TAKING ONE FOR THE TEAM: THE ROLE OF ASSUMPTION OF THE RISK IN SPORTS TORTS CASES

I. INTRODUCTION

"One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball."[1] These are the oft-quoted words of Justice Cardozo, which have laid the foundation for the use of the defense of assumption of risk by defendants in the expanding area of sports injury cases. The general theory behind the defense is that the plaintiff, by proceeding to participate in an inherently dangerous activity, either relieves the defendant of a duty of care that would have otherwise been owed to the plaintiff or was partly responsible for his or her injuries.[2] This is particularly appealing to defendants in sports injury cases because most sports in which serious injury may occur involve open and obvious risks.[3] Although some states have merged the doctrine of assumption of risk with comparative fault principles, the defense can be a powerful tool in those jurisdictions that still recognize the defense.[4]

Notwithstanding the popularity of comparative fault statutes, the defense of assumption of risk has once again gained acceptance in the context of sports injuries mainly due to the increase in actions brought by amateur athletes against coaches, school boards, athletic associations and others.[5] However, while instances of lawsuits of the latter type continue to rise, examples of similar suits brought by

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1. Murphy v. Steeplechase Amusement Co., Inc., 250 N.Y. 479, 482 (1929).

2. *See generally* Rita Hanscom, *Assumption of Risk Defense in Sports or Recreation Injury Cases*, 30 AM. JUR. PROOF OF FACTS 161 (3d ed. 2002).

3. *Id.*; *see also* Alexander J. Drago, *Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 583 (2002).

4. Drago, *supra* note 3, at 583.

5. *See* J. Barton Goplerud, Note, *Liability of Schools and Coaches: The Current Status of Sovereign Immunity and Assumption of the Risk*, 39 DRAKE L. REV. 759, 759-760 (1990).

professional athletes are few and far between. This may be due to the bar on negligence actions by operation of state workers' compensation statutes, preemption of state tort law claims by federal labor law, or simply because a standard player contract provides the exclusive remedy in case of injury. This comment focuses on the defenses available to defendants in actions brought by both amateur and professional athletes, and the corresponding effects such defenses have on the potential for plaintiffs' recoveries. To the extent that these defenses and remedies are different in the context of amateur and professional sports, a discussion follows as to whether these differences are legally and socially justified.

II. THREE CATEGORIES OF ASSUMPTION OF RISK

A. Generally

The defense of assumption of the risk has its roots in the common law and has traditionally acted as a complete bar to a plaintiff's recovery due to a defendant's negligent act.[6] This defense is particularly appealing in the context of sports because of the inherent risks of injury in such activities.[7] Therefore, a professional or amateur participant who willingly participates in a sporting activity is generally said to consent to unforeseen and unintentional injuries.[8] Applying this defense to the area of sports-related injuries promotes vigorous participation in athletic activities, which numerous courts have recognized as an important societal interest.[9] In addition, the utilization of the doctrine avoids a proverbial flood of litigation in a society where participation in sports is rampant.[10]

Traditionally, two elements have been required in order for the defense of assumption of risk to apply.[11] First, the defendant must not only prove that the plaintiff had knowledge of the danger involved, but that he or she also had an appreciation for the

6. *Id.* at 769.
7. Hanscom, *supra* note 2, at §1.
8. Drago, *supra* note 3, at 590.
9. *See* Crawn v. Campo, 136 N.J. 494, 503 (1994).
10. *Id.* at 501.
11. Hanscom, *supra* note 2, at §1.

magnitude of the danger.[12] Second, the defendant must prove that the plaintiff voluntarily proceeded in the activity, despite the presence of this known risk.[13]

In order to prove the first element of the defense, dealing with knowledge and appreciation of the risk, a subjective standard is used.[14] This approach differs from the objective standard employed in determining contributory negligence.[15] If the plaintiff did not know or could not appreciate the risk involved in the activity because or his or her age, intelligence, or experience, knowledge will not be imputed upon him or her and assumption of the risk will not apply.[16] However, such a plaintiff may still be found contributorily negligent.[17] Proving the second factor is seldom an issue in sports-related injury cases because participation is usually voluntary.[18]

B. Express Assumption of Risk

The doctrine of express assumption of risk disallows a plaintiff to recover for a defendant's negligent or reckless conduct in the event that the parties have agreed in advance to absolve the defendant of a duty of care with regards to the plaintiff.[19] The agreement usually takes the form of a release signed by athlete provided by a sports organization, team or school, but an expressly stated desire by the athlete to assume the risk can also trigger the defense.[20] Such an express waiver acts as a complete bar to recovery by the plaintiff as long as the language of the waiver is sufficient and, therefore, valid as per the principles of contract law.[21] Thus, a bargained-for exchange for valuable consideration in the form of a valid waiver will relieve a coach, school, or

12. *Id.*
13. *Id.*
14. Goplerud, *supra* note 5, at 769.
15. *Id.*
16. *Id.* at 769-770.
17. *Id.* at 770.
18. Hanscom, *supra* note 2, at § 1. *But see infra* notes 134, 139-41, 203 and accompanying text.
19. Drago, *supra* note 3, at 585. The Restatement (Second) of Torts §496B provides the following definition of express assumption of risk: "A plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant's negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy."
20. Drago, *supra* note 3, at 586.
21. Hanscom, *supra* note 2, at §3.

organization of any duty of care otherwise owed to a plaintiff-athlete.[22]

However, courts are often wary of enforcing exculpatory agreements which allow a party to escape the consequences of their own negligence, and therefore, these agreements are scrutinized closely.[23] It follows that a defendant cannot utilize the complete bar an express release or waiver provides unless the parties' intent to limit the defendant's liability is expressed in unequivocal, clear, and unambiguous language in the agreement.[24] Moreover, the term "negligence" or similar language must be included in the agreement.[25] Furthermore, a release or waiver complying with the above standards will still not act to exculpate a defendant who demonstrates reckless, grossly negligent, or intentionally tortious conduct.[26]

Finally, a waiver or release may be unenforceable if it is found to be against public policy.[27] There are a number of factors courts examine in deciding whether a waiver is void because of public policy, but in the context of sports-negligence cases, three are particularly relevant.[28] First, the waiver must concern an activity typically suitable for public regulation.[29] Second, the party wishing to be exculpated must perform or provide a service of noteworthy importance to the public, which may be a matter of practical necessity for certain members of the public.[30] Third, the party seeking to avoid liability must be in a position of superior bargaining power with relation to members of the public seeking the services that party provides.[31] Therefore, considering these factors, public policy alone will not often be a sufficient factor to void an otherwise valid exculpating agreement.[32] However, in the

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22. Goplerud, *supra* note 5, at 771.
23. Drago, *supra* note 3, at 586.
24. *Id.*
25. *Id.*
26. *Id.* In addition, courts may declare an agreement void if it is unconscionable due to a disparity in bargaining power between the parties. *Id.*, at 587-88.
27. Goplerud, *supra* note 5, at 772 (citing Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92 (1963)).
28. Goplerud, *supra* note 5, at 772.
29. *Id.*
30. *Id.*
31. *Id.*
32. Hanscom, *supra* note 2, at §3; *see also* Madison v. Super. Ct. of the County of Los Angeles, 203 Cal. App. 3d 589, 600 (Ct. App. 1988) (holding that an agreement exculpating a scuba diving school from negligence claims was not void against public policy).

context of high school athletics there is a much better chance that a court will find the above factors present, and hence find the agreement void, when a student and/or his parents sign an agreement limiting the liability of the school.[33]

C. Implied Assumption of Risk

The recent introduction of comparative fault principles in jurisdictions across the United States has prompted courts to reexamine the interplay between the latter and implied assumption of risk principles.[34] Specifically, the issue has centered on whether or not the doctrine of implied primary and secondary assumption of risk should be completely or partially merged with comparative fault analysis. In most jurisdictions that continue to recognize implied primary and secondary assumption of risk as separate from comparative fault schemes, for example California,[35] implied primary assumption of risk continues to act as a complete bar for a plaintiff's recovery by negating any duty the defendant owes to the plaintiff, while secondary assumption of risk is analyzed under comparative fault principles. Other states have eliminated implied assumption of risk altogether, discarding the complete bar and instead favoring comparative fault analysis in all cases.[36]

