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Buckle Your Chinstrap: Why Youth, High School, and College Football Should Adopt the NFL's Concussion Management Policies and Procedures

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I. INTRODUCTION

Four years ago, Blake Ripple was a household name in the greater Austin, Texas area when anyone talked about high school football.[1] However, over the course of his high school career, Ripple's doctors believe that he suffered "anywhere from thirty to forty concussions and sub-concussive hits while playing football."[2] Once a member of the National Honor Society, an Academic All-District student, star defensive lineman, and Division I college football recruit, the effects of the subsequent *preventable* concussions that Ripple sustained changed his life forever.[3] In the fall of 2009, Ripple sustained one of the final concussions of his career during a game.[4] Although Ripple suffered from and complained of constant headaches, nausea, numbness to one side of his body, and dizziness[5] throughout the remainder of the 2009 school year and into the 2010 football season, Ripple's coach allegedly "force[d]," him to return-to-play before his initial brain injury healed.[6] Now, due in part to his coach's alleged negligent acts, Ripple cannot play football, go to college, or live independently.[7]

Over the past five years, the rising numbers of reported concussions in the National Football League (NFL),[8] pending concussion litigation by former

1. *See* Complaint at 2, Ripple v. Marble Falls Indep. Sch. Dist. No. 1:12-cv-00827-LY (W. Dist. Tex. Sept. 7, 2012) [hereinafter Ripple Complaint] (discussing that some Division I college football programs demonstrated interest in offering Ripple a scholarship). The Complaint reflects the most current procedural posture of this case. *Id.*

2. *Id.* at 8.

3. *Id.* at 2–8.

4. *Id.* at 4.

5. Ripple's symptoms are common side effects of a concussion. *What Are the Potential Effects of TBI?*, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/TraumaticBrainInjury/outcomes.html (last visited Jan. 31, 2013) (on file with the *McGeorge Law Review*).

6. Ripple Complaint, *supra* note 1, at 6–7.

7. *Id.* at 8.

8. *See Concussion Watch*, PBS, http://www.pbs.org/wgbh/pages/frontline/ concussion-watch/ (last visited Feb. 19, 2014) (on file with the *McGeorge Law Review*) (tracking all reported concussions in the NFL). PBS and ESPN collaborated to track all concussions listed on the NFL teams' injury reports. *Id.*

players against the NFL,[9] and the suicides of former players linked to head trauma have combined to increase the public's awareness about the potential dangers of concussions in all levels of football.[10] This public health issue has affected how parents, coaches, high schools, universities,[11] and the government[12] view player safety, concussion management, and concussion treatment in youth, high school, and college football.[13] The NFL has led the way in increasing the safety of the game and mitigating the harmful effects of concussions.[14]

The NFL has access to cutting-edge medical research and technology and can also institute the highest possible safety measures.[15] As a result, the league has made strides to reduce the negative effects of concussions in all levels of football.[16] The NFL has focused on a few areas in particular to combat the effects

9. *See generally* Amended Complaint at 24–27, In re NFL Players' Concussion Injury Litig., No. 2:12-md-02323-AB (E.D.PA. July 17, 2012), MDL No. 2323, *available at* http://nflconcussionlitigation.com/?page_id=18 (on file with the *McGeorge Law Review*) [hereinafter Master Complaint] (asserting various causes of action against the NFL regarding concussions).

10. *See* Alan Schwarz, *Duerson's Brain Trauma Diagnosed*, N.Y. TIMES (May 2, 2011), http://www.nytimes.com/2011/05/03/sports/football/03duerson.html (on file with the *McGeorge Law Review*) (discussing the post-suicide autopsy of former Chicago Bear defensive back Dave Duerson); Mike Tierney, *Football Player Who Killed Himself Had Brain Disease*, N.Y. TIMES (July 27, 2012), http://www.nytimes.com/2012/07/27/sports/football/ray-easterling-autopsy-found-signs-of-brain-disease-cte.html (on file with the *McGeorge Law Review*) (asserting that a post-suicide autopsy of former Atlanta Falcons defensive back Ray Easterling revealed the presence of the brain disease, chronic traumatic encephalopathy, or CTE); Mark Fainaru-Wada et al., *Doctors: Junior Seau's Brain Had CTE*, ESPN (Jan. 11, 2013, 6:32 PM), http://espn.go.com/espn/otl/story/_/id/8830344/study-junior-seau-brain-shows-chronic-brain-damage-found-other-nfl-football-players (on file with the *McGeorge Law Review*) (illustrating that during a post-suicide autopsy, doctors determined that Seau suffered from CTE). While Duerson, Easterling, and Seau are the only former NFL players who committed suicide due in part to repeated head trauma, they represent a growing trend of retired NFL players that suffer from neurocognitive diseases after their playing career. *See* Nadia Kounang, *Football Players More Likely to Develop Neurodegenerative Disease, Study Finds*, CNN (Sept. 6, 2012, 12:35 PM), http://www.cnn.com/2012/09/05/health/nfl-neurodegenerative-disease/index.html (on file with the *McGeorge Law Review*) ("[A] new study suggests that professional football players are three times more likely to have neurodegenerative diseases than the general population."). The study also showed that NFL players are four times more likely to develop Alzheimer's and amyotrophic lateral sclerosis (ALS), or Lou Gherig's disease, than the general public. *Id.*

11. Stephanie Cary, *Tackling the Danger of Concussions: Documentary Raises Severity of Injury, How to Prevent It*, L.A. DAILY NEWS (Jan. 26, 2012), *available at* 2012 WLNR 1822692 *(*on file with the *McGeorge Law Review*).

12. Recently, President Barack Obama asserted, "[I]f I had a son, I'd have to think long and hard before I let him play football." Franklin Foer & Chris Hughes, *Barack Obama Is Not Pleased: The President on His Enemies, the Media, and the Future of Football*, NEW REPUBLIC (Jan. 27, 2013), http://www.newrepublic.com/article/112190/obama-interview-2013-sit-down-president# (on file with the *McGeorge Law Review*). The President also addressed his concerns with college athletes who suffer concussions and "have nothing to fall back on," in terms of medical benefits or care. *Id.*

13. Cary, *supra* note 11.

14. NFL EVOLUTION, http://www.nflevolution.com/nfl-timeline/index.html (last visited Nov. 9, 2012) (on file with the *McGeorge Law Review*).

15. *See* Master Complaint, *supra* note 9, at 3–4 (explaining the NFL has historically taken on the role as "guardian" of player safety in football).

16. *See generally id.* at 4–5 (arguing that the NFL has historically taken on the duty to properly inform players of the dangers of concussions).

of concussions: the league's collective bargaining agreement (CBA); concussion policies and guidelines; and the medical practices used by team doctors. These policies have created industry customs that shape the standard of care in concussion management.

This Comment argues that the NFL's measures to address concussions have created industry customs in concussion management that all lower levels of football should adopt. Such an adoption would increase the long-term health of players and shield coaches and schools from tort liability. If adopted, these changes will ensure that coaches and schools meet the standard of care for concussion management in negligence actions, will have a positive long-term effect on players' health, and will lower the risk of litigation brought by players against governing bodies, leagues, schools, and coaches.[17] Part II gives a general overview of concussions from a medical perspective. It also discusses how the NFL has historically dealt with concussions and its efforts to make football safer. Part III explains how the pending concussion litigation involving former players against the NFL changed the NFL's culture of concussion management. It also illustrates actions that the National Collegiate Athletics Association (NCAA) and various states took to combat the concussion epidemic. Part IV outlines factors that limit liability for concussion injuries in football and how customs impact the standard of care in a negligence case. Part V argues that states, governing bodies, and universities should adopt the NFL's concussion policies regarding return-to-play, education, baseline testing, and the amount of contact during practices. Part VI asserts that should adoption happen on a large scale, these policies will increase players' health during and after their playing careers, which will inherently lower the probability of future litigation brought by players.

II. CONCUSSION OVERVIEW

This Part explains how concussions medically affect a player's brain and their historical link to football. Section A briefly discusses concussions from a medical perspective. Section B gives a short history of how concussions are connected to football. Section C discusses rule changes that the NFL implemented to increase the health and safety of players. Section D examines the failures of the former Mild Traumatic Brain Injury Committee (MTBI Committee) to adequately address concussions in professional football. Part E illustrates the efforts that NFL Commissioner Roger Goodell has taken to address concussions.

17. While the concussion management procedures addressed in this Comment are generally applicable to all sports, this Comment intentionally limits its scope to football.

A. Medical Diagnosis of a Concussion

According to the Centers for Disease Control and Prevention (CDC), "a concussion is a type of traumatic brain injury" (TBI) that occurs when the head or body receives a blow that causes the brain to accelerate and decelerate quickly in the skull.[18] The force of the blow disrupts normal neurological functions of the brain.[19] The brain will normally heal from most TBI or concussions, but during the healing process, the brain is much more susceptible to aggravation or re-injury.[20] The effects of a concussion can range from short-term effects such as headaches, memory loss, and reduced mental cognition,[21] to long-term complications such as depression, seizures, and brain disease if not treated properly.[22] Proper treatment is paramount in youth and college football players because a developing brain is more susceptible to re-injury or aggravation before it fully heals from a concussion.[23]

B. A Brief History of Concussions in Football and Beyond

In 1905, football as we know it almost ended.[24] The deaths of eighteen college football players in 1905 led some people to call for the abolition of football.[25] A few years before the advent of professional football in America, President Theodore Roosevelt called the leaders of the Harvard, Yale, and Princeton football teams to Washington D.C. in order to create rules that would

18. *Concussion and Mild TBI*, CTR. FOR DISEASE CONTROL & PREVENTION (July 27, 2012), http://www.cdc.gov/Concussion/ (on file with the *McGeorge Law Review*); *Brain Animation: Digital View of a Concussion*, CTR. FOR DISEASE CONTROL & PREVENTION (2011), http://www.cdc.gov/concussion/HeadsUp/clinicians/resource_center/brain_animation.html (on file with the *McGeorge Law Review*).

19. *Brain Animation: Digital View of a Concussion*, *supra* note 18.

20. *Id.*

21. *What Are the Potential Effects of TBI?*, CTR. FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/TraumaticBrainInjury/outcomes.html (last visited Jan. 31, 2013) (on file with the *McGeorge Law Review*).

22. *See Resource Center: Complications of Concussion*, CTR. FOR DISEASE CONTROL & PREVENTION , http://www.cdc.gov/concussion/HeadsUp/clinicians/resource_center/complications_of_concussion.html (last visited Feb. 19, 2014) (on file with the *McGeorge Law Review*) (asserting various complications from concussions including "[p]ost-[c]oncussion [s]yndrome . . . [c]onvulsive [m]otor [p]henomena . . . [p]ost-[t]raumatic [s]eizures . . . [s]econd-[i]mpact [s]yndrome . . . [c]hronic [t]raumatic [e]ncephalopathy (CTE) . . . [d]epression . . . [and] [m]ild-[c]ognitive [i]mpairment).

23. Richard H. Adler, *Youth Sports and Concussions: Preventing Preventable Brain Injuries. One Client, One Cause, and a New Law*, 22 PHYSICAL MED. & REHAB. CLINICS OF N. AM. 721, 722 (2011) [*Preventing Preventable Brain Injuries*].

24. Douglas E. Abrams, *Confronting the Youth Sports Concussion Crisis: A Central Role for Responsible Local Enforcement of Playing Rules*, 2 MISS. SPORTS L. REV. 75, 76 (2013) (on file with the *McGeorge Law Review*).

