
THE LEGAL IMPLICATIONS OF CONCUSSIONS IN NORTH AMERICAN CONTACT SPORTS

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Sports have long been a part of everyday life for many people, both as spectators and participants. With modern advances in science the true inherent dangers of many of these sports are finally being examined, specifically with regard to concussions. Recent studies have revealed an alarming prevalence of concussions and other head injuries suffered by athletes in contact sports that are played all over the world, such as football, hockey, rugby and soccer. The results of these studies have brought much attention to the laws, rules, and regulations governing the conduct of athletes, coaches, trainers and other key personnel when a potential concussion has been experienced. Due to the possibility of serious and permanent injuries occurring on the field, diamond, rink or other, the potential for high value litigation is ever present.

Recent scientific studies have emphasized the serious risk of short term and long term repercussions for athletes who suffer from concussions. Furthermore, doctors are now able to trace the root cause of a medical condition developed later in life to an athlete's involvement in sport decades prior. Undoubtedly, these developments have had the effect of increasing the amount of concussion related litigation being pursued by athletes and their families and thus warrant further investigation.

This paper will first review the past Canadian jurisprudence which has established the requisite standard of care professional teams owe their athletes when they are faced with potential serious injuries. A brief analysis of these legal principles will analyze the duty of team physicians, coaches and trainers to properly diagnose, and effectively treat, a potential serious injury.

The second section of this paper will explore the standard of care owed by school officials, coaches, and teachers. It will emphasize the difference in standards of care that are required from schools and their training staff as compared to professional teams and their medical teams. It will then examine past concussion litigation involving schools and school personnel.

The third section of this paper will examine the proliferation of recent concussion litigation in North America that has been commenced by athletes and their families against various schools and leagues of all levels. A review of the allegations made in these lawsuits will reiterate the importance of proper diagnosis and treatment specifically with regard to concussions.

Overall, this paper will emphasize that the advances in science and research, with regard to concussions and brain injuries, that have set the stage for a proliferation of concussion related litigation as doctors are now able to more clearly connect a current concussion to future health issues. In addition, doctors are now able to establish a causal link between an individual's existing medical conditions and head trauma that a former athlete may have sustained in the past.

I – Defining the Standard of Care in Canada

The standard of care owed by team personnel towards their players with regard to concussion treatment has largely been developed by the courts through the common law. This is largely due to the fact no universal legislation exists with regard to what appropriate standard of care is owed by these organizations.

As the law currently stands, a professional team has 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 in negligence where the team physician fails to provide proper treatment for injuries.²

(a) Lawsuit

The landmark decision from which this standard of care was enunciated is *Robitaille v. Vancouver Hockey Club Ltd.*³ This is the leading decision dealing with the duty of care of sports teams and their personnel with regard to providing care for serious injuries to its players. This decision also provides insight into the pressures faced by team physicians in balancing their duties as a doctor with the pressures exerted by team management to allow players to play.

In *Robitaille*, on January 2, 1977, in a game against the New York Rangers, National Hockey League (NHL) player Mike Robitaille, who was playing for the Vancouver Canucks, was body checked and suffered what he described as “shocking sensations” and a “rubbery feeling” in his right leg. He also complained about neck pain.

Robitaille reported his symptoms to the trainer and coach of his team. Some of Robitaille's symptoms were immediately recognized by his trainer. However, there was a common belief among management and medical staff that Robitaille's complaints were the result of “psychological problems”. As such, no major action was taken.

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

² *Ibid.*

³ *Ibid.*

During a subsequent game on January 12, 1977, only 10 days after his initial injury, Robitaille was again hit by an opposing player. He fell to the ice and suffered “electric shock” sensations and his right leg jerked uncontrollably for a few minutes.