In addition, states that do recognize the distinction between implied primary assumption of risk and comparative negligence do not all agree on the rationale behind the former. For example, in *Turcotte v. Fell* the Court of Appeals of New York framed primary assumption of risk as essentially involving the advance consent of a plaintiff to relieve the defendant of a duty to him, taking his chances of injury arising from a known risk of the defendant's actions or inactions.[37] The result is that no duty of care is owed to the plaintiff by the defendant.[38] However, in *Knight v. Jewett* the California Supreme Court explicitly rejected the "implied consent" rationale.[39] The inquiry in *Knight* did not turn on the reasonableness of the plaintiff's conduct in encountering the risk, the plaintiff's subjective knowledge of the defendant's risky

33. Wagenblast v. Odessa School Dist., 110 Wash. 2d 845 (1988).
34. *See, e.g.*, Knight v. Jewett, 3 Cal. 4th 296 (1992).
35. *Id.*
36. *See* Mizushima v. Sunset Ranch, Inc., 737 P.2d 1158 (Nev. 1987).
37. Turcotte v. Fell, 68 N.Y.2d 432, 438 (Ct. App. 1986).
38. *Id.*
39. *Knight*, 3 Cal. 4th at 315.

behavior, or whether the plaintiff impliedly consented to such behavior.[40] The court instead looked first at whether the nature of the activity in question was inherently dangerous, and then examined the relationship of the parties to that activity in order to determine whether the defendant owed the plaintiff a duty of care.[41] Therefore, under *Knight*, the question of whether a duty is owed to a plaintiff in a sports-injury case will usually turn on the nature of the sport and what the inherent risks of that sport are.[42] In addition, the *Knight* court reiterated that the determination of what the inherent risks of a particular sport are is a question of law for the court to decide, rather than the jury.[43]

Regardless of the rationale behind the existence of primary assumption of risk, the general consensus is that primary assumption of risk acts as a defense against a plaintiff's negligence claim. However, because it attacks a plaintiff's prima facie case of negligence by negating the duty a defendant owes to the plaintiff, it is not a true defense in the legal sense.[44] Furthermore, the parties must be co-participants in the activity for primary assumption of risk to apply.[45] In a jurisdiction that follows the duty approach outlined in *Knight*, the success of a defendant's primary assumption of risk defense will first and foremost depend on the nature of the activity or sport.[46] A number of courts have considered this question and have held certain risks present in a variety of sports and activities to be inherent.[47] Naturally, for the plaintiff's suit to be barred, his or her injury must have been caused by this inherent risk.[48]

In addition, in some circumstances, the carelessness of others may be treated as an inherent risk of an activity or sport.[49]

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40. *Id.*

41. *Id.* at 316-18.

42. *Id.* at 315.

43. *Knight*, 3 Cal. 4th at 313. *But see* Staten v. Superior Court, 53 Cal. Rptr. 2d 657, 661 (Cal. Ct. App. 1996) (questioning the holding that the determination that the inherent risks of a sport is a legal question precluding expert testimony on the nature of the sport).

44. Hanscom, *supra* note 2, at § 5.

45. *Id.*

46. *See Knight*, 3 Cal. 4th at 315.

47. Hanscom, *supra* note 2, at § 5; *see also* Ordway v. Superior Court of Orange County, 198 Cal. App. 3d 98 (Cal. Ct. App. 1988) (holding that aggressive riding in horse racing was an inherent risk of the sport); Cohen v. Massapequa Union Free Sch. Dist., 728 N.Y.S.2d 94 (App. Div. 2001) (holding risk of injury while kicking a ball to inherent in game of soccer).

48. Hanscom, *supra* note 2, at § 5.

49. *Knight*, 3 Cal. 4th at 316, citing Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 734-5

Moreover, although a co-participant's conduct may be in contravention of the rules of the game, if this type of infraction is "within the ordinary expectations of the participants," primary assumption of risk will still bar the plaintiff's suit from proceeding.[50] However, it is well established in several jurisdictions that although a plaintiff may assume the risk of a co-participant's negligent or careless conduct, the latter's reckless or intentional conduct are not within the scope of inherent risks assumed by the plaintiff.[51]

In contrast to implied primary assumption of risk, implied secondary assumption of risk is more of a true defense.[52] Once a plaintiff has established a cause of action under a theory of negligence, secondary assumption of risk allows a defendant to claim that the plaintiff should be held partly responsible for his injury because he or she voluntarily proceeded in the face of a known risk.[53] Therefore, secondary assumption of risk applies when a defendant does owe the plaintiff a duty of care, but, operating in an identical fashion to comparative fault analysis, the defendant's liability is offset by the culpability of the plaintiff. In this manner, secondary assumption of risk does not act as a complete bar to recovery like primary assumption of risk.[54] As in primary assumption of risk analysis, a defendant owes no duty to a plaintiff to eliminate risks inherent in the sport.[55] However, a defendant does have a duty not to increase the risks to a plaintiff beyond those inherent in the activity.[56] In such an instance,

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(Ct. App. 1955) (holding that the risk of a baseball player being hit by a carelessly thrown ball is inherent in the sport); Thomas v. Barlow, 5 N.J. Misc. 764, 138 A. 208 (1927) (holding a carelessly thrown elbow in the context of a basketball game to be an inherent risk of the sport).

50. *Ordway*, 198 Cal. App. 3d at 111. The court gave examples of conduct within the ordinary expectations of the participants, including "blocking in football, checking in hockey, knock-out punches in boxing, and aggressive riding in horse racing." *Id.*

51. *See* Hackbart v. Cincinnati Bengals, Inc., 601 F.2d 516, 524 (10th Cir. 1979) (holding recklessness to be the applicable standard to overcome primary assumption of risk); *Knight*, 3 Cal.4th at 320 (approving the reckless/intentional standard in California); *Crawn*, 136 N.J. at 508 (adopting the reckless standard in New Jersey).

52. Hanscom, *supra* note 2, at § 7.

53. *Id.*

54. *Id.*

55. *Staten*, 53 Cal. Rptr. 2d at 659.

56. *Knight*, 3 Cal. 4th at 316; *See, e.g.*, Bush v. Parents Without Partners, 17 Cal. App. 4th 322, 329 (Ct. App. 1993) (holding summary judgment based on primary assumption of risk was inappropriate because, even if falling was an inherent risk in dancing, defendant owed plaintiff a duty not to increase the risk of slipping and falling).

assuming defendant has a duty not to increase the risk and the plaintiff voluntarily proceeds despite knowing of the increased risk, secondary assumption of risk will apply, and comparative fault principles will apportion fault accordingly.

Whereas primary assumption of risk generally applies only to co-participants, secondary assumption of risk may apply to coaches, instructors, schools, teams and organizations.[57] Generally, the latter owe a duty of care to students, participants or athletes due to a special relationship: students and athletes rely on the expertise of the coach and organization and are required to follow their directions.[58] Therefore, due to the duty of care school coaches and officials owe students, secondary assumption of risk will apply as a defense where primary assumption of risk is ordinarily not applicable.[59]

III. IMPLIED ASSUMPTION OF RISK IN THE CONTEXT OF AMATEUR SPORTS

A. Theories of Recovery

1. Generally

In the context of amateur sports, lawsuits between co-participants have been greatly limited due to the doctrine of primary assumption of risk[60] and the growing acceptance of a standard of care not to engage in reckless or intentional conduct, as opposed to a negligence standard.[61] However, in recent years the number of lawsuits against coaches, principles, school boards, school districts, and athletic associations arising from injury in the context of amateur sports competition has increased.[62] This is due to the fact that coaches, school boards, and other organizers of interscholastic sporting events owe student athletes a duty of care, which, in turn, gives rise to a number of theories of recovery for

57. Hanscom, *supra* note 2, at § 7; *see also* Goplerud, *supra* note 5, at 760.

58. Hanscom, *supra* note 2, at § 7. The rationale limiting the duty between co-participants, i.e. vigorous competition in athletics and threat of excessive litigation resulting in a chill in participation, does not exist in this context due to the special relationship that exists between an athlete and coach. *Id.*

59. *See infra* notes 135-138 and accompanying text.

