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CONCUSSIONS AND INJURIES IN CANADIAN AND AMERICAN CONTACT SPORTS:

A LEGAL PERSPECTIVE

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Sports are an indispensable part of society and have significant social value. However, the alarming prevalence of concussions and other head injuries suffered by athletes in contact sports, such as football, hockey and soccer, has garnered significant attention in Canada and the United States of America (USA). The risk of injury can be very high in these sports, which involve aggressive tackling, sliding, pushing and the use of sticks. The pressures of competing and winning also motivate players to frequently use high levels of aggression.

Medical literature has revealed the serious risk of short term and long term repercussions for athletes who suffer from concussions while playing. A number of cases have emerged where athletes are developing permanent injuries and long term illnesses, or even dying, as a result of their concussions or other head injuries.

This has been occurring, among other reasons, because athletes are returning to play prematurely or without adequately recovering. An athlete's decision to return to play following an injury typically involves multiple parties, such as the coach, team, sports organization or school board, thus, exposing these parties to potential legal liability. Therefore the question that emerges is which of these parties, or a combination thereof, bear the legal responsibility for the injuries suffered by these athletes?

As is often the case, the question of legal responsibility is a highly fact dependent inquiry. This paper will examine how legislation and common law in both Canada and the USA interact with specific fact scenarios involving litigation in the sports-related injury forum.

The first section of this paper will deal with instances where an athlete commences a legal action against his or her team, organization and association for injuries arising from sports-related activities. The relevant legal principles considered in these situations in both Canada and the USA will be outlined.

The second section of this paper will set out the legislative framework in Canada and the USA with respect to concussion-based injuries. Specifically, this section will set out how particular provinces and states have responded to the proliferation of head injuries by enacting legislation.

The third section of this paper will highlight the legal issues at play in instances where children are injured while playing on school teams in Canada and the USA.

Finally, the last portion of this paper will set out what risk management strategies can be employed to reduce head injuries and liability in lawsuits.

I - Athletes v. their Teams: Commencing actions for being cleared to play prematurely

Canada

In the absence of legislation with respect to concussion-related injuries, tort principles have established duties of care owed by teams to their players. A professional team is under a duty to exercise reasonable care for the health and safety of team members.[1] This duty covers the actions of the team's employees, including coaches, physicians and athletic trainers. As a result, a team may be liable where the team physician fails to provide proper treatment for injuries.[2]

This occurred in *Robitaille v. Vancouver Hockey Club Ltd.* This case is the leading decision dealing with the duty of care of a professional team and an example of the challenges that team physicians face in balancing their duties as a doctor with the pressures exerted by team management.

(a) *Robitaille v. Vancouver Hockey Club Ltd.*

During a road trip, Robitaille experienced neck, shoulder and arm pains. On January 2, 1977, in a game against the New York Rangers, Robitaille was body checked and suffered what he described as "shocking sensations" and a "rubbery feeling" in his right leg. He also complained about a painful neck.

Robitaille reported the pain to his trainer and coach. Some of his symptoms were noticed by his trainer. However, there was a common belief among management and medical staff that Robitaille's complaints were the result of "psychological problems". During a game on January 12, 1977, Robitaille collided with an opposing player and fell to the ice. He suffered "electric shock" sensations and his right leg jerked uncontrollably for a few minutes.

The trial judge found that he was suffering from a spinal cord contusion which put him at an increased risk of injury. Robitaille played again on January 15, 1977 despite weakness in his right leg. On January 19, 1977, he was body checked heavily by an opposing player, fell to the ice and suffered a spinal cord injury that left him permanently disabled. As a result of his injuries, Robitaille initiated an action against his team, the Vancouver Hockey Club Ltd.

The trial judge, after reviewing the medical evidence, found that before January 12, 1977 Robitaille showed symptoms of nerve root disorder, and at least on January 2, 1977, a possible spinal cord disorder. These were "warnings of a potentially serious problem".

[1] 1979 CarswellBC 477, 19 BCLR 158 (BC SC) [*Robitaille BCSC*]; aff'd *Robitaille v. Vancouver Hockey Club Ltd.*, 1981 CarswellBC 216, 30 BCLR (BC CA) [*Robitaille BCCA*].
[2] *Ibid.*

As a result of the January 12, 1977 injury, the defendant had actual notice of a serious medical problem.

The trial judge found that had reasonable attention been paid to Robitaille's welfare, he would have undergone a full medical and neurological examination prior to the game in which he suffered the contusion, or at least after that game.[3] As a result, his injury would have been discovered and he would not have played in the second game, in which the injury was severely aggravated.[4]

The trial judge held that the defendant owed a duty of care to take reasonable care to ensure that its players did not suffer undue or unnecessary risk of injury, and this duty included the obligation to provide medical care.[5] The defendant breached its duty of care in failing to react reasonably to Robitaille's complaints and symptoms, in failing to provide appropriate medical care and in putting pressure on him to ignore his injuries, which resulted in the permanent damage.[6] It was within the defendant's reasonable contemplation that carelessness on its part was likely to cause damage to Robitaille. Further, the doctors and coaches, who were employees of the defendant, were negligent, and thus, the defendant was vicariously liable for their actions.[7]

The defendant raised an issue with Robitaille's claim based on the collective bargaining agreement ("CBA") between the NHL and players' association. The defendant argued that because of the existence of the CBA, the common law was irrelevant; in other words, no duties or rights arose out of the employer and employee relationship except those set out in the CBA.

However, the court held that the existence of a collective agreement does not affect or eliminate the duty of care imposed on the defendant by the common law. [8] There was nothing in the CBA that addressed liability for breach of the duty of care, and it did not expressly or impliedly exclude liability in tort.

The trial judge ordered an award of $35,000.00 in exemplary damages on the ground that the defendant's conduct was high-handed, arrogant, ignored the dictates of common decency and common sense and displayed a callous and reckless disregard for Robitaille's rights, feelings and well being.[9] This award was upheld by the Court of Appeal.

However, the trial judge reduced Robitaille's compensatory damages of $400,000 by 20% because of his contributory negligence in failing to act reasonably to protect his own

[3] *Ibid.* at para 16.
[4] *Ibid.*
[5] *Ibid.* at para 46.
[6] *Ibid.* at para 64.
[7] *Ibid.* at para 63.
[8] *Ibid.* at para 29.
[9] *Ibid.* at para 80

health and well being. The Court of Appeal upheld the 20% finding of contributory negligence.