Despite this, Robitaille continued to play and on January 19, 1977, he was body checked and fell to the ice, suffering a spinal cord injury that ended his career and 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”. As a result of the January 12, 1977 injury, the team 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 first injury, or at the very least after that game.⁴ 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.⁵

The trial judge held that the defendant hockey club owed a duty of care to take reasonable care to ensure that its players did not suffer undue or unnecessary risk of injury, and that this duty included the obligation to provide medical care.⁶

The defendant breached its duty of care in failing to react reasonably to Robitaille’s complaints and symptoms. Further, by failing to provide appropriate medical care and in putting pressure on Robitaille to ignore his injuries, the defendant contributed to the permanent damage that resulted.⁷ It was within the defendant’s reasonable contemplation that carelessness on its part was likely to cause injury to Robitaille. Further, the doctors and coaches, who were employees of the defendant, were negligent and the defendant was vicariously liable for their actions.⁸

The trial judge ordered an award of \$35,000.00 in exemplary damages on the grounds that the defendant’s conduct was high-handed, arrogant, ignored the dictates of common decency and

⁴ *Ibid* at para 16.

⁵ *Ibid*.

⁶ *Ibid* at para 46.

⁷ *Ibid* at para 64.

⁸ *Ibid* at para 63.

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.

Although the Court ordered compensatory damages of \$400,000.00 to Robitaille, it reduced this award by 20% because of the plaintiff's contributory negligence in failing to act reasonably to protect his own health and well-being. The Court of Appeal also upheld the trial judge's determination as to contributory negligence.

(b) Impact

Although *Robitaille* was not a concussion based lawsuit it recognized 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 hires 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 orthopedics, neurology, or sports medicine. Therefore, these doctors are considered to have specialist training to assess sports-related injuries and concussions.¹² If a 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

With regard to a decision made by a team physician, to allow a player to return to play, 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 decision that is within the accepted standard of medical care."¹⁴

⁹ *Ibid* at para 80.

¹⁰ In order to claim against a team for the negligent actions of a team physician, through vicarious liability, a plaintiff 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 *Supra* note 11 at p 256-257.

¹⁴ *Supra* note 12 at p 279.

The principles espoused in *Robitaille* have provided a guide for the standard of care required by teams towards players with respect to serious injuries. These principles have been repeatedly tested in court and will undoubtedly have a major effect on findings of negligence and liability with regard to concussion litigation.

II – Concussion Litigation in Canada and the United States

(a) Overview of Principles

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 to supervise. 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,¹⁵ such that they must conduct "reasonable supervision in the circumstances to guard against foreseeable risks" that is suitable to the inherent danger of the activity and the age of the students.¹⁶ 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.¹⁷

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"¹⁸ and "must take all of the necessary steps to avoid placing a young athlete at risk of sustaining or aggravating an injury."¹⁹ 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."²⁰ However, their responsibilities may vary "according to the risks of the activity, accepted business practices and applicable professional guidelines or standards".²¹

¹⁵ *Myers v Peel County Board of Education*, [1981] 2 SCR 21 [*Myers v Peel*].

¹⁶ John Barnes, *Sports and the Law in Canada*, 3d ed. (Markham: Butterworths Canada Ltd., 1996) at p 297 [Barnes Sports].

¹⁷ *Ibid.*

¹⁸ *Ibid* at p245.

¹⁹ *Supra* note 12 at p 272.

²⁰ *Supra* note 16 at p 303-304.

²¹ *Ibid.*

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.²²

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:

- Was the attempted exercise suitable to the student's age and condition (mental and physical)?
- Was the student progressively trained and coached to do this exercise properly and avoid the danger?
- Was the equipment adequate and suitably arranged?
- Was the performance properly supervised?²³

Based on the current case law, a school board 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.²⁴

(b) Past Litigation

The litigation in *Dunn v. University of Ottawa*²⁵ involved an intercollegiate football game where 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 opposing coach, the plaintiffs claimed that he breached his duty to exercise reasonable care in controlling and supervising his staff and

²² *Supra* note 11 at p 244.