60. *See Knight*, 3 Cal. 4th at 316.

61. *See Hackbart*, 601 F.2d at 524.

62. Goplerud, *supra* note 5, at 759-60.

injured student athletes.[63] The common thread in all these theories is that parties responsible for the administration of athletic programs have a duty to use reasonable care to protect students from anticipated and preventable injuries.[64] Furthermore, although coaches, schools, and athletic associations owe student athletes no duty to protect them from risks that are inherent in the sport, they do owe them a duty not to increase these risks.[65]

2. Liability of High Schools and Coaches

Generally, the ability of a high school student athlete to recover for an injury incurred during a school athletic event depends on whether the school or coach fulfilled their duty of care owed to the student.[66] "Although a high school is not an insurer of a student athlete's safety, reasonable care must be used to protect an athlete's safety and health."[67] Specifically, the duty owed by a high school to its students "takes the form of giving adequate instruction in the activity, supplying proper equipment, making a reasonable selection or matching of participants, providing nonnegligent supervision of the particular contest, and taking proper post-injury procedures to protect against aggravation of the injury."[68] Furthermore, a school may be liable for the negligence of a coach or athletic trainer under principles of vicarious liability.[69]

A high school coach's primary duty is to supervise and train the students under his or her care or supervision.[70] The duty a coach owes to his or her players is the same level of care which a coach or instructor of ordinary prudence, with the same duties and responsibilities, would exhibit under identical or similar circumstances.[71] Therefore, a cause of action may arise if a coach negligently supervises or instructs a student under his or her care or if a school board negligently supervises activities under school

63. *Id.*

64. *See* Samuel Langerman & Noel Fidel, *Sports Injury – Negligence*, 15 AM. JUR. *PROOF OF FACTS* 2D 1, 8 (2002).

65. *See Knight*, 3 Cal. 4th at 316.

66. Goplerud, *supra* note 5, at 760.

67. Matthew J. Mitten, *Emerging Legal Issues in Sports Medicine: A Synthesis, Summary, and Analysis*, 76 ST. JOHN'S L. REV. 5, 48-49 (2002).

68. Leahy v. School Bd, 450 So. 2d 883, 885 (Fla. Dist. Ct. App. 1984) (quoting Annotation, 35 A.L.R. 3d 725, 734 (1971)).

69. Mitten, *supra* note 68, at 49.

70. Goplerud, *supra* note 5, at 760-61.

71. *Id.* at 761.

employees' control.[72] For example, in *Leahy v. School Board of Hernando County*, the court recognized a cause of action for negligent supervision against the school board when a coach allowed students to participate in a drill without helmets and without proper instruction.[73]

Furthermore, high school coaches and other school personnel have a duty to supply reasonable medical care to a student athlete in a timely manner in the event of an injury.[74] Although coaches are not charged with having the same knowledge and responsibility as health care professionals, they do have a duty to recognize a medical emergency and act with reasonable care under the circumstances.[75] This duty may be breached either by negligently moving a player who has been injured, or by delaying medical treatment.[76] In *Mogabgab v. Orleans Parish School Board*, the parents of a sixteen year old boy who died of heat stroke alleged that the defendants, including the school board and two coaches, were negligent in "failing to perform their duty of providing all necessary and reasonable safeguards to prevent accidents, injuries and sickness of the football players. . .and, also, in failing to provide for prompt treatment when injuries and sickness occur."[77] The plaintiffs' son displayed fatigue and collapsed after participating in "wind sprints," and subsequently vomited before being assisted to a bus that took him to the school.[78] The court found that the coaches were negligent in applying improper first-aid techniques and actively denying the boy access to treatment by a physician for nearly two hours.[79]

Likewise, if a coach knows or should have reason to know that a player is injured and unable to compete, but, nonetheless, requires the player to compete, a cause of action arises.[80] In *Morris v. Union High School District*, the plaintiff's son was coerced by the coach of

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72. *Id.*
73. *Leahy*, 450 So. 2d at 885.
74. Goplerud, *supra* note 5, at 764.
75. Mitten, *supra* note 68, at 52.
76. Goplerud, *supra* note 5, at 764.
77. Mogabgab v. Orleans Parish Sch. Bd., 239 So. 2d 456, 457 (La. Ct. App. 1970).
78. *Id.* at 458.
79. *Id.* at 460.
80. Goplerud, *supra* note 5, at 765; *see also* Mitten, *supra* note 68, at 52; *cf. infra* notes 135-138 and accompanying text (recognizing a cause of action if a coach allows a player who is fatigued beyond the point of safety to continue playing, but finding that the coach did not force the player to compete in the game, and therefore the player absolved the coach of negligence by assuming the risk).

the high school football team to practice with the team, and, as a result, the boy sustained back and spinal injuries.[81] Subsequently, the same coach, having full knowledge of the boy's prior injuries, coerced the boy to play in a game two weeks later.[82] Consequently, the boy sustained internal injuries and aggravated his previous injuries, ultimately necessitating several operations.[83] The Washington Supreme Court held that, "if the coach knew that a student in the school was physically unable to play football, or in the exercise of reasonable care should have known it, but nevertheless permitted, persuaded and coerced such student to play, with the result that he sustained injuries, the district would be liable."[84]

Another theory of recovery for student athletes against high schools is the negligent hiring of an incompetent coach.[85] In *Fallon v. Indian Trail School*, the Illinois Court of Appeals held that such an action will succeed only when the unfitness of a particular applicant for the coaching job poses harm to a third party, and the school knew or should have known of the existence of this danger when the person was hired.[86] Furthermore, mere allegations of failure to investigate a coach's background and credentials are insufficient to support an action for negligent hiring of an incompetent coach.[87]

Finally, courts have recognized a cause of action by high school athletes for negligent supply of defective athletic equipment, which alleges that the school breached its affirmative duty to use reasonable care in providing safe equipment to athletes, and that the coach or school knew or had reason to know of the defects in the equipment.[88] Although a coach may not have caused the defect in the athletic equipment, courts have held them to a higher standard of care due to their experience and knowledge of the sport.[89]

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81. Morris v. Union High Sch. Dist., 160 Wash. 121, 122 (1931).
82. *Id.*
83. *Id.*
84. *Id.* at 124.
85. Goplerud, *supra* note 5, at 762 (citing Garcia v. Duffy, 492 So. 2d 435 (Fla. 1986); Malorney v. B & L Motor Freight, Inc., 146 Ill. App. 3d 265 (App. Ct. 1986); Evans v. Morsell, 284 Md. 160, (Ct. App. 1978)).
86. Fallon v. Indian Trail School, 500 N.E.2d 101, 103-04 (Ill. App. Ct. 1986).
87. *Id.*
88. Goplerud, *supra* note 5, at 762.
89. *Id.* at 763; *see* Everett v. Bucky Warren, Inc., 376 Mass. 280 (1978); Gerrity v. Beatty,

3. Liability of Universities

As in negligence suits by high school athletes against schools and their employees, in order for a college athlete to recover against a university, the university or college must owe the student athlete a duty of care. In *Kleinknecht v. Gettysburg College*, the Third Circuit reversed the District Court for the Middle District of Pennsylvania and held that the college owed a duty of care to an intercollegiate athlete to provide "prompt emergency medical service while he was engaged in school-sponsored athletic activity."[90] The circumstances giving rise to the litigation involved the sudden death of a sophomore lacrosse recruit during a fall practice.[91] While participating in a "six on six" drill, the student collapsed and died of cardiac arrest, after allegedly receiving negligent emergency medical treatment.[92]

Ultimately, the court held that the college had a duty to have in place reasonable measures to provide prompt medical treatment in case of a life-threatening injury to any of its recruited intercollegiate athletes.[93] The court based its conclusion on the existence of a special relationship between the college and one of its athletic recruits.[94] In doing so, the court stressed the fact that the student was not acting in his private capacity as a student at the college, but instead was engaged in a scheduled team practice for an "intercollegiate team sponsored by the College under the supervision of College employees."[95] In addition, the court gave weight to the fact that the college actively recruited the student for its own benefit, with hopes that the student's skill at lacrosse would favorably impact the program and lead to improved recruiting.[96]

As a further justification for its holding, the court found that it was clearly foreseeable that a student participating in a sport such as lacrosse would suffer a serious injury necessitating immediate medical attention.[97] In response to the college's contention that recognizing such a duty would lead to a "slippery slope" requiring

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373 N.E.2d 1323 (Ill. 1978).