(b) Impact of *Robitaille* on the Canadian legal landscape

Clearly, *Robitaille* did not arise in the context of a concussion based injury. However, *Robitaille* recognizes the obligation to provide medical care in cases involving a professional athlete employed by a team. As discussed above, this obligation often involves athletic trainers and team physicians who the team has hired to provide treatment and medical care to its players.[10] With respect to team trainers, who may be the first people to treat an injured athlete, "the trainer must show the level of modern knowledge or technique to be expected of an ordinary competent athletic therapist" in accordance with the standards set by the certifying programs or governing associations of the sport.[11]

With respect to team physicians, they are typically specialists in the sports medicine field or neurology, or are experienced with sports-related injuries, and thus, are considered to have better training to assess sports-related injuries and concussions.[12] If the physician is considered a specialist, they are subject to a higher standard of care, and must exercise the skill of an average specialist in their field, rather than the ordinary professional standard of care established for general practitioners.[13]

Canadian courts have "viewed medical clearance on the part of physicians as a discretionary decision, as long as it adheres to the common and most current medical practice. In this respect, normally there is no liability for negligence when a physician makes a judgment call that is within the accepted standard of medical care."[14] If a team physician "can reasonably infer that the player is unfit or suffering from a condition, it is their duty so to inform both the player and the team and to ensure that medications are taken and the required course of treatment followed."

If they fail to do so, they can be liable for "failing to disclose long-term risks associated with injuries" or for failing to follow any precautions that may exist with respect to concussions suffered by a player.[15]

There is a dearth of cases in Canada dealing with situations where a professional player initiates an action against his or her team as a result of suffering a concussion during play. However, the main principles espoused in *Robitaille* will undoubtedly assist

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[10] In order to claim against a team for the negligent actions of a team physician, through vicarious liability, one must establish that the physician was an employee, acting in the course of their employment with the team, and not an independent contractor.

[11] John Barnes, *The Law of Hockey* (Markham: LexisNexis Canada Inc., 2010) at p 257 [*Barnes Hockey*].

[12] Marie-France Wilson, "Young athletes at risk: Preventing and managing consequences of sports concussions in young athletes and the related legal issues" (2010-2011) 21 Marq. Sports L. Rev. 241 at p 279 [*Marie-France Wilson*].

[13] *Barnes Hockey supra* note 11 at p 256-257.

[14] *Marie-France Wilson supra* note 12 at p 279.

[15] *Barnes Hockey supra* note 11 at p 258.

practitioners and the court in navigating the key issues with respect to the applicable duty and standard of care owed to those players by their professional organization.

United States of America

There have been recent claims brought in the USA by athletes against teams for allowing them to return prematurely after a concussion. The following is a brief overview of some of these cases at the high school and collegiate level.

(a) High school Level

Zachary Frith's story illustrates the consequences of not treating concussions properly at the high school level. Frith's high school administrators and football coaches allowed him to continue playing in a high school football game despite knowing he had suffered a concussion.[16] No one notified his parents. Instead, they allowed Frith to continue practicing and to play an entire game the following week.

Frith's parents began to notice behavioural changes in the week following this game and took him to a doctor, who diagnosed him with post-concussion syndrome, caused by the initial concussion and subsequent traumatic blows to his head. The doctor also prohibited him from participating in football.[17] Frith's parents notified the coach of the doctor's diagnosis and order, but the coaches continued to allow Frith to play for another week.[18]

Ultimately, Frith suffered permanent brain damage. His parents commenced an action on behalf of their son against the *Lafayette County School District* (Missouri), the coaches and the administrators, and the matter was eventually settled for $3 million.

(b) NCAA Level

In addition to professional teams, the NCAA and schools at the collegiate level have been targeted by injured student athletes. Paul Searles commenced an action against St. Joseph's College, his school coach and the athletic trainer[19]. The claim alleged that despite Searles' complaints and medical advice and information suggesting that Searles should not continue playing basketball, his coach insisted that he should. He alleged that as a result his knees became permanently impaired.[20] Searles further alleged that his coach knew or should have known that he should not be playing and that the trainer recognized the nature of Searles' problem was concerned that his continued play would result in greater injury. Searles stated that the trainer discussed the issue with the coach.

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[16] Andrew B. Carrabis, "Head Hunters: The Rise of Neurological Concussions in American Football and Its Legal Implications" (2011) 2 Harv J Sports & Ent L 271 at p 384 [*Andrew B. Carrabis*].

[17] *Andrew B. Carrabis supra* note 19 at p 384.

[18] Shamberg, Johnson & Bergman Chtd., "HS football concussion – injury - $3 million settlement" (27 January 2009), online: <http://www.sjblaw.com/CM/Verdicts-Settlements/HS-Football-Concussion-Injury.asp>.

[19] (1997), 695 A.2d 1206, 1997 ME 128 (Maine SC).

[20] *Ibid.* at para 3.

At trial, summary judgment was awarded in favour of St. Joseph's College. On appeal from the trial judge's decision, the court held that the legal duty of a college to exercise reasonable care towards its students encompasses the duty of college coaches and athletic trainers to exercise reasonable care for the health and safety of student athletes.[21] The court therefore held that the trial judge failed to recognize the coach's duty to exercise reasonable care for the health and safety of Searles.

