

TORT LIABILITY OF COACHES FOR INJURIES TO PROFESSIONAL ATHLETES: OVERCOMING POLICY AND DOCTRINAL BARRIERS

Timothy Davis*

I. INTRODUCTION

In a 2001 article, Professor Daniel Lazaroff commented on the impact of sports-related cases in shaping jurisprudential trends in several important areas.¹ Tort law was one of the doctrinal areas identified by Professor Lazaroff as having been influenced by sports law cases.² Related to Professor Lazaroff's observation is the complexity of the emerging jurisprudence of sports law. One manifestation of sports law's complexity is the convergence of legal doctrine. Quite often, judicial resolution of disputes that are seemingly straightforward requires invoking law from several substantive areas. The issue of the potential tort liability of coaches and their teams for injuries to professional athletes provides such an illustration. As the following discussion reveals, determining the culpability of coaches requires resort not only to tort law doctrine, but also to doctrine and policy related to contract, labor, and workers' compensation law. As a predicate to examining the legal doctrines that must be considered in analyzing this issue, this article frames the factual context by examining a scenario that prompts questions regarding the liability of coaches for injuries to professional athletes.

Comments by former New England Patriots linebacker Ted Johnson brought to light evolving concerns regarding the impact of concussions on football players when he alleged that Bill Belichick, the Patriots head coach, forced him to return to practice while he was suffering from a concussion.³ Johnson suffered a concussion during a preseason game in 2002.⁴ According to Johnson, he returned to practice the following week expecting to be required only to participate in minimal contact drills.⁵ Johnson said he was shocked to find that he was expected to participate in full-contact practice.⁶ He confronted the team's trainer, who confirmed that Johnson had not been medically cleared to participate

* John W. & Ruth H. Turnage Professor of Law, Wake Forest University, School of Law. The author gratefully acknowledges the research assistance of Brian J. Conley and David P. Ginzer.

¹ Daniel E. Lazaroff, *The Influence of Sports Law on American Jurisprudence*, 1 VA. SPORTS & ENT. L.J. 1, 2 (2001).

² *Id.* at 2-3.

³ Jackie MacMullan, *'I Don't Want Anyone to End Up Like Me': Plagued by Post-Concussion Syndrome and Battling an Amphetamine Addiction, Former Patriots Linebacker Ted Johnson is a Shell of His Former Self*, BOSTON GLOBE, Feb. 2, 2007, at 1E. For further discussion on the impact of concussions, see Alexander N. Hecht, *Legal and Ethical Aspects of Sports-Related Concussions: The Merrill Hoge Story*, 12 SETON HALL J. SPORT L. 17 (2002); Ken Murray, *NFL Looks at Effects of Head Injuries*, BALT. SUN, Mar. 8, 2007, at 1D; Dave Scheiber, *Concussions on Their Minds*, ST. PETERSBURG TIMES, Aug. 5, 2007, at 1C; Alan Schwarz, *Expert Ties Ex-Player's Suicide to Brain Damage from Football*, N.Y. TIMES, Jan. 18, 2007, at A1 (discussing mounting concern regarding ramifications of concussions for football players).

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

in full-contact drills.⁷ Johnson assumed Belichick gave the order that he participate in the full-contact drills, and though he was “so mad [he] wanted to scream” and feared further injury, he participated anyway.⁸ During a scrimmage, Johnson’s attempt to tackle a teammate led to a violent collision.⁹ Soon thereafter, Johnson began to feel “hazy,” much as he had felt following his first concussion.¹⁰ After notifying the team’s trainers of his new symptoms, Johnson was removed from the field and sent to a local hospital for further exams, which confirmed that he had suffered another concussion.¹¹

After his second concussion, Johnson was held out of practice because of his injury and he thought about trying to negotiate his release.¹² However, Johnson returned to the Patriots and eventually confronted Belichick, who, according to Johnson, admitted that he had made a mistake in asking him to return so quickly.¹³ Johnson eventually backed off of his criticism of Coach Belichick.¹⁴ Johnson stated he did not believe Belichick intentionally wanted to physically hurt him or that his former coach was aware of second-impact syndrome.¹⁵

Johnson’s comments extend beyond questions regarding the impact of concussions on players’ health. They bring into focus questions regarding the role of coaches in making decisions that impact the physical well-being of athletes. Should liability ensue if a coach, acting without intent to injure a player, nevertheless engages in negligent or reckless conduct that directly or indirectly harms a player? In addressing this question, this article first provides an overview of the law regarding the tort liability of institutions for injuries to athletes and the standards of care that courts have adopted. The article suggests that the breach of any duty imposed on coaches and their teams would be assessed according to a heightened standard of care, specifically recklessness.

The article concludes, however, that even if a coach engaged in conduct that falls short of the applicable standard of care, a professional athlete will have difficulty prevailing in a tort-based civil action against a coach, or by virtue of vicarious liability, the team. In this regard, the article briefly discusses the defenses that might impede a player’s ability to pursue state tort claims. Moreover, these defenses, which include the labor law preemption doctrine, mandatory arbitration, and workers’ compensation, demonstrate the convergence of different strands of law in resolving sports-related disputes.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ MacMullan, *supra* note 3.

¹⁴ Mike Reiss, *Johnson Backs Off Belichick*, BOSTON GLOBE, Feb. 10, 2007, at 2D.

¹⁵ *Id.*

II. LIABILITY OF COACHES FOR ATHLETE INJURIES

A. The Standard of Care – Training and Instruction

1. High School and College – Heightened Standard

a. Co-Participants

Whether articulated as primary assumption of the risk or the no-duty rule, courts have adopted the general rule that coaches are not liable in negligence for injuries to athletes that result from risks inherent to the sport at issue. In endorsing this rule of non-liability, courts have borrowed from the principles developed in litigation between co-participants in athletic events. In a leading case establishing the standard of care of co-participants, the California Supreme Court in *Knight v. Jewett* stated, “it is improper to hold a sports participant liable to a coparticipant for ordinary careless conduct committed during the sport . . .”¹⁶

From *Knight* and other cases emerges a rule of limited liability that has been fashioned by adoption of a reckless or intentional conduct standard of care. In adopting what it accurately portrayed as the majority approach, another court held the following:

[V]oluntary participants in sports activities assume the inherent and foreseeable dangers of the activity and cannot recover for injury unless it can be established that the other participant either intentionally caused injury or engaged in conduct so reckless as to be totally outside the range of ordinary activity involved in the sport.¹⁷

b. Coaches

The heightened standard of care articulated in co-participant cases has been extended to liability suits asserted against coaches by high school and college athletes. While a coach generally will not be held liable in negligence for conduct involving risks inherent to a sport, liability may ensue when a coach’s conduct amounts to something more than simple negligence. In another leading California case, *Kahn v. East Side Union High School District*, the court stated, “sports instructor[s] may be found to have breached a duty of care to a student or athlete only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is ‘totally outside the range of ordinary activity’ involved in teaching or coaching the sport.”¹⁸ Coaching activities that

¹⁶ *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992).

¹⁷ *Mark v. Moser*, 746 N.E.2d 410, 416, 420 (Ind. Ct. App. 2001). *Accord* *Jaworski v. Kiernan*, 696 A.2d 332, 339 (Conn. 1997); *Yoneda v. Tom*, 133 P.3d 796, 808-09 (Haw. 2006); *Ritchie-Gamester v. City of Berkeley*, 597 N.W.2d 517, 525 (Mich. 1999); *Dotzler v. Tuttle*, 449 N.W.2d 774, 777 (Neb. 1990); *Kiley v. Patterson*, 763 A.2d 583, 585-86 (R.I. 2000).

¹⁸ *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 32-33 (Cal. 2003).

fall within the range of ordinary conduct were defined in *Kahn* to include coaching activity related to training students in the techniques of a particular sport, and challenging students to excel at higher levels of competency in a particular sport.¹⁹ In an important caveat, however, the *Kahn* court held that although coaches owe no duty to eliminate risks that arise from a sport, coaches owe a duty of care to their students not to increase risks that are inherent in a sport.²⁰ At the amateur level, the majority of courts have agreed with the *Kahn* court's articulation of the standard of care applicable to coaches.

c. Policy Justifications

In adopting the forgoing rules, courts have relied on several policies in insulating coaches from liability for inherent risks, except for intentional or reckless conduct. As suggested above, modern courts have most often turned to the theory of primary assumption of the risk as a basis for requiring more than simple negligence before imposing liability on co-participants and coaches in the amateur and recreational contexts. The focus of primary assumption of the risk is whether to impose a duty of care on the defendant.²¹ The question of duty is determined by engaging in an examination of the inherent characteristics of the activity involved and the defendant's and plaintiff's relationship to the activity or sport.²² If the injury causing risk is an inherent part of an activity, the defendant is absolved of negligence liability.²³

The limited liability rule is also derived from a fundamental premise: risk of injury is an inherent and integral part of sports.²⁴ Since careless conduct is considered an inherent risk of most competitive sports, a defendant has no duty of care to avoid it.²⁵ This premise is consistent with the notion of primary assumption of risk, which assumes an appreciation of the risks inherent in a sport and an athlete's implicit assumption of such risks.²⁶

Reliance on the primary assumption of risk concept to shield a defendant from liability was recently applied in what portends to be another leading California case. In *Avila v. Citrus Community College District*, the California Supreme Court considered whether to impose liability on a college for injuries caused by a player on its baseball team to a player on an opposing team.²⁷ Relying on a theory of primary assumption of risk, the court held that the college

¹⁹ *Id.* at 40.

