecht, *supra* note 22, at 25.

145. *Id.* at 26.

146. *Id.*

147. *Id.*

148. *Id.* at 27.

concussion.¹⁴⁹ Hoge described how he stumbled around on the field, as if he was “drunk.”¹⁵⁰ As a result of the multiple concussions he sustained over his career, Hoge alleged that he suffered from “headaches, sensitivity to light, and anger-management issues.”¹⁵¹

In the lawsuit he filed against Munsell for damages resulting from his premature retirement from football, Hoge alleged that Munsell failed to warn him about the signs and symptoms of concussions, the dangers subsequent concussions would pose, and negligently allowed him to return to play without a follow-up examination.¹⁵² In his defense, Munsell argued that Hoge was responsible for his injuries because he hid his symptoms from management and Munsell; thus, they were unable to inform him of the risks of concussions or protect him after he sustained the subsequent concussion.¹⁵³ A jury later awarded Hoge \$1.45 million, which would compensate him for the two additional years on his contract with the Bears, and an additional \$100,000 for pain and suffering.¹⁵⁴ One could view the minimal award for pain and suffering as recognition of Munsell’s defense, that Munsell could not inform or protect Hoge if he had negligently hid his condition in order to remain on the field.¹⁵⁵ If Hoge played today, in the age of posters hung in locker rooms and players suspended for extremely violent hits, he might not be able to make the same argument that, but-for the failure of his team physician to warn him of the signs, symptoms, and risks of a concussion, he would have been able to continue his football career into his thirties.

B. Jani v. Bert Bell/ Pete Rozelle NFL Player Retirement Plan

In 2002, Mike “Iron Mike” Webster died; a heart attack was named as the official cause of death.¹⁵⁶ Unofficially, researchers believed that the brain damage he suffered during his sixteen-year career in the NFL contributed to his

149. *Id.*

150. Hecht, *supra* note 22, at 27.

151. *Id.* at 29.

152. *Id.* at 27–28.

153. *Id.* at 28.

154. *Id.* at 29. The award was later overturned and the parties settled.

155. *Id.* at 28.

156. Heiner, *supra* note 29, at 272–73.

death.¹⁵⁷ Webster was best known for his tenure with the Pittsburgh Steelers, where he helped the team win four Super Bowl titles.¹⁵⁸ Playing as a center, Webster's position was particularly prone to hard hits, and he took many throughout his career.¹⁵⁹ In 1990, Webster retired and in the decade before his death, could never hold down a job and fell into financial ruin.¹⁶⁰ Doctors later diagnosed Webster with brain damage in 1998 resulting from the multiple blows to the head he suffered during his career.¹⁶¹

Because of his diagnosis of brain damage stemming from work-related injuries and his financial need, Webster applied for Active Football Benefits and Football Degenerative Benefits administered through the Bert Bell/Pete Rozelle NFL Player Retirement Plan.¹⁶² Along with his application, Webster submitted medical records from his own doctors as evidence of his total and permanent disability.¹⁶³ The Board responsible for determining benefits granted him benefits under the Football Degenerative plan but denied him the more lucrative benefits under the Active Football plan.¹⁶⁴ The Board reasoned that it did not believe his severe brain damage caused by trauma to his head and brain occurred while he was an active player in the NFL, a requirement of that type of benefit plan.¹⁶⁵

This case arose after Webster's estate sued the Board under the Employee Retirement Income Security Act of 1974 ("ERISA") claiming that the Board abused its discretion in ordering Webster to be medically evaluated by an independent physician, but denying the physician's findings that Webster's disability occurred while he was still playing football.¹⁶⁶ The United States Court of Appeals for the Fourth Circuit affirmed the district court's holding that the Board had abused its discretion.¹⁶⁷ The Fourth Circuit found that

157. *Id.*

158. *Jani v. Bert Bell/Pete Rozelle NFL Player Ret. Plan*, 209 F. App'x 305, 307 (4th Cir. 2006).

159. *Id.*

160. *Id.* at 307–08.

161. *Id.* at 308.

162. *Id.* at 310.

163. *Id.*

164. *Jani*, 209 F. App'x at 306.