²³ *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).

²⁴ *Supra* note 12 at p 272; *Supra* note 16 at p 302; *Supra* note 15.

²⁵ [1995] OJ No 2856 (Ont Ct of Justice, Gen Div) [*Dunn*].

players, and that he failed to prevent his staff and players from embarking on unreasonably dangerous activities during the course of the game.²⁶

The court dismissed the action against the opposing university and its coach after determining that 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 that this was not such a 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... The game is played to win, but it is not played to win at all costs."²⁷

In *Thomas v. Hamilton (City) Board of Education*²⁸ Jeffery Thomas played junior football for his high school football team for three years. 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.²⁹ 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.³⁰ Thomas' parents brought an action against the Hamilton Board of Education and the high school's coaches.

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, by signing a consent form at the beginning of the first season, to the normal risks of football, including the risk of serious injury. It was further argued by the plaintiff that due to Thomas' neck configuration, namely that it was longer and leaner compared to the other players, that he should not have been allowed to play football or at least should have been warned by the school or coaches about the risk of serious injury in playing with his neck configuration. Thomas took the position that players with long lean necks have an increased exposure to neck injuries when making a tackle.³¹

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

²⁶ *Ibid* at para 12.

²⁷ *Ibid* at paras 28-29, 31-32

²⁸ (1994), 20 OR (3d) 598 (ON CA); reversing, 1990 WL 1048311 (Ont HC) [*Thomas*].

²⁹ *Ibid* at para 16.

³⁰ *Ibid* at para 28.

³¹ *Ibid* at para 56.

were not negligent in the circumstances as Thomas had been appropriately coached, he was in excellent condition, and he was wearing the appropriate equipment.³² Further, Thomas had participated in the school's football program of his own free will and was aware of the risk of serious injury.³³ 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.³⁴ With respect to Thomas' neck vulnerability, the court found that the "swan neck theory" (as it was referred to) 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.³⁵

On the issue of the appropriate standard of care to be required of the defendants, the court applied the careful and prudent parent principle.³⁶ 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."³⁷

(c) Current Litigation

In recent years science has not only been able to better predict the long term effects of a concussion, but it has also been able to trace the root of an injury later in life to an athlete's previous participation in sports. As a result, the past few years have seen a plethora of concussion-related litigation commenced by athletes of all ages and skill levels. The following is a brief overview of some of the larger actions that are currently before the courts.

Kwasny v Bishop's University

According to the Statement of Claim in *Kwasny v Bishop's University*, Kevin Kwasny was a 21 year old student at Bishop's University, in Quebec, and was a defensive end for the Gaiters, Bishop's intercollegiate football team. During a game in 2011, Kwasny took a big hit to his head. Immediately thereafter, Kwasny told multiple members of the coaching staff that he had been hit hard. It is alleged that Kwasny was ordered to return to play, despite having symptoms of a concussion and despite his complaints. Kwasny's dad, Greg, has stated that "He complained about his head being sore and that he got hit very hard ... and they just told him to get back in

³² *Ibid* at para 91.

³³ *Ibid* at para 89.

³⁴ *Ibid* at para 48.

³⁵ *Ibid* at paras 69, 73, 87.

³⁶ *Ibid* at para 35, citing: *Myers v. Peel*, *supra* note 15.

³⁷ *Ibid* at paras 36-37.

there a couple of plays later and keep on going."³⁸ A few plays later Kwasny was hit again and suffered a major brain bleed, which left him unconscious. At half-time, with his condition quickly deteriorating, he was rushed to hospital where he was put in a medically-induced coma.

Two years after that football game Kwasny is still undergoing therapy. He currently lives in a rehabilitation centre in Selkirk, north of Winnipeg (where his family lives), and is working to regain his mobility and strength. Kwasny now has permanent brain damage and multiple physical injuries. It is alleged that he will never be able to work.