²⁰ *Id.* at 39. This exception has been subsequently interpreted as requiring the application of a negligence standard of care in assessing whether a coach has increased the risks inherent in a sport. *Id.*

²¹ *Davenport v. Cotton Hope Plantation Horizontal Prop. Regime*, 508 S.E.2d 565, 570 (S.C. 1998).

²² *Knight*, 834 P.2d at 704.

²³ *Id.* at 708-09.

²⁴ *Mark*, 746 N.E.2d at 419 ("risk of injury is a common and inherent aspect of sports and recreational activity").

²⁵ *See Knight*, 834 P.2d at 708.

²⁶ *Mark*, 746 N.E.2d at 418.

²⁷ *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383 (Cal. 2006).

owed no duty of care to the plaintiff.²⁸ It found that a batter being intentionally hit by a pitch is an inherent risk of baseball.²⁹

Courts have articulated additional policies in allocating the risk of negligent co-participants and coaches to injured parties. They reason that requiring a standard of care that exceeds negligence comports with the social desire not to chill vigorous participation in competitive sports.³⁰ According to this view, over-regulation of athletic competition through a negligence standard would chill the competitive zeal with which sports are played and would, in turn, eventually result in fundamentally altering the ways in which particular sports are played.³¹ The court in *Knight* stated:

The courts have concluded that vigorous participation in such sporting events, [baseball or football], likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct [I]mposition of *legal liability* for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.³²

In addition to the forgoing policies, adoption of the intentional and reckless standard is based on the judiciary's concern that a negligence standard of liability would lead to a flood of litigation which could adversely impact educational institutions.³³

As it specifically relates to coaches in the amateur setting, another policy rationale is derived from the belief that a central task of a coach is to motivate students. Such a role often involves encouraging students to engage in activities that will assist them to move beyond their limits. Accordingly, courts reason that a liability rule exceeding negligence is necessary in order to avoid undermining the learning and teaching functions that are integral aspects of the student and coach relationship. Added to this concern is the belief that imposing a simple negligence standard with respect to inherent risk would result in withdrawal of

²⁸ *Id.* at 393-96.

²⁹ *Avila*, 131 P.3d at 395; *accord Kavanagh v. Trs. of Boston Univ.*, 795 N.E.2d 1170, 1179 (Mass. 2003) (liability will be imposed on a coach for an injury to an athlete only where the coach at least acted recklessly).

³⁰ *Mark*, 746 N.E.2d at 419 (as between co-participants, "adopting a negligence standard would create the potential for mass litigation and may deter participation in sports because of fear of incurring liability for the injuries and mishaps incident to the particular activity"); *Yoneda v. Tom*, 133 P.3d 796, 808 (Haw. 2006); *Schick v. Ferolito*, 767 A.2d 962, 965 (N.J. 2001).

³¹ *Karas v. Strevell*, 860 N.E.2d 1163, 1190-91 (Ill. App. Ct. 2006) (noting chilling effect if organizers of sports events and coaches are held liable for negligent conduct).

³² *Knight*, 843 P.2d at 710. *accord Moser*, 746 N.E.2d at 422 ("[A]doption of the recklessness or intentional conduct standard preserves the fundamental nature of sports by encouraging, rather than inhibiting, competitive spirit, drive, and strategy.").

³³ *Jaworski*, 696 A.2d at 337-38; *Yoneda*, 133 P.3d at 808; *Schick*, 767 A.2d at 965.

competent individuals from coaching, which would ultimately increase the dangers of organized sports participation.³⁴

In adopting a heightened standard of care, courts recognize the careful balancing act in which they are engaged. One court stated that the reckless and intentional standard “will avoid judicial review of the kind of risk-laden conduct that is inherent in sports and generally considered to be part of the game, while at the same time imposing liability for acts that are clearly unreasonable and beyond the realm of fair play.”³⁵ Another court noted,

We . . . are convinced that a recklessness standard will sufficiently protect participants in athletic contests by affording them a right of action against those who cause injuries not inherent in the particular game in which the participants are engaged. In other words, we believe that the reckless or intentional conduct standard of care will maintain civility and relative safety in team sports without dampening the competitive spirit of the participants.³⁶

Such statements recognize the tension between promoting vigorous athlete participation and protecting participants.³⁷ To date, promoting safety has been subordinate to promoting vigorous participation.

2. Professional Sports – Heightened Standard

As it relates to professional sports, courts have had few occasions to address the standard of care in cases involving the tort liability of either co-participants or coaches. The paucity of cases is a consequence of the effectiveness of the defenses that defendants would likely assert.³⁸ In addition, the culture of sports is likely to inhibit the bringing of lawsuits, particularly those in which athletes assert claims against coaches. As a predicate to discussing the applicable standard of care in the professional setting, this article addresses the features of the sports culture that propels athletes to play when hurt, inclines them to follow coaching directives (even if potentially harmful), and discourages injured athletes from pursuing tort claims against coaches and their teams.

³⁴ *Karas*, 860 N.E.2d at 1190-91. The majority opinion reads as follows:

In order to avoid liability, organizers would be forced to either change the fundamental nature of the games they organize or to withdraw completely from overseeing the games. In the first situation, the law would burden the free and vigorous participation in sports to such a degree as to change the nature of the sports. In the second situation, the law would forestall organized and coached sports competition altogether.

Id.

³⁵ *Moser*, 746 N.E.2d at 422.

³⁶ *Jaworski*, 696 A.2d at 337.

³⁷ *Id.*

³⁸ See discussion *infra* Part III.

a. The Sports Culture

Several variables, including the impact of key features of the sports culture, the social and financial rewards of sports participation, athletes' concerns relating to job insecurity, and pressure from management and coaches, influence athletes' tendencies to play in disregard for their physical well-being. A common belief in sports is that "pain is to be endured," and future consequences are relegated to insignificance.³⁹ The sports culture applauds athletes who elevate the game over their personal interests because doing so gives comfort to teammates, coaches, and the public that the athlete will do whatever it takes.⁴⁰ Consequently, athletes who play when hurt develop reputations as "gamers" or "iron men." In contrast, athletes who are not eager to play when they have suffered an injury are stigmatized.⁴¹ When NFL commentator, John Riggins, called Washington Redskins wide receiver, Michael Westbrook, a "punk" because Westbrook missed several games due to injury, Westbrook took the insult seriously.⁴² Westbrook attempted to return too quickly, which resulted in re-injuring his knee.⁴³

The social benefits of athletic participation may also prompt athletes to play when hurt. In the world of non-stop television and internet coverage of sports, athletic accomplishments can transform players into overnight heroes, while mistakes can cause them to suffer years of grief.⁴⁴ Given the importance of sports to the public, fan reaction to injured players constitutes a powerful motivator for players to play when hurt. Fans quickly forget injured athletes and the media's interest turns elsewhere.⁴⁵

An athlete may also equate performance in a respective sport with personal identity. Athletes who are unable to perform may feel that they are letting down their teammates and coaches.⁴⁶ Such feelings when combined with anxiety induced by a fear that they will not heal or will be replaced causes some athletes to conceal injuries and prematurely return to the playing field.⁴⁷ Moreover, athletes will play through injuries because of their love for the game. This phenomenon is referred to as "funktionlust," the love of doing something regardless of the potentially harmful consequences.⁴⁸

³⁹ James H. Davis, *Fixing the Standard of Care: Motivated Athletes and Medical Malpractice*, 12 AM. J. TRIAL ADVOC. 215, 217 (1988).

⁴⁰ See Scott Polsky, *Winning Medicine: Professional Sports Team Doctors' Conflicts of Interest*, 14 J. CONTEMP. HEALTH L. & POL'Y 503, 512 (1998).

⁴¹ *Id.* at 513.

⁴² *Id.* at 513-14.

⁴³ *Id.*

⁴⁴ Davis, *supra* note 39, at 218.

⁴⁵ Hecht, *supra* note 3, at 36-37.

⁴⁶ Craig Smith, *Injury Mind Games – Sitting on Sidelines Shakes an NFL Player's Confidence*, SEATTLE TIMES, Sept. 11, 1991, at B1.

