HIGH-SCHOOL FOOTBALL INJURIES: WHO BESIDES THE PLAYERS MAY TAKE A HIT?

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I. INTRODUCTION

From 1931 to 2003, 655 high-school students died participating in interscholastic football programs.[1] From 1977 to 2003, 197 high-school students suffered catastrophic spinal cord injuries while participating in football.[2] And from 1984 to 2003, 81 high-school football players suffered severe cerebral injuries in which the player did not fully recover.[3] While statistics were only available for the most devastating of injuries, there can be no doubt that the numbers of abrasions, bruises and broken bones attributable to high-school football are exponentially larger than the figures cited which relate only to death, paralysis and brain damage. To illustrate this point, in the year 2002, 18.8% (1,083,000 out of 5,783,000) of those who participated in the sport of football, were injured.[4]

This article will explore negligence claims under which students who suffer injuries participating in high-school football may recover compensation for the harm they suffer, [5] and the potential defenses that will likely be raised against these claims. It will also analyze factual situations that are likely to produce a successful lawsuit for a plaintiff injured while participating in interscholastic high-school football.

II. CLAIMS OF NEGLIGENCE

A student injured playing interscholastic high-school football has a number of negligence claims which may be alleged; this article will focus on four in particular that have stood out in the case law as the most popular: (A) the student plaintiff may allege negligent coaching due to

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[1] *National Center for Catastrophic Sport Injury Research Data Tables*: Annual Survey of Football Injury Research, 1931-2003. (figures were not available for the year 1942).
[2] *Id*.
[3] *Id*.
[4] Dean Richardson, Player Violence: *An Essay on Torts and Sports*, 15 Stan. L. & Policy Rev. 133, n. 13 (2004) citing Abraham Verghese, *The Way We Live Now: Pain Gains*, N.Y. Times MAG., July 27, 2003, at 9 (providing chart with statistics on selected U.S. sports injuries in 2002 from American Sports Data, Inc.).
[5] While the author of this paper realizes that player on player violence and products liability provide alternative theories of liability, this article is limited to an exploration of possible recovery under theories relating to negligence on behalf of individuals and entities directly associated with the schools sponsoring football programs.

a failure to properly instruct the player on how to safely participate in the sport of football;[6] (B) the student plaintiff may allege negligence in failing to warn him of the potential risk of injury inherent in playing football;[7] (C) the student plaintiff may allege negligence in the failure to properly issue or supply necessary protective equipment;[8] (D) an injured high-school football player may attempt to recover for his injuries on the basis of premises liability or negligent field maintenance.[9]

A. Negligent Instruction and Training

In discussing negligence liability on behalf of a coach for an injury suffered by one of his players the issue is whether or not the coach had a duty to protect that player from the injury that befell him.[10] Case law and commentary have held that "Coaches generally have a duty to 'instruct and train their players with respect to the fundamentals of the particular sport[,]' including teaching the rules and skills necessary to the games, as well as methods to reduce the risk of injury."[11] Therefore, coaches may be found liable to their players if they either provide (1) negligent instruction or (2) minimal to no instruction at all.

An example of negligent instruction can be illustrated by reference to the 1976 rule change which prohibited the use of the head as the initial or primary point of impact while

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[6] See *Vendrell v. School District No. 26C, Malheur County*, 233 OR 1, 376 P2d 406 (1962) (discussing whether the defendant coach failed to exercise reasonable care for the protection of his players, and if so, whether the injury which the plaintiff sustained resulted there from).

[7] See *Hammond v. Board of Education of Carroll County, Maryland*, 100 Md. App. 60, 639 A2d 223 (1994) (discussing whether high-school authorities have a duty to warn of the dangers inherent in playing the sport of football).

[8] See *Thomas v. Chicago Board of Education*, 77 Ill2d 165, 395 NE2d 538 (1979) (discussing the possible liability of coaches and school board for failing to inspect and subsequently issuing equipment which turned out to defective and contributed to plaintiff's injury).