As a result, the court remanded the matter because the medical testimony and Searles' account of his condition created a genuine issue of material fact as to whether he suffered permanent injury as a result of playing basketball at St. Joseph's College.[22]

Preston Plevretes also brought an action against his college, La Salle University. He claimed that he was improperly treated by its medical staff after sustaining a concussion, as he was cleared to play only weeks later despite having continuing symptoms of headaches and dizziness.[23] During a football practice in early October 2005, Plevretes sustained a concussion and subsequently informed the coaching staff that he was experiencing headaches since the practice.[24] He attended the Student Health Center at La Salle University and was diagnosed with a Grade 1 concussion, and was cleared to play in mid October 2005. [25]

In a game in early November, Plevretes was momentarily knocked unconscious after a helmet-to-helmet collision.[26] After regaining consciousness, he collapsed and went into a coma due to swelling of his brain, and eventually part of his skull was removed.[27] As a result, Plevretes suffers from brain damage, speech impediments, memory loss and requires full time care.[28] His action against La Salle eventually settled for $7.5 million one day before trial was to begin.[29]

In response to the Plevretes case, the NCAA took drastic measures to adopt concussion policies for its football league, particularly by enhancing the NCAA Sports Medicine Handbook with respect to concussions. Historically, the handbook has been inadequate considering the risk and prevalence of concussions in college level athletics. It simply stated some of the common symptoms of concussions and suggested that athletes should not return to play until the symptoms subsided.[30]

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[21] *Ibid.* at para 5.
[22] *Ibid.* at para 9.
[23] Alan Schwarz, "La Salle Settles Lawsuit With Injured Player for $7.5 Million" *New York Times* (30 November 2009), online: <http://www.nytimes.com/2009/12/01/sports/ncaafootball/01lasalle.html> [*Schwarz*].
[24] *Andrew B. Carrabis supra* note 19 at p 381.
[25] *Ibid.*
[26] *Ibid.*
[27] *Ibid.*
[28] *Schwarz supra* note 32.
[29] *Ibid; Andrew B. Carrabis supra* note 19 at p 381.
[30] *Ibid.* at p 382.

However, in December 2009, the NCAA added a number of new rules to the handbook relating to concussion treatment, for example, requiring that an athlete who exhibits signs or symptoms of a concussion must be immediately removed from play and prevented from returning to play until cleared by a physician. The handbook also informs students of the potential damaging and lasting effects of a concussion when the student returns to play without adequately recovering.

In April 2010, the NCAA also released a mandate requiring each NCAA school to implement a concussion management plan by August 2010. While the NCAA appears to be on the right track, these efforts were arguably 'too little too late' for some student athletes. On September 12, 2011, the first lawsuit solely targeting the NCAA rather than the player's alma mater was filed in Illinois.[31]

Adrian Arrington was a football player for the Eastern Illinois University ("EIU") team. He alleges that during his time on the team, he suffered from numerous and repeated concussions, and was cleared to return to play the next day following his initial three concussions.[32] It was only after Arrington began to experience memory loss and seizures that the EIU sent him to see a neurologist.[33]

Arrington further alleged that at no time was he coached on how to make safer tackles, and in fact, the message from the EIU was to "play hard and play fast" without regard to safety; those who did not play in this manner would be released from the team.[34] Arrington was also never educated or informed of the risks of concussions or how to prevent head injuries while playing.[35] Arrington sustained two more concussions before he decided to leave the EIU football team, and has continued to suffer from memory loss, depression and almost daily migraines due to his head injuries.[36]

Arrington's complaint asserts claims related to medical monitoring, negligence, concealment of information, carelessness and unjust enrichment, alleging, *inter alia*, that the NCAA has:

- Failed its student athletes, choosing instead to sacrifice them for money and profits;

[31] This was a Class Action Complaint filed by Adrian Arrington in the United States District Court for the Northern District of Illinois Eastern Division on September 12, 2011 against the NCAA and NCAA Football [*Arrington Class Action*]. Shortly after Arrington's complaint was filed, Derek Owens (football player at the University of Central Arkansas) and Alex Rucks (football player of Northwestern University) filed a similar class action complaint in the same court on September 28, 2011. The two class action complaints were subsequently consolidated into a [Corrected] Consolidated Class Action Complaint, naming Arrington, Owens, Mark Turner (football player at Fordham University) and Angela Palacios (soccer player at Ouachita Baptist University) as Plaintiffs (Civil Action No. 1:11-CV-06356). The NCAA filed an "Answer and Affirmative Defenses" on December 21, 2011, denying nearly all of the Plaintiffs' allegations. On January 13, 2012, the parties filed a Joint Status Report, with discoveries to be completed by October 2012 and a proposed jury trial to take place in mid-2013.

[32] *Ibid.* at para 28.

[33] *Ibid.* at para 29.

[34] *Ibid.* at para 30.

[35] *Ibid.*

[36] *Ibid.* at para 31.

- Engaged in a long established pattern of negligence and inaction with respect to concussions and concussion-related maladies sustained by its student athletes;
- Failed to address and/or correct the coaching of tackling methods that cause head injuries;
- Failed to implement system-wide "return to play" guidelines for student-athletes who have sustained concussions;
- Failed to implement system-wide guidelines for the screening and detection of head injuries; and
- Failed to implement a support system for student athletes who, after sustaining concussions, are left unable to either play football or even lead a normal life.[37]

(c) Legal actions and Class action suits against the NFL by former players

When highly motivated, superbly conditioned athletes collide violently in the pursuit of glory, the path that results is broken bodies and damaged brains. Due to the fact that there are only fifty-three positions available on any active NFL roster, the players feel that they are required to have "supreme athleticism" and "the ability to play in pain" to hold on to their job.[38]

The NFL is a multi billion-dollar industry, however, it has been alleged that its "profits have come at the expense of the long-term mental health of those who play".[39] While there is an inherent risk in all contact sports, the "tough it out" culture and high collision nature of NFL football has led to approximately 170 concussions suffered each season, and this number likely does not include the significant number of players who downplay or fail to report their symptoms.[40]

Some commentators have indicated that the NFL's history of concussion management is marked by inadequate measures to protect players against concussions, concealment of the long-term effects of concussions and lack of insight towards the problems associated with concussions. In 2007 the NFL continued to stand behind the studies of its Mild Traumatic Brain Injury Committee which concluded that there was no link between concussions and long-term problems, such as dementia, despite immense conflicting scientific research.[41] Finally, in 2009, the NFL acknowledged this link and NFL Commissioner Goodell stated that the NFL would be using stricter measures for dealing with concussions.[42]

As of February 24, 2012, 35 concussion-related mass tort lawsuits have been filed against the NFL[43] in Texas, Pennsylvania, Illinois, California, New York, New Jersey, Atlanta,

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[37] *Ibid.* at paras 1-2, 4-5.

[38] Kristina M. Gerardi, "Tackles that Rattle the Brain" (2011) 18 Sports Law J 181 at p 194 [*Kristina M. Gerardi*].