25. *Id.*

make football safer.[26] Roosevelt advocated for and ultimately succeeded in implementing rules that focused on preventing brain injuries.[27]

As contact sports like football and boxing progressed, the medical community, as early as 1928, began linking concussions to brain disease.[28] Over the years, the scientific and medical community continued to develop evidence linking repeated concussions to brain disease in football players and boxers,[29] while at the same time people outside of the scientific committee made the same practical inferences.[30]

The CDC estimates that 1.7 million Americans receive a TBI each year.[31] Of that number, 173,285 youth athletes suffer from reported sports-related concussions;[32] recent studies show the greatest number of these sports-related concussions occur in youth football.[33]

26. *Id.* at 78.

27. *Id.* at 78–79.

28. *See* Harrison S. Martland, *Punch Drunk*, 91 J. AM. MED. ASS'N 1103, 1103–04 (1928) (asserting that nearly half of boxers developed brain abnormalities if they continued to box for a long period of time).

29. *See generally* Master Complaint, *supra* note 9, at 1–5 (describing findings of various concussion studies from 1928–1991).

30. *See* Bob Dylan, Who Killed Davey Moore? (Columbia 2004) (on file with the *McGeorge Law Review*) (singing about a boxer who died in the ring due to head trauma).

"'Not me," says the boxing writer, [p]ounding print on his old typewriter. Saying, 'Boxing ain't to blame [t]here's just as much danger in a football game.' Saying, 'Fistfighting is here to stay. It's just the old American way.'" *Id.* For example, running a search for the term "concussion" on Twitter or Google merits enough substantial results to write any number of scientific or law review articles. Twitter topic search, TWITTER https://twitter.com/search?q=concussion &src=typd (search "concussion;" then follow search hyperlink to results) (on file with the *McGeorge Law Review*).

31. Mark Faul et al., TRAUMATIC BRAIN INJURY IN THE UNITED STATES: EMERGENCY DEPARTMENT VISITS, HOSPITALIZATIONS & DEATHS 2002–2006 7 (CDC eds. 2010). The CDC compiled the number of traumatic brain injuries from data collected from the National Hospital Ambulatory Medical Care Survey, National Hospital Discharge Survey, and National Vital Statistics Survey. *Id.* at 49–50.

32. *See* Julie Gilchrist et al., *Nonfatal Traumatic Brain Injuries Related to Sports and Recreation Activities Among Persons Aged ≤ 19 Years—United States, 2001–2009*, 60 MORBIDITY & MORTALITY WEEKLY REPORT 1, 1–2 (Oct. 2010), *available at* http://www.cdc.gov/mmwr/index2011.html (on file with the *McGeorge Law Review*); *Take Concussions Out of Play: Learn to Prevent, Recognize, and Respond to Concussions*, CTR. FOR DISEASE CONTROL & PREVENTION (July 9, 2012), http://www.cdc.gov/features/protectyoungathletes/ (on file with the *McGeorge Law Review*).

33. *See* Kate Snow et al., *Concussion Crisis Growing in Girls' Soccer*, ROCK CENTER (May 9, 2012, 9:50 AM), http://rockcenter.nbcnews.com/_news/2012/05/09/11604307-concussion-crisis-growing-in-girls-soccer ?lite (on file with the *McGeorge Law Review*) (detailing the prevalence of concussions in girls soccer and the rising safety concerns about the sport). Girls soccer has the second highest concussion rate among youth sports, with football having the highest concussion rate. *Id.*

C. NFL Rule Changes Over Time

Since its inception in 1922,[34] the NFL has implemented equipment standards, in-game rules, and procedures to ensure player safety.[35] Starting in 1920 and continuing each decade thereafter, the NFL continually upgraded protective equipment, such as helmets and padding.[36] Moreover, the NFL instituted numerous rules intended to increase player safety, from roughing the passer (1939) to the current rules that protect defenseless players (2010–2011).[37]

D. The Failures of the Initial MTBI Committee

In 1994, under the leadership of former Commissioner Paul Tagliabue, the NFL created the Mild Traumatic Brain Injury Committee (MTBI Committee) to research the effects of brain injuries on NFL players.[38] The formation of the MTBI Committee represented the NFL taking steps to officially address the concussion issue in football.[39] The MTBI Committee, with the stated purpose of "improving player safety" and "instituting 'rule changes aimed at reducing head injuries,'" authored sixteen papers from 2003–2009. It asserted the cumulative effect of repeated concussions suffered by NFL players did not result in any neurological damage or brain disease.[40] At the time, the medical community widely criticized the papers published by the MTBI Committee because its denial of a causal link between concussions and long-term negative effects contradicted nearly all accepted and validated medical studies.[41] Furthermore, the NFL Head, Neck, and Spine Medical Committee[42] (Medical Committee), formed in 2010, validated the medical community by criticizing the work of the previous MTBI

34. In 1920, the American Professional Football Association (APFA) became the first professional football league; it later became the NFL in 1922. NFL EVOLUTION, http://www.nflevolution.com/nfl-timeline/index. html (last visited Nov. 9, 2012) (on file with the *McGeorge Law Review*).

35. *Id.*

36. *See id.* (illustrating the helmet upgrades implemented by the league). The NFL mandated the wearing of helmets in 1943, implemented the first plastic padded helmet in 1950, mandated the universal wear of facemasks on helmets in 1962, introduced the full facemask in 1972, and introduced the facemask grill in 1990, which modern helmets currently incorporate. *Id.*

37. *Id.* (noting the increase in the number of rule changes increasing player safety each decade, beginning in the 1970s, as medical research linking concussions to brain disease and neurological damage became more prevalent).

38. Master Complaint, *supra* note 9, at 4, 36, 38.

39. *See id.* at 23–32 (listing studies from 1928–2010 that linked repeated head trauma and/or concussions to brain disease).

40. *Id.* at 35. One paper stated, "[p]layers who are concussed and return to the same game have fewer initial signs and symptoms than those removed from play. Return to play does not involve a significant risk of a second injury either in the same game or during the season." *Id.* at 42.

41. *Id.* at 35–38.

42. The Medical Committee replaced the MTBI Committee in 2010 after the league effectively dissolved the leadership on the MTBI committee. *Id.* at 47.

Committee, calling it "not acceptable by any modern standards." This statement illustrated the NFL's new resolve to properly address concussions.[43]

E. Commissioner Goodell's Push for a Safer Game

Less than a year after Roger Goodell took over as commissioner of the NFL in 2006,[44] he held the first ever "league-wide concussion summit."[45] While the summit marked a turning point in the league in terms of actively addressing concussions, the NFL remained hesitant to link concussions to long-term health problems.[46] Goodell and the NFL soon came under pressure from Congress to discuss the long-term health risks associated with concussions.[47] After an autopsy of former NFL player Chris Henry demonstrated signs of Chronic Traumatic Encephalopathy (CTE),[48] and a University of Michigan study found that NFL players ages 30–49 are nineteen times more likely to suffer from Alzheimer's disease, Congress held hearings in 2009 and 2010.[49] At these hearings, Goodell and MTBI Committee co-chairman Dr. Ira Casson testified.[50] In both hearings, Goodell and Casson would not admit an existing link between concussions and brain disease.[51] Following the hearings, Goodell replaced the MTBI Committee

43. *Id*.

44. Jim Corbett, *Tagliabue Hands Off to Goodell as NFL's Next Commissioner*, USA TODAY (Aug. 9, 2006, 6:00 PM), http://usatoday30.usatoday.com/sports/football/nfl/2006-08-08-goodell-commissioner_x.htm (on file with the *McGeorge Law Review*).

45. *See* Jeanne Marie Laskas, *Game Brain*, G.Q. (October 2009), http://www.gq.com/sports/profiles/200909/nfl-players-brain-dementia-study-memory-concussions (on file with the *McGeorge Law Review*) (explaining that the doctors invited by Goodell to present at the summit provided contrary data regarding concussions in comparison to the NFL's MTBI Committee). The MTBI Committee attacked the findings of Dr. Bennet Omalu, presented by Dr. Julian Bailes, linking repeated concussions suffered by former Pittsburgh Steeler Mike Webster to his diagnosis of CTE discovered during an autopsy as "flawed." *Id.*

46. *See id.* (explaining that the NFL contradicted the contrary evidence provided by outside medical professionals linking concussions to long-term brain injuries).

47. Associated Press, *Conyers Wants Review of All Data*, ESPN (Oct. 28, 2009, 9:36 PM), http://sports.espn.go.com/nfl/news/story?id=4601966 (on file with the *McGeorge Law Review*).

48. *What is CTE?*, BOSTON UNIV. CTR. FOR THE STUDY OF TRAUMATIC ENCEPHALOPATHY (2013), http://www.bu.edu/cste/about/what-is-cte/ (on file with the *McGeorge Law Review*) ("Chronic Traumatic Encephalopathy . . . is a progressive degenerative disease of the brain found in athletes (and others) with a history of repetitive brain trauma, including symptomatic concussions as well as asymptomatic subconcussive hits to the head.").

49. Master Complaint, *supra* note 9, at 44–47; Associated Press, *Conyers Wants Review of All Data*, ESPN (Oct. 28, 2009, 9:36 PM), http://sports.espn.go.com/nfl/news/story?id=4601966 (on file with the *McGeorge Law Review*); Alan Schwarz, *Congress Examines N.F.L. Concussions*, N.Y. TIMES (Jan. 4, 2010), http://www.nytimes.com/2010/01/05/sports/football/05concussions.html?_r=0 (on file with *McGeorge Law Review*).

50. Master Complaint, *supra* note 9, at 44; *Conyers Wants Review of All Data*, *supra* note 49; Alan Schwarz, *supra* note 49.

51. Master Complaint, *supra* note 9, at 44–47; *Conyers Wants Review of All Data*, *supra* note 49; Alan Schwarz, *supra* note 49.

with the current Medical Committee.[52] In 2009, the NFL officially recognized the link between traumatic brain injuries (resulting from concussions) and brain disease.[53]

Since 2011, more than 4,800 former players (in 242 individual suits) have sued the NFL alleging that the league negligently and fraudulently misled the players regarding the severity and long-term effects of concussions.[54] The current litigation is a byproduct of mounting medical data linking repeated concussions to brain disease coupled with the NFL's historically inadequate management of concussions.[55] The build-up to the current litigation also served as a catalyst for the NFL to initiate significant policy changes regarding concussions and head injuries.[56]

The NFL's most recent efforts regarding the concussion issue include enacting further in-game rule changes to increase safety, publicly supporting state legislation adopting concussion laws, actively inserting itself into the public sphere of concussion awareness, partnering with the US military to share TBI data, donating $30 million in funding for medical research to the Foundation for the National Institutes of Health, and commissioning a new health and safety report.[57] All of these current efforts highlight the NFL's response to the concussion litigation that former players have brought against the NFL.[58]

III. HOW THE CURRENT NFL CONCUSSION LITIGATION SPARKED CHANGE IN THE CULTURE OF CONCUSSION MANAGEMENT

This Part identifies the actions the NFL has taken through the CBA, the Medical Committee, and the Commissioner to tackle the concussion issue. It also

52. Master Complaint, *supra* note 9, at 47.

53. SPORTS LEGACY INST., http://sportslegacy.org/about-sports-legacy-institute/sli-achievements/ (last visited Nov. 12, 2012) (on file with the *McGeorge Law Review*).

54. Paul D. Anderson, *Plaintiffs/Former Players*, NFL CONCUSSION LITIG. (Feb. 22, 2013), http://nflconcussionlitigation.com/?page_id=274 (on file with the *McGeorge Law Review*). Including the spouses of former players, there are over 5,800 plaintiffs suing the NFL for damages. *Id.* This figure has continued to grow since 2011. *See* Nathan Fenno & Luke Rosiak, *NFL Concussion Lawsuits*, WASHINGTON TIMES (Dec. 20, 1013), http://www.washingtontimes.com/footballinjuries/ (on file with the *McGeorge Law Review*) (listing all of the plaintiffs in the NFL concussion lawsuit).