90. Kleinknecht v. Gettysburg College, 989 F.2d 1360, 1375 (3d Cir. 1993).
91. *Id.* at 1363.
92. *Id.*
93. *Id.* at 1371.
94. *Kleinknecht*, 989 F.2d at 1367.
95. *Id.*
96. *Id.* at 1368.
97. *Id.* at 1371.

schools to provide trainers certified in CPR "at each and every athletic practice whether in-season or off-season, formal or informal, strenuous or light" and for "intramural, club sports and gym class," the court dismissed such speculation as unwarranted and explicitly stated that their holding is narrow and specific to the facts of the case.[98] Moreover, the question of whether the college breached this duty was a question of fact to be determined by the jury.[99]

Consistent with the holding in *Kleinknecht*, the court in *Stineman v. Fontbonne College* found that the college owed a duty to provide medical treatment to a student athlete who had been injured during a softball practice.[100] The plaintiff in *Stineman* was a freshman member of the intercollegiate softball team at Fontbonne College and had been deaf since infancy.[101] After being struck in the eye with a softball thrown by another girl, the coaches present at the practice did not send the plaintiff to receive medical treatment, but instead told her to go to her dormitory room to rest.[102] Subsequently, the plaintiff's serious eye injury was not detected and treated until secondary hemorrhaging had occurred, ultimately costing the plaintiff use of her eye.[103]

The *Stineman* court looked to three factors to establish whether or not the college and its employees owed the plaintiff a duty to render medical assistance: first, the court looked to whether or not the defendant could appreciate the severity of the student athlete's injury; the second factor was the defendant's ability to provide adequate and effective medical treatment; and finally, the third factor inquired whether the ultimate harm caused by the injury would have been avoided if such medical attention was, in fact, provided.[104] Finding that all three of these factors were satisfied,

98. *Kleinknecht*, 989 F.2d at 1370. *But see* Mitten, *supra* note 68, at 62 (asserting that the holding in *Kleinknecht* has potentially broad implications with regards to the scope of a college's duty to their intercollegiate athletes due to the influence the holding may have upon the content of the NCAA guidelines published in their sports medicine handbook).

99. *Kleinknecht*, 989 F.2d at 1370.

100. Stineman v. Fontbonne College, 664 F.2d 1082, 1086 (8th Cir. 1981).

101. *Id.* at 1085. The opinion does not make explicit whether or not the plaintiff was recruited by the college or received an athletic scholarship, as the athlete in *Kleinknecht* had been. *Id.* The *Kleinknecht* court appeared to restrict their holding to such instances. *See Kleinknecht*, 989 F.2d at 1370.

102. *Stineman*, 664 F.2d at 1085.

103. *Id.*

104. *Id.* at 1086. The court used the factors set forth in Kersey v. Harbin, 531 S.W.2d 76 (Mo. Ct. App. 1975), but distinguished the two cases on the basis of differing theories of

the *Stineman* court held that the defendant college had a duty to provide the plaintiff with medical assistance, and that there was enough evidence to submit the question of whether the defendant breached this duty to a jury.[105]

In addition to the duty to provide medical assistance, courts have also found that colleges have a duty not to allow or pressure an injured athlete to compete or return to a game.[106] For instance, in *Lamorie v. Warner Pacific College*, the plaintiff was a basketball scholarship athlete who had injured his nose and eye while playing football recreationally, off campus, and ultimately required surgery.[107] The plaintiff informed both his basketball coach and team trainer that his doctor had instructed him to refrain from participating in athletic exercise.[108] However, plaintiff's coach subsequently asked him to participate in a basketball scrimmage which plaintiff agreed to because of fear of losing his scholarship, even though he did not feel healthy enough to compete.[109] During the scrimmage, the plaintiff re-injured his nose and sustained further injury to his eye.[110] The Oregon Court of Appeals held that a reasonable jury could find that the plaintiff's re-injury of his nose and eye was a foreseeable consequence of the coach's instruction to the scholarship athlete to participate in the scrimmage, for which the college could be held accountable.[111]

However, in *Orr v. Bringham Young University*, the Tenth Circuit, applying Utah law, affirmed the U.S. District Court for the District of Utah in granting summary judgment against a scholarship athlete claiming negligence on the part of the university.[112] The

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liability. *Id.*, at n.3.

105. *Stineman*, 664 F.2d at 1086.

106. Mitten, *supra* note 68, at 63; *cf. infra* notes 134, 139-41, 203, and accompanying text.

107. Lamorie v. Warner Pac. Coll., 850 P.2d 401 (Or. Ct. App. 1993); *see also* Searles v. Trustees of St. Joseph's College, 695 A.2d 1206 (Me. 1997) (holding that a college, by way of its coaches and trainers, has a legal duty to use reasonable care in caring for the safety and health of student athletes). The court in *Searles* found that a coach may breach this duty if he allows a scholarship athlete to play basketball, against the recommendation of the trainer, when he knows or should have known that the athlete should not be playing in such a condition. *Id.* at 1209. Equally important, the court stated that the school trainer could also be liable if he failed to inform the coach and player of the seriousness of the injury and the consequences of continuing to play with such a condition. *Id.* at 1211.

108. *Lamorie*, 850 P.2d at 401.

109. *Id.* at 402.

110. *Id.*

111. *Id.*

112. Orr v. Bringham Young Univ., 108 F.3d 1388 (10th Cir. 1997) (unpublished opinion).

plaintiff in *Orr* was a student who played for the university football squad for two years as a scholarship athlete.[113] After playing with minor back pain for a number of games, the athlete suffered a more serious injury to his back during practice that required surgery.[114] Subsequently, the athlete sued the university and alleged that the coaches placed undue pressure on him to perform despite his injury, which resulted in an aggravation of the injury.[115] In refusing to follow *Kleinknecht*, the court held that there was "no compelling reasons to impose upon colleges and universities additional duties beyond those owed to other students. . ."[116] The court reasoned that any distinctions between student athletes and other students were more contractual in nature, as opposed to custodial distinctions which would mandate "special duties of care and protection beyond those traditionally recognized under a simple negligence theory of liability."[117] As a result, the plaintiff in *Orr* was only allowed to proceed against the defendant upon a theory of negligence based on a breach of medical standards of care by the defendant's sports medicine personnel.[118]

The approach of *Kleinknecht* recognizing a special relationship giving rise to a duty would appear to be sound public policy aimed at making colleges and universities a safer place for kids to compete, or at least as safe as a high school environment. However, a problem with the court's analysis in *Kleinknecht* is that it seems to restrict its holding to scholarship athletes.[119] If part of the rationale for recognizing a special relationship between a college and a student athlete is that the latter is not acting in his or her private capacity as a student, but is instead engaged in a team practice or game sponsored and supervised by the college, it is not readily apparent why that logic should not apply to both walk-on athletes who make the team and recruits alike.[120] Although the *Orr* approach may not lead to a morally comfortable result for some, it attempts to address these problems by declining to treat college

113. Orr v. Bringham Young Univ., 960 F. Supp. 1522, 1523 (Utah 1994).
114. *Id.* at 1524.
115. *Id.* at 1525-26.
116. *Id.* at 1528.
117. *Orr*, 960 F. Supp. at 1528.
118. *Id.* at 1531.
119. *See supra* note 97.
120. *See supra* notes 96, 102. With a little imagination, the rationale in *Kleinknecht* could be extended, for instance, to academic scholarship students who are injured at a school sponsored academic decathlon.

students differently for purposes of tort liability solely because of their involvement, or lack of, in the intercollegiate sports program.[121] As a final note, whether or not a court follows the approach of *Kleinknecht* or *Orr* in defining the duty a college owes to a student athlete has substantial implications on the application of assumption of risk, as will be seen in part B of this section.