[39] *Ibid;* Sean Gregory, "The Problem with Football: How to Make it Safer", *Time.com* (Jan. 28, 2010), online: <http://www.time.com/time/nation/article/0,8599,1957046,00.html?hpt=C1>.

[40] *Ibid.* at p 191.

[41] *Ibid.* at p 204-205.

[42] *Ibid.* at p 213.

[43] Note that the *Hardman v. NFL* lawsuit, filed on October 13, 2011, has been voluntarily dismissed. Also note that on January 31, 2012, the United States Judicial Panel on Multi District Litigation granted the NFL's motion to transfer

Florida and Louisiana. The lawsuits are extremely similar and tend to include allegations against the NFL for negligence, fraud, fraudulent concealment, negligent misrepresentation, conspiracy, loss of consortium and medical monitoring.[44]

Essentially, the players allege that the NFL and its employees were aware of the risks of long term injuries and neurological effects associated with concussions and repeated hits to the head, but instead of protecting or warning them, they deliberately concealed the truth. Other allegations against the NFL involve negligence with respect to the league-mandated equipment.

In response to the lawsuits, the NFL is taking steps to file motions to dismiss the lawsuits, advancing arguments that, *inter alia,* they do not belong in the courts because they are barred by the collective bargaining agreement between the NFL and its players pursuant to Section 301 of the USA's *Labor Management Relations Act, 1947*.[45]

A noteworthy class action includes the wrongful death claim filed in Illinois on February 23, 2012, by, *inter alia*, the family of the late Dave Duerson, who committed suicide. Like other wrongful death claims filed against the NFL, Duerson's family asserts claims against the NFL and Riddell for negligence, fraudulent concealment, conspiracy and failure to warn.[46] Another noteworthy class action includes the workers' compensation claim filed in California on October 11, 2011, by, *inter alia*, Ralph Wenzel (through his wife Eleanor Perfetto). It is considered a test case in determining the NFL's liability for dementia suffered by its retired players.[47]

II - Concussion legislation in Canada and the USA

United States of America

With the increasing amount of research and awareness of the dangers relating to concussions in youth sports, the American Federal government and a significant number of states have attempted to implement concussion-management laws.

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four of the pending lawsuits to a consolidated proceeding in the United States District Court for the Eastern District of Pennsylvania.

[44] The former players have primarily named the NFL and not the individual doctors that attended to them during their professional football career or the members of the Mild Traumatic Brain Injury Committee, who were instrumental in the NFL's denial of the long-term effects of concussions or the significant risks associated with returning to play before fully recovering from a concussion. This is because the doctors and members of the Committee were employees of the NFL, acting within the scope of their employment and under the supervision of the NFL, and thus, the NFL can be held vicariously liable for the negligent actions of its employees, and financially, the NFL has the deepest pockets.

[45] Paul D. Anderson, "NFL Concussion Lawsuit Tracker: 35" *NFL Concussion Litigation Blog* (28 February 2012), online: <http://nflconcussionlitigation.com/>.

[46] Paul D. Anderson, "Will the NFL Concussion Lawsuits Be a Game Changer?" (8 February 2012).

[47] *Kristina M. Gerardi supra* note 47 at 226; Alan Schwarz, "Case Will Test N.F.L. Teams' Liability in Dementia" *New York Times* (5 April 2010) at A1, online: <http://www.nytimes.com/2010/04/06/sports/football/06worker.html?_r=1>. Many workers' compensation claims are filed against the NFL in California each year because the state's system provides a unique method for retired professional athletes throughout the USA to seek lifetime medical care from their teams and their insurance carriers if they participated in at least one game within the state of California (*Ibid*).

The States of New Jersey and Washington took the lead in enacting concussion management legislation to protect student athletes. This caught the attention of Roger Goodell who sent a letter to over forty state governors urging all states to enact similar legislation.[48]

In May 2009, the State of Washington enacted model legislation, known as the "Lystedt Law", which contains three essential elements: (1) Athletes, parents and coaches must be educated about the dangers of concussions each year; (2) If a young athlete is suspected of having a concussion, he/she must be removed from play; and (3) A licensed health care professional must clear the young athlete to return to play in the subsequent days or weeks.[49]

At the state level, as of November 28, 2011, 35 states and the District of Columbia had passed bills related to concussion management. Legislation is pending in four other states and in five states, bills were introduced but not passed. Six states have yet to introduce any legislation on the issue.

At the Federal level, Senator Timothy Bishop (D-N.Y.) introduced the *Protecting Student Athletes from Concussions Act of 2011* (H.R. 469) ("*Act of 2011*") to the House of Representatives on January 26, 2011, which aims primarily to promote minimum state requirements for the prevention and treatment of concussions caused by participation in school sports. The *Act of 2011* was referred on February 25, 2011 to the Subcommittee on Early Childhood, Elementary, and Secondary Education, and remains at the committee stage of the legislative process.

The *Act of 2011* has been criticized for failing to include a requirement for a pre-participation baseline assessment of cognitive-linguistic function: however, it does provide information with respect to the prevalence of concussions in high school athletics, the rate of players returning to play without fully recovering and ways to prevent and recover from a concussion.

It also sets out a number of requirements with respect to the education of students, parents and school personnel about concussions, posting of information on concussions on school property, the response of school personnel, coaches and athletic trainers when a student sustains a concussion (such as immediately removing the student from the activity) reporting a concussion to the student's parents and the return of the student to the sport.

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[48] *Andrew B. Carrabis supra* note 19 at p 384-5; Bryan Toporek, "NFL Encourages All States to Adopt Student-Athlete Concussion Laws" *Education Week* (February 25, 2011), online: <http://blogs.edweek.org/edweek/schooled in sports/2011/02/nflencourages all us states to adopt student-athlete concussion_ aws. html>.

[49] *Ibid.* at p 385. The Lystedt Law was named after Zackery Lystedt, a middle school football player who sustained a serious brain injury and partial paralysis after sustaining two concussions in one game. Lystedt had returned to the game approximately fifteen minutes after sustaining the first concussion.