55. *See generally* Master Complaint, *supra* note 9.

56. *Compare infra* Part III (discussing how the NFL handled concussions over time), *with* Master Complaint, *supra* note 9, at 4. Note: The NFL and former players reached a preliminary settlement of the lawsuit in August 2013 of $760 million. Doug Farrar, *Judge Anita Brody Denies Preliminary Approval for NFL Concussion Settlement*, SPORTS ILLUSTRATED (Jan. 14, 2014), http://nfl.si.com/2014/01/14/nfl-concussion-lawsuit-settlement-2/ (on file with the *McGeorge Law Review*). However, District Court Judge Anita Brody denied the preliminary motion for settlement asserting that the agreement "lack[ed] of documentation regarding the fairness of the final monetary figure, and whether the players involved would be diagnosed and paid properly based on their claims." *Id.*

57. *See* NFL EVOLUTION, http://www.nflevolution.com/ (last visited Nov. 11, 2012) (on file with the *McGeorge Law Review*) (chronicling all advancements in concussion awareness by the NFL since 2010).

58. *Infra* Part III.

considers the NFL's current impact on college and youth football. Section A identifies the specific areas that the NFL addressed regarding concussions. Section B discusses concussion management at the college level. Section C gives an overview of current state concussion laws.

A. Identifying and Implementing Concussion Solutions from Litigation Issues

1. Concussion Issues Addressed in the CBA

It doesn't take a brain surgeon to understand that less exposure to contact situations diminishes the chances of suffering a concussion.[59] Medical studies since 1928[60] have linked repeated blows to the head, resulting in multiple traumatic brain injuries, to long-term health problems and brain disease.[61] In 2011, the NFL and NFL Players Association[62] (NFLPA) agreed in their CBA to limit "contact"[63] practices during pre-season, season, and post-season.[64]

During pre-season "two-a-day" training camp, players can only practice once per day in pads.[65] Furthermore, teams can only practice on the field for four hours per day, of which only three[66] can be padded.[67] The CBA limits the second practice to "'walk-through' instruction" without pads, and it must start no earlier than three hours after the first practice session.[68]

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59. *See* Associated Press, *Steelers Hoping Less Contact Equals Longer Careers*, THE SCORE (Dec. 20, 2011), http://www.thescore.com/nfl/articles/156408-steelers-hoping-less-contact-equals-longer-careers (on file with the *McGeorge Law Review*) (discussing how several players on the Pittsburg Steelers, a team known for its physical play, think that less contact in practice will lead to increased health in the long-term).

60. *See* Martland, *supra* note 28 (asserting that boxers who suffered repeated blows to the head suffered from side effects such as being "'cuckoo,' 'goofy,' 'cutting paper dolls,' or 'slug nutty'").

61. *See* Ann C. McKee et al., *The Spectrum of Disease in Chronic Traumatic Encephalopathy*, BRAIN: A J. OF NEUROLOGY 1, 2 (2012). CTE was originally reported in 1928 by Harrison Martland, a New Jersey pathologist, who described the clinical aspects of a progressive neurological deterioration . . . that occurred after repetitive brain trauma in boxers. . . . [T]he recognition that activities other than boxing were associated with its development lead to the preferred use of terms such as progressive traumatic encephalopathy and later, CTE. *Id.*

62. The NFLPA is the union that represents all players in the NFL. NFL PLAYERS ASS'N, https://www.nflplayers.com/about-us/ (last visited Mar. 15, 2014) (on file with the *McGeorge Law Review*).

63. The NFL CBA defines contact as "'live' blocking, tackling, pass rushing, [and] bump-and- run" and "one-on-one offensive linemen vs. defensive linemen pass rush or pass protection drills, . . . wide receivers vs. defensive backs bump-and-run drills, and . . . one-on-one special teams drills involving both offense and defense." NFL COLLECTIVE BARGAINING AGREEMENT art. 21 §§ 2, 5 (2011) [hereinafter NFL CBA].

64. *Id.* at art. 23 §§ 1, 24. There are also no "padded" practices allowed during the first three days of training camp. *Id.* at art. 23.

65. *Id.* at art. 23 § 6(a). "[A] 'padded practice' shall be defined as a practice in which players are required to wear helmets and shoulder pads, in addition to any other equipment required by the Club." *Id.* at art. 24 § 1(c).

66. The three-hour clock for padded practices starts when "position coaches begin to coach players on the field." *Id.* at art. 23 § 6.

67. *Id.*

68. *Id.*

During the regular season (the first seventeen weeks of the season), the CBA authorizes teams to have a total of fourteen "padded" practices.[69] They must conduct eleven of the fourteen practices within the first eleven weeks of the regular season.[70] During the final six weeks of the season, teams may have three padded practices.[71] Teams may use discretion in deciding what day to hold padded practices, but padded practices generally fall in the middle of the week, which gives a three to four day buffer between padded practices and games.[72]

If a team qualifies for the post-season, the CBA authorizes it to have one padded practice per week.[73] The day of the padded practice is also subject to the discretion of the team.[74]

The current NFL CBA also broadly addressed the right of medical care for players with respect to concussions.[75] All teams must have medical consultants that have certifications in neurology and neuropsychology.[76] Moreover, the neurologist must have board certifications in "neurosurgery, . . . sports medicine, emergency medicine, or psychiatry, with extensive experience in mild and moderate brain trauma."[77] The CBA makes the NFLPA Medical Director a voting member of every health and safety committee.[78] This increases player awareness of concussions and directly involves the NFL player's union in shaping concussion management rules in the league.[79]

The CBA additionally created the Accountability and Care Committee, which "provide[s] advice and guidance" on a number of issues.[80] These include: credentialing standards and educational programs of teams' medical personnel; standardized pre-[81] and post-season medical examinations; educational methods to inform players of the risks inherent in football and the role of the team medical personnel in treating injuries; conducting research regarding prevention and

69. *Id.* at art. 24 § 1(a); *see also supra* note 64 (defining padded practices).

70. *Id.* at art. 24 § 1(a). "[Teams] may hold two padded practices during the same week during one week of the regular season, provided that such week falls within the first eleven weeks of the regular season." *Id.*

71. *Id.*

72. *Id.*; *see also* Doug Chapman, *Doug's Dish: A Typical Week in the NFL*, NFL PLAYERS ASS'N (Nov. 13, 2009), https://www.nflplayers.com/Articles/Public-News/Doug%E2%80%99s-Dish-A-Typical-Week-in-the-NFL/ (on file with the *McGeorge Law Review*) (asserting that teams generally hold padded practices on Wednesday during the regular season). Note: The general rule of padded practices applies to games played on Sundays and Monday Nights but does not take into account games played on Thursday or Saturday. NFL CBA, *supra* note 63, at art. 24 § 1(a).

73. NFL CBA, *supra* note 63, at art. 24 § 1(b).

74. *Id.*

75. *Id.* at art. 39 § 1.

76. *Id.* at art. 39 § 1(b)(i) (emphasizing the words "head trauma" after the Neurologist requirement).

77. *Id.* at art. 39.

78. *Id.* at 39 § 1(d).

79. *Id.*

80. *Id.* at art. 39 § 3.

81. All pre-season physicals must include a neuropsychological baseline test. *Id.* at Appendix K Standard Minimum Preseason Physical Examination.

treatment methods of football related injuries; and methods of injury surveillance.[82] It also clearly states that the standard of care for medical treatment is each team's "best efforts to ensure that its players are provided with medical care *consistent with professional standards for the industry*."[83]

2. Concussion Issues Addressed by League Policies

Toward the end of the regular season in 2009, the NFL updated its return-to-play policy and adopted a stricter and more thorough policy.[84] The key provisions of the policy dictate that teams must remove a player who suffers a concussion from play. The player cannot return-to-play until he is free of concussion symptoms, passes neurological and neuropsychological examinations and tests, and the team physician, as well as an independent neurological consultant, clears him to play in writing.[85]

Prior to the 2011 season, the NFL introduced the "NFL Sideline Concussion Assessment Protocol," which teams use as a guideline to assess players suspected of suffering a concussion.[86] The NFL also instituted the "Madden Rule," which mandates that "if a player is diagnosed with a concussion and removed from a game, he must leave the field . . . escorted [by] . . . a member of the medical staff" for observation.[87] In 2012, the NFL focused on increasing concussion awareness by ensuring teams, players, and officials received more education on the signs and symptoms of concussions.[88] It also updated the NFL Sideline Concussion Assessment Protocol[89] and removed players from the field immediately upon suspicion of a concussion, as opposed to after diagnosis. Significantly, the league implemented a policy of adding independent certified athletic trainers to a press box area equipped with video replay access and communications to each team's medical staff to monitor for potential concussions missed by teams on the field of play.[90] Since 2009, the average

82. *Id.* at art. 39 § 3(a), (c).

83. *Id.* at § 3(c) (emphasis added).

84. Press Release, NFL, NFL Adopts Stricter Statement on Return-to-Play Following Concussions (Dec. 2, 2009) (on file with the McGeorge Law Review) [hereinafter NFL Press Release].

85. *Id.*

86. Memorandum from the Co-Chairs of the NFL Head, Neck and Spine Comm. to Team Physicians, Team ATCs, Team Neurological Consultants (2011) [hereinafter NFL Memo] (on file with the *McGeorge Law Review*). If a player fails the sideline exam, he is subject to the 2009 return-to-play policy. *Id.*

87. *Id*.

88. *See* NFL, FALL 2012 HEALTH & SAFETY REPORT 2, 7–9 (2012) [hereinafter NFL HEALTH & SAFETY REPORT] (explaining the different educational programs provided by the NFL in 2012).

89. *Id.* at 8; *see also* NFL SIDELINE CONCUSSION ASSESSMENT TOOL (2012) (asserting that the sideline test is "a guide derived from the Standardized Concussion Assessment Tool 2 (SCAT2) . . . and represents a standardized method of evaluating NFL players for concussion consistent with the reasonable, objective practice of the health care profession").

90. HEALTH & SAFETY REPORT, *supra* note 88, at 8.

number of reported concussions per game has risen from 5.4 to 8.4 and increased by more than nine percent in 2013.[91] These statistics indicate that the concussion management policies in place by the NFL have contributed to better recognition of initial concussion injuries on the field.[92] By removing injured players from play immediately and ensuring that they do not return-to-play before they are fully healed, the policies benefit the players' long-term health.[93]

B. Current Concussion Management at the College Level

Before the 2011 season, the NCAA did not have rules in place to govern concussion management.[94] Prior to that fall sports season, each division of the NCAA (I, II, and III)[95] "adopted [identical] legislation requiring each member institution to have a concussion management plan."[96] Although the NCAA does not mandate any concussion management policies, they do support institutions implementing a return-to-play policy[97] that keeps players off of the field until they are asymptomatic.[98] It also recommends neuropsychological baseline testing for players.[99] Some schools, such as the University of Georgia, have developed thorough and effective concussion policies.[100] However, across all divisions of the

91. Steve Fainaru & Mark Fainaru-Wada, *Inside the Numbers: Counting Concussions in the NFL*, PBS (Dec. 13, 2012, 8:57 AM), http://www.pbs.org/wgbh/pages/frontline/sports/concussion-watch/inside-the-numbers-counting-concussions-in-the-nfl/ (on file with the *McGeorge Law Review*).

92. Concussion research and evidence of a higher risk of long-term brain disease in former players suggests that the discovery of the dangers of concussions is not new or a growing problem, but that the new policies have increased awareness, which has led to policy changes in the NFL that improved concussion management. *See* Deborah Blum, *Will Science Take the Field?*, N.Y. TIMES, Feb. 2, 2010, at A25 (discussing that science has linked repeated head injuries to long-term health problems).