165. *Id.*

166. *Id.*

167. *Id.* at 317.

the Board discredited the findings of its own physician in order to prevent Webster from receiving the more lucrative benefits, while having insufficient evidence to disprove the physician's conclusions.¹⁶⁸ Essentially, the Board went out of its way to ensure that brain damage and other neurological degenerative disorders were not categorized as work-related injuries. As previously discussed, a finding that the injuries are work-related not only is good news for the player, but also good news for the NFL, as it recognizes brain damage as a hazard of the job, a risk that a player must accept when he turns professional.

PART V: TORT LAW AND COMPARATIVE NEGLIGENCE

In order to argue that comparative negligence has the potential to affect players' recovery in suits brought against the NFL as a result of the League's new concussion management policies and initiatives, it is essential to understand basic tort theories. This Part first lays out the basic principles of tort law and the elements players must prove for various claims against the NFL, their teams, and their team physicians. Next, this Part provides a primer on comparative negligence theory, especially the doctrine of assumption of the risk. This Part concludes with a discussion on how all of this could affect players' recovery and the level of liability imposed on the NFL for players' disabilities.

A. *Introduction to Tort Law*

In order to establish a negligence claim, a player must prove the following elements: (1) the League owed him a duty of care, (2) the League breached the duty by its action, (3) the League's action was both the actual and proximate cause of the player's injury, and (4) the player sustained damages as a result.¹⁶⁹ In addition to holding the NFL directly liable for its own negligence by establishing these elements, a player could prove that the NFL is *vicariously* liable for the negligent acts of its employees (e.g. coaches, physicians). Also known as *respondeat superior*, courts can hold employers vicariously

168. *Id.*

169. Erika A. Diehl, *What's All the Headache?: Reform Needed to Cope with the Effects of Concussions in Football*, 23 J.L. & HEALTH 83, 97 (2010).

liable for their employees' acts when the negligent act is done "while acting within the scope of their employment."¹⁷⁰ For example, the Supreme Court of Utah determined that an employee acted within the scope of his or her employment if the conduct: (1) was of the kind the employee was hired to perform, (2) occurred during the hours and "spatial boundaries" of his or her employment, and (3) was motivated by his or her purpose of serving the employer's interests.¹⁷¹

Players also have the option of bringing medical malpractice actions, which differ from traditional negligence claims for one obvious reason—the injury is the result of medical treatment.¹⁷² The elements of the claim, however, are similar, in that the player must show that a duty existed, and the breach of that duty caused damage.¹⁷³ To prove the duty element in these types of actions, a claimant must show that there was a physician-patient relationship between the parties.¹⁷⁴ This would be simple enough for a player to prove, though, as the team generally contracts with and employs a physician for the team to provide care specially for its players, thus creating a duty to the player. Specific duties owed to players include the disclosure of information pertinent to the condition the physician is treating and an adequate assessment of the player's safe return to the game.¹⁷⁵ As with medical malpractice cases outside the realm of professional sports, in order for a player to establish a breach of the duty stemming from the physician-patient relationship, the physician's acts must have fallen below the prescribed standard of care, which can vary by jurisdiction.¹⁷⁶ Similar to the standard in negligence claims, causation must be actually and proximately attributable to the physician's negligent act.¹⁷⁷ The final element, damages, requires players only to prove that the recovery is necessary to put the player back in the position he was in before the injury occurred.¹⁷⁸

170. MARC A. FRANKLIN ET AL., *TORT LAW AND ALTERNATIVES* 19 (8th ed. 2006) (citing *Christensen v. Swenson*, 874 P.2d 125 (Utah 1994)).

171. *Id.* at 19–20.

172. Landis, *supra* note 94, at 140

173. *Id.* at 140–44.

174. *Id.* at 140–41.

175. *Id.* at 141–42.

176. *Id.* at 143.

177. *Id.* at 144.

178. *Id.* at 145.

B. Introduction to Defenses

Recognizing that courts should not allow plaintiffs to recover in full or should limit the recovery to partial damages in negligence or medical malpractice actions when the plaintiffs were also negligent, defendants to these actions are entitled to raise comparative negligence or assumption of the risk defenses.