Canada

The legislative efforts of Canada at the federal and provincial level in Canada in addressing the issue of concussions are minimal in comparison to the USA.[50] Nonetheless, the three main pillars of the Lystedt Law discussed above continue to permeate guidelines and legislation in Ontario. Those three main pillars are seen as the fundamental components of an effective effort to combat concussion-related injuries. They include 1) education on the dangers and symptoms of concussions, 2) proper protocols in place to diagnose concussions and remove players from the field of play accordingly and 3) proper medical protocols to clear athletes to return to play, following concussion-like symptoms.

For instance, the Ontario Physical and Health Education Association have issued guidelines for concussion management in elementary and secondary schools.[51] The guidelines represent the minimum standards for risk management practice for physical activities and sports within school boards, and focus the attention of teachers and coaches on safe practices in order to minimize the risk of injuries. They include comprehensive return to play guidelines and require the active involvement of a doctor in assessing and clearing students to play following a concussion.

While most school boards in Ontario have subscribed to the online guidelines through a fee-for-service model, it is not mandatory, requires the cooperation of multiple parties, and once subscribed to, the school boards are able to raise or lower the standards set out in the guidelines.

In addition to the aforementioned guidelines, Laurel Broten, Ontario's Minister of Education, has just introduced amendments to Ontario's *Education Act* (Bill 39). Bill 39 - *An Act to Amend the Education Act with respect to Concussions* was given first reading on March 6, 2012. The aim of these amendments is to protect students participating in school sports and physical education classes from the effects of concussion.

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[50] To date four legislative initiatives have been introduced across Canada, and none have been passed, as follows:

1) In Nova Scotia, the *Concussion Awareness Act* (Bill no. 63) was introduced by Chuck Porter and Hants West and went through a first reading on May 9, 2011;
2) In British Columbia, the *Concussions in Youth Sport Safety Act* (Bill M 206 - 2011) was introduced by Dr. Moira Stilwell and went through a first reading in November 2011;
3) On October 4, 2011, New Democratic Party MP Glenn Thibeault reintroduced the *National Strategy for Serious Injury Reduction in Amateur Sport Act* (Bill C-319).
4) On March 6, 2012, Laurel Broten, Ontario's Minister of Education, introduced amendments to Ontario's *Education Act* by way of *An Act to Amend the Education Act with respect to Concussions* (Bill 39).

[51] Ontario Physical and Health Education Association, "Ontario Safety Guidelines for Physical Education: Elementary Curricular Guidelines" and "Ontario Safety Guidelines for Physical Education: Secondary Curricular Guidelines" (2008), online: <http://www.ophea.net/programs-services/safety-guidelines>. The Safety Guidelines are organized into three modules for each of the elementary and secondary levels: Elementary and Secondary Curricular Programs, Elementary and Secondary Intramural Clubs and Activities, and Elementary and Secondary Interschool Athletics.

According to Bill 39's explanatory note, the amendments to the *Education Act* authorize the Minister to make policies and guidelines respecting all aspects of head injuries and concussions. The amendments require boards to establish policies and guidelines respecting head injuries and concussions and require boards to address the specified matters. The Minister is also given authority to make regulations about the same matters. The matters referred to in the legislation again pertain to the three main pillars contemplated in the Lystedt law; namely, education, protocol for diagnosis of concussions and return to play protocols.

The legislation also describes when board employees or volunteers will not be liable in a civil proceeding for their acts or omissions. Section 7 states the following:

> No liability if person acts reasonably and in good faith
>
> (7) A board employee or volunteer who is involved in intramural or inter-school athletics or any part of the health and physical education curriculum is not personally liable in a civil proceeding for an act or omission if the person acts reasonably in the circumstances, in good faith and in accordance with the Act, regulations and with any policies and guidelines made under this section.

In the event that Bill 39 receives Royal Assent, close attention must be paid to the regulations concerning protocols that are enacted with respect to the diagnosis of concussions and return to play. How those protocols interact with section 7, above, will undoubtedly be the subject of future litigation and debate. These, and other related questions, are issues that we will continue to monitor closely going forward.

In considering the legal implications of the amendments to the *Education Act* it is also imperative that we consider the common law as it relates to injured student athletes.

III - Parents v. School Boards and Coaches: Commencing actions for injuries sustained by children while playing on school teams (in Canada and the USA)

Canada

(a) Overview

The Canadian courts have had to consider the legal duty that school coaches and schools owe to their student athletes. In brief, a school's liability can be based on occupier's liability, breach of statutory duties or regulations, or the common law duty of supervision. Schools are also typically bound by statutory duties of care and control.

With respect to school sports, schools have a duty to exercise supervision in the manner of a prudent or careful parent,[52] such that they must conduct "reasonable supervision in

[52] *Myers v. Peel County Board Of Education*, [1981] 2 SCR 21 [*Myers v. Peel*].

the circumstances to guard against foreseeable risks" that is suitable to the inherent danger of the activity and the age of the students.[53] However, there will likely be no liability if the injury occurred due to an inherent risk in a sport properly conducted by the school, if the injury was unforeseeable or if the school could not have prevented the injury by reasonable precautions.[54]

School coaches are also generally bound by the careful and prudent person standard of care. Coaches must maintain "current knowledge about the risk of injury in the sport",[55] and "must take all of the necessary steps to avoid placing a young athlete at risk of sustaining or aggravating an injury."[56] Canadian jurisprudence has held that a coach must also show the "special skill and expertise of the physical education instructor", and "the instructor's responsibility is to take reasonable precautions for the safety of participants and to operate an appropriate system of teaching that takes account of the experience level of the individual or group".[57] However, their responsibilities may vary "according to the risks of the activity, accepted business practices and applicable professional guidelines or standards".[58]

Note that the application of the careful parent standard to the conduct of a school or coach will vary from case to case and will depend on a number of factors, including but not limited to: "the number of students being supervised at any given time, the nature of the exercise or activity in progress, the age and degree of skill and training which the students may have received in connection with such activity, the nature and condition of the equipment in use at the time, [and] the competency and capacity of the students involved".[59]

With respect to specialized and hazardous activities, such as gymnastics, a school and coach may be required to show expertise that exceeds that of the average parent, and the following tests will be reviewed to determine whether they exercised reasonable care in selecting and supervising an activity:

(i) Was the attempted exercise suitable to the student's age and condition (mental and physical)?
(ii) Was the student progressively trained and coached to do this exercise properly and avoid the danger?
(iii) Was the equipment adequate and suitably arranged?
(iv) Was the performance properly supervised?[60]

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[53] John Barnes, *Sports and the Law in Canada*, 3d ed. (Markham: Butterworths Canada Ltd., 1996) at p 297 [*Barnes Sports*].
[54] *Ibid.*
[55] *Ibid.* at p 245.
[56] *Marie-France Wilson supra* note 12 at p 272.
[57] *Barnes Sports supra* note 61 at p 303-304.
[58] *Ibid.*
[59] *Barnes Hockey supra* note 14 at p 244.
[60] *Ibid.* at p 245; *Thornton v. Prince George Board of Education*, [1976] BCJ No 1390 (BCCA); varied by *Thornton v. Prince George Board of Education*, [1978] 2 SCR 267 (SCC).