In Kwasny's Statement of Claim he is seeking \$7.5 million in damages from Bishop's University as a result of his injuries. His Statement of Claim alleges that he left the field after the first hit and told his coaches that he was dizzy and had blurred vision, but was told to return to play. As of the writing of this paper, Bishop's University has yet to file a Statement of Defence.

NHL Lawsuits

In November of 2013, a group of former NHL players, led by Gary Leeman, filed a class action lawsuit in the District of Columbia naming the NHL and NHL Board of Governors as defendants. This lawsuit seeks damages for "the pathological and debilitating effects of brain injuries caused by concussive and sub-concussive impacts sustained by former NHL players during their professional careers." Additionally, another large lawsuit was filed against the NHL on April 9, 2014, in New York, making similar allegations.

The lead lawsuit alleges, in a 47 page Complaint (known as a Statement of Claim in Ontario) that "the NHL hid or minimized concussion risks from its players, thereby putting them at a substantially higher risk for developing memory loss, depression, cognitive difficulties, and even brain related diseases such as dementia, Alzheimer's disease, and Parkinson's disease."

These allegations state that the NHL intentionally hid their knowledge of the debilitating effects that a concussion may have on an individual both immediately after the event that caused the concussion and later in life. Inherently, this claim is alleging negligent diagnosis and treatment of concussions by NHL teams and their medical personnel. None of these allegations have yet been proven in court.

In another interesting turn of events, TIG Insurance Company, a company that issued primary, umbrella, and excess insurance policies to the NHL and its affiliates during various times

³⁸ *Football player sues Bishop's University over severe head injury suffered during game.* Globe and Mail Newspaper. September 10, 2013. Available online: <http://www.theglobeandmail.com/sports/football/football-player-sues-bishops-university-over-severe-head-injury-suffered-during-game/article14218664/>.

between 1989 and 2001 is suing the NHL and a plethora of insurance companies seeking a judicial declaration limiting its duty to defend the league with regard to the aforementioned lawsuits.

One of the grounds for this declaration is that its policies do not insure against “intentional wrongdoings”. TIG is alleging that the NHL intentionally allowed the injuries to be caused as alleged in the players’ class action lawsuits.³⁹ These serious allegations, if proven, will have repercussions that extend to the entire sports world as they may lead to potential rule changes, or at the very least a reconsideration of the wording and coverage afforded by insurance policies that are purchased to insulate leagues from claims such as the ones that TIG is trying to avoid. As this action was filed in Manhattan on or around April 15, 2014, there has yet to be an official response from the NHL.

Shepherd v. Kansas City Chiefs

On December 1, 2012, former Kansas City Chiefs (of the NFL) linebacker Jovan Belcher shot his girlfriend and mother of his infant daughter, Kasandra Perkins, to death before turning the gun on himself.

Now, Belcher’s mother, Cheryl Shepherd, is suing the Chiefs football team alleging that Belcher was subjected to repetitive head trauma, and that the team did not provide adequate medical attention to him prior to his committing murder and suicide.

At the request of the family, Belcher’s body was exhumed at the end of 2012 to determine whether he suffered from Chronic Traumatic Encephalopathy (CTE).⁴⁰ Since research into CTE is still in its primary stages, there is no direct evidence that connects CTE to any cognitive or psychological disorder, much less murder and suicidal tendencies. However, the reliance of current lawsuits on recently discovered conditions, which some doctors believe may result in tremendous negative changes in a person’s physical and mental state, may have a retroactive effect on future lawsuits. By claiming damages for injuries that were not clearly understood at the time they were experienced, suggests a potential proliferation on lawsuits in the future based on injuries previously sustained; even if the underlying diagnosis is not currently understood.

³⁹ Cited as TIG Insurance Co. v National Hockey League, 651162/2014, New York State Supreme Court, New York County (Manhattan).