1. Comparative Negligence

When a defendant establishes a comparative negligence defense, the court limits the plaintiff's recovery by weighing the defendant's negligent act that gives rise to the suit and the plaintiff's own negligence.¹⁷⁹ As Chart 1 (below) indicates, states have adopted various forms of comparative negligence, mainly either pure systems or modified systems.¹⁸⁰ Under the pure system of comparative negligence, a plaintiff receives exactly the percentage of his or her damages for the portion of the negligence attributable to the defendant.¹⁸¹ For example, a defendant who is 75% at fault for the damages would be liable for 75% of the plaintiff's damages.¹⁸² In contrast, modified comparative negligence exists in two forms. In one, a plaintiff can recover in the same way as he or she would under the pure system so long as his or her negligent act is "not as great as' the defendant's."¹⁸³ Under the other form of modified comparative negligence, the plaintiff's negligence can be "no greater than' the defendant's" in order to allow recovery.¹⁸⁴

CHART 1: COMPARATIVE NEGLIGENCE IN THE UNITED STATES

Key:

***Pure** – Plaintiff can recover his or her damages from Defendant's negligence minus a percentage attributable to his or her own negligence.

***50% or less** – Plaintiff can only recover if his or her own negligence accounts for less than 50% of his or her damages.

179. FRANKLIN ET AL., *supra* note 170, at 445.

180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

***49% or less** – Plaintiff can only recovery if his or her own negligence accounts for less than 49% of his or her damages.

State	Comparative Negligence Rule ¹⁸⁵	Home to NFL Team? ¹⁸⁶
Alabama	Plaintiff's negligence is a bar to recovery	No
Alaska	Pure	No
Arizona	Pure	Arizona Cardinals
Arkansas	49% or less	No
California	Pure	Oakland Raiders; San Diego Chargers; San Francisco 49ers
Colorado	49% or less	Denver Broncos
Connecticut	50% or less	No
Delaware	50% or less	No
District of Columbia	Plaintiff's negligence is a bar to recovery	No
Florida	Pure	Jacksonville Jaguars;

185. ALASKA STAT. § 09.17.060 (2011); ARIZ. REV. STAT. ANN. §12-2505(A) (2010); ARK. CODE ANN. §16-64-122 (b)(1) (2010); COLO. REV. STAT. §13-21-111(1), (3) (2010); CONN. GEN. STAT. § 52-572h(b) (2010); DEL. CODE ANN. tit. 10, § 8132 (2010); FLA. STAT. § 768.81(2) (2010); GA. CODE ANN. §51-12-33(a), (g) (2010); HAW. REV. STAT. § 663-31(a) (2010); IDAHO CODE ANN. § 6-801 (2010); 735 ILL. COMP. STAT. 5/2-1116 (2010); IND. CODE § 34-51-2-6, 7(b)(2), 8(b)(2) (2010); IOWA CODE § 668.3(1)(a) (2010); KAN. STAT. ANN. § 60-258a(a) (2010); LA. CIV. CODE ANN. art. 2323(A) (2010); ME. REV. STAT. ANN. tit. 14, § 156 (2010); MASS. GEN. LAWS ch. 231, § 85 (2010); MICH. COMP. LAWS § 600.2959 (2010); MINN. STAT. § 604.01(1) (2010); MISS. CODE ANN. § 11-7-15 (2010); MONT. CODE ANN. § 27-1-702 (2010); NEB. REV. STAT. § 25-21, 185.09 (2010); NEV. REV. STAT. § 41.141(2)(a) (2010); N.H. REV. STAT. ANN. § 507:7-d (2010); N.J. STAT. ANN. § 2A:15-5.1 (West 2010); N.Y. C.P.L.R. § 1411 (McKinney 2010); N.D. CENT. CODE § 32-03.2-02 (2010); OHIO REV. CODE ANN. § 2315.35 (West 2010); OKLA. STAT. tit. 23, § 13 (2010); OR. REV. STAT. § 31.600 (2010); 42 PA. STAT. ANN. § 7102 (West 2010); R.I. GEN. LAWS § 9-20-4 (2010); S.D. CODIFIED LAWS § 20-9-2 (2010); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (West 2010); UTAH CODE ANN. § 78B-5-818 (West 2010); VT. STAT. ANN. tit. 12, § 1036 (West 2010); WASH. REV. CODE § 4.22.005 (2010); WIS. STAT. § 895.045(1) (2010); WYO. STAT. ANN. § 1-1-109(b) (West 2010). *Williams v. Delta Int'l Mach. Corp.*, 619 So. 2d 1330, 1132 (Ala. 1993); *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1242-43 (Cal. 1975); *Sinai v. Polinger Co.*, 498 A.2d 520, 523-24 (D.C. 1985); *Hilen v. Hays*, 673 S.W.2d 713, 719-20 (Ky. 1984); *Franklin v. Morrison*, 711 A.2d 177, 187 (Md. 1998); *Gustafson v. Benda*, 661 S.W.2d 11, 16 (Mo. 1983); *Scott v. Rizzo*, 634 P.2d 1234 (N.M. 1981); *Miller v. Miller*, 160 S.E.2d 65, 73-74 (N.C. 1968); *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783, 784 (S.C. 1991); *McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992); *Baskett v. Banks*, 45 S.E.2d 173, 177 (Va. 1947); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 885 (W. Va. 1979).