[9] See *McIntosh v. The Omaha Public Schools*, 249 Neb 529, 544 NW2d 502 (1996) (discussing whether a student injured on the football practice field was a licensee or an invitee, and the standard of care owed to him dependant upon determination of his status).

[10] Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 Seton Hall J. Sports L. 7, 14 (1996).

[11] *Kelly v. McCarrick*, 155 Md. App. 82, 113, 841 A.2d 869 (2004) citing Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 Seton Hall J. Sports L. 7, 23-24 (1996).

blocking or tackling.[12] The purpose of this rule was to lower the risk of players suffering head and spinal cord injuries as a result of using their head as the point of impact while making blocks or tackles.[13] If a coach were to teach and train his players to use this technique he could be found liable for providing negligent instruction.

Negligent instruction on behalf of a high-school football coach was at issue in the Oregon Supreme Court case of *Vendrell v. Malheur County*,[14] which is a leading case regarding the duty owed by a high-school football coach to adequately train his players, and the conduct required by the coach to satisfy that duty. Plaintiff Vendrell, a 15-year-old high-school freshman playing in a varsity game, suffered a broken neck resulting in paraplegia when he was tackled by players of the opposing team.[15] Vendrell alleged he did not receive proper or sufficient instruction in playing the game of football.[16] The court reasoned that plaintiff was really alleging that his coaches "should have told him that if he lowered his head and used it as a battering ram injury to his spine might ensue."[17]

The Court described the coach's duty to his player as one "to minimize the possibility that body contacts may result in something more than slight injury."[18] In finding that the level of instruction provided to the plaintiff by his coach satisfied this duty, the court noted:

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[12] Univ. of N.C. Nat'l Ctr. for Catastrophic Sports Injury Research, Annual Survey of Football Injury Research, 1931-2000, at http://www.unc.edu/depts/nccsi/SurveyofFootballInjuries.htm (last visited Oct. 23, 2004) (stating Rule changes for the 1976 football season which eliminated the head as a primary and initial contact area for blocking and tackling is of utmost importance. Coaches who are teaching helmet or face to the numbers tackling and blocking are not only breaking the football rules, but are placing their players at risk for permanent paralysis or death. This type of tackling and blocking technique was the direct cause of 36 football fatalities and 30 permanent paralysis injuries in 1968. In addition, if a catastrophic football injury case goes to a court of law, there is no defense for using this type of tackling or blocking technique).

[13] *Id*.

[14] 233 Or 1, 376 P2d 406 (1962) (Although this case was decided before the 1976 rule change regarding blocking and tackling technique, its analysis and holding concerning the plaintiff's claims of negligent coaching and instruction are still good law.)

[15] *Id* citing the lower courts opinion at 226 Or 263, 360 P2d 282 (1960).

[16] *Id* at 14.

[17] *Id* at 14-15.

[18] *Id* at 15-16.

> The extensive calisthenics, running and other forms of muscular exercise to which the…coaches subjected [their team] were intended to place the players in sound physical condition so that they could withstand the shocks, blows and other rough treatment with which they would meet in actual play. As a further safeguard for the players' protection the [coaches] provided all of the players with protective equipment. Each player was taught and shown how to handle himself while in play so that a blow would fall upon his protective equipment and not directly upon his body. We have also noticed the fact that every player was instructed in the manner of (1) running while carrying the ball, (2) tackling an opposing player, and (3) handling himself properly when about to be tackled.[19]

The basic level of training and instruction, which the Court found to satisfy the coach's duty to the plaintiff, supports the contention that coaches generally have a duty to instruct and train their players properly in the fundamentals of the sport, and no more.[20]

In contrast to alleging that a coach provided his player with negligent instruction, alleging negligence on the basis of minimal or no instruction at all would involve facts in which a player was asked to perform a maneuver inherent to the sport, after having received little or no instruction on how to perform such maneuver, and thereafter sustained an injury. Such was the case in *Woodson v. Irvington Board of Education*, where the plaintiff suffered a severe neck injury while making a tackle in practice and thereafter alleged negligence on behalf of his coach for providing him little or no instruction in tackling.[21] Specifically, the player had only been required to attend one practice session prior to sustaining his injury and had not been instructed on the importance of keeping one's head up while making contact, in order to avoid neck