⁴⁷ *Id.*; Polsky, *supra* note 40, at 513.

⁴⁸ Polsky, *supra* note 40, at 514.

The influence of management and coaches on an athlete's desire to play is multi-dimensional. Players want to stay in the good graces of management, whether it be to preserve a roster spot, to earn a larger future contract, or to request a future trade. A former team physician for the Oakland Raiders commented that an athlete who did not play injured risked going on the team owner's [expletive] list, which could not only end the player's chances of playing, but also ruin a player's chances of being traded or picked up by another team.⁴⁹

Thus, a premium is placed on an athlete's "current ability to perform at maximum effort."⁵⁰ As a former National Basketball Association ("NBA") player stated, "if management thinks that you're not willing to play with a certain amount of pain, they can no longer use your services They'll find someone else willing to take the pain numbing shots and play hurt."⁵¹ In order to avoid the sometimes career-shortening reputation of being "soft," players feel they must play through almost anything.⁵² Veteran athletes live with the reality of having to ward off young players while younger players fight for playing time in order to prove their worth.⁵³ The fact that management can easily replace an athlete means athletes are more likely to play in disregard of health concerns as a means of helping to ensure their roster spot on a team.⁵⁴

The social relationship between players and coaches is complex. On one hand, coaches are interested in the well-being of athletes. On the other hand, coaches attempt to instill the idea that athletes should play through pain. Vince Lombardi, the storied coach of the Green Bay Packers, said, "No one is ever hurt. Hurt is in your mind."⁵⁵ Once injured, coaches will often pressure players to perform.⁵⁶ A former Vancouver Canucks coach is reported to have remarked, "Of course, we were short a defenceman with [Mike] Robitaille out [with a sore shoulder]. I don't know exactly how bad it is but I tell you he'd better start playing. If he doesn't, I'm going to have to consider suspending him."⁵⁷ A coach's desire that his or her team excel in the present rather than the future can cloud his or her decision-making regarding players and their health.

Comments by Boston Globe columnist Seth Mnookin provide a good summary of several of the more prominent variables that result in athletes playing when hurt:

Gene Upshaw said it was a player's responsibility to decide when he could and couldn't play. "If a coach or anyone else is saying, 'You don't have a

⁴⁹ *Id.* at 513.

⁵⁰ Davis, *supra* note 39, at 217.

⁵¹ Polsky, *supra* note 40, at 513.

⁵² See MacMullan, *supra* note 3.

⁵³ Polsky, *supra* note 40, at 513.

⁵⁴ *Id.* at 513.

⁵⁵ See Brainy Quote, Vince Lombardi Quotes,

http://www.brainyquote.com/quotes/authors/v/vince_lombardi.html (last visited Feb. 22, 2008).

⁵⁶ Davis, *supra* note 39, at 219.

⁵⁷ *Id.* at 219.

concussion, you get back in there,' you don't have to go, and you shouldn't go," Upshaw said. "You know how you feel. That's what we tried to do throughout the years, is take the coach out of the decision making." That statement is so patently ridiculous it would be risible if the consequences weren't so dire. In the moments after someone sustains an injury, he is the person least able to properly diagnose himself. The adrenaline coursing through his body serves as a natural painkiller. Concussions – which, by their very definition, leave a player disoriented – add a whole other wrinkle. And football players, who don't have guaranteed contracts and live in fear of losing their jobs to the next guy on the depth chart, are infamous for not acknowledging injuries. Even without all of those factors, 20-something athletes who have never known life outside of sports are not famous for making decisions that realistically consider their futures.⁵⁸

b. The Applicable Standard of Care

1. Co-participants

In determining the tort liability of co-participants engaged in professional sports activities, courts follow the approach favored by courts in the amateur setting. In *Hackbart v. Cincinnati Bengals, Inc.*, the court held that a reckless standard should govern the liability of a player who struck and injured another player.⁵⁹ Similarly, in *Turcotte v. Fell*, where a professional jockey asserted another jockey's negligence caused him to fall to the ground and suffer severe personal injuries, the court ruled the defendant owed the plaintiff a duty of care to "avoid reckless or intentionally harmful conduct."⁶⁰ Noting that courts have avoided imposing liability on sports participants out of fear that to do so would burden vigorous participation, the court suggested that the reckless/intentional standard strikes the proper balance.⁶¹ The *Turcotte* court relied on the primary assumption of risk framework in adopting a heightened standard of care.⁶² In doing so, it identified several factors that determine whether a plaintiff has consented to the act or injury of the co-participant.⁶³ One of the more significant of these factors was professional athletes' presumed greater awareness of the dangers involved in sports participation.⁶⁴ The court also pointed to the salary

⁵⁸ Seth Mnookin, *When to Hang It Up*, BOSTON GLOBE, May 6, 2007 (Magazine), at 6, available at http://www.boston.com/news/globe/magazine/articles/2007/05/06/when_to_hang_it_up/.

⁵⁹ *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 524-25 (10th Cir. 1979). See also *Lang v. Silva*, 715 N.E.2d 708, 976 (Ill. App. Ct. 1999) (applying willful and wanton or intentional misconduct standard in determining tort liability of jockey allegedly injured by a co-participant); *McKichan v. St. Louis Hockey Club, L.P.*, 967 S.W.2d 209, 211-13 (Mo. Ct. App. 1998) (holding that because the risk inherent in the game includes rough play suggests that a heightened standard of care is required to establish the liability of a co-participant in professional sports).

⁶⁰ *Turcotte v. Fell*, 502 N.E.2d 964, 966-67 (N.Y. 1986).

⁶¹ *Id.* at 967.

⁶² *Id.* at 967-68.

⁶³ *Id.* at 969.

⁶⁴ *Id.*

that professional athletes receive for accepting risk as another factor that supported a heightened standard of care.⁶⁵

2. Liability of Coaches for Inherent Risks

In cases involving professional sports, it is highly unlikely that courts would apply a negligence standard with respect to risks that could be characterized as inherent to the sport. However, where a coach's liability to an athlete is at issue, courts would likely extend the heightened standard of care applied in co-participant cases involving professional athletes. The overwhelming authority in the amateur setting, which applies a reckless/intentional standard where both co-participants and coaches are sued, would support adoption of a heightened standard of care if a professional athlete were to sue a coach. Support for such a standard is buttressed by an athlete's status as a professional, which presumes, in contrast to amateur athletes, an enhanced appreciation of the risks involved in athletic participation.⁶⁶ As previously discussed, risk of injury due to the negligence of a coach as it relates to coaching decisions such as instructing an athlete on the techniques of a game, as well as selecting plays and drills that players are instructed to run, fall within the scope of inherent risks associated with athletic participation.⁶⁷ The compensation that athletes receive for participation also supports a heightened standard of care.⁶⁸ The existence of internal mechanisms in professional sports leagues for both regulating player conduct and compensating injured players further compels application of a heightened standard of care.⁶⁹

Finally, albeit limited, the existing precedent supports the application of a heightened standard of care. Although a coach was not the defendant, *DiMarco v. New York City Health and Hospitals Corp.*, is nevertheless relevant. There the court applied a recklessness standard to assess the liability of a gym to a professional boxer.⁷⁰ In fashioning this duty of care, the court focused on the skill and experience of the plaintiff boxer.⁷¹ Similarly, in *McKichan v. St. Louis Hockey Club*, a professional player injured as a result of a body check sued the player who charged him and the owner of the opposing team.⁷² The court held that the owner was not vicariously liable because the defendant player's conduct

⁶⁵ *Id.*

⁶⁶ See, e.g., *Classen v. Izquierdo*, 520 N.Y.S.2d 999, 1001 (N.Y. App. Div. 1987) (justifying its articulation of the reckless/intentional standard of care where facility operator was sued given his experience, and holding that a professional boxer should be aware of inherent risk in the sport of boxing).

⁶⁷ See *supra* Part II.A.1.b.

⁶⁸ See *McKichan v. St. Louis Hockey Club, L.P.*, 967 S.W.2d 209, 213 (Mo. Ct. App. 1998) (suggesting compensation that athletes receive supports a recklessness standard).

⁶⁹ See *id.*

⁷⁰ *DiMarco v. N.Y.C. Health & Hosps. Corp.*, 589 N.Y.S.2d 580, 581-82 (N.Y. App. Div. 1992); see also *Classen*, 520 N.Y.S.2d at 1000.

⁷¹ *DiMarco*, 589 N.Y.S.2d at 581.