186. *NFL Teams*, NFL.COM, <http://www.nfl.com/teams> (last visited Aug. 25, 2012).

		Miami Dolphins; Tampa Bay Buccaneers
Georgia	49% or less	Atlanta Falcons
Hawaii	50% or less	No
Idaho	49% or less	No
Illinois	50% or less	Chicago Bears
Indiana	50% or less	Indianapolis Colts
Iowa	50% or less	No
Kansas	50% or less	No
Kentucky	Pure	No
Louisiana	Pure	New Orleans Saints
Maine	49% or less	No
Maryland	Plaintiff's negligence is a bar to recovery	Baltimore Ravens; Washington Redskins
Massachusetts	50% or less	New England Patriots
Michigan	Pure	Detroit Lions
Minnesota	50% or less	Minnesota Vikings
Mississippi	Pure	No
Missouri	Pure	Kansas City Chiefs; St. Louis Rams
Montana	50% or less	No
Nebraska	49% or less	No
Nevada	50% or less	No
New Hampshire	50% or less	No
New Jersey	50% or less	New York Jets; New York Giants
New Mexico	Pure	No
New York	Pure	Buffalo Bills
North Carolina	Plaintiff's negligence is a bar to recovery	Carolina Panthers
North Dakota	49% or less	No
Ohio	50% or less	Cincinnati Bengals, Cleveland Browns
Oklahoma	50% or less	No
Oregon	50% or less	No
Pennsylvania	50% or less	Pittsburgh Steelers; Philadelphia Eagles
Rhode Island	Pure	No
South Carolina	50% or less	No
South Dakota	If plaintiff's	No

	negligence is “slight” in comparison to that of tortfeasor, plaintiff may recover amount reduced by plaintiff’s negligence.	
Tennessee	49% or less	Tennessee Titans
Texas	50% or less	Houston Texans; Dallas Cowboys
Utah	49% or less	No
Vermont	50% or less	No
Virginia	Plaintiff’s negligence is a bar to recovery	No
Washington	Pure	Seattle Seahawks
West Virginia	49% or less	No
Wisconsin	50% or less	Green Bay Packers
Wyoming	50% or less	No

Comparative negligence was intended to be less harsh than its predecessor, contributory negligence, which was a *complete bar* to recovery when a plaintiff’s conduct was a contributing factor to his or her injury.¹⁸⁷ Comparative negligence theory encompasses the ideas of avoidable consequences and aggravation of a pre-existing condition,¹⁸⁸ which could be problematic for players seeking damages for their concussion-related injuries. Under the avoidable consequences theory, a plaintiff suffering from an injury “as the proximate result of a tort cannot recover for any portion of the harm that by the exercise of ordinary care he could have avoided.”¹⁸⁹ Therefore, if a player proceeded against the advice of his physician and returned to the field following a concussion or other head trauma and was subsequently injured, the player could be found to have failed to exercise ordinary care to avoid further trauma and would be responsible for his injuries (both short and long-term). While a defendant generally must take a plaintiff as he finds him/her—the famous eggshell plaintiff rule—the rule is

187. BARRY R. FURROW ET AL., HEALTH LAW: CASES, MATERIALS, AND PROBLEMS 412, 415 (6th ed. 2008) (citing *Ostrowski v. Azzara*, 545 A.2d 148 (N.J. 1988)).