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[19] *Id*.
[20] See *Kelly*, 155 Md. App at 113.
[21] Walter T. Champion, Jr., *Fundamentals of Sports Law* § 3.1, at 73 (2004) (citing Woodson v. Irvington Board of Education, no. L-56273-85 (Essex County, N.J.; Nov. 19, 1987; Coburn, J.); 3 Nat'l Jury Verdict Rev. & Anal. 10 (no. 8, July 1988)).

injury.[22] The jury found the plaintiff's coaches to have been negligent and awarded the plaintiff $6.5 million.[23]

In *Kelly v. McCarrick*, the Maryland Court of Appeals conducted a thorough review of case law and commentary discussing circumstances in which a coach has been sued for failing to prepare players to safely encounter specific physical dangers that commonly occur in a particular sport.[24] That court found that "inadequate instruction and training claims have progressed to trial only when a coach provided little or no training before asking the injured athlete to engage in a significantly dangerous play, and compounded that omission by failing to adequately supervise that play."

Although the majority of courts addressing the issue of negligent coaching and instruction have found negligence to be the standard for establishing liability on behalf of school officials, at least one court has held that negligence is not enough and that in order for liability to be established a plaintiff must prove that the defendant school officials acted in a reckless manner.[25] In *Kahn v. East Side Union High-School Dist.*, the plaintiff was a 14-year old member of the junior varsity swimming team and was required by her coach to perform a shallow water dive in a swim meet after receiving little to no diving instruction; she struck her head on the bottom of the pool and suffered a broken neck.[26] Furthermore, the evidence showed that the plaintiff had informed her coach of her fear of such diving, that the coach previously had promised her she would not be required to perform such a dive, and that the coach ultimately

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[22] *Id*.
[23] *Id*.
[24] *Kelly*, 155 Md. App. at 112.
[25] See *Kahn v. East Side Union High-School Dist.*, 31 Cal. 4th 990, 75 P.3d 30 (2003).
[26] *Id* at 995.

coerced the plaintiff into performing the dive with threats of removing her from the swimming team or at least from participation in the meet where she was injured.[27]

Despite the coach's lack of concern for the safety of one his swimmers, the California Supreme Court held that:

> "A sports instructor may be found to have breached a duty of care to a student or athlete only if the instructor intentionally injures the student or engages in conduct that is reckless in the sense that it is 'totally outside the range of the ordinary activity' involved in teaching or coaching the sport."[28]

The reckless standard of care applied to the coach in this case is one that in the past had only been applied to injuries caused by the violent acts of sports participants.[29] The court's rationale for applying this standard of care to cases involving coaching and instruction was that:

> "because a significant part of an instructor's or coach's role is to challenge or 'push' a student or athlete to advance his or her skill level and to undertake more difficult tasks…the fulfillment of such a role could be improperly chilled by too stringent a standard of potential legal liability…"[30]

Although liability is considerably harder to establish under the standard applied in California, it should be noted that the majority of jurisdictions still judge a coach's liability for inadequate training and instruction under a negligence standard.

In sum, coaches are not insurers of athletic prowess; they cannot be expected to train players in a manner that eliminates all dangers created by misplay, whether the misplay is caused by a young athlete's physical error or by mental error.[31] Therefore, if coaches provide proper

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[27] *Id* at 996.
[28] *Id* citing *Knight v. Jewett*, 3 Cal. 4th 296, 843 P.2d 696 (1992) (applying the same standard of care in cases of sports participant on sports participant injuries).
[29] *Id*.
[30] *Id*.
[31] *Kelly*, 155 Md. App. at 111.

instruction on the basics of blocking, tackling and receiving a tackle, they will not be found liable for injuries suffered by their players that occur in the regular course of playing football.