⁷² *McKichan*, 967 S.W.2d at 210.

was a risk inherent in professional hockey.⁷³ Emphasizing the inherent risk of boxing, the court in *Classen v. Izquierdo* applied a recklessness standard in absolving the proprietor of a boxing facility from liability for the death of a boxer who died during a boxing match.⁷⁴

B. Applying the Standard of Care

1. Distinguishing Coaching Decisions

In applying the above-mentioned standards to the professional setting, several questions emerge. For instance, should all decisions made by coaches that in some way relate, directly or indirectly, to on-the-field-play by athletes fall within the parameters of an inherent risk associated with the game?⁷⁵ Should inherent risk be reserved for coaching decisions that relate only to the fundamentals or technical dimensions of a particular sport, such as rules of the sport, determining plays and drills athletes must execute, instructing and training athletes as to the mechanics of a sport (including encouraging players to excel beyond their level of expertise), and methods to reduce injury?⁷⁶ In contrast, do coaching decisions relating to an injured athlete's fitness to return to play or the failure to provide adequate medical care for an injured athlete fall outside the scope of what constitutes an inherent risk?⁷⁷

In cases involving amateur athletes, courts impliedly have acknowledged the relevance of the distinction between the proper categorization of the coaching decision.⁷⁸ Where the coaching decision does not relate to sport fundamentals, judicial analysis focuses on whether the institution owes a duty of care to the injured athlete to avoid a foreseeable risk of harm.⁷⁹ Examples include cases in which a coach did the following: demanded or pressured an injured athlete to participate, resulting in the aggravation of an existing injury;⁸⁰ required an athlete

⁷³ *Id.* at 213.

⁷⁴ *Classen*, 520 N.Y.S.2d at 1002. *Accord* *Mc Duffie v. Watkins Glen Int'l, Inc.*, 833 F. Supp. 197, 200 (W.D.N.Y. 1993) (“[P]rimary assumption of risk, in the context of professional sports . . . is a complete defense to negligence claims brought by the participant against the owner of the sport facility or the promoter.”).

⁷⁵ Although it is not the focus of this article, drawing a distinction between the types of decisions made by coaches is relevant in amateur sports as well.

⁷⁶ *See* *Kelly v. McCarrick*, 841 A.2d 869, 887 (Md. Ct. Spec. App. 2004) (describing the types of duties and decisions related thereto that coaches make).

⁷⁷ *See id.*

⁷⁸ *See id.* at 887-88 (examining each claim of alleged coaching misconduct separately to determine the applicable standard of care to apply to each).

⁷⁹ *See* *Geiresbach v. Frieje*, 807 N.E.2d 114, 118 (Ind. Ct. App. 2004); *King v. Univ. of Indianapolis*, 2002 WL 31242233, at *5 (S.D. Ind. Oct. 3, 2002).

⁸⁰ *See* *Morris v. Union High Sch. Dist.*, 294 P. 998, 999 (Wash. 1931) (concluding that coach may be liable in negligence when he permits or demands athlete to play even though he is or should have been aware of athlete's injuries); *Searles v. Trustees of St. Joseph's Coll.*, 695 A.2d 1206, 1209 (Me. 1997) (injured student-athlete presented cognizable negligence action relating to coach's

to play even though the coach failed to determine the state of an athlete's medical condition,⁸¹ failed to allow an athlete to access proper medical care,⁸² and provided improper equipment resulting in injuries to an athlete.⁸³

A case of particular note is *Wattenbarger v. Cincinnati Reds, Inc.*⁸⁴ In *Wattenbarger*, the plaintiff, a 17 year-old pitcher, attended a tryout supervised by a representative of the Cincinnati Reds major league baseball franchise.⁸⁵ While he was throwing warm-up pitches, the plaintiff felt his arm pop.⁸⁶ He informed representatives of the Reds, but they remained silent.⁸⁷ The plaintiff returned to the pitcher's mound and threw additional pitches, but he experienced severe pain and stopped pitching.⁸⁸ A medical exam revealed a serious injury to his pitching arm.⁸⁹ He filed suit alleging that defendants "negligently allowed [him] to continue to pitch when they knew or ought to have known [sic] that to continue would cause irreparable harm."⁹⁰ The court ruled that the club "owed a duty of care to protect participants from aggravating injuries during the tryout."⁹¹ It acknowledged that the primary assumption of the risk doctrine precludes recognition of a duty of care for risks inherent to a sport.⁹² It also acknowledged that pitching injuries suffered by pitchers are inherent risks of baseball.⁹³ Relying on *Knight v. Jewett*, however, the court refused to apply primary

decision to allow him to return to play); *Lamorie v. Warner Pac. Coll.*, 850 P.2d 401, 402 (Or. Ct. App. 1993).

⁸¹ See *Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.*, 679 N.W.2d 198, 205 (Neb. 2004) (noting coach can be held liable in negligence for permitting injured athlete to return to play before a medical determination of player's fitness to return to play).

⁸² See *Jarreau v. Orleans Parish Sch. Bd.*, 600 So. 2d 1389, 1393 (La. Ct. App. 1992); *Mogabgab v. Orleans Parish Sch. Bd.*, 239 So. 2d 456, 460-61 (La. Ct. App. 1970) (finding coach negligent for failing to allow athlete access to medical treatment).

⁸³ See *Torres v. Univ. of Mass.*, 2005 WL 3629285, at *2 (Mass. Super. Ct. Dec. 19, 2005) (noting that heightened standard of care is not imposed in all cases involving sporting events and indentifying cases in which coaches were held liable in negligence to include instances where coach supplied player with defective helmet, defective design landing pit for pole vaulting, and equipped a player with a pole that was too light); *Henney v. Shelby City Sch. Dist.* 2006 WL 747475, at *3 (Ohio Ct. App. Mar. 23, 2006) (involving improper athletic equipment); *Zides v. Quinnipiac Univ.*, 2006 WL 463182, at *5-7 (Conn. Super. Ct. Feb. 7, 2006) (finding material issues of fact existed as to coach's responsibility for maintaining equipment used to protect college pitchers during batting practice). See also Matthew J. Mitten, *Emerging Legal Issues in Sports Medicine: A Synthesis, Summary, and Analysis*, 76 ST. JOHN'S L. REV. 5, 51-52 (2002) (generally describing coaching decisions for which a high school may be held vicariously liable).

⁸⁴ 28 Cal. App. 4th 746 (1994).

⁸⁵ *Id.* at 749.

⁸⁶ *Id.* at 750.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* at 750-51.

⁹¹ *Id.* at 756.

⁹² *Id.* at 755.

⁹³ *Id.*

assumption of risk, since defendants had a duty not to increase risk over and above those inherent in a sport.⁹⁴

2. Reckless Conduct

As it relates to professional sports, the more important question that emerges from the forgoing discussion of the standard of care for injuries to professional athletes is whether a coaching decision that aggravates an injury to an athlete constitutes reckless or intentional conduct.⁹⁵ Consider the following scenario: A coach orders a player to continue to play or return to play even though a trainer or doctor has informed the coach that the player is physically unfit to play. Would such a decision made by a coach constitute reckless or intentional conduct?

Terms such as “gross negligence,” “willful or wanton misconduct,” and “reckless disregard for risk” are all used in tort law to distinguish between conduct that is merely negligent and conduct that is considered reckless. According to the proposed Restatement (Third) of Torts, a defendant’s conduct amounts to reckless behavior if:

- (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person’s situation, and (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person’s failure to adopt the precaution a demonstration of the person’s indifference to the risk.⁹⁶

The forgoing instructs us that recklessness constitutes conduct so outside the scope of acceptable behavior that it amounts to more than mere negligence, and the perpetrator should be held accountable where he or she might not have been if mere negligence was the applicable standard.

The proposed Restatement (Third) of Torts suggests several factors relevant in determining whether a defendant acted recklessly.⁹⁷ Under the Restatement’s formulation, the defendant must have known of the risk or, if he or she lacked actual knowledge, the facts and circumstances should have made obvious to a reasonable person in the actor’s situation that the likelihood of danger was extremely high.⁹⁸ In addition, the Restatement instructs courts to examine the imbalance between the magnitude of the risk and the burden of precautions.⁹⁹ The magnitude of the risk is both the likelihood that harm will occur and the

⁹⁴ *Id.* at 754-55. See *Knight v. Jewett*, 834 P.2d 696 (Cal. 1992).

⁹⁵ See discussion *supra* Part II.B.1.

⁹⁶ RESTATEMENT (THIRD) OF TORTS: LIABILITY OF PHYSICAL HARM § 2 cmt. a (Proposed Official Draft 2005).

⁹⁷ *Id.* § 2 cmt. c.