B. Application of Secondary Assumption of Risk

Part A of this section established that, for the most part, high schools and universities owe student athletes a duty of care because of the existence of a special relationship.[122] Also, as was explained in Section II, part C, *supra*, the existence of a duty is the *sine qua non* of secondary assumption of risk: once a plaintiff has established a cause of action under a theory of negligence (which fundamentally requires the existence of a duty), secondary assumption of risk allows a defendant to claim that the plaintiff should be held partly responsible for his injury because he or she voluntarily proceeded in the face of a known risk.[123] Therefore, if a court such as the one in *Orr* finds that the defendant did not owe the plaintiff a duty due to the existence of a special relationship, presumably primary assumption of risk would apply as opposed to secondary assumption of risk, and plaintiff's suit would be barred completely.[124] However, regardless of whether or not a court follows the duty approach of *Kleinknecht* or *Orr*, it is generally accepted that while high schools and universities owe no duty to a student athlete to eliminate risks inherent in a particular sport, they do have a duty not to increase the risks to a plaintiff beyond those inherent in the activity.[125] Moreover, once the plaintiff voluntarily proceeds despite knowing of an increased risk, secondary assumption of risk will apply as a defense for the school or university, and comparative fault principles will apportion fault accordingly.

For example, in *Benitez v. New York City Board Of Education*, the

121. *See supra* note 117.

122. *See supra* Part III. A. Immunity issues that arise in this area are beyond the scope of this comment. *See generally*, Mitten, *supra* note 68; Goplerud, *supra* note 5 for treatment of these issues.

123. Hanscom, *supra* note 2, at § 7.

124. This is true only if the defendant did not increase the risks inherent in the sport. *See infra* notes 145-153 and accompanying text.

125. *Knight*, 3 Cal.4th at 316.

Court of Appeals of New York found that a high school football player's personal injury action against the school board and the city public school athletic league, which alleged negligence on the part of the school principal and coach for allowing the student to participate in a fatigued state against an over-matched opponent, was barred by the doctrine of assumption of risk.[126] The plaintiff in *Benitez* was a 19-year-old star for his high school football team, which played in Division A of the public school league.[127] By all accounts, the plaintiff was as gifted an athlete as they come, and he had already received numerous scholarship offers to play football from several colleges.[128] However, during a game in which his team was concededly "overmatched," the plaintiff suffered a broken neck while executing a block on an opposing player just before halftime.[129] Subsequently, the plaintiff sued the school board, among others, alleging negligence "in placing and retaining GW in Division A; allowing GW to play the JFK game in the face of an obvious mismatch; and allowing him to play virtually the entire first half of the game without adequate rest."[130]

After a jury verdict for the plaintiff and appeal by the defendants, the Supreme Court, Appellate Division found that even if a particular activity carries with it certain inherent dangers, if the defendant acted in a way that substantially increased or enhanced the likelihood of harm to the plaintiff, the plaintiff would not be barred by assumption of risk.[131] Affirming the trial court, the court found that the defendants did, in fact, unreasonably increase or enhance the likelihood of harm to the plaintiff by "playing him in a game between mismatched teams and by playing him for virtually the entire game, while he was tired, because there was no adequate substitute for him."[132] Moreover, the court held that the fact that the plaintiff voluntarily chose to compete and did not ask to be taken out of the game was not "legally fatal."[133]

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126. Benitez v. New York City Bd. of Educ., 541 N.E.2d 29 (N.Y. 1989).
127. *Id.* at 31.
128. *Id.*
129. *Id.*
130. *Benitez*, 541 N.E.2d at 31.
131. Benitez v. New York City Bd. of Educ., 141 A.D.2d 457, 459 (N.Y. App. Div. 1988).
132. *Id.*
133. *Id.* As support for this aspect of their holding, the court relied on the doctrine of indirect or inherent compulsion, stating that a student in the plaintiff's position would understandably be "reluctant to refuse to participate for fear of the negative impact such refusal might have on his or her grade or standing." *Id.* Additionally, the court implied

However, the Court of Appeals disagreed with both aspects of the holding of the Appellate Division, finding instead that there was insufficient evidence that the defendants breached a duty of care owed to the plaintiff that proximately caused his injuries.[134] The court first rejected the lower court's finding that the school owed the plaintiff a heightened duty of care, holding that "a board of education, its employees, agents and organized athletic councils must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks."[135] The court then analyzed how the doctrine of assumption of risk should be applied in the context of an extracurricular sport that a student voluntarily takes part in, and reiterated that such a student athlete assumes only those risks "which their roles expose them but not risks which are 'unreasonably increased or concealed.'"[136] Applying this rationale, the court found that the plaintiff failed to produce sufficient evidence that any of the defendants increased or enhanced the risk beyond which plaintiff would have assumed anyhow.[137]

Finally, the court rejected plaintiff's theory of inherent compulsion that claimed that the plaintiff did not act voluntarily because he was compelled to play by his superior.[138] The court reasoned that two factors are required for application of the theory of inherent compulsion: 1) a command by a superior to act, and 2) an economic or other equally compelling incentive to comply with that command.[139] Although the court did not expressly state that this theory is inapplicable to the area of sports negligence cases, the

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that this theory would be particularly applicable to this plaintiff due to the fact that he was one of the best players to ever come out of his high school and that he had a "drawer full" of scholarship offers from colleges. *Id.*

134. *Benitez*, 541 N.E.2d at 30.

135. *Id.* at 33; *cf. Orr*, 960 F. Supp. at 1528 (declining to find that a university scholarship athlete was entitled to a higher degree of care by the university due to the existence of a special relationship). *But see Kleinknecht*, 989 F.2d at 1367 (justifying a heightened duty of care owed to a scholarship athlete by a university due to the existence of a special relationship).

136. *Benitez*, 541 N.E.2d at 33. The court also distinguished the risks a professional assumes from the risks an amateur athlete assumes: "Manifestly, a high school athlete, even an outstanding one, does not assume all the risks of a professional sportsperson, but neither does a 19-year-old senior star football player and college scholarship prospect fall within the extra protected class of those warranting strict parental duties of supervision." *Id.*

137. *Benitez*, 541 N.E.2d at 34.

138. *Id.* at 33.

139. *Id.*

court found that in this instance the plaintiff "failed to present any evidence that he had no choice but to follow the coach's direction to play despite his concern over enhanced risk factors known by or communicated to the coach."[140]

In *Baker v. Briarcliff School District*, the court followed the approach to assumption of the risk analysis outlined by the Court of Appeals in *Benitez*.[141] The plaintiff in *Baker* was a high school student who was injured during her varsity field hockey practice when she was struck in the mouth by a teammate's stick.[142] Subsequently, she commenced a negligence action against the coach and school which contained three allegations: failing to correctly supervise the team, allowing the team to participate in practice without the proper safety gear, and failing to inform the team of the dangers of not wearing their mouth protectors.[143] The defendants contended that its defense of assumption of risk was established due to the plaintiff's testimony that although she had her mouthpiece with her that day, she failed to use it during the practice.[144] However, following the standard articulated in *Benitez*, the court found that the defendants had a duty to exercise reasonable care to protect the plaintiff "from any unreasonably increased risks during the practice session."[145] Furthermore, the court found that the plaintiff had produced sufficient evidence at trial to raise questions of fact regarding whether the coach had properly warned the players about the risks of not wearing mouth guards, whether the coach exercised reasonable care in supervising the practice, and whether the coach's conduct exposed the plaintiff to an increased risk of injury.[146]

However, in *Fortier v. Los Rios Community College District*, a California appellate court took a fundamentally different approach

140. *Id.* at 34. The language of the Court of Appeals implies that, were a plaintiff to rely on a theory of inherent compulsion in this context, he or she would seem to face a rather demanding evidentiary burden of showing that he or she had "no choice" but to follow the coach's instructions and that the enhanced risk was known to the coach. *Id.*

141. 205 A.D.2d 652 (N.Y. App. Div. 1994); *see also* Edelson v. Uniondale Union Free Sch. Dist., 219 A.D.2d 614 (N.Y. App. Div. 1995) (holding that defendant school district owed duty of care to high school wrestler to use reasonable care to protect him from increased or concealed risks, but that defendant did not breach this duty by allowing plaintiff to face a heavier opponent and allowing match to continue after time-out was called).