B. Failure to Warn of Inherent Dangers

Football is a violent game. As the Oregon Supreme Court observed:

> The game demands that players come into contact with each other constantly, frequently with great force. The linemen charge the opposing line vigorously, shoulder to shoulder. The tackler faces the risk of leaping at the swiftly moving legs of the ball-carrier and the latter must be prepared to strike the ground violently. Body contacts, bruises, and clashes are inherent in the game. There is no other way to play it.[32]

Must school officials warn of the inherent dangers of such an activity or else face liability?

In *Hammond v. Carroll County*, the Maryland Court of Appeals addressed this issue.[33] Plaintiff Hammond was a sixteen year-old, female, high-school junior who tried out for the varsity football team.[34] In her first practice scrimmage against another team plaintiff was tackled by a rival player while carrying the ball and sustained multiple internal injuries including a ruptured spleen.[35] Her spleen and part of her pancreas were removed and she was hospitalized for some time.[36]

Plaintiff sued the local school board alleging a duty on its behalf to warn of the severe injuries that might result from voluntarily participating on a varsity high-school tackle football team. The court was not receptive to this argument. First, the court noted there are numerous cases in which students injured while playing in school sporting events have sued school officials asserting that the officials' negligence caused the participants injuries.[37] However, the court

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[32] *Vendrell*, 233 Or at 15.
[33] 100 Md. App. 60, 639 A2d 223 (1994).
[34] *Id* at 224.
[35] *Id* at 225.
[36] *Id*.
[37] *Id*.

further noted that in none of those cases had the plaintiffs successfully asserted that the school officials were negligent because they failed to warn the plaintiffs of the possible dangers inherent in the sport.[38] The court then went on to hold that there is a fundamental principle that there is no duty to warn of obvious risks, and that "the possibility of injury to a voluntary participant in a varsity high-school tackle, football game – was 'the normal, obvious and usual incident' of the activity."[39]

In states such as Maryland, courts will find that school officials have no duty to warn a student athlete of the obvious and inherent risks in a contact sport.[40] However, other states express this principle via the defense of a player assuming the risk of the inherent dangers of the sport.[41] In jurisdictions that have abolished the assumption of the risk defense, school officials must allege that they had no duty to warn of the sport's obvious or inherent dangers (cite?).

Regardless of how the principle is stated, the concern remains the same -- what risks are considered an obvious and inherent danger of the sport? For example, suppose in the *Hammond* case that the plaintiff had received her injuries not from being tackled but instead from being the victim of a punch delivered from an opposing player with a reputation for such behavior known to the victim's coach.[42] Ultimately, the factual conclusion of whether or not the injury suffered by plaintiff was the result of an obvious and inherent risk of the sport would determine whether or not the coach had a duty to warn of such a risk.

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[38] *Id*.
[39] *Id* at 227.
[40] See *Hammond*, 100 Md. App. 60 (1994).
[41] See *Vendrell*, 233 Or. 1 (1962).
[42] See Richardson, supra note 4 (discussing whether player-on-player violence is considered an inherent risk of a sport).

C. Negligent Issuance of Equipment

In no sport is proper equipment more necessary to protect participants than in football. Accordingly, school officials have a duty to supply proper equipment to students participating in school sponsored athletic events.[43] A breach of this duty is likely to lead a court to find negligence present on the behalf of school officials.[44]

An obvious case of negligence in the issuance of equipment was presented in *Leahy v. Hernando County*.[45] In Leahy, the coach allowed a number of players to participate in a light contact[46] drill without helmets or mouthpieces and, as a result, plaintiff suffered facial injuries.[47] The court noted that the coach had a duty to provide adequate equipment to his players and further stated that he breached this duty in part because the injury was a foreseeable consequence of the coach's failure to supply all his players with helmets.[48]