⁴⁰ “Jovan Belcher’s mother files wrongful death lawsuit against Kansas City Chiefs.” NY Daily News. December 31, 2013. Available online: <http://www.nydailynews.com/sports/football/jovan-belcher-mother-files-wrongful-death-lawsuit-chiefs-article-1.1563081#ixzz32r2HTvnD>.

NFL Litigation

The most noteworthy of current concussion litigation is undoubtedly the multiple lawsuits being brought against the National Football League. It has been alleged that the NFL's "profits have come at the expense of the long-term mental health of those who play".⁴¹ 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.⁴²

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.⁴³ Finally, in 2009, the NFL acknowledged this link and NFL Commissioner Roger Goodell stated that the NFL would be using stricter measures for dealing with concussions.⁴⁴

Lawsuits against the NFL have been mounting in recent years. Included in this list are law suits commenced in Texas, Pennsylvania, Illinois, California, New York, New Jersey, Georgia, Florida and Louisiana. The lawsuits are generally similar and tend to include allegations against the NFL for negligence, fraud, fraudulent concealment, negligent misrepresentation, conspiracy, loss of consortium and medical monitoring.

Essentially, the plaintiffs 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. Instead of protecting or warning the players, the NFL and its employees deliberately concealed the truth. Other allegations against the NFL involve negligence with respect to the league-mandated equipment.

Of the over 200 current lawsuits filed against the NFL,⁴⁵ the most publicized of the NFL class action lawsuits has been brought by over 4,500 players and their families and involves brain

⁴¹ 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>>.

⁴² *Ibid* at p 191.

⁴³ *Ibid* at p 204-205.

⁴⁴ *Ibid* at p 213.

⁴⁵ For a full listing of all current NFL litigation, please see "http://nflconcussionlitigation.com/?page_id=18".

injuries suffered by any of the 18,000 retired NFL players.⁴⁶ In this action the plaintiffs agreed, in August of 2013, to a \$765 million settlement of the claim. However, in an important decision, US District Judge Anita Brody rejected the initial settlement, indicating that she did not have any evidence that the amount of the settlement would be enough to provide compensation for everyone within the class that received a qualifying diagnosis. Although counsel for the plaintiffs' indicated that Justice Brody's decision was a minor event that would quickly be remedied, there has yet to be any progress in this regard to date.

In a somewhat related event, a lawsuit was filed in the United States District Court for the Northern District of California⁴⁷ on or about May 20, 2014 on behalf of eight former players, including three members of the Super Bowl champion 1985 Chicago Bears, alleging that the NFL illegally supplied players with non-prescribed medication and narcotics to mask their pain so that these players could continue to play despite their injuries. Although these allegations have yet to be proven in court, some players have claimed that they have retired addicted to these drugs. This litigation may have a tremendous effect on the other NFL class action lawsuits as, if proven, it may clearly indicate that the NFL was aware of the potential damages associated with concussions and even illegally attempted to downplay and cover them up. Again, due to the recent filing of this lawsuit, the NFL has yet to defend to it.

With all these pending actions and the rejection of a large settlement proposal, the coming court battles for the NFL will surely have an effect on other leagues of all levels. Although the NFL appears to be the "test case" with regard to concussion litigation in professional sports, a positive verdict for the plaintiffs would surely spurn a plethora of further lawsuits being brought at all levels of sports for negligent care and handling of concussion related injuries.

III – Conclusion

Given the physical nature of many contact sports and the speed at which those sports are played, fully eradicating concussions may not be possible with eliminating entire aspects and rules of a game. For example, sports like football would require mass changes to the rules of play if the risk of concussions is to be fully eliminated, due to the inherent physical aspect of the game. Courts have seemingly recognized this fact in holding that certain risks, such as the risk of concussions, cannot be eliminated from contact sports.

⁴⁶ *Re: National Football League Players' Concussion Injury Litigation* (2012), No. 2:12-md-02323-AB, MDL No. 2323 (United States District Court, Eastern District of Pennsylvania).