Based on the preceding discussion, a school and coach should not be liable in negligence for a sports-related injury if they ensure that: the level of skill required in the sporting activity was appropriate given the age and condition of the athlete; the athlete was properly instructed; the athlete was using the correct equipment; and the athlete was properly supervised.[61]

(b) *Dunn v. University of Ottawa*[62]

In an intercollegiate football game, Robert Dunn suffered serious injuries after being hit by a player of the opposing university team. Following the incident, Dunn and his parents commenced a claim against the player that hit him and the opposing university and coach. With respect to the coach, the plaintiffs claimed that he breached his duty to exercise reasonable care in controlling and supervising his staff and players, and that he failed to prevent his staff and players from embarking on unreasonably dangerous activities during the course of the game.[63]

The court dismissed the action against the opposing university and its coach after finding there was no negligence on the coach's part during the game. The court recognized that there are circumstances under which a coach could be held responsible for the actions of a player, but not in this case. Further, the court recognized that "without any doubt, at the university intercollegiate level, it is the responsibility of the coach to encourage and teach fair play and good sportsmanship.[64] The game is played to win, but it is not played to win at all costs.[65]

(c) *Thomas v. Hamilton (City) Board of Education*[66]

Jeffry Thomas, played junior football for his high school, and his parents brought an action against the Hamilton (City) Board of Education and the high school's coaches. During all three seasons that Thomas played, the coaches provided tackling instruction to the players, particularly to make contact with their shoulders and with their heads up, such that their necks are extended to a limited degree.[67] During a game, Thomas made a routine tackle on another player, and in the process broke his neck and was rendered a quadriplegic. Based on the evidence, it was apparent that his head was not up and his neck was not extended at the time of contact with the other player.[68]

The trial judge ruled in favour of the defendants in the action. On appeal from the trial judge's decision, the plaintiffs argued that the trial judge erred in concluding that Thomas and his mother consented, through a consent form at the beginning of the first season, to

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[61] *Marie-France Wilson supra* note 12 at p 272; *Barnes Sports supra* note 61 at p 302; *Myers v. Peel supra* note 62.
[62] [1995] O.J. No. 2856 (Ont. Ct. of Justice, Gen. Div.) [*Dunn*].
[63] *Ibid.* at para 12.
[64] *Ibid.* at paras 28-29, 31-32.
[65] *Ibid.* at paras 28-29, 31-32.
[66] (1994), 20 OR (3d) 598 (ON CA); rev'ing, 1990 WL 1048311 (Ont HC).
[67] *Ibid.* at para 16.
[68] *Ibid.* at para 28.

the normal risks of football, including the risk of injury as serious as that suffered by Thomas. Further, Thomas argued that he should not have been allowed to play football because of his neck configuration or at least should have been warned by the school and / or coaches about the risk of serious injury in playing with his neck configuration. Thomas based this argument on "the long, lean swan neck theory" ("swan theory"), such that players with long lean necks have an increased exposure to neck injuries when making a tackle.[69]

In dismissing the appeal, the court noted that the consent of Thomas and his mother did not relieve the school authorities from the duty of care they owed to him. However, the defendants were not negligent in the circumstances as Thomas had been appropriately coached, he was in excellent condition and he was wearing the appropriate equipment.[70] Further, Thomas had participated in the school's football programme of his own free will and was aware of the risk of serious injury.[71] The injury he sustained occurred during a routine play, which came within the ambit of the risks inherent in a contact sport, such as football.[72] Further, with respect to Thomas' neck vulnerability, the court found that the swan theory was not generally known by coaches at the time and that the defendants were not negligent for failing to know or warn Thomas of the vulnerability caused by his neck configuration.[73]

On the issue of the appropriate standard of care to be required of the defendants, the court applied the careful and prudent parent principle[74]. The court also referred to the concept of a "supraparental standard of care", and clarified that generally "the careful or prudent parent standard applies, but that it must be adjusted to the circumstances where, for example, in a school setting the particular expertise expected of the school authorities – those responsible for a given group of students – may extend beyond the expertise which may be provided by a careful or prudent parent."[75]

(d) Duty to Provide Prompt Medical Services

Schools and coaches also have a duty to provide prompt medical services to injured players while under their supervision. While the common law does not generally impose a duty to give medical assistance to strangers, a person who is in a special relationship of care, such as a school or coach with its players, must provide reasonable first aid and arrange for further treatment.[76] As a result, when a sports injury occurs, before professional attention is given, there should be suitable interim care provided to the athlete, provided they consent.[77] In that interim period, if a coach gives immediate

[69] *Ibid.* at para 56.
[70] *Ibid.* at para 91.
[71] *Ibid.* at para 89.
[72] *Ibid.* at para 48.
[73] *Ibid.* at paras 69, 73, 87.
[74] *Ibid.* at para 35, citing: *Myers v. Peel supra* note 62.
[75] *Ibid.* at paras 36-37.
[76] *Barnes Hockey supra* note 14 at 256.
[77] *Ibid.* at p 255.

attention to the injury, they "must meet the standard of a competent person of similar experience, and the first aid requirements associated with coaching certification would be relevant in evaluating what was done. The standard is higher than that required of the ordinary citizen who has no experience of sports injuries, but is less demanding than the knowledge expected of a qualified physician".[78] As such, a coach may be found liable for unreasonable medical care if they do something that aggravates an injured player's condition.[79]

In *Poulton v. Notre Dame College,*[80] a hockey player suffered a severe hip infection following two injuries after the school coach refused to let him see a doctor. The court held that the coach and school owed a duty of care to the student and had breached that duty by failing to secure medical care for him, while under their supervision. They were liable in negligence for the aggravation to the student's injuries and the resulting damages, which were caused by the delayed treatment.[81]

United States of America

There have also been a number of legal actions commenced against schools and school coaches in the USA. The following is a review of a few noteworthy cases.