A less obvious case of negligence is found in *Harvey v. Ouachita Parish School Board*, in which the Louisiana Court of Appeals upheld a trial court ruling that the high-school coach and school board were negligent for not supplying a player with a replacement neck roll after his had been torn off in the game in which the player was subsequently injured.[49] The court took note of the fact that neck rolls were typically considered to be optional equipment.[50] However, plaintiff had suffered two minor neck injuries earlier in the season and his parents had required to

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[43] Allan Korpela, *Tort Liability of Public Schools and Institutions of Higher Learning for Accident Occurring During Athletic Events*, 35 A.L.R.3d 725, 735 (1971).
[44] See *Gerrity v. Beatty*, 71 Ill. 2d 47, 373 NE 2d 1323 (1978) (Supreme Court of Illinois found the school district liable to 15-year old football player because it supplied the player with an inadequate and poor-fitting helmet).
[45] 450 So2d 883 (1984).
[46] *Id.* at 884-85. (The drill consisted of ten or twelve players getting on their knees and positioning themselves in a row, while the rest of the team formed a line and approached the row one at a time. The players were instructed to go up to each lineman, hit him on the shoulders with both hands, fall and roll on the ground, and then get up "as fast as possible" and go on to each subsequent lineman in the same manner).
[47] *Id*.
[48] Id. at 886. (The court stated, "Foreseeable consequences are those which a person by prudent human foresight can be expected to anticipate as likely to result from an act, because they happen so frequently from the commission of such an act that in the field of human experience they may be expected to happen again.")
[49] 674 So2d 372 (1996).
[50] *Id.* at 375.

him to wear a neck roll to provide added protection for his neck.[51] The court held that because the coach was aware of plaintiff's parents' wishes, a neck roll was not optional equipment for the plaintiff.[52] Therefore, when plaintiff was sent into the game without a neck roll and was subsequently injured, the coach was negligent.[53]

As expected, however, liability will not be found on all claims of negligent issuance of equipment. For example, in *Hunt v. Skaneateles School District*, the plaintiff alleged the school district was negligent in not supplying him with a different colored jersey to wear during contact drills in practice.[54] Plaintiff, while playing running back, was tackled by a defensive player and suffered a broken leg.[55] The court held that regardless of whether different colored jerseys should be considered protective equipment, the defendant's alleged failure to require players to wear them during a practice drill did not expose the plaintiff to an unassumed, concealed or unreasonably increased risk, and further the plaintiff knew being tackled violently was an inherent part of football.[56] Therefore, the school district's failure to require offensive and defensive players to wear different colored jerseys was not the cause of plaintiff's injury.[57]

D. Premises Liability or Negligent Field Maintenance

Schools have a duty to provide and maintain safe facilities for their students.[58] Included in this duty is the keeping of an inspection and maintenance schedule.[59] School districts do not have to possess actual knowledge of a dangerous condition to be found liable; they are liable if

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[51] *Id*.
[52] *Id*.
[53] *Id*.
[54] *Hunt v. Skaneateles Central School District*, 643 N.Y.S.2d 252 (A.D.2d 1996).
[55] *Id*.
[56] *Id* at 252.
[57] *Id* (stating "Andrew's injury 'was a luckless accident arising from the vigorous voluntary participation in competitive interscholastic athletics'" (quoting *Benitez v. New York City Bd. of Educ.*, 541 N.E.2d 29, 34 (N.Y. 1989)).
[58] WALTER T. CHAMPION, JR., SPORTS LAW IN A NUTSHELL 120-21 (2d ed.2000).
[59] *Id*.

they knew or should have known of a defective field.[60] "School employees have a duty of reasonable care to inspect the premises for hidden and lurking dangers" and "[s]chool districts will be liable for harm caused by dangers that coaches discovered or should have detected and failed to warn" against.[61] "However, they are not liable for unconcealed dangers that are known or should be obvious to participants."[62]