⁹⁸ *Id.*

⁹⁹ *Id.* § 2 cmt. d.

severity of that potential harm.¹⁰⁰ If the burden of precautions is considerably low and the magnitude of the risk is considerably high, such an imbalance will often result in a finding of recklessness.¹⁰¹ Moreover, a finding of recklessness is usually appropriate if the burden of precautions is low and the actor had actual knowledge of the risk.¹⁰² The actor's conduct in such cases is reckless because of the indifference he or she exhibits as to whether other people will be hurt.¹⁰³ Such indifference is more than mere negligence and is considered reckless because the dangers to which others are exposed are not only foreseeable to the actor, but are known to the actor and are deliberately disregarded.¹⁰⁴

Courts in the sports setting have adhered to the Restatement's suggested formulation in determining whether a defendant's conduct amounts to reckless behavior. In *Schick v. Ferolito*, the New Jersey Supreme Court stated,

[A]n actor acts recklessly when he or she intentionally commits an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probably that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.¹⁰⁵

In differentiating recklessness from negligence, the court added, "Recklessness, unlike negligence, requires a conscious choice of a course of action, with knowledge or reason to know that it will create serious danger to others The quantum of risk is the important factor."¹⁰⁶

Adopting the Restatement (Second) of Torts definition of recklessness, the court in *Thompson v. McNeil* stated,

What constitutes an unreasonable risk under the circumstances of a sporting event must be delineated with reference to the way the particular game is played, *i.e.*, the rules and customs that shape the participants' ideas of foreseeable conduct in the course of a game [A]ny conduct which is characterized by the strong probability of harm that recklessness entails, and

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* The obviousness of the risk and the imbalance between the magnitude of that risk and the burden of precautions are decisive factors courts use for determining recklessness. *Id.* The comments to the proposed Restatement identify additional factors that courts should consider, including a high probability that a defendant's conduct would be harmful, the severity of the harm, and the knowledge of the wrongfulness of the conduct. *Id.* at cmts. e-g.

¹⁰⁵ *Schick v. Ferolito*, 767 A.2d 962, 969 (N.J. 2001). See also *Zides v. Quinnipiac Univ.*, 2006 WL 463182, at *11 (Conn. Super. Ct. Feb. 7, 2006) (pointing out that one form of recklessness refers to those instances in which an actor knows of or has reason to know of a high degree of risk of injury to another, and "deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference, to that risk"); *Tarlea v. Crabtree*, 687 N.W.2d 333, 339 (Mich. Ct. App. 2004) (defining gross negligence as "conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results").

¹⁰⁶ *Schick*, 767 A.2d at 969.

which occurs outside the normal conduct and customs of the sport, may give rise to liability.¹⁰⁷

The *Thompson* court emphasized that assessing reckless conduct is dependent not only on the specific factual circumstances, but also on the nature of the sport at issue and the informal and formal rules that govern it.¹⁰⁸ The court stated, “We cannot provide a single list of actions that will give rise to tort liability for recklessness or intentional misconduct in every sport. The issue can be resolved in each case only by recourse to the rules and customs of the game and the facts of the incident.”¹⁰⁹

The *Thompson* court provided the following illustration of what might constitute reckless behavior in a case involving co-participants: “If . . . a golfer knows another is within the line of flight of his shot and fails to offer the customary warning of ‘fore,’ liability might accrue. Such conduct could amount to reckless indifference to the rights of others.”¹¹⁰

In *Koffman v. Garnett*, the court employed the language of gross negligence.¹¹¹ The court found that a coach who substantially outweighed an athlete could be found to have committed gross negligence when the coach’s demonstration on the athlete resulted in injury.¹¹² In its holding, the court emphasized the coach’s knowledge of the differences in his and the player’s size and levels of experience.¹¹³ The coach’s conduct was in “utter disregard” for the player’s safety.¹¹⁴

It has been suggested that the generally applicable standard for defining recklessness should take on a more specialized meaning in the sports context than in the traditional tort setting.¹¹⁵ This view is based on language from *Knight v. Jewett*, which states that recklessness refers to conduct deemed to be “totally outside the range of the ordinary activity involved in the sport.”¹¹⁶ According to this view, recklessness must be viewed in light of risks inherent in a sport.¹¹⁷

¹⁰⁷ *Thompson v. McNeill*, 559 N.E.2d 705, 708 (Ohio 1990).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* See *Karas v. Strevell*, 860 N.E.2d 1163, 1175 (Ill. App. Ct. 2006) (noting that the meaning of willfulness and wantonness can only be determined in the context of the game played).

¹¹⁰ *Thompson*, 559 N.E.2d at 707. See *Karas*, 860 N.E.2d at 1172 (using the terms “willful” and “wanton” to describe reckless behavior and emphasizing that recklessness involves “an utter indifference to or conscious disregard for [another’s] welfare”).

¹¹¹ *Koffman v. Garnett*, 574 S.E.2d 258, 260 (Va. 2003). The court defined gross negligence as “that degree of negligence which shows indifference to others as constitutes an utter disregard of prudence amounting to a complete neglect of the safety of [another].” *Id.* (quoting *Ferguson v. Ferguson*, 181 S.E.2d 648, 653 (Va. 1971)).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Vogel v. Am. Amateur Baseball Cong.*, 2005 WL 2304485, at *4 (Cal. Dist. Ct. App. Sept. 21, 2005).

¹¹⁶ *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992). See also *Kahn v. E. Side Union High Sch. Dist.*, 75 P.3d 30, 32 (Cal. 2003) (quoting *Knight*, 834 P.2d at 710).

¹¹⁷ *Vogel*, 2005 WL 2304485, at *6.

This admonition may not differ in substance from the stance taken by courts in cases such as *Schick* and *Thompson*, where the courts emphasized that recklessness can only be considered in the context of the nature of the sport and its customs.¹¹⁸

At the amateur and recreational levels of sports, courts have had occasion to impose liability based on a coach's recklessness. In *Halper v. Vayo*, the court held that recklessness could be established in instances where a coach acted outside the realm of his expertise.¹¹⁹ Recklessness might be established if facts proved that a coach without medical training improperly treated an athlete and aggravated an existing injury.¹²⁰ Another court opined that while liability would not ensue, it might arise on the basis of recklessness if an instructor failed to act after having been informed of a particular risk.¹²¹ Similarly, one commentator argues that at least in the case of a minor, a coach might be found to have acted recklessly if he insisted that an injured player return to the playing field.¹²² The commentator states,

If a coach were to refuse to accept a stoppage when a player indicates that he or she is injured and wants to stop, or otherwise repeatedly refuse to take 'no' for an answer from an inexperienced minor athlete, then such a course of conduct would qualify as grossly negligent or reckless behavior if an injury were to result.¹²³

Another commentator suggests liability should be imposed at the professional level, stating that "in theory, a coach's job responsibilities entail protecting his or her players from unreasonable risk of injury."¹²⁴

Returning to our hypothetical, might a coach's insistence that an injured athlete return to play constitute reckless conduct? The forgoing cases suggest that, where an athlete is injured as a consequence of a coach acting in a manner that is outside the realm of his or her expertise, potential liability based on recklessness might ensue.¹²⁵ This is particularly the case where coaches have actual or constructive appreciation of the potential risks that might flow from their conduct. Such would be the case when a coach's decision is contrary to medical advice. Similarly, a coach's demand that an athlete return to play, given the coach's absence of medical expertise, arguably provides evidence of recklessness, since it disregards an immediate and readily ascertainable risk, in

¹¹⁸ See *Schick v. Ferolito*, 767 A.2d 962, 966 (N.J. 2001); *Thompson v. McNeill*, 559 N.E.2d 705, 708 (Ohio 1990).

¹¹⁹ *Halper v. Vayo*, 568 N.E.2d 914, 920 (Ill. App. Ct. 1991).

¹²⁰ *Id.* at 920-21.

¹²¹ *Geiersbach v. Frieje*, 807 N.E.2d 114, 118 (Ind. Ct. App. 2004).

¹²² Donald T. Meier, *Primary Assumption of Risk and Duty in Football Indirect Injury Cases: A Legal Workout from the Tragedies on the Training Ground for American Values*, 2 VA. SPORTS & ENT. L.J. 80, 117 (2002).

¹²³ *Id.* at 143.

¹²⁴ Hecht, *supra* note 3, at 40.

¹²⁵ See *supra* Part II.B.2.

contrast to an abstract possibility of risk.¹²⁶ In the aftermath of the incident involving Ted Johnson, NFL Commissioner Roger Goodell commented that “a coach’s decision should never be allowed to override a medical decision.”¹²⁷ In short, a coach who engages in such conduct demonstrates what could be characterized as a conscious disregard of the risk of injury to an athlete in order to pursue the coach’s goal.

Nevertheless, there are several reasons why a court might not recognize a recklessness cause of action in favor of professional athletes against their coaches and teams. First, courts might have difficulty disassociating a player’s willingness to return to play from the issue of whether a duty of care should be imposed on a coach. As discussed above, however, an athlete’s decision to follow a coach’s decision involves a complex web of social, economic, and psychological variables. Moreover, a player’s decision to obey a coach’s instruction when an athlete has some appreciation of the risk he takes in doing so should not be considered in determining whether a coach owes a duty of care to an athlete. Rather, the athlete’s decision should be considered as a part of a court’s comparative fault analysis.¹²⁸ Judicial reticence might also stem from the belief that existing mechanisms, such as players unions and player rights and benefits under collective bargaining agreements, provide sufficient protection for athletes. This might influence the judiciary’s desire not to intervene to protect athletes in order to avoid upsetting the balance between leagues, teams, athletes, coaches, and players unions.