Mohr was on the swim team of his high school and injured while practicing a racing start from a platform at the shallow end of the high school's swimming pool. Following the incident, Mohr and his parents commenced an action against various parties, including the Wisconsin Interscholastic Athletic Association ("WIAA"),[82] claiming that it was negligent in adopting a rule set out by the National Federation of State High School Associations ("NFSH") with respect to racing starts in shallow water without first investigating the safety of this rule.[83] The trial judge granted, *inter alia*, summary judgment in the WIAA's favour on public policy grounds, which the plaintiffs appealed.[84] The crucial question for the court of appeal with regard to the WIAA's duty was if its conduct in not making its own inquiry into the adequacy of the rule was

[78] *Ibid.* at p 256.
[79] *Ibid.* In situations where the coach does give emergency assistance and it is subsequently claimed that they worsened the athlete's condition, many of the provinces, including Ontario, have legislation that sets a standard of gross negligence if the treatment was given at the immediate scene of the accident outside a hospital or a medically equipped facility (*Ibid*).
[80] (1976), 60 DLR (3d) 501 (Sask QB).
[81] *Ibid.*
[82] *Mohr v. St. Paul Fire & Marine Insurance Co.* (2003), 674 N.W.2d 576, 582 (Wis Ct App) [*Mohr*].
[83] The NFHS is an association of state athletic associations, including the WIAA. The NFHS formulates and publishes playing rules, such as the contested rule in this case, to govern competition in interscholastic sports, including swimming and diving. (*Ibid.* at para 4). The WIAA is a voluntary association of Wisconsin high schools that coordinates and promotes interscholastic athletic competition among Wisconsin schools. The WIAA is not required by the Federation to adopt the Federation's playing rules, but the WIAA's general policy is to do so for all sports (*Ibid.* at para 5).
[84] *Ibid.* at para 2.

consistent with its duty to exercise reasonable care.[85] The court found that the WIAA did not exercise reasonable care in adopting the rule and remanded the matter to trial.[86]

This case has been considered as an authority in support of the proposition that high school athletic associations do owe a duty of care to their students, including the obligation to establish and enforce rules to protect their health and safety.[87] Further, the association has a duty to make independent safety inquiries when adopting a rule recommended by a national association of which it is a member.

In *Cerny v. Cedar Bluffs Junior/Senior Public School*,[88] a player suffered a head injury after being allowed to return to play during the same game as well as a subsequent practice. As a result, he brought an action alleging negligence against the school and the school district. The court held that "the appropriate standard of care to be applied to coaching staff of the school is that of a reasonably prudent person that holds a state teaching certificate and a coaching endorsement", which requires that the coach (i) be familiar with the elements of a concussion, (ii) must look for concussion symptoms if a player has suffered a head injury, (iii) must repeat this evaluation at intervals before the player can return to play, and (iv) must evaluate the seriousness of the injury to determine whether it is appropriate that the player resume play or be prohibited from participating until cleared by a medical professional."[89]

In this case, not only was the coaching staff subject to the standard of a reasonably prudent person, but in light of the training that the high school coaches were subject to, they were required to identify and manage sports-related concussions suffered by their players.[90] Since the coaching staff was able to demonstrate that they had exercised reasonable care in following the concussion return to play guidelines established by the school or association, the court found that they were not negligent and had exercised reasonable care.[91]

The *Zemke v. Arreola*[92] case also dealt with the duty of care to arrange for prompt medical care for injured students. A high school football player advised his coaches of a dislocated finger during a game, but did not report a head injury that he also sustained. The student continued to play but suffered a subdural hematoma following another hit, and subsequently brought a negligence claim against his coaches and the school district.[93]

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[85] *Ibid.* at para 39-41.
[86] *Ibid.* at para 45.
[87] *Marie-France Wilson supra* note 12 at p 263-264. However, note that in the case of return-to-play guidelines, the independent inquiry will likely not be an issue, as in 2009, the NFHS Sports Medicine Advisory Committee and the Centers for Disease Control and Prevention ("CDC") compiled its recommended concussion guidelines for member schools (*Ibid*. at para 264).
[88] (2004), 679 NW 2d 198, 200-01 (Neb Dis Ct) [*Cerny*].
[89] *Ibid.* at 203; *Marie-France Wilson supra* note 12 at p 271.
[90] *Marie-France Wilson supra* note 12 at p 271.
[91] *Cerny supra* note 97 at 203, 206-7; *Marie-France Wilson supra* note 12 at p 271.
[92] (2006), WL 1587101 (Cal App 2 Dist).
[93] *Ibid; Marie-France Wilson supra* note 12 at p 274.

The main issue before the court was whether aggravation of the student's head injury was foreseeable. Since the player did not report the head injury and since there were no obvious symptoms of it, the court held that the coaches were not negligent in failing to remove the student from play (thereby incurring the risk of aggravating the head injury.)[94]

IV - Risk Management Strategies to Reduce Head Injuries and Liability in Lawsuits

Unfortunately, concussions are an inherent risk in any contact sport that cannot be eliminated. They occur at all levels of competition, with players of all ages, and in practices or games.[95] Consequently, awareness of the dangers and risks associated with concussions has skyrocketed over the past decade as an increasing number of athletes are experiencing serious short and long term effects following this injury.

As a result, as seen in the claims discussed above, there has been increased litigation and a willingness of athletes to come forward with their stories, which puts the efforts of various parties, such as teams, coaches, sports organizations and schools, under greater scrutiny.

Through effective concussion management, there are strategies that teams, coaches, sports organizations and schools can take to prevent or reduce concussions and to minimize exposure to liability in the event that an injured athlete commences an action against them. If implemented, these strategies will help build a defence against the injured athlete's claim that the targeted parties did not meet the standard of care required of them or that all reasonable steps were not taken to avoid the injury in the circumstances.