93. *Infra* Part V.A.

94. NCAA, *Behind the Blue Disc* (Apr. 11, 2011), *available at* http://www.ncaa.org/wps/wcm/connect/public/NCAA/Resources/Behind+the+Blue+Disk+landing+page (on file with the *McGeorge Law Review*).

95. *See* NCAA DIVISION I MANUAL art. 3.2.4.17 [hereinafter D-I MANUAL], *available at* http://www.ncaapublications.com/s-13-Manuals.aspx (on file with the *McGeorge Law Review*) ("An active member institution shall have a concussion management plan for its student-athletes."); NCAA DIVISION II MANUAL art. 3.2.4.17 [hereinafter D-II MANUAL], *available at* http://www.ncaapublications.com/s-13-Manuals.aspx (on file with the *McGeorge Law Review*); NCAA DIVISION III MANUAL art. 3.2.4.16 [hereinafter D-III MANUAL], *available at* http://www.ncaapublications.com/s-13-Manuals.aspx (on file with the *McGeorge Law Review*). Division I, II, and III all use the exact same language in their respective concussion management plan articles. D-I MANUAL art. 3.2.4.17; D-II MANUAL art. 3.2.4.17; D-III MANUAL art. 3.2.4.16. Each plan must include, but is not limited to, an annual educational requirement for student-athletes; a removal requirement if a player demonstrates the signs and symptoms of a concussion; and a return-to-play requirement that a player cannot return in the same day, and that a player can only return after being medically cleared from a doctor or the doctor's designee. D-I MANUAL art. 3.2.4.17; D-II MANUAL art. 3.2.4.17; D-III MANUAL art. 3.2.4.16.

96. NCAA, *Behind the Blue Disc*, *supra* note 94.

97. NCAA, CONCUSSION: A FACT SHEET FOR COACHES (2012), *available at* fs.ncaa.org/Docs/health_safety/ConFactSheetcoaches.pdf (on file with the *McGeorge Law Review*).

98. NCAA, *Behind the Blue Disc*, *supra* note 94.

99. *Id.*

100. *See generally* CONCUSSION MANAGEMENT GUIDELINES, UNIV. GA. ATHLETIC ASS'N (July 2010), *available at* http://www.cbsatlanta.com/story/19564028/uga-takes-layered-approach-to-concussions (on file

NCAA, the lack of uniform concussion management guidelines may unnecessarily put players' health at risk, as well as expose some schools to tort liability if the school's concussion policy does not meet the standard of care for concussion management.[101]

C. State Concussion Laws

In response to the growing concern about concussions in sports, specifically in football, the state of Washington passed the nation's first comprehensive concussion law, named the Zackery Lystedt Law, in 2009.[102] This established a three-prong law that served as a model for subsequent state concussion laws across the nation and which generally mirrors the current NFL return-to-play protocol.[103] The three core tenets of the Lystedt Law are:

> (1) "[a]thletes, parents and coaches must be educated about the dangers of concussions each year," (2) "[i]f a young athlete is suspected of having a concussion, he/she must be removed from a game or practice and not be permitted to return to play," and (3) "[a] licensed health care professional "trained in the evaluation and management of concussions[104]" must clear the young athlete to return to play" in writing.[105]

Attempting to influence other states, NFL commissioner Roger Goodell sent letters to forty-four state governors in 2010 urging them to pass laws similar to the state of Washington.[106] Following Washington's lead, other states started to adopt concussion legislation.[107]

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with the *McGeorge Law Review*) [hereinafter Georgia Concussion Guidelines].

101. *Compare* W. Va. Univ. Intercollegiate Athletics, CONCUSSION MANAGEMENT PLAN (2010), *with* Winona St. Univ., CONCUSSION MANAGEMENT PLAN (2010); LeTourneau University, CONCUSSION MANAGEMENT PLAN (2011). Although all three plans address concussions, the discrepancies between the three plans generally shows the inconsistency among NCAA member university concussion plans at the Division I, II, and III levels.

102. WASH. REV. CODE ANN. § 28A.600.190 (West 2012); *see also Lystedt Law Overview*, NFL, http://nflhealthandsafety.com/zackery-lystedt-law/lystedt-law-overview/ (last visited Feb. 17, 2014) (on file with the *McGeorge Law Review*) (explaining that Washington named the law after Zackery Lystedt, a middle school football player who suffered a debilitating brain injury when he returned to a middle school football game after sustaining an undiagnosed concussion in 2006).

103. *Lystedt Law Overview*, *supra* note 102.

104. WASH. REV. CODE ANN. § 28A.600.190 (West 2012).

105. *Id*. at § 28A.600.190(4); Lystedt *Law Overview*, *supra* note 102.

106. *See, e.g.*, Letter from Roger Goodell, Comm'r, NFL to Christopher J. Christie, Governor, N.J. (May, 21, 2010) (on file with the *McGeorge Law Review*) (encouraging states to support legislation that would better protect young athletes by mandating laws that would improve the treatment of concussions); Letter from Roger Goodell, Comm'r, NFL & Mark Emmert, NCAA, President to Richard D. Snyder, Governor, Mich. (Jan 11, 2012) (on file with the *McGeorge Law Review*) (encouraging states to adopt concussion legislation).

107. *Concussion Legislation by State*, NFL EVOLUTION, http://www.nflevolution.com/article/Concussion

As of April 2014, forty-eight states have passed statutes containing the three tenets of the Lystedt Law, which shows a national trend regarding return-to-play and concussion management standards at the high school and youth levels.[108] While all current state concussion laws apply to interscholastic athletics, non-school athletics, like Pop Warner football, usually fall outside of the scope of state laws.[109] Moreover, there is a jurisdictional split between states on whether the statutory provisions explicitly create an independent cause of action.[110] Generally, statutes either explicitly read that the return-to-play requirements do not "create, establish, expand, reduce, contract or eliminate any civil liability," or they are silent and therefore do not create a private right of action.[111] Regardless, in the forty-eight states with statutory provisions similar to the Lystedt Law, each of the three prongs of the law are elements of the return-to-play protocol that has become a custom in football.[112]

IV. TORT ACTIONS IN SPORTS

This Part addresses the legal standard in tort actions against public and private individuals. Section A discusses how assumption of the risk can

-Legislation-by-State?ref=767#CA (last updated Aug. 14, 2012) (on file with the *McGeorge Law Review*).

108. *Id.* Six states (Arkansas, Georgia, Montana, South Carolina, and West Virginia) passed concussion legislation in 2013. *Id.* Mississippi passed state concussion legislation in January 2014. *Id.* Furthermore, only three states that have passed laws do not contain all three tenants of the Lystedt Law. *Id.* Although Colorado passed legislation, it does not have the parent and athlete educational component (but does require coaching education). *Id.* Illinois passed legislation that delegates concussion laws to the Illinois High School Association, which has regulations that mirror the Lystedt Law. *Id.* Wyoming passed legislation that "only requires that the state Superintendent of Public Institutions develop a model protocol and to assist school districts in developing protocols for addressing risks associated with concussions from school athletics." *Id.* The law does not have the removal or return to play tenants of the Lystedt Law. *Id.*

109. *Compare* WASH. REV. CODE ANN. § 28A.600.190 (West 2012); CAL. EDUC. CODE § 49475 (West 2012) (applying concussion laws to student-athletes only), *with* 24 PA. STAT. ANN. § 5323(g) (West 2012) ("The sponsors of youth athletic activities not specifically addressed by this act are encouraged to follow the guidance set forth in this act."). *But see* D.C. CODE § 7-2871.01 (2011) ("'Athletic activity' means a program or event, including practice and competition, organized as part of a school-sponsored, interscholastic-athletic program, an athletic program sponsored by the Department of Parks and Recreation, or an athletic program under the auspices of a nonprofit or for-profit organization."). The fear of liability for volunteer coaches in club sports such as Pop Warner may contribute to the fact that not all states incorporate club sports into their return-to-play statutes. *See* Phoebe Anne Amburg, *Protecting Kids' Melons*: *Potential Liability and Enforcement Issues with Youth Concussion Laws*, 23 MARQ. SPORTS L. REV. 171, 186 (2012) (asserting that the potential liability imposed on coaches concerned some state legislators).

110. *See* Amburg, *supra* note 109, at 183 (discussing how most statutes generally do not create an independent cause of action). Conversely, the City of Chicago charges schools a fee if they do not enforce the city's concussion management ordinance. *Id.*

111. *Compare* 24 PA. STAT. ANN. § 5323 (West 2012); TEX. EDUC. CODE ANN. § 38.159 (West 2011) (asserting that the statute neither waives immunity nor creates a cause of action), *with* WASH. REV. CODE § 28A.600.190 (West 2012); CAL. EDUC. CODE § 49475 (West 2012); D.C. CODE § 7-2871.01 (2011); FLA. STAT. ANN. § 943.0438 (West 2012). Each of the latter statutes is silent on whether it creates a separate cause of action for a plaintiff.

112. *Infra* Part V.A.

potentially limit liability. Section B addresses the qualified immunity of public entities, such as schools and universities. Section C outlines the effectiveness of a comparative negligence argument by a defendant. Section D discusses the role of custom in negligence lawsuits.

A. Assumption of the Risk in Football

Generally, a negligence-based theory[113] of liability is common in sports injury related lawsuits.[114] The initial evaluation of a potential lawsuit involving a concussion injury requires an evaluation of the potential limits on liability. In sports, assumption of the risk is a complete bar to recovery.[115] There are two types of assumption of the risk: express and implied.[116]

Football players assume the risk of injury due to the physical nature of the game. In high school football, concussion information sheets that players and parents must sign are an example of express assumption of the risk.[117]

113. *See* Thomas R. Hurst & James N. Knight, *Coaches' Liability for Athletes' Injuries and Deaths*, 13 SETON HALL J. SPORT L. 27, 32 (2003) ("[T]he plaintiff must prove (1) that the defendant owed a duty to conform to a standard of conduct established by law for the protection of the plaintiff, (2) that the defendant breached that duty; (3) that the defendant's breach was the legal cause of the plaintiffs injury; and (4) that the plaintiff suffered compensable injury.").

114. *See* Cerny v. Cedar Bluffs Junior/Senior Pub. Sch., 679 N.W.2d 198, 200 (2005) [hereinafter *Cerny II*] (alleging negligence against the school and coaching staff for allowing a football player to re-enter a game after suffering a concussion); Ripple Complaint, *supra* note 1, at 12 (alleging football coaches' negligence for allowing a football player to continue to play after receiving multiple concussions); District Court Order at 2, Alt v. Shirey, No. 2:llcv468 (W. Dist. Penn. Mar. 1, 2012) (granting in-part and denying in-part a negligence action against a coach for allowing a concussed football player to participate in a game); Leahy v. Hernando Cnty., 450 So. 2d 883, 885 (1984) (alleging negligence for injuries sustained by a player competing in a drill without a helmet against a player with a helmet); Zalkin v. Am. Learning Sys. Inc., 639 So. 2d 1020 (1994) (alleging negligent supervision for allowing a player to return-to-play following a shoulder injury); Benitez v. N.Y.C. Bd. Educ., 73 N.Y.2d 650, 654 (1989) (alleging negligence for allowing a player to enter a game when overly fatigued); Kahn v. E. Side Union High Sch. Dist., 31 Cal. 4th 990, 995 (2003) (alleging negligence when a coach failed to teach a swimmer how to properly dive into a pool); Complaint, Arrington v. NCAA, No. 1:11-cv-06356 (N. Dist. Ill. E. Div. Sept. 12, 2011) (alleging negligence in implementing return-to-play guidelines); *La Salle Settles Injured Player's Lawsuit*, ESPN (Nov. 30, 2009, 6:55 PM), http://sports.espn.go.com/ncf/news/story?id=4700355 (on file with the *McGeorge Law Review*) (discussing how La Salle University settled for $7.5 million over an alleged injury suffered by a football player that returned-to-play before his brain fully healed). "The lawsuit hinged on the family's claim that an earlier concussion made [the player] more vulnerable to the second, catastrophic blow," which was suffered after the player previously received a concussion during a practice earlier that week. *Id.*

115. *See* RESTATEMENT (SECOND) OF TORTS § 496A (1965) ("A plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.").