188. *Id.*

189. *Id.*

subject to the defense that the plaintiff aggravated a pre-existing condition.¹⁹⁰ This theory is similar to avoidable consequences, but the two can be distinguished as the defendant, under a theory of aggravation of pre-existing conditions, would be responsible only for “the amount of harm actually caused by . . . [his] negligence.”¹⁹¹ What the plaintiff has done negligently is not relevant, but rather how the defendant finds the plaintiff and the harm actually caused by the defendant’s negligence.¹⁹²

The eggshell plaintiff rule could have proven problematic for the NFL and its physicians had comparative negligence theories not diluted its effect. Owen Thomas, for example, had severely damaged his brain despite only being in his early twenties and playing football at the collegiate level.¹⁹³ It is quite possible that other high school and college football players are like Owen Thomas, playing with concussion-related brain damage before they turn professional. Should they enter the NFL, it may not take many hits for the damage necessary to cause CTE or another degenerative disease. The NFL would likely argue that it is not responsible for damage done to a player before he even entered the League—damage that perhaps resulted from playing in a league less regulated than the NFL. This raises the question as to how far back the NFL must go into a player’s career to determine when the damage was done, and if this is even possible.

2. Assumption of the Risk

Then-Judge Cardozo provided a famous definition for the assumption of the risk defense in *Murphy v. Steeplechase Amusement Co., Inc.*, stating: “One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary”¹⁹⁴ Essentially, a plaintiff is responsible for the damages incurred as a result of “obvious and necessary” risks of participation in an activity. There are

190. *Id.* at 415–16; FRANKLIN ET AL., *supra* note 170, at 401 (requiring the “eggshell plaintiff” to be taken as the defendant finds him, “even if that means that the defendant must compensate the plaintiff for harm an ordinary person would not have suffered” from the accident that the defendant caused).

191. FURROW ET AL., *supra* note 187, at 415.

192. *Id.*

193. Schwarz, *supra* note 2.

194. *Murphy v. Steeplechase Amusement Co., Inc.*, 166 N.E. 173, 174 (N.Y. 1929).

two different categories of assumption of the risk, express and implied.

a. Express Assumption of the Risk

With express assumption of the risk, a court bars a plaintiff's recovery when the parties had previously agreed that the defendant's negligent or reckless conduct would not be grounds for liability.¹⁹⁵ If the parties made such an agreement, the defendant would owe no duty to the plaintiff and the plaintiff would be unable to establish a negligence action.¹⁹⁶ A plaintiff could also be barred from recovering against a defendant for negligence when the plaintiff has expressly agreed in advance to assume the very risk that led to his or her injury.¹⁹⁷ Defendants run into trouble with this defense because agreements in which they have expressly agreed to bear no liability for a plaintiff's injuries must be clear and unambiguous.¹⁹⁸ As a result, defendants often write agreements of this nature ambiguously to cover a vast array of possibilities.

b. Implied Assumption of the Risk

Two separate theories of implied assumption of the risk exist—primary and secondary implied assumption of the risk. Primary implied assumption of the risk is applicable only in situations where the defendant owes no duty of care to the plaintiff and the plaintiff has assumed the risk for injuries “arising from a known risk of the defendant's actions or inactions.”¹⁹⁹ Courts must look at the individual activity that led to the injury to determine if it is so inherently dangerous that no duty of care should be owed to the participant.²⁰⁰ Secondary implied assumption of the risk, however, arises when the defendant *does* owe a duty of care to the plaintiff, thus allowing the plaintiff to begin stating his claim for negligence.²⁰¹ Under this theory, a defendant raising the

195. Denner, *supra* note 102, at 211.

196. *Id.*

197. *Id.*

198. *Id.* at 212.

199. *Id.* at 213.

200. *Id.* at 214.

201. Denner, *supra* note 102, at 215.

defense would argue that the plaintiff should bear some responsibility for his injury because of his voluntary participation in the activity and his continued participation in it.²⁰² This is similar to the pure system of comparative negligence where a court may award a plaintiff damages, but the court reduces the amount to account for the plaintiff's responsibility for the injury. This defense is of no use to a defendant who has increased the risks to the plaintiff beyond those that make the activity inherently dangerous.²⁰³

3. How Comparative Negligence and Assumption of the Risk Can Affect Damages Recovered by Players

With all of these defenses in mind, it is important to note the specific application to cases involving professional sports and analyze how these theories and the decisions based on them could affect the damages players seek as compensation for their concussion-related injuries.