142. *Baker*, 205 A.D.2d at 652.

143. *Id.* at 652-53.

144. *Id.* at 653.

145. *Id.* at 655.

146. *Baker*, 205 A.D.2d at 655.

in applying the doctrine of assumption of risk.[147] In *Fortier*, a college football player injured himself while attending a football instruction class when another player collided with him during a seven-on-seven "no contact" drill.[148] Upon initiation of the suit against the college, the plaintiff claimed negligent instruction and supervision on the part of the coach who instructed the course.[149]

The court claimed to adhere to the principle stated in both *Knight v. Jewett* and *Benitez* that an instructor has a duty to an athlete not to increase the inherent risks present in the particular activity.[150] However, the court stated that primary assumption of risk was applicable in this case, as opposed to secondary assumption of risk.[151] The court rejected the plaintiff's claim that only secondary assumption of risk, as opposed to primary assumption of risk, is applicable when an athlete initiates a suit against an instructor alleging negligent supervision.[152] Instead, the court stated that prior case law stood for the proposition that "when an instructor acts so as to increase the risk of harm inherent in a particular sport, the instructor may not thereafter rely on primary assumption of the risk."[153] Interestingly, the court then analyzed the inherent risks of the football drill, but also seemed to analyze whether or not the coach increased these risks.[154] Ultimately, the court found that the risk of collision was inherent in the sport of football, and therefore, "the possibility that plaintiff's injury resulted from an increase by defendants in the inherent risks is necessarily excluded."[155]

Although both the *Benitez* approach and the *Fortier* approach seem to both stand for the proposition that a school and its

147. *See* Fortier v. Los Rios Cmty. Coll. Dist., 52 Cal. Rptr. 2d 812 (Cal. Ct. App. 1996).

148. *Id.* at 813.

149. *Id.*

150. *Id.* at 815. *See also Knight*, 3 Cal. 4th at 316; *Benitez*, 541 N.E.2d at 33-34.

151. *Fortier*, 52 Cal. Rptr. 2d at 815.

152. *Id.*

153. *Id.*; *see also* Wattenbarger v. Cinncinnati Reds, Inc., 28 Cal. App. 4th 746, 756 (Cal. Ct. App. 1994).

154. *Fortier*, 52 Cal. Rptr. 2d at 815-17. For example, the court considered the merits of the plaintiff's three theories for finding that the defendant increased the risks inherent in the football drill, which included: (1) encouraging the players to be "aggressive" during the drill, (2) misleading the players by telling them that the drill would be "noncontact" in nature, and (3) failing to inform the students playing offense that the students playing defense would attempt to intercept the ball. *Id.* In rejecting these theories, the court also seemed to speak more generally about the inherent risks one assumes while playing football. *Id.*

155. *Fortier*, 52 Cal. Rptr. 2d at 818.

employees owe students a duty not to increase the risks inherent in a sport, the approach a court chooses to take will have a major impact on a plaintiff's success in that case. A court faced with a suit by a student athlete against a school that follows *Benitez* will proceed with a secondary assumption of risk analysis, which allows a jury to decide whether the defendant unreasonably increased or enhanced the risk to the plaintiff and to apportion fault accordingly.[156] However, a court that follows the *Fortier* approach will first proceed under a primary assumption of risk analysis, requiring the court to decide if the injury sustained by the athlete was an assumed risk inherent to the sport, and necessarily precluding the merits of the case from reaching a jury.[157] Under *Fortier*, only if the court finds that the defendant increased the risks inherent in the sport will secondary assumption of risk apply. Therefore, a court following this approach essentially would usurp the role of the jury by undertaking the analysis of whether or not the defendant increased the inherent risks in the sport *before* the court even decides that secondary assumption of risk is applicable.[158] Consequently, courts that follow *Benitez* would seem to be more plaintiff friendly than courts following *Fortier*.

IV. Implied Assumption of Risk in the Context of Professional Sports

A. Collective Bargaining Agreement and Workers' Compensation Issues

In the context of professional sports, athletes must overcome a number of hurdles besides the defense of assumption of risk in order to succeed on a claim of negligence against a team or coach. A professional team's legal duty to its athletes arises from contract law, whereas a high school or university's legal duty to student athletes exists via tort law's concept of a special relationship.[159]

156. *See supra* notes 53-60 and accompanying text.

157. *See Fortier*, 52 Cal. Rptr. 2d at 816.

158. The problem with this analysis essentially revolves around how the court chooses to recognize the defendant's duty to the plaintiff. If a court states that the defendant had a duty not to increase the risks inherent in the sport, an argument can be made that, subsequently, the inquiry should revolve around whether or not the defendant breached that duty. Instead, the court in *Fortier* proceeded along a no duty analysis after it already stated that defendant did, in fact, owe the plaintiff a duty. *Id.* at 815-16.

159. *See* Mitten, *supra* note 68, at 42.

More specifically, the league collective bargaining agreement (CBA) negotiated between the players' labor union and the league and the standard player contract which an athlete signs govern the team's duty to provide an injured player with medical treatment.[160] These agreements usually provide that a dispute over the alleged negligent care of an injured player is subject to arbitration.[161] As a result, courts have held that these labor disputes often require construction and interpretation of the terms of the CBA under federal labor law, and therefore, state tort law claims are often preempted.[162]

For example, in a case decided by the Fifth Circuit, two football players brought an action against the team alleging state tort law claims based on required participation in an abusive rehabilitation program.[163] Both players signed one-year deals with the team, but during preseason training camp each sustained injuries that prevented them from playing.[164] The team desired to cut both players, but N.F.L. policy prohibited the team from terminating their contracts while they were rehabilitating from injuries.[165] After the players refused a buy-out of their contracts, the team required the players to participate in a rigorous rehabilitation program, which was allegedly designed to coerce them into quitting the team.[166]

In analyzing whether or not federal labor law preempted the players' negligence claims, the Fifth Circuit stated that preemption occurs when the state tort law claims are substantially dependant upon the meaning of the terms in the CBA.[167] Therefore, "the question of preemption turns on whether the conduct upon which the claim is grounded is governed by the CBA."[168] Ultimately, the court found that federal labor law preempted the state tort law claims because "the alleged misconduct cannot be separated from the underlying dispute between the players and the Oilers over the adequacy of the Oilers' offer of termination pay."[169]

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160. *See* Mitten, *supra* note 68, at 42.
161. *See* Mitten, *supra* note 68, at 42.
162. *See* Mitten, *supra* note 68, at 42-43.
163. Smith v. Houston Oilers, Inc., 87 F.3d 717, 718 (5th Cir. 1996).
164. *Id.*
165. *Id.*
166. *Id.*
167. *Smith*, 87 F.3d at 719.
168. *Id.* (quoting Baker v. Farmers Elec. Co-op., Inc., 34 F.3d 274 (5th Cir. 1994)).
169. Id. at 720; *cf.* Hendy v. San Diego Chargers Football Co., 925 F.2d 1470 (9th Cir.