116. *Id.* at §§ 496A–B.

117. *See, e.g.*, Cal. Interscholastic Fed'n, Concussion Information Sheet (May 20, 2010), *available at* http://www.cifstate.org/index.php/the-latest-news/concussions (on file with the *McGeorge Law Review*) (illustrating the signs and symptoms of a concussion for athletes participating in sports). Most states require high school students and parents to sign concussion information sheets including (but not limited to) California, Texas, Florida, Pennsylvania, Oklahoma, and Ohio. While California's concussion information sheet discusses one potential injury for an athlete, Oklahoma and other states have a more explicit and broad assumption of the risk waivers. *See* Okla. Secondary Sch. Activities Ass'n, Physical Examination and Parental Consent Form

Additionally, implied assumption of the risk states that a defendant does not owe a plaintiff a duty of care for an injury that occurred from an inherent risk of a sport.[118] In the football context, a coach is not liable for injuries that a player sustains from an initial concussion because contact is an inherent part of the game.[119]

However, coaches do have a duty to exercise reasonable care to protect players from "unreasonably increased risks."[120] Coaches will only incur liability for acting intentionally or recklessly in a manner that is "totally outside the range of the ordinary activity involved in the sport."[121] However, coaches do have a duty to exercise reasonable care to protect players from "unreasonably increased risks."[122] In *Cerny II*, coaches who allowed a concussed football player to re-enter a game could not use assumption of the risk as a bar to the player's negligence suit.[123] Therefore, it follows that a school or its agents (coaches, trainers, or team doctors) owe a duty to not let a concussed player re-enter a game because doing so would increase the player's risk of aggravation or injury.[124] Such behavior would constitute reckless behavior, preventing a defendant from establishing the defense at trial.[125] In addition to the assumption of the risk defense, plaintiffs must also deal with traditional principles of sovereign immunity.[126]

(2013), *available at* http://ossaa.com/MiscForms.aspx (on file with the *McGeorge Law Review*) ("I understand the risk of injury in athletic participation."). Note: the state of Florida requires high school football players to sign a waiver and release of liability form that bars suit against schools "us[ing] reasonable care in providing [sports] activities." Fla. High Sch. Athletic Ass'n, Consent and Release from Liability Certificate (May 2012). A coach allowing a player to enter a game after sustaining a concussion and showing the signs and symptoms of a concussion does not fall within this waiver. *See infra* notes 120–22 (discussing a coach's duty not to increase the inherent risks of sports).

118. Knight v. Jewitt, 3 Cal. 4th 296, 316 (1992).

119. *Id.*; *see also* Fortier v. Los Rios Cmty. Coll. Dist., 45 Cal. App. 4th 430, 432–33 (1996) (holding that accidental contact during a "seven-on-seven" drill was an inherent risk of football).

120. Benitez v. N.Y.C. Bd. Educ., 73 N.Y.2d 650, 654 (1989).

121. *See* Kahn v. E. Side Union High Sch. Dist., 31 Cal. 4th 990, 996 (2003) (asserting that a coach's failure to instruct a novice swimmer to dive, combined with manipulative and coercive behavior leading to the injury of the swimmer, was outside the "ordinary activity" of coaching).

122. Benitez v. N.Y.C. Bd. Educ., 73 N.Y.2d 650, 654 (1989); Kahn v. E. Side Union High Sch. Dist., 31 Cal. 4th 990 at 1005.

123. *See generally Cerny II*, 679 N.W.2d 198 (2004) (evaluating only whether the coaches failed to meet the standard of care).

124. *See* Cerny v. Cedar Bluffs Junior/Senior Pub. Sch., 628 N.W.2d 697, 705 (2001) [hereinafter *Cerny I*] (stating it was "clear that the School and the coaches it employed owed a duty," to a football player that suffered a concussion in a game). Given that concussion litigation is a fairly recent trend and the striking majority of concussion cases end in settlement, *Cerny I* represents one of the only written decisions specifically outlining a duty for schools and its agents to students playing football. *Id.* However, other case law supports an analogous duty for schools and coaches to protect students from unreasonably increasing the risk of the sport, which allowing a concussed player to re-enter a game falls within. *Supra* notes 120–22.

125. *Id.*

126. *Infra* Part IV.B.

B. Governmental Immunity for Public Schools

Generally, public schools are immune from tort action in the event of injury or death, with a few exceptions.[127] The exceptions are "constitutional or legislative provision[s]" applying liability or if a school's conduct is willful or wanton.[128] Schools cannot bar suit regardless of whether its willful or wanton conduct was active or passive.[129] When applying this doctrine to concussion management, in the absence of constitutional or statutory provisions, the fact that so much information is readily available regarding the subject[130] means that schools are on notice that certain practices may be inherently dangerous.[131] Therefore, a plaintiff would have a strong argument that governmental immunity would not apply because the school's actions (convincing a player to stay in the game) or lack of action (failing to remove a player who exhibited symptoms of a concussion) demonstrated a conscious disregard for the safety of the student.[132] This would allow the plaintiff to move forward in his tort action, and ordinary negligence principles would apply.[133] Following the logic in *Villardo*, *Gerrity*, and *Cerny II*, if a coach allowed a player who demonstrated the signs and symptoms of a concussion to re-enter a game, and that player suffered further

127. Allan E. Korpela, *Modern Status of Doctrine of Sovereign Immunity as Applied to Public Schools and Institutions of Higher Learning*, A.L.R. 3d 703, § 2a (1970). Most states waive a sovereign immunity defense when a claim arises out of gross negligence or reckless behavior of the educator. John B. Roesler, *Public School Liability: Constitutional Tort Claims for Excessive Punishment and Failure to Supervise Studen*ts, 48 AM. JUR. TRIALS 587 at § 8 (2013). Furthermore, in some jurisdictions, if a school purchases insurance that covers the claimed injury, it effectively waives immunity. *See*, *e.g.*, Herweg v. Bd. Educ. Lawton Pub. Sch., 673 P.2d 154, 157 (1983) ("[W]henever a school district does have public liability insurance for the harm that is sought to be vindicated, its immunity is waived 'to the extent of the . . . coverage only.'"). Note: private schools or leagues outside of school or interscholastic competition cannot use the defense of governmental immunity. Jaar v. Univ. Miami, 474 So. 2d 239 (Fla. Dist. Ct. App. 3d Dist. 1985).

128. Korpela, *supra* note 127. For example, in Arkansas, "state employees are not immune from suit for *negligence,* to the extent the employees are covered by other viable liability insurance." Deitsch v. Tillery, 309 Ark. 401, 409 (2000).

129. *See* Jackson v. Hankinson, 51 N.J. 230 (1968) ("[T]here has been a shift towards frank recognition that municipal entities, along with all others, should justly be held accountable for injuries resulting from their tortious acts and omissions under ordinary principles of negligence . . . .").

130. *See, e.g.,* NFHS LEARNING CENTER, http://nfhslearn.com/electiveDetail.aspx?courseID=15000 (last visited Mar. 1, 2013) (on file with the *McGeorge Law Review*) (offering free concussion education). Generally, state athletic governing bodies and the NCAA link to free concussion training through either the CDC or NFHS. *Concussions*, CIF, http://www.cifstate.org/index.php/the-latest-news/concussions (last visited Mar. 1, 2013) (on file with the *McGeorge Law Review*). The CIF website links to both CDC and NFHS. *Id.*

131. Korpela, *supra* note 127.

132. *See Vilardo v. Barrington Cmty. Sch. Dist*, 406 Ill. App. 3d 713, 720 (2010) (asserting that a school is immune from liability unless the school has "actual or constructive notice of the existence of such a condition that is not reasonably safe in reasonably adequate time prior to an injury to have taken measures to remedy or protect against such condition").

133. *See* Gerrity v. Beatty, 71 Ill. 2d 47, 52 (1978) (holding that public policy combined with willful and wanton acts by a school in failing to provide a proper football helmet to a student subjected the school to an ordinary negligence suit).

injury, governmental immunity would not apply.[134] One final argument plaintiffs must address is comparative fault.[135]

C. Comparative Fault

In a negligence case, a defendant can use the defense of comparative fault to lower the amount of a plaintiff's recoverable damages. There are two types of comparative fault, "pure form" and "equal to or greater than."[136] The former assigns liability in direct proportion to the fault of both parties.[137] The latter assigns proportional liability only if the defendant's liability is equal to or greater than the plaintiff's.[138] In each system of comparative fault, defendants "are responsible for their acts to the extent their fault contributes," to a plaintiff's injury.[139]

In the context of football, this argument has mixed results. If a coach saw a player exhibiting any signs and symptoms of a concussion, even if a player says "I'm OK," a coach could not use comparative fault as a defense because return-to-play laws require removal if a coach objectively sees any symptoms of a concussion, regardless of what a player may say.[140] On the other hand, in the context of "contact"[141] practices, a coach who had two contact practices in one day may be able to use a comparative fault defense if a player suffered an injury by knowingly tackling another player in an unsafe manner after receiving proper instruction by a coach.[142] If a player can get past the legal hurdles of assumption of the risk, government immunity, and comparative negligence, he may be able to succeed in a negligence suit in court.[143]

D. The Role of Custom in Negligence Suits

In a negligence suit, individuals breach the standard of care if they do not exercise reasonable care.[144] In a negligence case, an individual acts unreasonably

134. 406 Ill. App. 3d at 720; 71 Ill. 2d at 52; 679 N.W.2d at 198.

135. *Infra* Part IV.C.

136. Li v. Yellow Cab Co., 13 Cal. 3d 804, 827 (1975).

137. *Id.*

138. *Id.*

139. *Id.* at 828.

140. *See generally supra* Part III.C (explaining the prongs of return-to-play laws).

141. *Infra* Part V.E.

142. *See* Knight v. Jewett, 3 Cal. 4th 296, 310 (1992) ("[T]he injury in such a case may have been caused by the combined effect of the defendant's and the plaintiff's culpable conduct.").

143. *Infra* Part IV.D.

144. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 13 (2010). Note: while RESTATEMENT (SECOND) OF TORTS § 295A (1965) also covers custom, the updated version is used here because of the added commentary, which goes into further detail regarding custom than the previous Restatement. Note: This Article assumes that the other elements of negligence are satisfied. Duty would arise from the school's or

if the burden to prevent the injury is less than the probability of injury multiplied by the gravity of the injury (B < PL).[145] Although some jurisdictions differ, generally coaches in college, high school, and youth football have the "duty to exercise reasonable care to prevent foreseeable risks of harm," to their players.[146]

An individual's compliance with a custom is generally strong evidence that that individual is acting reasonably, if relying on the custom decreases the risk of injury.[147] Practices that "virtually all those participating in an activity," adopt are widespread customs.[148] In many cases, widespread customs have become the standard of care because the custom "induces general reliance by virtually all those participating in an activity," and it is the most reasonable practice.[149] Industry customs[150] that leading experts in a certain field agree are the most reasonable practices also give strong indications that the custom directly informs the standard of care.[151]

Since 1923, lower levels of football have tended to adopt advancements in safety that the NFL has taken in order to make football safer.[152] In terms of concussion prevention, management, and treatment, the practices currently used by the NFL are all byproducts of collaborations by the league with various independent experts in the fields of science, medicine, athletic training, bioengineering, and equipment manufacturing, which gives a strong indication that the customs established by the NFL should directly inform the standard of care.[153] The NFL concussion management custom most widely adopted by the lower levels of football is removal and return-to-play.[154] However, individual states and the NCAA can do more to improve all of their concussion management policies.[155]

coach's duty to protect players. Causation would be satisfied because the breach would be a substantial factor in the injury. Finally, the likelihood of injury in a football game would be sufficiently related to demonstrate proximate cause, and damages could be established because of the clear physical injury.