In *Kabella v. Bouschelle*, the plaintiff and defendant were voluntarily playing a friendly game of football on opposite teams.²⁰⁴ When the defendant attempted to tackle the plaintiff, the plaintiff stated that he was already "down."²⁰⁵ According to the rules of the game, the defendant would have to cease tackling if the player was down.²⁰⁶ Despite the rule and the plaintiff's claim that he was down, the defendant continued his tackle until the plaintiff was on the ground, suffering a dislocated hip.²⁰⁷ At issue in this case was whether a "participant in an athletic activity involving physical contact between the players may recover in tort for the alleged negligent conduct of another participant."²⁰⁸ The trial court had granted the defendant summary judgment as a matter of law, and the Court of Appeals of New Mexico agreed that there was no cause of action available for the plaintiff because there was no willful or reckless action alleged on the part of the defendant.²⁰⁹ The court found that there was

202. *Id.*

203. *Id.* at 215-16.

204. *Kabella v. Bouschelle*, 672 P.2d 290, 291 (N.M. Ct. App. 1983).

205. *Id.*

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.* at 291, 294.

implied consent to all the “normal risks” associated with a sport by voluntary association.²¹⁰ The court also cited a decision involving the NFL, which distinguished intentional conduct from a risk inherent in the sport, namely, a neck fracture from a blow to the head and neck, which would not be barred by assumption of the risk.²¹¹

Another case involving amateur football players found a plaintiff suing the defendant for breaking his finger in a touch football game.²¹² Applying primary implied assumption of the risk to the facts, the court found that the plaintiff had no cause of action against the defendant, as his injury “arose from ‘ordinary careless conduct committed during the sport’”²¹³ Other courts have also held that primary implied assumption of the risk is the correct doctrine to apply to professional sports as players assume the risks inherent in the sport through their voluntary participation.²¹⁴

What impact do all of these theories have on players claiming that the NFL (or its employees) acted negligently and in so doing caused their concussion-related injuries? When looking at the current landscape of football, with all the new precautions the NFL is taking with the guidelines, rules of the game, funding studies, and lobbying Congress, now more than ever, there is an abundance of information floating around not only on the signs and symptoms of concussions but also on the connection between concussions and degenerative neurological diseases. There is the possibility that these diseases can be recognized as inherent dangers of the game, a risk that the players assume, barring their recovery completely. Additionally, it could be argued that players should have known of the damage that playing professional football could cause, which would only exacerbate the preexisting damage from their high school/college football careers, and thus they assumed the risk of that further damage. This knowledge thus places greater responsibility on the player to exercise greater caution when engaging in professional football.

210. *Kabella*, 672 P.2d at 292.

211. *Id.* at 292–93 (citing *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 524 (10th Cir. 1979)).

212. Diehl, *supra* note 169, at 98.

213. *Id.*

214. Denner, *supra* note 102, at 233-34.

Another risk of all the recent changes the NFL has implemented in recognition of the damage that concussions cause is that courts may begin to hold players to an even higher standard than they already hold professional athletes. The risks that players face through their participation in professional football are so widely known and discussed that it would be extremely difficult for a player to make an argument that he was unaware of the risk of sustaining a concussion, how to identify the concussion, and the dangers the concussion posed.

An argument exists that players should not be held responsible for the consequences of their decisions to return to the field or withhold the symptoms of their concussions because they are in no mental position to make such decisions.²¹⁵ However, all of the new information the NFL has disseminated, in addition to the NFL's various committees researching the danger of concussions, as well as the prior and pending litigation, seems sufficient to put players on notice prior to stepping onto the field that concussions are an inherent danger of the sport. Therefore, players should be held to have assumed all of the risks that can result from their negligent actions, including returning to the field before their concussion symptoms have subsided or even remaining on the field and failing to inform the medical staff or coaches that the hit they took was harder than normal.

For example, in 2007, quarterback Jon Kitna took an especially hard sack and the team physician informed him that he had suffered a concussion.²¹⁶ Kitna left the game after reporting that he had memory loss, severe head pain, and dizziness.²¹⁷ However, at halftime, Kitna claimed to be free of any pain or complications from the concussion and by the fourth quarter, with his team losing, the team doctor cleared him to return to the field.²¹⁸ The argument that players need to be protected from themselves stands on shaky grounds when a player such as Kitna can influence medical decisions

215. Andrew D. Hohenstein, *Team Physicians: Adhering to the Hippocratic Oath or Just Plain Hypocrites?*, 19 MARQ. SPORTS L. REV. 579, 593 (2009).