III. DEFENSES TO PROFESSIONAL ATHLETE CIVIL ACTIONS

Even if a court were to conclude that policy supports imposing liability on coaches under the limited circumstances discussed herein, athletes will encounter well-established defenses before a coach and his team (based on vicarious liability) will be held liable in a civil action. The following discussion identifies the most significant of these defenses. It does not attempt to provide a comprehensive analysis of these defenses. Rather, its modest goal is simply to identify the essence of the defenses that injured athletes would be required to overcome.

A. Workers’ Compensation

Workers’ compensation laws provide expeditious administrative procedures that compensate and provide medical expenses for employees who suffer work-

¹²⁶ See *Karas v. Strevell*, 860 N.E.2d 1163, 1177 (Ill. App. Ct. 2006).

¹²⁷ Ron Borges, *Goodell Takes Safe Approach*, BOSTON GLOBE, Feb. 3, 2007, at 1C.

¹²⁸ See Annotation, *Application of Comparative Negligence to Action Based on Gross Negligence, Recklessness, or the Like*, 10 A.L.R.4th 946 (1981) (discussing the differences in approaches taken by courts in determining whether the plaintiff’s negligence should be considered in cases involving a defendant’s reckless or wanton conduct).

related injuries and diseases.¹²⁹ Pursuant to such legislation, injured workers are generally entitled to benefits regardless of an employer's common law tort liability.¹³⁰ In exchange for the benefits of this simplified no-fault compensation system, employees waive the ability to raise tort claims against their employers.¹³¹

In most states, professional athletes are considered employees¹³² and are covered under state workers' compensation statutes,¹³³ except where they are statutorily excluded.¹³⁴ As is true in the non-sports context, workers' compensation is the exclusive remedy for a professional athlete injured in the scope of his or her employment.¹³⁵ Where an athlete asserts that a team is vicariously liable for the tort acts of one of the team's employees, workers' compensation immunizes teams from vicarious liability.¹³⁶ In the sports context, this would typically include injuries resulting from acts of employees of the team, including coaches, trainers, and physicians, for which the injured athlete played.¹³⁷

The trend that has emerged in most states is to afford co-employees the same immunity from tort liability as employers. Except under limited circumstances, workers' compensation bars tort claims asserted by athletes against their teams and co-employees.¹³⁸ The co-employee defense is applicable if the conduct of an employee that resulted in an injury to a fellow employee occurred in the course of employment.¹³⁹

The forgoing discussion suggests that an athlete whose injuries are aggravated as a result of his coach's demand that he return to play would be relegated to the workers' compensation system to seek recourse. The exclusivity of workers' compensation would warrant such a result unless an athlete was able to establish some exception that would allow him to circumvent the system to pursue a civil action.

¹²⁹ Joseph H. King, Jr., *The Exclusiveness of an Employee's Workers' Compensation Remedy Against His Employer*, 55 TENN. L. REV. 405, 406 (1988).

¹³⁰ *Id.*

¹³¹ *Id.* at 407-08.

¹³² See, e.g., *Bryant v. Fox*, 515 N.E.2d 775, 779 (Ill. App. Ct. 1987) (describing players as employees for purposes of workers' compensation statute).

¹³³ See generally Margorie A. Shields, *Award of Workers' Compensation Benefits to Professional Athletes*, 112 A.L.R.5th 365 (2003) (providing a comprehensive state-by-state survey of the coverage of professional athletes under workers' compensation statutes).

¹³⁴ States in which professional athletes are statutorily excluded are Florida and Wyoming. See FLA. STAT. ANN. § 440.02(17)(c)(3) (West 2006); WYO. STAT. ANN. § 27-14-102 (2007).

¹³⁵ See Shields, *supra* note 133, § 18; *Hendy v. Losse*, 819 P.2d 1, 12 (Cal. 1991).

¹³⁶ *Hendy*, 819 P.2d at 12-13.

¹³⁷ See *id.* at 1, 3 (injured professional athlete's medical malpractice claim against a co-employee, a physician employed by the team, was precluded by virtue of workers' compensation statute); *Brinkman v. Buffalo Bills Football Club*, 433 F. Supp. 699, 702 (W.D.N.Y. 1977) (reaching the same result).

¹³⁸ See *Hendy*, 819 P.2d at 10-11.

¹³⁹ *Id.*

In some states, legislatures and the judiciary have created an intentional injury exception to the exclusivity of workers' compensation.¹⁴⁰ As a result, an athlete who suffers an injury or aggravation of an injury as a result of a coach's decision that he return to play would likely assert that the immunity afforded by workers' compensation statutes is unavailable because of the intentional conduct exception to workers' compensation. As articulated by one court, co-employees are not immune from suits arising from acts committed with "willful and wanton disregard, unprovoked aggression, or gross negligence when such acts result in injury."¹⁴¹

The applicability of the intentional conduct exception, however, will focus on how courts interpret the concept of intentional conduct. In particular, has the language of the relevant statute creating the exception been interpreted to require that an injured employee establish actual intent before the exception is triggered? Where actual intent is required, it constitutes a rather exacting burden.¹⁴² However, not all statutes creating the intentional conduct exception have been interpreted to require actual intent.¹⁴³

The few sports cases in which courts have examined the intentional injury exception offer limited guidance in predicting whether courts would apply the exception in this context. In *Ellis v. Rocky Mountain Empire Sports, Inc.*, a player asserted tort claims alleging that his team, its coaches, and its physicians required him to participate in contact football drills before he had fully recovered from off-season injury.¹⁴⁴ Finding that Colorado's Workmen's Compensation Act covers intentional acts of co-employees, the court held that the plaintiff's sole remedy was under the Act.¹⁴⁵

A similar result was reached in *DePiano v. Montreal Baseball Club, Ltd.*,¹⁴⁶ albeit for different reasons. The plaintiff, a minor league baseball player, sued his minor league club and the parent club, the Montreal Expos, alleging "negligence in their failure to provide timely and adequate medical care for his injury, and for requiring him to continue playing despite his injury."¹⁴⁷ The alleged consequence of the defendants' alleged negligence was aggravation of the plaintiff's injury and the end of his baseball career.¹⁴⁸ The court found that the plaintiff had not alleged facts sufficient to establish an intentional tort as defined in New York's Workers' Compensation Act, which had been previously interpreted to require facts establishing that defendant desired to "bring about the consequences of the act."¹⁴⁹ The New York statute was interpreted such that "mere knowledge and appreciation of the risk is not the same as the

¹⁴⁰ ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW §§ 103.02-.03 (2007).

¹⁴¹ *Oppenheim v. Reliance Ins. Co.*, 804 F. Supp. 305, 307 (M.D. Fla. 1991).

¹⁴² LARSON, *supra* note 140, at 103.03.

¹⁴³ *Id.* at 103.04.

¹⁴⁴ *Ellis v. Rocky Mountain Sports, Inc.*, 602 P.2d 895, 896 (Colo. Ct. App. 1979).

¹⁴⁵ *Id.* at 898.

¹⁴⁶ 663 F. Supp. 116 (W.D. Pa. 1987).

¹⁴⁷ *Id.* at 117.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

intent to cause injury.”¹⁵⁰ Thus, the plaintiff’s assertion that the defendants’ awareness of the risk and that “injury was ‘substantially certain’ to occur” did not fall within the intentional injury exception as interpreted in New York.¹⁵¹

Thus, an athlete injured under circumstances where a coach instructs him to play notwithstanding contrary medical advice would need to show the following to avoid the preclusive effect of workers’ compensation in pursuing a civil action premised on recklessness: the existence of an intentional injury exception and statutory language that specifically encompasses conduct which could be characterized as reckless. Absent such express language, the athlete would be required to establish that the intentional injury exception has been broadly interpreted in a particular jurisdiction to include acts for which actual intent to injure is either not required or can be inferred from the nature of the wrongful conduct.¹⁵² As noted by one court, co-employee immunity is unavailable when “conduct threatens the safety of others and is so reckless or manifestly indifferent to the consequence [of that action] that a finding of willfulness and wantonness equivalent in spirit to actual intent is justified.”¹⁵³

B. Federal Preemption and Arbitration

Two formidable defenses to which coaches and teams would turn in defending against athlete state tort claims are federal preemption and arbitration. In the major professional sports (Major League Baseball, the National Football League, the National Hockey League, and the National Basketball Association), bargaining units representing team owners and unions representing players have entered into collective bargaining agreements (“CBAs”). As a consequence, the CBAs are the primary source for establishing the contours of the relationships between owners and players. By virtue of the CBA, most aspects of the relationship between teams and players fall under the auspices of national labor law. Due to labor law’s entwinement into the player and team relationship, a coach and team sued by an injured athlete will assert that an athlete’s reckless conduct claim is subject to preemption under the Labor Management Relations Act (“LMRA”) and mandatory arbitration by virtue of provisions in the CBA and documents incorporated therein.