145. *See* U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (1947) (describing Learned Hand's B<PL formula).

146. *See* Hurst & Knight, *supra* note 113, at 32–33 (discussing duty relating to a sports injury as a part of negligence personal injury liability).

147. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 13 (2010) (stating that conforming to a custom does not preclude a finding of negligence nor does non-adherence to a custom guarantee a finding of negligence).

148. *Id.* at § 13 cmt. e (2010).

149. *Id.*

150. *Id.*

151. *Id.*

152. *See supra* Part II.C (illustrating the initial adoption of safer equipment and rule changes).

153. NFL HEALTH & SAFETY REPORT, *supra* note 88, at 27–29.

154. *Infra* Part V.B.

155. *Infra* Part V.

V. NFL CUSTOMS THAT COLLEGE, HIGH SCHOOL, AND YOUTH FOOTBALL SHOULD ADOPT

This Part argues that the lower levels of football should adopt the various concussion management customs currently in place in the NFL. It further argues that the NFL's current actions to address concussions either informs or is the most reasonable standard of care for different areas of concussion management. Each Section of this Part will analyze a custom, assert its bearing on the standard of care, and suggest how to implement the custom at the college, high school, or youth level. Section A discusses return-to-play protocols. Section B argues how education should supplement concussion laws and policies. Section C discusses baseline testing. Section D discusses the elimination of two-a-day practices.

A. Removal from Play and Return-to-Play

1. Informing the Standard of Care in High School and Youth Football

There are only ten states that have not adopted the model legislation supported by the NFL.[156] The Lystedt Law and its progeny essentially mirror the current NFL removal and return-to-play policy in all aspects.[157] However, most state concussion laws do not apply to every area of football, namely private schools or non-school football leagues like Pop Warner.[158] Of all the concussion management customs that the NFL has promulgated, its return-to-play policy is the strongest candidate for adoption by states into their statutes because it is already the most widely adopted. Such an adoption would directly inform the standard of care for concussion management regardless of whether the entity is public or private.

Concussions are an inherent part of the game of football, but allowing a player to return-to-play after demonstrating the signs and symptoms of a concussion unnecessarily increases the risk of injury.[159] Although a plaintiff could likely not sue under negligence per se,[160] a plaintiff could argue that because the NFL return-to-play policy is both the industry custom based on expert knowledge, and a widespread custom that all players participating in sports rely on, non-adherence to the custom should constitute a breach of the standard of care.[161] Because almost all concussion lawsuits have settled before trial,[162] there is

156. *Infra* Part III.

157. *Infra* Part III.

158. *Infra* Part IV.D.

159. Benitez v. N.Y.C. Bd. Educ., 73 N.Y.2d 650, 654 (1989); Kahn v. E. Side Union High Sch. Dist., 31 Cal. 4th 990, 1005 (2003).

160. *See supra* text accompanying note 111 (asserting that the various state concussion statutes either do not create a private right of action or are silent).

161. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 13 (2010).

a lack of case law discussing the standard of care. If more concussion cases start making it to trial, a custom mirrored in nearly every state statute governing concussion management will be highly relevant, although not dispositive, and may lead courts to adopt the NFL return-to-play policy as the standard of care. If a player, injured in a state that does not have a concussion law or does not fall within the scope of the state's concussion statute, brought a suit under the same facts as the Zachary Lystedt case,[163] the player could point to the NFL's policy as well as the laws of forty-eight other states[164] as being the most reasonable way to manage concussions.[165]

Additionally, states that do not have statutory guidelines unnecessarily expose youth players to greater risk of returning-to-play before they fully heal because it is less clear to coaches and schools what the most generally accepted form of concussion management is.[166] There is also preliminary evidence from states with concussion laws in place that both emergency room visits due to sports related head trauma and personal injury lawsuits are down, while concussion reporting is on the rise.[167]

These facts further lead to the conclusion that the NFL return-to-play policy is the most reasonable action for coaches and schools to take regarding concussion management. And if faced with a negligence lawsuit, a court would likely view the NFL's return-to-play policy as highly relevant to determining the standard of care.[168] The most effective way to implement these laws is to amend current state concussion laws to encompass all football from youth to high school, including private schools. Amending state laws to be more inclusive gives more teeth to current regulations in place by non-school leagues or state athletic governing bodies, which also informs the standard of care. A potential hurdle to making existing state concussion laws more inclusive is the potential of "chilling" participation by volunteer coaches because of fear of litigation. However, non-school football leagues like Pop Warner already implement similar return-to-play guidelines.[169] Additionally, most state high school athletic

162. *See supra* note 125 (discussing that only one case has established a standard of care for concussion management).

163. Lystedt was a middle school football player who suffered a debilitating brain injury when he returned-to-play in a football game after sustaining an undiagnosed concussion in 2006. His story and subsequent lawsuit spurred the national movement for states passing concussion laws. *See Lystedt Law Overview*, *supra* note 102.

164. *Concussion Legislation by State*, *supra* note 107.

165. In the instance that the player-plaintiff did not fall within the scope of a state statute, the plaintiff could argue that either the statute *should* apply to him or (if the statute does not create a cause of action) that the three prongs of the statute represent the standard of care applicable to all defendants.

166. Richard H. Adler et al., *Changing the Culture of Concussion: Education Meets Legislation*, 3 AM. ACAD. PHYSICAL MED. & REHAB. S469 (2011) [hereinafter *Education Meets Legislation*] (asserting that in order to have a uniform concussion policy there must be both concussion education and legislation).

167. *Id.* at S470.

168. *See infra* Part IV.D (discussing custom's role in a negligence suit).

169. *Pop Warner Concussion Policy*, POP WARNER (2013), http://www.popwarner.com/safety/

governing bodies have their own return-to-play protocols for member schools that mirror state law.[170] Since private school members are subject to the bylaws of the governing body, amending state laws would not unduly burden private schools or force them to change their concussion management policies and would be the most effective action for states to take in order to reduce return-to-play injuries.

2. Enforcing Uniformity in College Football: Matt Scott Case Study

The University of Arizona has its own return-to-play rule because the NCAA delegates its concussion management policies to the individual institutions.[171] On October 27, 2012, Arizona hosted the then ninth-ranked team in the country, the University of Southern California (USC), in what was Arizona's biggest game of the season.[172] While sliding at the end of a running play, two USC defenders hit quarterback Matt Scott in succession in the back and then the front of his head.[173] Scott was slow getting up, immediately grabbed his head, threw-up moments later, and appeared somewhat disoriented.[174] Arizona called a timeout where Scott and his teammates talked to coaches while the team's athletic trainers passively observed the conversation.[175] Both television announcers during the broadcast recognized that Scott exhibited the signs and symptoms of a concussion.[176] After the timeout, Scott remained in the game and, three plays later, threw a touchdown pass that sealed an upset win for Arizona.[177] Coaches pulled Scott from the game after the touchdown, he vomited again on the sidelines, and a team doctor finally administered a sideline test. Scott did not re-enter the game.[178]

If Scott had suffered an aggravating injury after returning to play and sued the University of Arizona for negligence, the University's current return-to-play

concussionpolicy.htm (on file with the *McGeorge Law Review*).

170. *See* TEX. EDUC. CODE ANN. § 38.152 (West 2011) (applying the state statute to University Interscholastic League, the state's high school athletics governing body). The Texas concussion statute provides a model for expanding high school return-to-play protocols to private high schools. *Id.; see also* CAL. INTERSCHOLASTIC FED'N CONST., BYLAWS, & STATE CHAMPIONSHIP REGULATIONS 2011–2012 (2011) art. 30 § 313, *available at* http://205.214.168.16/governance/constitution_bylaws/pdf/CIF%20CONSC%20BYLAW%20BOOK%201011.pdf. (on file with the *McGeorge Law Review*) (applying the concussion bylaws to all member schools).

171. *Infra* Part III.B.

172. Dan Diamond, *Arizona Just Broke the NCAA's Concussion Policy. Will it Matter?*, FORBES (Oct. 27, 2012, 9:27 PM), http://www.forbes.com/sites/dandiamond/2012/10/27/arizona-just-broke-the-ncaas-concussion-policy-will-it-matter/ (on file with the *McGeorge Law Review*).

173. *Id.*

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. *Id.*

policy suggests that he would have had a strong case.[179] The first prong of the policy is to remove a player immediately if he is demonstrating any "physical . . . cognitive . . . emotional . . . [or] sleep" symptoms of a concussion.[180] Scott objectively appeared "dazed or stunned" and vomited, which are clear concussion symptoms.[181] The second prong is to evaluate the player immediately by trained medical professionals, such as team trainers or the team doctor.[182] This did not occur, as Arizona only called a timeout and had a trainer watch Scott's interactions with the coaching staff.[183] At that point, coaches or team medical personnel should not have allowed Scott to re-enter the game.[184] By allowing Scott to remain in the game, Arizona did not adhere to the industry custom and most reasonable practices established by the NFL, which are mirrored by the university, NCAA, and most state laws.[185] Another telling sign that Arizona breached the standard of care is that immediately after Scott led the team to the game-winning score, he received a proper sideline evaluation from a medical staff member and did not return to the game.[186]

Luckily for all involved, Scott did not suffer an injury after returning to play during the three plays in which he remained in the game.[187] Both the University of Arizona and Scott denied that he suffered a concussion.[188] However, universities should use this as an example of how not to execute concussion management because it exposes them to negligence liability. The fact remains that Scott did exhibit the signs of a concussion, and the school did not remove him from play immediately, conduct a sideline evaluation, or wait to return him to play until after approval from a medical professional.[189]

179. *Compare* Mild Traumatic Brain Injury (MTBI)/Concussion Guidelines, Univ. Ariz. (2010) [hereinafter Arizona Concussion Guidelines], *with* NCAA, CONCUSSION: A FACT SHEET FOR COACHES, *supra* note 97 (illustrating that the University of Arizona's return-to-play guidelines generally mirror the NCAA's recommended return-to-play guidelines).

180. Arizona Concussion Guidelines, *supra* note 181.

181. *Id.*

182. *Id.* Since the University of Arizona did not meet the second prong of its return-to-play policy, it is not necessary to evaluate the final two prongs. *Id.*

183. Diamond, *supra* note 174.

184. *See supra* note 113 (discussing the elements of negligence). Even under the lowered return-to-play standard in *Cerny II* (which the current Nebraska concussion statute raised), the University would have violated the standard of care. Cerny v. Cedar Bluffs Jr./Sr. Pub. Sch., 679 N.W.2d 198, 203 (2005)("[T]the coach must evaluate the player who appears to have suffered a head injury for the symptoms of a concussion.").

185. NFL Memo, *supra* note 86; NCAA, CONCUSSION: A FACT SHEET FOR COACHES, *supra* note 97; *Lystedt Law Overview*, *supra* note 102.

186. Diamond, *supra* note 174.

187. *Id.*

188. *See id.* ("As of Tuesday noon ET, they still refuse to confirm or deny that Scott had a concussion test and whether he passed or failed it.").

189. NFL Memo, *supra* note 86; NCAA, CONCUSSION: A FACT SHEET FOR COACHES, *supra* note 97; *Lystedt Law Overview*, *supra* note 102; Arizona Concussion Guidelines, *supra* note 181.