⁴⁷ *Richard Dent et al. v National Football League* (2014), 3:14-cv-02324 (US District Court for Northern District of California).

Despite these risks, courts have still upheld a certain standard of care that is owed by a team and its personnel to its players with regard to serious injuries and the threat and treatment thereof. The decisions in *Robitaille*, *Dunn* and *Thomas* clearly indicate that a duty of care is owed towards athletes by their teams, and specifies the standard of care to which these teams will be held responsible for injuries sustained by their players. The *Dunn* and *Thomas* decisions provide insight into the standard of care owed with respect to student athletes. In those decisions, the courts held that the appropriate standard of care to be required of coaches and trainers is that of a careful and prudent parent.⁴⁸ The courts also referred to the concept of a “supraparental standard of care” and circumstances in which that standard may be appropriate.

Unlike schools, professional sports teams generally have a full medical staff with wide ranging expertise in various sports related injuries. As such, the *Robitaille* decision recognized a standard of care owed by a professional organization to its athletes as being greater than the standard owed in a school setting. In a professional context, team personnel have a duty to take reasonable care to ensure that its players do not suffer undue or unnecessary risk of injury, and this duty included the obligation to provide medical care when needed.⁴⁹ A court will find that the duty is breached where an organization fails to provide appropriate medical care, which results in injury.⁵⁰

The aforementioned decisions provide considerable guidance with respect to the fundamental legal principles regarding liability minimization for sports related injuries. However, the law in Canada relating to liability for concussion related injuries is still in its nascent stages of development. Recent medical advances in the areas of concussions and brain related injuries have put these issues at the forefront of the public’s attention. This further increase in awareness has led to a demand for greater oversight and regulation.

As evidenced by the many lawsuits against schools, universities, and professional sports teams, including the class action lawsuits against the NHL and NFL, the legal landscape on this issue is rapidly evolving.

The case of *Robitaille* remains an important decision in the context of sports liability, specifically as it relates to the potential liability of sports teams and their staff. *Robitaille* remains instructive in that it held that a sports team’s staff and medical personnel must follow proper protocol and procedures in diagnosing and treating potentially serious injuries, as well as determining when that injured athlete should be cleared to return. *Robitaille* states that a failure to follow industry procedures and protocols constitutes a breach of the standard of care, such that

⁴⁸ *Supra* note 65 at para 35, citing *Myers v Peel*, *supra* note 15.

⁴⁹ *Supra* note 1 at para 46.

⁵⁰ *Ibid* at para 64.

civil liability will ensue against that team and its employees. This portion of *Robitaille* is directly applicable to cases involving concussions. In concussion based cases, the plaintiff will need to establish liability against a sports team, by demonstrating that his or her team fell below the standard of care in diagnosing or treating a concussion and/or permitted the athlete to return from their injury prematurely.

One area where present or future courts may depart from *Robitaille* is as it relates to contributory negligence. It is important to point out that *Robitaille* was decided in the 1970's and that the court ordered a 20% reduction in the plaintiff's damages for contributory negligence on the grounds that Robitaille should have been more aware of his medical condition and should not have returned to the ice. This was despite the limited information and knowledge that was available to Robitaille with regard to his injury. However, in today's day and age, with the recent increase in both research and publicity regarding concussions, players are much more informed of the symptoms and potential consequences of concussions and returning to play prematurely after suffering one. As such, courts may be more willing to find that concussions are an inherent risk of contact sports and that athletes are keenly aware of those inherent risks. The courts may therefore hold players more accountable for choosing to participate in these inherently risky sports and may apportion higher percentages of contributory negligence to plaintiffs injured in those sports.

We are carefully watching all the developments relating to this area, as the court decisions that will be decided in the next few years will certainly change the law of sports as it relates to concussions in a manner that is meaningful not just for players, but the legal, medical, educational and insurance community as well.