To achieve effective concussion management, teams, coaches, sports organizations and schools might consider implementing the following strategies:[96]

Increasing Education and Awareness

In order to prevent and properly treat injuries in contact sports, it is critical that players, parents and other relevant parties are properly educated concerning the risks and dangers of concussions and head injuries. Further, if people are better informed of the long term repercussions, in particular, they may be more inclined to implement the strategies outlined in this paper.

Pressure has been put on the NFL to take a lead role in concussion management education and to enforce stricter return to play standards. While education is needed at

[94] *Ibid* at 5; *Marie-France Wilson supra* note 12 at p 274.
[95] *Kristina M. Gerardi supra* note 47 at p 190-191.
[96] The way in which these strategies are implemented will apply differently depending on the level of competition, the age of the players, the resources available to the parties, and the experience and knowledge that the parties have with respect to the sport (ie. a school coach versus a competitive or professional team and their coaches).

all levels, the change needs to start at the top in order for it to be achieved at the lower levels of football.[97] This also seems to be happening with the NHL, which has started a process of implementing stricter regulation in relation to blows to the head due to the risk of injury and recent well publicized incidents. The Ontario Hockey League and international competitions like the Olympics have also prohibited checks to the head and mandated automatic penalties when they occur.[98]

Therefore, in keeping with the trend, smaller entities, such as youth teams, coaching associations and schools should implement their own concussion education programs. Ways to achieve better concussion education include: providing seminars and / or manuals regarding the risks, consequences and prevalence of concussions to players and their parents and educating coaches on how to prevent concussions or properly manage them when they occur. With respect to coaches, it is important that they are qualified and well-informed of health and safety matters.[99]

Adopting Adequate Methods of Detecting and Diagnosing Concussions

Depending on the level of competition and resources available, consideration should be given to adopting proven methods of testing athletes if a concussion is suspected or has occurred as well for brain damage following a concussion. There are different methods of baseline testing or electronic programs available to help track brain injuries, such as the Immediate Post-Concussion Assessment and Cognitive Testing (ImPACT), which "evaluates cognitive functions such as memory, information processing speed and reaction time, as well as symptom levels".[100]

This program is used as a baseline test at the beginning of a season to measure a player's brain without injury, and if a concussion or brain injury occurs, another test is taken to determine any effects on the player's brain.[101] As a result, the player will have a better idea of the recovery time they need and they can better gauge when they should return to play.[102]

Consideration should also be given to having a health care professional on site during games and practices, and ideally one who has training in the assessment and management of concussions.

Implementing Strict Return to Play Guidelines & Post-Concussion Management Programs

This strategy cannot be stressed enough, especially for young athletes. Medical studies suggest that they are more vulnerable to concussions and experience longer recovery

[97] *Kristina M. Gerardi supra* note 47 at p 216.
[98] *Ibid.* at p 210.
[99] *Barnes Hockey supra* note 14 at p 192.
[100] *Kristina M. Gerardi supra* note 47 at p 221.
[101] *Ibid.*
[102] *Ibid.*

times compared to adults. In addition, young athletes playing in recreational or school leagues may not have access to advanced medical screening equipment and onsite team physicians that are typically present with professional and semi-professional teams.[103]

Teams, sports organizations and schools should develop return to play guidelines that:

- Require medical clearance following a concussion or obvious signs of a concussion by a physician trained in the management of concussions
- Provide for sanctions for failing to adhere to the guidelines
- Emphasize that the decision to return to play is based solely on medical factors; and,
- Emphasize or mandate strict enforcement and adherence to the guidelines.

Changes in Attitude and Behaviour

This strategy is particularly relevant at the youth level and it is imperative that schools, teams and coaches encourage young athletes to be open and honest about their head injuries.

This strategy is also relevant to coaches, who should teach techniques and the game in a way that minimizes contact to the head and the risk of concussions. As was highlighted in the *Thomas* decision above, the courts will consider a coach's instruction to players with respect to proper tackling in determining whether that coach has discharged their duty of care.

V - Conclusion

As outlined in this paper, there are several strategies that can be employed in order to minimize concussion-related injuries suffered by athletes. However, given the physical nature of many contact sports and the speed at which those sports are played, eradicating concussions may not be a practical objective. Courts have seemingly recognized this fact in holding that certain risks come within the ambit of contact sports.

That being said, the decisions in *Robitaille, Dunn* and *Thomas* confirm that Canadian courts have acknowledged the existence of a duty of care owed by schools, organizations, coaches and trainers to their athletes.

In the context of student athletes, the *Dunn* and *Thomas* decisions indicated that the appropriate standard of care to be required of coaches and trainers is that of a careful and prudent parent[104]. The courts also referred to the concept of a "supraparental standard of care" and circumstances in which that standard may be appropriate.

With respect to professional organizations and the medical trainers and physicians they employ, the *Robitaille* decision recognized a duty of care owed by a professional

[103] *Marie-France Wilson supra* note 12 at p 241.

[104] *Thomas.* at para 35, citing: *Myers v. Peel supra* note 62.

organization to its athletes. That duty is to take reasonable care to ensure that its players did not suffer undue or unnecessary risk of injury, and this duty included the obligation to provide medical care.[105] A court will find that the duty is breached where an organization fails to provide appropriate medical care which results in permanent damage.[106]

The aforementioned decisions provide considerable guidance with respect to the fundamental legal principles regarding liability minimization for sports-related injuries. However, we note that the law in Canada relating to liability for concussion-related injuries is still in its nascent stages of development. There has been a palpable increase in the public's awareness with respect to concussions. That increase in awareness has led to a demand for greater oversight and regulation. Associations, organizations, school boards and politicians have responded in kind.

As is evident by the proposed amendment to the *Education Act* in Ontario, as well as the recent class action suits in the USA, the legal landscape on this issue is rapidly evolving. As practitioners and advocates, we continue to monitor and analyze these developing and emerging legal trends with interest, as they have important implications for organizations, athletic associations, school boards, coaches and medical trainers alike.

[105] *Robitaille.* at para 46.
[106] *Ibid.* at para 64.