216. *Id.* at 604–05. A sack is defined as when a player on the opposing team tackles the quarterback “behind the line of scrimmage” before the quarterback is able to throw a pass. Sack, DICTIONARY.COM, <http://dictionary.reference.com/browse/sack> (last visited Apr. 26, 2012).

217. Hohenstein, *supra* note 215, at 605.

218. *Id.*

by expressing that the concussion symptoms he just experienced had dissipated and that, because he is feeling 100% better, he should be allowed to return to the field.

CONCLUSION

As stated in the Introduction, this Comment did not intend to argue for holding players entirely accountable for the devastating injuries that develop after their years employed as a professional football player for their fans' enjoyment. Rather, this Comment intended to provide a fresh look at the state of concussions in the NFL in light of all the very recent policies the NFL implemented and how such policies affect players' claims that the League's negligence leads to early diagnoses of Alzheimer's disease, dementia, and other brain degenerative disorders.

There are not only legal opinions on concussions in the NFL, but also those based on morality; should football even have a viewing audience given how violent and potentially dangerous it is?²¹⁹ Society has entered an era where a popular sport has become so dangerous that fans may simply begin to tune out rather than see the kinds of injuries sustained by players like Eric LeGrand. In October 2010, LeGrand, a player on the Rutgers University football team, was paralyzed from the neck down as a result of running head first into the shoulder of his opponent.²²⁰ LeGrand lay on the field, his legs slightly raised in the air, though he was unable to move them, as a stadium full of fans and viewers at home watched.²²¹

The NFL has a responsibility to not only ensure that its teams' coaches, physicians, and players themselves follow the concussion management policies and regulations, but also that the League continues to pave the way to making the sport safer while not detracting from the very basic appeal of the game: the violent (but, ideally, not dangerous) quality created by larger-than-life men running around a field into one another to move the pigskin and score touchdowns.

219. Michael Sokolove, *Should You Watch Football?*, N.Y. TIMES, Oct. 23, 2010, at WK1, available at <http://www.nytimes.com/2010/10/24/weekinreview/24sokolove.html?ref=football&pagewanted=all>.

220. Mark Viera, *Rutgers Player Is Paralyzed Below the Neck*, N.Y. TIMES, Oct. 17, 2010, at D1, available at <http://www.nytimes.com/2010/10/18/sports/ncaaf/football/18rutgers.html?scp=1&sq=eric%20legrand&st=cse>.

221. *Id.*

Though the players are money makers for the League, they are also humans who can be hurt. Policies that enhance the safety of professional football provide dual benefits to the players and the League: players receive benefits to their health and well-being, but the NFL also benefits from an even stronger defense to players' claims that the trauma sustained from concussions has led to brain damage. Additionally, the NFL must ensure that players compete in an environment where they do not have to fear that admitting to a concussion will lead to them getting "pipped," allowing them to comply with the NFL regulations on concussions and properly heal before returning to the field.²²²

Players must also realize that being "pipped" is not the end of the world, but heading back onto the field with an untreated concussion or without the necessary time to recover could have far greater consequences than getting benched or traded. Commentators have suggested that "machismo" is another reason why players fail to report their symptoms.²²³ Again, players must recognize that their health is much more important and valuable than the way teammates and fans perceive their manhood; players will not have much of a career available to them to show off their manhood if they cannot remember their names. Applying theories of comparative negligence to professional football players' suits for damages incurred as a result of these concussion-related injuries, in a sense, provides the incentive that posters and public service announcements cannot—while the NFL may be held liable for some of the damages, a player will not receive all of his damages for his concussion-related injuries when he not only assumes the risk of the sport, but also creates the risks.

222. Alan Schwarz, *Pipp's Headache Was Gehrig's Big Break*, N.Y. TIMES, Aug. 17, 2010, at B12, available at <http://www.nytimes.com/2010/08/18/sports/baseball/18pipp.html?scp=11&sq=&st=nyt>. During the 1925 baseball season, Wally Pipp, the first-baseman for the New York Yankees, was benched due to a headache stemming from a concussion. *Id.* Who should step in for the injured first baseman but Lou Gehrig! *Id.* Wally Pipp returned to play that season, but played infrequently due to another head injury. *Id.* The additional head injury, combined with Gehrig's talent, proved to be the nail in the coffin of Pipp's career, as he was traded the next season. *Id.*

223. Hecht, *supra* note 22, at 36–37.