1. Federal Preemption

Section 301 of the LMRA provides that “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States”¹⁵⁴ The scope of the preemption doctrine was recently

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *See, e.g., Gibson v. Drainage Prods., Inc.*, 766 N.E.2d 982, 988-89 (Ohio 2002).

¹⁵³ *Pleasant v. Johnson*, 325 S.E.2d 244, 248 (N.C. 1985).

¹⁵⁴ Labor Management Relations Act, 29 U.S.C. § 185(a) (2006).

addressed in *Stringer v. National Football League*, in which the spouse of a deceased NFL player, Korey Stringer, alleged the NFL negligently caused Stringer to die while practicing in extreme heat.¹⁵⁵ According to the plaintiff, the NFL breached its duty to NFL players “to use ordinary care in overseeing, controlling, and regulating practices, policies, procedures, equipment, working conditions and culture of the NFL teams . . . to minimize the risk of heat-related illness.”¹⁵⁶ The plaintiff also sought to hold the NFL responsible for its asserted failure to provide appropriate and comprehensive information and directions to NFL athletic trainers, physicians, and coaches regarding heat-related illness.¹⁵⁷

In *Stringer*, the federal district court articulated a two-part test to determine whether a state-law tort claim is sufficiently independent to survive the § 301 preemption.¹⁵⁸ First, “[a] court must ‘ascertain whether the right claimed by the plaintiff is created by the collective bargaining agreement or by state law.’”¹⁵⁹ In elaborating, the court stated that in assessing whether a claim arose from a CBA, the relevant inquiry should focus on how a claim came into being.¹⁶⁰ In other words, is the CBA the source of the duty allegedly violated?¹⁶¹ The court determined that “[i]f the right is created by the collective bargaining agreement, the claim will be preempted by § 301.”¹⁶²

If the state claim is not a product of the CBA, a court must consider a second possible basis for establishing preemption: “whether proof of the state law claim requires interpretation of collective bargaining agreement terms.”¹⁶³ The court further stated that “[i]f resolution of the state law claim is ‘substantially dependent’ on an analysis of the terms of the collective bargaining agreement, or ‘inextricably intertwined’ with it, the claim will be preempted by § 301.”¹⁶⁴ It added that merely because the CBA will be consulted in resolving the state claim is not sufficient to establish preemption.¹⁶⁵ Moreover, the fact that a tort claim is brought by an employee who is covered under a CBA does not mean the LMRA preempts the claim.¹⁶⁶ The relevant inquiry is whether a plaintiff can establish its claims without interpreting provisions of the CBA.¹⁶⁷

¹⁵⁵ *Stringer v. NFL*, 474 F. Supp. 2d 894, 898 (S.D. Ohio 2007).

¹⁵⁶ *Id.* at 899.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 903. *Accord* *McPherson v. Tenn. Football, Inc.*, 2007 U.S. Dist. LEXIS 39595, at *3 (M.D. Tenn. May 31, 2007) (adopting the same two step process for determining if state claims are preempted by the Labor Management Relations Act).

¹⁵⁹ *Stringer*, 474 F. Supp. 2d at 900 (quoting *DeCoe v. General Motors Corp.*, 32 F.3d 212, 216 (6th Cir. 1994)).

¹⁶⁰ *Id.* at 908.

¹⁶¹ *Id.* at 904.

¹⁶² *Id.* at 903.

¹⁶³ *Id.* at 900.

¹⁶⁴ *Id.* at 900.

¹⁶⁵ *Id.* at 900.

¹⁶⁶ *McPherson v. Tenn. Football, Inc.*, 2007 U.S. Dist. LEXIS 39595, at *11 (M.D. Tenn. May 31, 2007); *Brown v. NFL*, 219 F. Supp. 2d 372, 378 (S.D.N.Y. 2002).

¹⁶⁷ *Stringer*, 474 F. Supp. 2d at 909.

2. Mandatory Arbitration

The CBAs for the major team sports provide arbitration procedures for resolving disputes between players and teams that relate to the provisions of collective bargaining agreements, the standard player/team contracts, and league constitutions and bylaws. Arbitration is the exclusive mechanism for resolving such disputes. For example, the NFL CBA provides:

Any dispute . . . arising after the execution of this Agreement and involving the interpretation of, application of, or compliance with, any provision of this Agreement, the NFL Player Contract, or any applicable provision of the NFL Constitution and Bylaws pertaining to terms and conditions of employment of NFL players, will be resolved exclusively in accordance with the procedure set forth in this Article.¹⁶⁸

Although it involved a claim brought by a player against the NFL, *Brown v. NFL* provides guidance as to which disputes are subject to mandatory arbitration.¹⁶⁹ The *Brown* court did not interpret the above-quoted language as creating an “all-encompassing arbitration provision;” rather, it characterized the CBA as containing several provisions that require arbitration of particular disputes.¹⁷⁰ The *Brown* court also emphasized that the CBA only requires arbitration of disputes that grow out of the CBA or documents incorporated therein, including the NFL player contract and the NFL Constitution and Bylaws.¹⁷¹ As it relates generally to tort claims, the *Brown* court stated the NFL CBA “does not purport to require arbitration of what would otherwise be tort actions brought by players against the NFL for the carelessness of its employees.”¹⁷²

3. Case Analysis

Athletes pursuing tort claims against professional teams have not fared well in the instances in which courts have examined the applicability of preemption and mandatory arbitration to tort claims premised on state law. *Smith v. Houston Oilers, Inc.* illustrates how § 301 preemption and mandatory arbitration provisions often operate in tandem to foreclose tort actions.¹⁷³ In *Smith*, two football players each signed one-year contracts to play for the Houston Oilers, then of the NFL.¹⁷⁴ The standard NFL team/player contract

¹⁶⁸ Collective Bargaining Agreement Between the NFL Management Council and the NFL Players Association, art. IX, § 1, at 13 (Mar. 8, 2006) [*hereinafter* NFL CBA], available at http://www.nflpa.org/pdfs/Agents/CBA_Amended_2006.pdf.

¹⁶⁹ *Brown*, 219 F. Supp. 2d at 376.

¹⁷⁰ *Id.* at 389; accord *McPherson*, 2007 U.S. Dist. LEXIS 39595, at *18-19 (quoting *Brown* with approval).

¹⁷¹ *Brown*, 219 F. Supp. 2d at 389.

¹⁷² *Id.*

¹⁷³ *Smith v. Houston Oilers, Inc.*, 87 F.3d 717 (5th Cir. 1996).

¹⁷⁴ *Id.* at 718.

prohibited teams from cutting injured players who were recovering during the one-year contract term.¹⁷⁵ The players rejected a team offer which would have cancelled their contracts with the team.¹⁷⁶ The plaintiffs alleged they were thereafter required to participate in a “phony” rehabilitation program under threat of dismissal from the team.¹⁷⁷ The defendant allegedly subjected the plaintiffs to severe abuse during their participation in the rehabilitation program in order to coerce them to leave the team.¹⁷⁸ The plaintiffs also alleged that the team engaged in wrongful conduct, including intentional infliction of emotional distress and threats to blackball them from playing for other NFL teams in the future.¹⁷⁹

Relying on § 301 preemption and the NFL CBA arbitration provisions, the Oilers sought dismissal of the players’ civil action.¹⁸⁰ The plaintiffs argued that resolution of their claims was not dependent on an interpretation of the CBA.¹⁸¹ Alternatively, the plaintiffs contended that the outrageous nature of the defendant’s conduct brought their claim outside the scope of § 301 preemption.¹⁸²

The Fifth Circuit acknowledged that “LMRA preemption typically does not occur ‘where the alleged tortious conduct could not have been sanctioned by the CBA, for example in cases concerning assault and battery or sexual harassment.’”¹⁸³ Given, however, that the CBA authorized NFL teams to require players to participate in the rehabilitation program, the court characterized the plaintiffs’ claims as amounting to a dispute regarding termination, specifically the sufficiency of the offer to termination pay.¹⁸⁴ The court also found that the alleged abusive conduct occurred from the plaintiffs’ desire to remain on the team and was dependent upon analysis of the CBA to determine the outrageousness of the team’s conduct during the plaintiffs’ rehabilitation.¹⁸⁵ Consequently, § 301 preemption was applicable since the plaintiffs’ claims were dependent on an analysis of the NFL CBA.¹⁸⁶ In addition, the plaintiffs’ exclusive means of redress was the arbitration mechanism established in the CBA.¹⁸⁷

LMRA preemption under § 301 was also invoked in *Sherwin v. Indianapolis Colts, Inc.*, where a football player sued his team and the team physician alleging inadequate medical care and the intentional withholding of

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ *Id.* at 718-19.