Some Division I programs, like Arizona, have the large budget to adopt the exact NFL protocol of the doctor sideline examination. In those cases, the program should mirror the NFL return-to-play policy because it is the most comprehensive. At a minimum, to insure player safety and avoid litigation, all NCAA Division I–III member institutions should implement return-to-play policies that mirror the suggested NCAA policy, which the NCAA derived fundamentally from the NFL's return-to-play policy.[190] Furthermore, the NCAA should mandate member universities to adopt the return-to-play it currently suggests. This represents the baseline reasonable standard of care because it is an industry custom[191] supported by medical experts, which all levels of football from the NFL to Pop Warner have adopted.[192]

B. Education Supplements Laws and Boosts Awareness

In order for coaches to more effectively implement return-to-play rules and prevent long-term injuries from repeated concussions, education must supplement legislation.[193] Many states, such as California and Texas, require coaches to receive training on the signs and symptoms of and appropriate responses to concussions.[194]

States should supplement their concussion laws to add mandatory concussion training for youth and high school football coaches. Coaches can receive free online training through the National Federation of High School Associations (NHFS) or Centers for Disease Control and Prevention (CDC) websites, which would enable states to pass legislation with no financial burden.[195] At the collegiate level, NCAA member universities should add mandatory concussion training for coaches into their university's concussion management policy. This will equip coaches with training that will help them make effective on-field decisions to remove players from games or practices and could potentially limit liability for schools that do not have enough money in their athletic budget to hire a sideline doctor.[196] Some may argue that mandating education for coaches will

190. NFL Press Release, *supra* note 84; NFL Memo, *supra* note 86.

191. *Supra* Part IV.C.

192. *Supra* Part III.A.1–2, V.B.1.

193. *Education Meets Legislation*, *supra* note 168, at S469.

194. *See generally*, CAL. EDUC. CODE § 35179.1 (West 2012); TEX. EDUC. CODE ANN. § 38.159 (West 2011).

195. *Coaches Concussion Resources*, CAL. INTERSCHOLASTIC FED'N (2012), http://205.214.168.16/ health_safety/concussion/ coaches.html (on file with the *McGeorge Law Review*) (offering links to concussion information, including free concussion training).

196. *See* Josh Hunsucker, "*When In Doubt, Sit Them Out": Chapter 173 Effectively Supplements California Concussion Law and Raises Awareness Among Coaches*, 44 MCGEORGE L. REV. 600, 606 (2013) (asserting that uniform concussion guidelines will also reduce concussion litigation and the number of injuries resulting from athletes returning to play before they are fully healed).

increase the standard of care.[197] However, mandating education on concussions does not give coaches medical training, it merely clarifies what a reasonable coach should know about concussions.[198] This education would not only clarify the standard of care for return-to-play, but would also help coaches enforce return-to-play laws and policies.[199]

C. Baseline Testing Becomes the Standard of Care

Computerized baseline and post-injury neurocognitive tests have become a mandatory part of the preseason physical in the NFL.[200] Other professional sports leagues such as the Canadian Football League,[201] Major League Baseball, the National Hockey League, the National Basketball Association, and Major League Soccer use baseline testing.[202] In California alone, fifty-nine universities[203] and 168 high schools[204] use ImPACT,[205] which is the "most-widely used and most scientifically validated computerized concussion evaluation system."[206] A computerized baseline test generally consists of a twenty-minute battery of tests that measure neurocognitive function.[207] If a player takes a test before the season and then suffers a concussion, the baseline test serves as a data point to evaluate a concussed player's post-injury condition and track recovery for safe return to play, thus preventing the cumulative effects of concussion."[208]

197. *See* Cerny v. Cedar Bluffs Pub. Sch., 628 N.W.2d 697, 702 (2001) (holding that a reasonable coach's base of knowledge extends only to "the requisite first aid training required by the State as part of a college level course dealing with the prevention of athletic injuries"). When an "alleged tort-feasor possesses special knowledge . . . training, or experience . . . that is superior to that of the ordinary person. Such a person is not held to the standard of a reasonably prudent person," but to a heightened standard of care. *Id.*

198. Hunsucker, *supra* note 196, at 606.

199. *See* Cerny v. Cedar Bluffs Pub. Sch., 679 N.W.2d 198, 203 (2004) (discussing the first prong of the Nebraska common law standard of care for concussion management).

200. NFL CBA, *supra* note 63, at Appendix K Standard Minimum Preseason Physical Examination (2011).

201. *Concussion Card*, CFL, http://www.cfl.ca/page/concussion-card (last visited Feb. 2, 2013) (on file with the *McGeorge Law Review*).

202. *Complete List of ImPACT Users*, IMPACT (2013), http://impacttest.com/clients/page/all (on file with the *McGeorge Law Review*).

203. *Id.*

204. *Id.*

205. *About ImPACT*, IMPACT, http://impacttest.com/about/ (2013) (on file with the *McGeorge Law Review*); ImPACT, http://impacttest.com (last visited Jan. 9, 2014) [hereinafter *Overview and Features of the ImPACT Test*] (on file with the *McGeorge Law Review*).

206. *Id*. This Comment recognizes that there are various, valid computerized neurocognitive baseline testing models, including but not limited to, iBaseline, Pass Mark, and Axon. This Comment specifically uses ImPACT because it discloses their clients, which allows for an analysis of the degree of adoption of the custom of computerized baseline testing. *See supra* note 205. In using the numbers from ImPACT alone, I recognize any argument about widespread use will assert inherently understated figures.

207. *Id.*

208. *Id.*

The well-defined policy established by the NFL, which universities and high schools have widely adopted across the country, is an emerging custom[209] that directly should inform the standard of care.[210] If a student attending a high school sued the school alleging negligence in ensuring the students' safety, the student could make an argument that by not adhering to the baseline testing custom, the school acted unreasonably.[211]

The following are two arguments that a plaintiff could make if he sued a high school under a negligence theory for improper concussion management.[212]

1. Widespread Custom and Industry Custom

The first argument based on widespread custom may be difficult for plaintiffs to make currently but will likely be a stronger argument as science and medicine advance. Regardless of the widespread nature of the custom, a plaintiff will always prevail even if an emerging custom is not widespread but is the most reasonable standard of care.[213]

A plaintiff could argue that because so many professional sports, universities, and high schools across America conduct computerized baseline testing[214] that all players participating in sports are reliant on baseline testing to ensure proper concussion management.[215] The problem with this argument is that because baseline testing is fairly new, it is probably not widespread enough to induce reliance.[216]

A second argument is that since the NFL and other professional football leagues mandate baseline testing as an industry custom, which medical experts agree is an important part of concussion management,[217] there is a strong

209. For the purpose of this Article, an emerging custom is a practice that is new, and while becoming more widely accepted, does not currently meet the legal criteria for a widespread custom.

210. *Complete List of ImPACT Users*, *supra* note 202.

211. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 13 (2010).

212. *Infra* Part V.D.1–2. Note that the use of California schools does not change the analysis and another state could be substituted for any other state without changing the substantive effect of the argument.

213. *See* T.J. Hooper v. N. Barge Co., 60 F.2d 737 (1932) (holding that carrying radios on tugboats was the most reasonable practice even though it was not a general custom).

214. *See Complete List of ImPACT Users*, *supra* note 202 (listing all of the ImPACT users by state).

215. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 13 (2010).

216. Telephone interview with Dr. Michael Collins, Dir., UPMC Sports Med. Concussion Program (June 6, 2012) (on file with the *McGeorge Law Review*) [hereinafter Collins Interview]. Dr. Collins asserted that the future goals of concussion management at the high school level are baseline testing becoming part of the standard of care, coaches increasing their awareness of concussions through regional concussion seminars, and ensuring injured athletes receive treatment from clinicians specializing in concussion management. *Id.* "[N]eurocognitive testing has been called the 'cornerstone' of proper concussion management by an international panel of sports medicine experts." *Overview and Features of the ImPACT Test*, *supra* note 205.

217. *See Baseline Testing for Concussion*, SPORTS CONCUSSION INSTIT., http://www.Concussion treatment.com/baseline-testing.html (last visited Feb. 19, 2014) (on file with the *McGeorge Law Review*) (asserting that baseline testing provides important post-injury comparative data and enables doctors to better treat and rehabilitate a patient).

indication that it highly relevant to informing the standard of care.[218] Combining the widespread custom and industry custom arguments could show that the industry's emerging custom will likely induce greater reliance in the future.[219] However, because of the emerging nature of the custom[220] and the emerging nature of the science, a court may not find baseline testing to be the most reasonable practice based on these two arguments.

2. Application of the Learned Hand B < PL Formula

If the first two arguments failed, the plaintiff could rely on *T.J. Hooper v. N. Barge Co*.[221] In *T.J. Hooper*, two tugboats sank in the Atlantic Ocean and the parties whose cargo sunk sued the tug boat owner alleging negligence because the boats did not carry radios.[222] The court ruled that even though carrying radios on tugboats was not a general custom, it was the most reasonable practice.[223] Similar to *T.J. Hooper*, a defendant school could argue that it was not negligent for failing to administer a baseline test because even though there are 168 schools that conduct baseline tests, there are not enough schools using baseline testing to make it a well-established custom.[224] However, even if baseline testing is only an emerging custom, if it is the most reasonable practice, then it informs the standard of care.[225]

In applying B<PL, a jury could likely find that schools that did not administer a baseline test "unduly lagged in the adoption of new and available devices."[226] A jury would likely determine that the probability and likelihood of serious injury from football is fairly high given the inherent physicality of the sport.[227] The jury would then look at the burden of baseline testing on the school.[228]

The biggest issue with computerized neurocognitive baseline testing would be the feasibility of expecting schools to afford the test. ImPACT costs between

218. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 13 (2010).

219. *Id.* at § 13 cmt. d

220. The NFL first mandated baseline testing in its CBA in 2011. NFL CBA, *supra* note 63, at Appendix K Standard Minimum Preseason Physical Examination (2011).

221. 60 F.2d 737 (1932).

222. 60 F.2d at 739.

223. *Id.* at 740. An individual acts unreasonably if the burden to prevent the injury is less than the probability of injury multiplied by the gravity of the injury. U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (1947).

224. *T.J. Hooper*, 60 F.2d at 739.

225. *See id.* ("[I]n most cases reasonable prudence is in fact common prudence; but strictly it is never its measure.").

226. *Id.*

227. U.S. v. Carroll Towing Co., 159 F.2d 169, 173 (1947).

228. *Id.*

$400–$1200 for a school to purchase.[229] Depending on the school budget at the time of the incident, the financial burden could be less than the magnitude and probability of severe harm. Conversely, given the economic situation of a particular state and shrinking school budgets, costs that seem relatively small may actually be too burdensome.[230] In determining whether the financial burden of computerized baseline testing would outweigh the likelihood of harm, juries would have to undertake a fact-based analysis in each case.[231]

Additionally, plaintiffs could argue that the school could give lower-cost neurocognitive testing such as the SCAT2[232] or King-Devick Test,[233] two widely used tests that indicate symptoms of concussions. The King-Devick tests "oculomotor inefficiencies" through a series of "visual tracking and saccadic eye movements."[234] Similarly, the SCAT2 test indicates concussions through a battery of orientation, concentration, and memory tests.[235] While both tests are helpful sideline tools that help indicate concussions immediately after an injury, they are not effective office-based baseline tests because they "general[ly] lack . . . sensitivity," in their measurements compared to computerized baseline tests.[236] The SCAT2 test is available for free online on the NFL Evolution[237] website, and the King-Devick Test website offers a hard-copy test and fifty score sheets for $50.00 or iPad application for $44.99.[238] If the defendant argued the burden of purchasing a $350 ImPACT package for the school was too high, the plaintiff

229. *Purchase ImPACT*, IMPACT, http://impacttest.com/purchase/form (last visited Feb. 19, 2014) (on file with the *McGeorge Law Review*). The packages offer "100 Baseline with 15 Post Injury Tests [for] $400 per School Organization per Year . . . 300 Baseline with 60 Post Injury Tests [for] $600 per School Organization per Year . . . 500 Baseline with 100 Post Injury Tests [for] $800 per School Organization per Year . . . 800 Baseline with 150 Post Injury Tests [for] $1200 per School Organization per Year." *Id.*

230. *See, e.g.*, Lyndsey Layton, *In Trimming School Budgets, More Officials Turn to a Four-Day Week*, WASH. POST (Oct. 28, 2011), http://articles.washingtonpost.com/2011-10-28/local/35279654_1_school-districts-school-week-students (on file with the *McGeorge Law Review*) (discussing how school budget cuts have forced 292 school districts nationwide to adopt four-day weeks among other significant budget cuts).