Another obstacle for professional athletes to overcome when bringing suit against a team is the workers' compensation bar.[170] As mentioned above, the CBA and standard player contracts mandate that a team has a duty to provide medical treatment to its athletes.[171] Therefore, a team will absorb the cost of an athlete's injuries, including aggravation of injuries caused by the negligence of team medical personnel and coaches.[172] Athletes are entitled to be compensated for the latter under state workers' compensation law.[173] In exchange for these benefits, the athlete is barred from seeking further redress through state tort law for the aggravation of his injuries due to negligent treatment.[174] However, most state workers' compensation statutes include a statutory exemption allowing an employee to bring an action against an employer for harm resulting from intentionally injurious conduct.[175]

The narrow scope of this intentional injury exception was illustrated in *DePiano v. Montreal Baseball Club, LTD.*[176] In *DePiano*, a minor league baseball player injured his shoulder when he collided with the outfield wall during a game.[177] The plaintiff sued the team and its major league parent alleging negligence in their medical treatment of his injury and allowing him to continue playing despite their knowledge of this injury.[178] Despite allowing the plaintiff to amend his complaint to allege intentional injury, the court found that the plaintiff failed to produce evidence sufficient to satisfy New York's intentional injury exception to its workers' compensation statute.[179] The court explained that the exception to New York's Workers' Compensation Act is very narrow: in order to qualify for the exception, an employee "must prove an intentional or deliberate act by the employer directed at causing harm to that

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1991) (holding that plaintiff's state law tort claims of negligent hiring of the team doctor and negligent and intentional withholding of the plaintiff's medical information were not subject to the arbitration provision of the CBA because the claims arose independently of the CBA and did not require construction or interpretation of the terms of the CBA).

170. *See* Mitten, *supra* note 68, at 44-45.

171. *See* Mitten, *supra* note 68, at 44-45.

172. *See* Mitten, *supra* note 68, at 44-45.

173. *See* Mitten, *supra* note 68, at 44-45.

174. Mitten, *supra* note 68, at 44-45.

175. *Id.* at 46. In such a case, an employee may elect to pursue either the tort claim or the workers' compensation benefits. *Id.*

176. 663 F.Supp. 116 (W.D. Pa. 1987).

177. *Id.*

178. *Id.* at 117.

179. *Id.* at 117-118.

particular employee."[180] The court found that the plaintiff's evidence showing the defendant knew of the risk of further injury and that such an injury was likely to occur was insufficient to satisfy the intentional injury exception.[181] For these reasons, the court granted the defendant's motion for summary judgment.[182]

However, even if an employer does not have the requisite intent to fall within the intentional injury exception, a player may still overcome the workers' compensation bar by showing "fraudulent concealment of material medical information" on the part of the team.[183] For example, in *Krueger v. San Francisco Forty Niners*, a California court of appeals found a team liable for fraudulently concealing the full extent of a football player's severe knee injury.[184] The court found that the team's hired physicians failed to disclose to the player the fact that x-rays revealed the severely degenerated condition of the player's left knee, as well as the adverse effects of steroid injections he received.[185] In addition, the court found that the defendant had the intent to induce the player to continue playing in football games despite his severely injured knee.[186] Furthermore, since the plaintiff was entitled to rely on the team's doctors for full disclosure of material information of this type and there was no evidence offered to suggest that the plaintiff would not have followed the advice of the doctors to retire had they informed him of the magnitude of his injury, the elements of reliance and causation, respectively, were satisfied.[187]

A case recently decided in an Atlantic County, New Jersey superior court provides further illustration of how these principles work to shield professional teams from tort liability, perhaps to the disadvantage of team physicians. In *Babych v. Bartolozzi*, a former National Hockey League player sued the Philadelphia Flyers and their team physician, Arthur Bartolozzi, for allegedly making him play during the 1998 N.H.L. playoffs despite having suffered a

180. *DePiano*, 663 F.Supp. at 117, *quoting Crespi v. Ihrig*, 472 N.Y.S.2d 324 (App. Div. 1984), *aff'd*, 469 N.E.2d 526.

181. *DePiano*, 663 F. Supp. at 117.

182. *Id.* at 118.

183. Mitten, *supra* note 68, at 46.

184. 234 Cal Rptr. 579 (Cal. Ct. App. 1987), *rehearing denied* (Mar 23, 1987), *review denied and ordered not to be officially published* (Jun 03, 1987).

185. *Id.* at 583.

186. *Id.* at 584.

187. *Id.* at 584-85.

broken left foot a few weeks earlier.[188] The player claimed that the doctor misinformed him about the severity of the injury and told him he could play after giving him injections of painkillers instead of setting his foot in a cast to facilitate proper healing.[189] As a result, the player claimed that this mistreatment led to a premature end to his career.[190] The court dismissed the team as defendants by operation of the workers' compensation bar, citing a lack of evidence that the Flyers engaged in fraudulent concealment.[191] However, the jury found that the team physician committed malpractice and awarded the player $1.37 million for lost earnings and pain and suffering.[192]

B. Application of Assumption of Risk

As the previous section illustrates, a professional athlete wishing to recover tort damages against the team he or she plays first must face the hurdles of contract law, preemption by federal labor law, and the workers' compensation bar. Assuming an athlete tackles those obstacles, the defense of assumption of risk is still available to the defendant.[193] Although these cases are few and far between for the very reasons discussed up to this point, as well as the high volume of settlements struck in this area,[194] presumably the assumption of the risk defense applies to professional sports teams in much the same fashion as it applies to high schools and universities.[195] However, primary assumption of risk will usually apply instead of secondary assumption of risk because the duty a professional team owes its athletes stems from their contractual relationship as opposed to a special relationship grounded in tort law.[196]

For example, in *Maddox v. City of New York*, the New York Court

188. Jeff Jacobs, *Painful Implications of Playing Hurt*, HARTFORD COURANT, Nov. 2, 2002, *available at* 2002 WL 101513664. The trial judge did not issue a written opinion in this case.

189. Charles Toutant, *1.37M for Hockey Player's Foot*, NEW JERSEY LAW JOURNAL, Nov. 11, 2002, *available at* LEXIS, News Library, N.J. Law Journal File.

190. *Id.*

191. Jacobs, *supra* note 189; Toutant, *supra* note 190.

192. *Id.*

193. Maddox v. City of New York, 487 N.E.2d 553 (N.Y. 1985).

194. Jacobs, *supra* note 189.

195. *Maddox*, 487 N.E. 2d at 555.

196. *Cf. Turcotte*, 68 N.Y.2d at 438 (applying primary assumption of risk to defeat a professional jockey's negligence claim against a co-participant).

of Appeals dismissed a professional baseball player's claim of negligence against the city and various other entities.[197] The plaintiff in *Maddox* played center field for the New York Yankees.[198] During a game being played at Shea Stadium in the summer of 1975, the plaintiff severely injured his knee when he fell into a puddle in center field, which the player had previously noticed and pointed out to both the grounds crew and the manager of his team.[199] In discussing the defense of primary assumption of risk, the court found that the inherent risks of baseball included the risks associated with the construction and maintenance of the field.[200] In addition, the court stated that the successful application of the defense requires that the plaintiff not only exhibit "knowledge of the injury-causing defect, but also" an appreciation of the resulting risk.[201] Furthermore, the court elaborated by pointing out that awareness of the risk must be assessed "against the background of the skill and experience of the particular plaintiff, and in that assessment a higher degree of awareness will be imputed to a professional than to one with less than professional experience in the particular sport."[202] Since the plaintiff testified that he was aware of the wet and muddy condition in the field, the court found he assumed that risk and that this risk was not enhanced by the defendants.[203] Finally, the court found that there was a lack of evidence that the plaintiff had no choice but to obey an order by his coach or the owner of the team to play despite the danger presented by the condition of the field.[204]

However, it is possible California courts may take a slightly different approach to the application of assumption of risk as a defense for professional sports organizations, as the *Fortier* court did in the amateur context.[205] Although the plaintiff in *Wattenbarger*

197. *Maddox*, 487 N.E.2d at 554.
198. *Id.*
199. *Id.*
200. *Id.* at 556.
201. *Maddox*, 487 N.E.2d at 556.
202. *Id.* at 556-557; *see also Turcotte*, 68 N.Y.2d at 440 (stating that professional athletes are "more aware of the dangers of the activity, and presumably more willing to accept them in exchange for a salary, than is an amateur").
203. *Maddox*, 487 N.E.2d at 557.
204. *Id.* at 557-58; *see also Benitez*, 541 N.E.2d at 34 (finding no merit to plaintiff's claim of inherent compulsion); *Turcotte*, 68 N.Y.2d at 439 (expressing skepticism that a professional athlete could be found to be acting involuntarily while participating in a game that he is paid to play).
205. *See Fortier*, 52 Cal. Rptr. 2d at 815.