¹⁸⁰ *Id.* at 719.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.* at 719-20 (quoting *Baker v. Farmers Elec. Coop., Inc.*, 34 F.3d 274, 281 (5th Cir. 1994)).

¹⁸⁴ *Id.* at 720.

¹⁸⁵ *Id.* at 720-21.

¹⁸⁶ *Id.* at 721.

¹⁸⁷ *Id.* at 719.

medical information.¹⁸⁸ The Colts argued that their duty to provide medical care to players arose from the standard player contract and the CBA, and that any claim arising out of the club's provision of medical care involved an interpretation of those documents.¹⁸⁹ The court identified specific provisions of the relevant documents in finding that the Colts owed no duty to provide for the plaintiff's medical care independent of that established in the CBA and other documents.¹⁹⁰ It found that the plaintiff's claims relating to inadequate medical care could only be assessed by reference to clauses in the CBA that established such duties.¹⁹¹ The court also found that the plaintiff's intentional fraud claim was derived from the same circumstances that underlie the inadequate medical care claim and was thus subject to dismissal.¹⁹² It rejected the plaintiff's argument that preemption was inapplicable because the language of the relevant CBA provision only imposed a duty on physicians and not on coaches.¹⁹³ According to the court, such a dispute could only be decided by an arbitrator.¹⁹⁴ The court thus concluded that the plaintiff's claims fell within § 301 and were subject to arbitration.¹⁹⁵

In contrast to *Smith* and *Sherwin*, the court in *McPherson v. Tennessee Football, Inc.* refused to find that the LMRA preempted plaintiff's state court tort claims.¹⁹⁶ In *McPherson*, a football player sought to recover for personal injuries he sustained after he was struck by a vehicle driven by defendant football team's mascot during halftime of a preseason game.¹⁹⁷ The defendants argued that the LMRA and the CBA completely preempted McPherson's state law claims.¹⁹⁸ Using the two-step approach adopted in *Stringer*, the court found § 301 preemption did not apply.¹⁹⁹ The court emphasized the defendant's failure to specifically identify CBA provisions concerning mascots or field safety for half-time activities as establishing any legal duty that the team, via its agents, owed to players.²⁰⁰ The court concluded that the injury clause in the NFL CBA did not bring the action within the scope of § 301 since the clause covers injuries that

¹⁸⁸ *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1173 (N.D.N.Y. 1990).

¹⁸⁹ *Id.* at 1173-74. The CBA incorporated (and still incorporates) by reference the standard team/player contract. *Id.* at 1177.

¹⁹⁰ *Id.* at 1178.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 1179.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* See also *Rudnay v. Kansas City Chiefs Football Club, Inc.*, 1983 U.S. Dist. LEXIS 12595, at *6-7 (W.D. Mo. Oct. 19, 1983) (holding that injured player's claims of entitlement to salary during labor strike required determination of rights under CBA and were subject to preemption and arbitration); *Cincinnati Bengals, Inc. v. Thompson*, 553 F. Supp. 1011 (S.D. Ohio 1983) (finding player's claim that he was entitled to compensation during player's strike subject to arbitration).

¹⁹⁶ *McPherson v. Tenn. Football, Inc.*, 2007 U.S. Dist. LEXIS 39595, at *3 (M.D. Tenn. May 31, 2007).

¹⁹⁷ *Id.* at *1.

¹⁹⁸ *Id.* at *2-3.

¹⁹⁹ *Id.* at *14-23.

²⁰⁰ *Id.* at *16.

affect the player's ability to perform under his contract with his NFL team.²⁰¹ Thus, the court concluded that McPherson's state law claims had an independent basis and that an interpretation of the CBA was not necessary to resolve those claims.²⁰²

Courts have analyzed preemption in two prominent cases in which the NFL, as opposed to individual teams, was the defendant. In *Holmes v. NFL*, a plaintiff tested positive on a drug test administered by the Detroit Lions pursuant to the NFL's drug testing program, which was established under the NFL CBA.²⁰³ As a consequence of this and subsequent positive test results, the plaintiff was involuntarily enrolled in the NFL's drug program and suspended for four games without pay.²⁰⁴ Following an adverse ruling on his appeal, Holmes sued alleging that his involuntary participation in the NFL's drug program and suspension violated his due process rights as mandated by the NFL CBA.²⁰⁵ He also asserted several state claims, including an allegation that he was fraudulently induced to take the drug tests.²⁰⁶

The court held that the underlying labor dispute concerning the propriety of Holmes' enrollment in the Drug Program could not be separated from his state tort claims.²⁰⁷ According to the court, "The touchstone of each of Holmes' state-law tort claims [was] that he was misled into submitting to the Lions test."²⁰⁸ Resolution of these claims, the court continued, required analysis of "the CBA and the collectively-bargained Drug Program in order to ascertain whether the Lions defrauded Holmes"²⁰⁹ Thus, the court viewed the plaintiff's tort claims as "inextricably intertwined with, and substantially dependent upon, the terms of the Drug Program."²¹⁰

In a scenario involving an athlete's claims premised on a coach's alleged reckless conduct in demanding that an injured athlete return to play, a coach and team would likely point to several provisions of the CBA and documents incorporated therein that compel preemption and arbitration. Examples of such provisions include language in the CBA that refers to the Joint Committee on Player Safety and Welfare.²¹¹ For instance, the NFL CBA states that the committee was created "for the purpose of discussing the player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, *player-coach relationships*, and any other relevant subjects."²¹²

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Holmes v. NFL*, 939 F. Supp. 517, 520 (N.D. Tex. 1996).

²⁰⁴ *Id.* at 520.

²⁰⁵ *Id.* at 522.

²⁰⁶ *Id.*

²⁰⁷ *Id.* at 527.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ *Id.*

²¹¹ *See, e.g.*, NFL CBA, *supra* note 168, art. XIII, § 1, at 22.

²¹² *Id.* § 1(a), at 22 (emphasis added). Players no doubt would argue, in part, that this language does not support preemption, since the CBA fails to specify the duties owed by coaches to athletes.

Defendants might also rely on several provisions that collectively impose a duty on the part of NFL clubs to provide medical care for players as supporting preemption.²¹³ In addition, defendants might argue that a determination as to whether a coach acted recklessly cannot be made absent an inquiry into how the particular sport is to be played as defined in the CBA, which incorporates the NFL playing rules and constitution.²¹⁴

IV. CONCLUSION

Significant obstacles will lie in the path of professional athletes who assert state tort claims against teams and coaches based on the latter's decision to require an injured athlete to return to play. Both policy and doctrine provide support for imposing a duty on coaches under such circumstances. Apart from the question of duty, however, athletes will face other challenges to pursuing state tort claims. These defenses demonstrate the complexity of sports law as a discipline but more importantly the complexity of the web of relationships that exist within professional sports. Even assuming an athlete successfully constructs a cognizable state tort claim premised on an ill-advised coaching decision, the delicately balanced relationships extant in professional sports suggests that, while litigation represents an external mechanism for accountability, the creation of internal structures may be a preferred route for resolving broader issues concerning players' health. One such issue relates to defining the proper role of other key actors, such as teams, leagues, commissioners, players unions, and players themselves in protecting athletes' health. A first step in developing appropriate solutions will lie in these actors directly confronting concerns that place athletes at risk.²¹⁵ As it specifically relates to the player-coach relationship, only then will these actors be in a position to develop guidelines that regulate coaching behavior by balancing the interests coaches have in maintaining their authority and discretion against the interests of deterring behaviors that jeopardize the well-being of athletes.

²¹³ *Id.* art. XLIV, at 129. Players might fashion an argument premised on the notion that a court could infer from these provisions neither an express nor an implied obligation on the part of coaches to refrain from engaging in conduct that would aggravate an injury to a player.

²¹⁴ *But see* *Brown v. NFL*, 219 F. Supp. 2d 372, 387 (S.D.N.Y. 2002) (concluding that NFL game rules and constitution are not incorporated into the NFL collective bargaining agreement).

²¹⁵ An example that provides some early signs of hope is what appears to be the NFL's recent desire to seriously confront the question of the impact of concussions on players and the league and NFLPA's plan to provide medical assistance to players suffering from the long-term effects of concussions. *See* Scheiber, *supra* note 3, at 1C; Dave Goldberg, *NFL Forms Plan to Help Ailing Ex-Players*, FT. WAYNE J. GAZETTE, Mar. 25, 2007, at 7B.