231. *See Carroll Towing,* 159 F.2d at 173 (determining negligence by balancing the facts of the case using the B<PL formula).

232. NFL SIDELINE CONCUSSION ASSESSMENT TOOL (2012), *available at* www.nflevolution.com/. . ./nfl-concussion-tool-post-injury.pdf. (on file with the *McGeorge Law Review*).

233. *About King-Devick Test*, KING-DEVICK TEST, (http://kingdevicktest.com/about/ (last visited Feb. 19, 2014) (on file with the *McGeorge Law Review*).

234. *Id.*

235. NFL SIDELINE CONCUSSION ASSESSMENT TOOL (2012), *available at* www.nflevolution.com/. . ./nfl-concussion-tool-post-injury.pdf (on file with the *McGeorge Law Review*).

236. Email from Dr. Michael Collins, Dir., UPMC Sports Med. Concussion Program to Author (Mar. 7, 2013, 11:11 AM) (on file with the *McGeorge Law Review*) [hereinafter Collins Email] ("[T]he tests have not been shown to pick up deficits beyond the very acute stages of injury. I would certainly endorse baseline testing with these tests-but for sideline not office based use.").

237. NFL SIDELINE CONCUSSION ASSESSMENT TOOL, *supra* note 232.

238. *Find the King-Devick Test That Is Right for You*, KING-DEVICK TEST, http://kingdevicktest.com/for-concussions/purchase/ (last visited Feb. 19, 2014) (on file with the *McGeorge Law Review*); *King-Devick Concussion Screening Test Kit*, KING-DEVICK TEST, http://kingdevicktest.com/for-concussions/features/ (last visited Feb. 19, 2014) (on file with the *McGeorge Law Review*).

may counter that using either the King-Devick or SCAT2 would have a significantly lower burden. Using either of those tests without supplementing it with a computerized neurocognitive baseline test is a less effective means of managing a player's concussion and subsequent treatment.[239] However, using either of those tests is more effective than not using any type of lower cost neurocognitive testing. On balance, it would be a close call whether a jury would rule that the failure to use computerized baseline testing at the youth or high school level would breach the standard of care for concussion management.[240]

Regardless, youth and high school football should strongly consider neurocognitive baseline testing as a regular part of a player's preseason physical. Specifically, schools with the financial means should strongly consider using a computerized baseline testing program.[241] The cost of litigation or a damages award against a coach or school would almost certainly outweigh the costs of purchasing a computerized baseline testing program.[242] Furthermore, state athletic governing bodies should encourage high schools to use computerized baseline testing. While state legislatures may be hesitant to create a statutory requirement of computerized baseline testing due to the inherent costs schools and leagues would incur,[243] governing bodies can effectively amend their bylaws to encourage the practice. And as computerized baseline testing becomes more affordable,[244] it may become feasible for states to mandate that type of requirement.

Similarly, universities should implement, at a minimum, a computerized neurocognitive baseline test prior to a player participating. The NCAA already recommends computerized baseline testing,[245] which may indicate that the member schools are currently in a better financial position to adopt that model of testing than their youth and high school counterparts.[246] The most logical inference is that all Division I programs currently have enough money in their

239. Collins Email, *supra* note 238.

240. *Supra* Part V.D.2.

241. *See Supra* Part V.D.2 (asserting that the financial burden would be the key fact in determining liability).

242. *Compare San Diego-Area School District to Pay $4.4 Million for Football Head Injury*, NBC NEWS (Mar. 10, 2012, 2:17 PM), http://usnews.nbcnews.com/_news/2012/03/10/10635259-san-diego-area-school-district-to-pay-44-million-for-football-head-injury?lite (on file with the *McGeorge Law Review*), *and* Hackney Publications, *California School District Settles Lawsuit Brought by Former Football Player Who Suffered Concussion*, CONCUSSION POL'Y & THE LAW (Aug. 8, 2012), http://concussionpolicyandthelaw.com/2012/08/08/california-school-district-settles-lawsuit-brought-by-former-football-player-who-suffered-concussion/ (on file with the *McGeorge Law Review*) (discussing the reported $40,000 settlement between a former high school football player and the East Nicolaus High School District), *with Purchase ImPACT*, *supra* note 231.

243. *Purchase ImPACT*, *supra* note 231.

244. *See* Collins Interview, *supra* note 218 (discussing the goal of spreading ImPACT to all high schools).

245. NCAA, CONCUSSION: A FACT SHEET FOR COACHES, *supra* note 97.

246. *See supra* Part V.D.2 (asserting that the financial burden would be the key fact in determining liability).

budget to afford computerized baseline tests given the millions of dollars in revenue generated from football.[247] Since member universities must give financial statements to the NCAA, the NCAA could mandate member universities with a minimum net revenue in their athletic departments to institute computerized baseline testing for all of their players.[248] Therefore, the NCAA should mandate computerized baseline testing immediately[249] for its member schools that have football teams *and* the budget to afford the testing. For schools that cannot currently afford the testing, the NCCA should mandate a plan to implement that practice into the university's budget within a reasonable time based on projected revenue gains.

D. Less Contact = Less Injuries = Less Litigation

The NFL no longer allows two-a-day practices during training camp.[250] Some states currently implement rules that preclude padded practice during the first week of summer training camp.[251] The current practice in place in the NFL CBA of precluding two-a-day practices is a policy that should concern youth, high school, and university administrators and coaches.

If an injured player brings a negligence suit[252] against a school or university, the player could claim that the two-a-day practice in which he sustained an injury was not reasonable. To inform the standard of care, he would point to the NFL practice policies adopted in the CBA. It is logical to assert that practice is more necessary for NFL players than high school or college players because it is their profession. The plaintiff's argument would follow that the industry leader in football (the NFL) found it dangerous enough to player health that both management and the union agreed to eliminate that part of the game.[253] Furthermore, the medical community has acknowledged that the developing brain of a youth or college player is more susceptible to injury or aggravation

247. *See College Athletics Revenues and Expenses–2008*, ESPN (last visited Apr. 12, 2013), http://espn.go.com/ncaa/revenue (on file with the *McGeorge Law Review*) (detailing university financial disclosures to the NCAA).

248. Note: One additional consideration is that member institutions would have to make baseline testing available in equal proportions to their male and female athletes in order to comply with Title IX. 20 U.S.C. §§ 1681–88 (West 2013).

249. Georgia Concussion Guidelines, *supra* note 100. The NCAA described the University of Georgia's concussion management policy as the model for other universities to adopt. Jennifer Mayerle, *UGA Takes Layered Approach to Concussions*, CBS (Dec. 18, 2012 8:14 AM), http://www.cbsatlanta.com/story/19564028/uga-takes-layered-approach-to-concussions (on file with the *McGeorge Law Review*).

250. *Infra* Part III.A.

251. *See* Gregg Easterbrook, *Time to Focus on Excesses of Practice,* ESPN (Aug. 30, 2011), http://espn.go.com/espn/page2/story/_/id/6906007/tmq-says-time-focus-safety-football-practice (on file with the *McGeorge Law Review*) (noting that jurisdictions are split on this practice).

252. *Supra* note 145.

253. Douglas A. Wolfe, *Why High School Football Needs NFL Limitations*, ILL. SCH. BD. J. 34 (Nov.–Dec. 2011).

than a fully developed adult brain.[254] Therefore, there is a strong argument that "it's [unreasonable] to . . . take a young scholar athlete at an age that is more vulnerable and have them play more dangerously than at the highest professional level."[255]

The NCAA, high school governing bodies, and individual schools can shield themselves from potential liability by adopting this policy. There may be an argument that because concussions in youth and high school football account for the majority of TBI in all youth sports,[256] and that a youth's developing brain is more susceptible to injury and aggravation,[257] that there should be even more reduced contact practices. However, the inherent risk in football and the assumption of the risk that players take by voluntarily playing would likely shield a school or coach from liability if they conducted one "contact"[258] or "padded"[259] practice per week.[260] Since the NFL adopted its standard by consulting industry experts, the entities not adhering to this policy would have a difficult time arguing that the burden of this practice is greater than the combined magnitude and probability for serious injury.[261]

Pop Warner football is a refreshing example of the emerging custom of limiting contact at the lower levels of football.[262] High schools and universities should follow suit with the NFL and Pop Warner and begin to limit the amount of contact in two-a-days, in-season practice, and eliminate any drill that unnecessarily increases the risk of injury.[263] By implementing contact policies similar to the NFL's, lower levels of football will shield players from additional contact that could lead to injury, while at the same time lowering the risk of litigation by decreasing the amount of unnecessary contact.[264]

254. *Preventing Preventable Brain Injuries*, *supra* note 23, at 726.

255. *See* Wolfe, *supra* note 253, at 34 (quoting Dr. Robert Cantu, a leader in the field of neurology—specifically CTE).

256. *See* Gilchrist et al., *supra* note 32, at 1341 (illustrating that football accounts for 20.7 percent of all concussions in athletes ages ten to fourteen and 30.3 percent in athletes ages fifteen to nineteen).

257. *Preventing Preventable Brain Injuries*, *supra* note 23, at 722.

258. *See supra* note 63 (defining "contact" within the context of the NFL CBA).

259. *See supra* note 65 (defining "padded" within the context of the NFL CBA).

260. *Supra* Part IV.A.

261. RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 13 (2010).

262. *See* Gregg Easterbrook, *Football Finally Focusing on Practice*, ESPN (Aug. 14, 2012), http://espn.go.com/espn/playbook/story/_/id/8265669/pop-warner-rules-limiting-contact-practice-show-football-taking-head-injuries-seriously (on file with the *McGeorge Law Review*) ("[N]oting that more concussions occur in practice than in games, cut back on the amount of contact allowed in practice, while banning the Oklahoma-style drill in which players run toward each other and smash helmets").

263. Kahn v. E. Side Union High Sch. Dist., 31 Cal. 4th 990, 1005 (2003).

264. *Id.*

VII. CONCLUSION

The lower levels of football have the ability to prevent what happened to Blake Ripple.[265] Although playing football always has the potential to cause injury, state legislatures, governing bodies, schools, and universities have an obligation to prevent avoidable injuries. The NFL has made great strides in the past five years to address the concussion issue in football.[266] The customs it has developed through rules and policies are already trickling down to the lower levels of football and other sports.[267] Now, youth, high school, and college football need to run with the ball. In order to preserve the long-term health and safety of young players, as well as shield themselves from liability, schools and universities must begin to implement the customs established by the NFL.[268] As science and medicine develop better treatment and practices, the sports industry will likely see the NFL incorporate the newest and best concussion management practices, and everyone else should follow suit.

265. *Supra* Part V.
266. *Supra* Part III.
267. *Supra* Part V.
268. *Supra* Part I.