v. Cincinnati Reds, Inc. was not an employee of the professional club, thereby distinguishing the case from *Maddox*, a California court of appeals rejected the defendant's claim that primary assumption of risk applied, and instead found that application of secondary assumption of risk was proper.[206] *Wattenbarger* involved a major league tryout for the Reds in which the plaintiff, a 17-year-old pitcher, was a participant.[207] The plaintiff was pitching in a simulated game, and after his third pitch he felt his arm "pop."[208] At that point, he stepped off the mound and informed the Reds' personnel, who had been supervising the drill, but received no response.[209] After throwing another pitch, the plaintiff experienced immediate severe pain, which was later found to be caused by a severe injury to the bone and tendons in his left arm.[210]

The court first noted that the arm injury suffered by the plaintiff was unquestionably a risk inherent in the game of baseball.[211] Indeed, the court stated that primary assumption of risk would have been appropriate if the plaintiff had stopped after the third pitch he threw in the simulated game.[212] However, the court emphasized that the defendants initially directed the plaintiff to pitch and permitted him to continue after he had informed them of the "pop" he had felt in his arm.[213] Assessing the circumstances of the tryout, noting that defendant supervised and controlled the activities, provided the equipment, and gave instructions to the athletes, the court found that the defendant "owed a duty of care to protect participants from aggravating injuries during the tryout."[214] Therefore, primary assumption of risk, which would act as a complete bar to plaintiff's recovery, was not applicable.[215]

The obvious difference between the New York and California approaches is that the latter recognized that a professional sports team may, in some cases, owe a duty of care to players under its supervision. Equally obvious, however, is that *Wattenbarger* did not involve a suit by a professional athlete employed by the team,

206. *Wattenbarger*, 28 Cal. App. 4th at 756.
207. *Id.* at 749.
208. *Id.* at 750.
209. *Id.*
210. *Wattenbarger*, 28 Cal. App. 4th at 750.
211. *Id.* at 753.
212. *Id.*
213. *Id.*
214. *Wattenbarger*, 28 Cal. App. 4th at 756.
215. *Id.*

which, as has been seen, fundamentally changes the duty analysis. Therefore, it is unlikely a California court would find that secondary assumption of risk was applicable in a situation factually similar to *Maddox*. Perhaps a more practical and solid maxim applicable to professional athletes can be taken from *Maddox*: greater knowledge and awareness of risks inherent in the sport will be imputed to professional athletes than amateurs.[216] Therefore, taking this into account, as well as the possibility of federal preemption and the workers' compensation bar, it can be said with a certain degree of confidence that the class of plaintiffs with the smallest chance of obtaining damages in a sports injury case is professional athletes.

V. CONCLUSION

As a society that is more than ever obsessed with both sports and litigation, it is clear that the defense of assumption of risk will continue to play an important role in the courtrooms around the country. It is equally clear, however, that this defense is still being shaped and applied differently in various jurisdictions.[217] Despite the various differing approaches to the defense, jurisdictions in which assumption of risk has survived comparative fault statutes and which recognize the distinction between primary and secondary assumption of risk generally agree that the ultimate inquiry revolves around the existence of a duty. The rationale behind primary assumption of risk is that the defendant owes *no duty* to the plaintiff because the plaintiff has assumed the risks inherent in the sport.[218] On the other hand, secondary assumption of risk is applicable only if the defendant *does* owe the plaintiff a duty of care, but the plaintiff proceeds in the face of a known risk, thereby triggering a comparative fault analysis.[219] Of course, the problem arises when a court must choose which one is appropriate.

Since duty can be seen as the *sine qua non* of assumption of risk analysis, whether or not a court chooses to recognize a duty, and in what context, will decide which species of assumption of risk will be implicated. In the context of amateur athletics, most courts have been willing to recognize a duty running from the high school or

216. *Maddox*, 487 N.E.2d at 556-57.
217. *See* Drago, *supra* note 3, at 583.
218. *See supra* note 45.
219. *See supra* note 54 and the accompanying text.

college to the athlete, therefore triggering a secondary duty analysis.[220] However, not only are courts reluctant to recognize a duty owed to professionals by their employers, thereby barring their negligence actions via primary assumption of risk, but these athletes face higher hurdles to overcome in the form of contract law, the CBA between the union and league, and state workers' compensation statutes.[221] Therefore, amateur athletes will fare much better in sports-injury suits than professionals. Is this result justified? Of course, professionals are compensated for their services and are viewed under the law as employees first, and athletes second. This view is buttressed by notions of basic contract law, which dictate that a person is free to contract away his right to sue for tort damages for good and valuable consideration.

However, does this mean that an amateur athlete who dies from heat related illness should have a better chance of recovery than a professional who suffers the same ailment under similar circumstances?[222] After a Minnesota judge dismissed the lawsuit filed by the widow of Korey Stringer against the Minnesota Vikings organization, it appears judges will continue to answer the latter question in the affirmative.[223] Stringer, an offensive lineman for the Vikings, collapsed due to heat and humidity during practice in August of 2001, and died shortly thereafter.[224] Stringer's widow sued the team and the team's doctors and personnel, alleging gross negligence and malpractice.[225] The team's attorneys argued that the suit should be dismissed due to Minnesota's workers' compensation law, which bars suits against an employer for injury or death unless gross negligence or intentional harm can be shown.[226] However, the Stringers contended that the statute didn't apply to contractors hired by the team.[227] Furthermore, they argued that the personnel that treated Stringer deviated from the standard

220. *See supra* note 64 and the accompanying text.

221. *See supra* notes 160-63, 194 and accompanying text.

222. *See supra* notes 78-80 and accompanying text.

223. *See Vikings off the Hook in Stringer Death*, MINNESOTA PUBLIC RADIO (April 25, 2003), *available at* http://news.mpr.org/features/2003/04/25_ap_stringer.

224. *See* Pam Louwagie, *Stringer Got Subpar Care, Doctors for his Widow Say; But Vikings Say Staff Acted Properly*, MPLS.-ST. PAUL STAR TRIBUNE, (Dec. 21, 2002), *available at* 2002 WL 5389052.

225. *Id.*

226. Pam Louwagie, *Vikings, Stringers Argue Over Compensation Law; Judge to Rule Later on Liability in Tackle's Heatstroke Death*, MPLS.-ST. PAUL STAR TRIBUNE, Dec. 4, 2002, *available at* 2002 WL 5387937.

227. *Id.*

of care because the doctors treating Stringer were inadequately trained and used improper techniques for treating his condition.[228]

The dismissal of the Stringers' claim against the team apparently rested on their inability to show that the Vikings were grossly negligent in treating Korey, and therefore, the workers' compensation statute shielded the team from liability.[229] However, the judge allowed the Stringer's claim to proceed against the team's physician and his clinic[230], which is consistent with the result in *Babych*. Unfortunately for the purposes of this article, the Stringers and Dr. David Knowles, the team physician, settled the remaining claims for an undisclosed amount.[231] Presently, the Stringers have filed an appeal to have the claims against the Vikings reinstated in state court, and have concurrently filed a claim against the National Football League in federal district court.[232] Whether or not federal courts will be willing to provide professional athletes with the same remedies that state courts have provided to amateur athletes is a question which will only be answered in time.

Interestingly, if the Stringers can convince the state appellate court to reinstate their claim against the Vikings, it is still possible they could face the defense of assumption of risk, even if they overcome the workers' compensation bar. Is dying of heat stroke an inherent risk of the game of football? Nobody ever said it was a game for the weak hearted.

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228. Louwagie, *supra* note 224.
229. Vikings off the Hook in Stringer Death, *supra* note 223.
230. Id.
231. *Id.*
232. *Id.* (The complaint alleges that "[a] perverse, insidious and deadly culture has existed and continues to exist among NFL coaches, which unreasonably subjects player[sic] to heat-related illness during practices, ostensibly out of the twisted belief that players benefit from being subjected to such working conditions".) *Id.*