The Nebraska Supreme Court case of *McIntosh v. Omaha Public Schools*, deals specifically with premises liability in the context of high-school football.[63] Plaintiff McIntosh was injured while participating in a spring football clinic at the high-school. Plaintiff alleged that the poor condition of the school's practice field caused his injury.[64] The trial court held that plaintiff was a licensee[65] and therefore had to prove willful or wanton negligence on the part of the school district in the maintenance and use of their practice field.[66] The Supreme Court reversed the trial court's determination of plaintiff's status as that of a licensee and found plaintiff to be in the capacity of a business invitee[67] at the time of his injury. Thus, the school owed plaintiff a duty of due care to make all conditions upon the land reasonably safe and to conduct active operations on the land with reasonable care.[68] In so holding, the court stated that at the time of his injury plaintiff was a student participating in a high-school physical education

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[60] *Id*.
[61] *Id*.
[62] *Id*.
[63] *McIntosh v. The Omaha Pub. Sch.*, 544 N.W.2d 502 (Neb. 1996).
[64] *Id.* at 505 (The court noted evidence submitted at trial that the field upon which plaintiff's injury occurred was "'rutted' with 'clumps of hard packed dirt,'" and was further described as being "in the 'lower quartile' in terms of usability and playability" when compared with other fields in the school district).
[65] Licensees are defined as those on the land with the landowner or occupier's express or implied consent but who are there for their own purposes; therefore landowners only owe them a duty not to intentionally, willfully or wantonly cause injury. DAN B. DOBBS, THE LAW OF TORTS 596-97 (2000).
[66] *McIntosh*,544 N.W.2d at 504.
[67] Business invitees are invited to enter the land in connection with some business dealing with the possessor. DAN B. DOBBS, THE LAW OF TORTS at 599.
[68] *Id* at 602.

clinic, which was mutually beneficial to both plaintiff and defendant; therefore at the time of his injury, plaintiff was clearly an invitee.[69]

Although there is little case law discussing premises liability in the context of high-school football or any other high-school sport, the law available "emphasizes the prevention of probable injury by requiring those in control of sports facilities to undertake reasonable precautions for maintaining their premises in a reasonably safe condition.[70] Premises liability is based upon the duty of those in charge to use ordinary care and diligence in discovering and remedying potentially dangerous conditions."[71]

III. POTENTIAL DEFENSES TO OR IMMUNITIES FROM LIABILITY

Substantial hurdles have to be overcome by a student athlete plaintiff to establish negligence liability on behalf of school officials for an injury suffered playing high-school football. Three defenses to negligence liability are particularly prevalent in the case law: (A) assumption of the risk;[72] (B) sovereign immunity;[73] (C) conduct of defendant satisfied the standard of care owed to the player.[74]

A. Assumption of the Risk

Courts traditionally have disallowed recovery when a plaintiff assumes the risk of defendant's negligence.[75] In a sports context, this general rule is stated as "[one] who takes part

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[69] *McIntosh*,544 N.W.2d at 507.
[70] GEORGE W. SCHUBERT, RODNEY K. SMITH, & JESSE C. TRENTADUE, SPORTS LAW 238 (1986).
[71] *Id*.
[72] See *Hale v. Davies*, 70 S.E.2d 923 (Ga. App. 1952) (holding that since student realized football was a hazardous game and voluntarily participated in it anyway, he assumed the risk of being injured).
[73] See *Kain v. Rockridge Cmty. Unit Sch. Dist. #300*, 453 N.E.2d 118 (Ill. App. 3d 1983) (holding football game in which injury occurred was connected with a school program and therefore statute providing immunity from negligence for teachers and school districts in supervision of school activities applied).
[74] See *Cerny v. Cedar BluffsJunior/Senior Pub. Sch.*, 679 N.W.2d 198 (Neb. 2004) (holding that the coach satisfied the applicable standard of care, that of a reasonably prudent person holding a Nebraska teaching certificate and coaching endorsement).
[75] DAN B. DOBBS, THE LAW OF TORTS 535 (2000).

in a sport accepts the dangers that inhere in it so far as they are obvious and necessary."[76] "As an integral part of athletic competitions, persons are generally held by their actual and implied consents to the risks of "injury-causing events which are known, apparent, or reasonably foreseeable consequences of the participation"."[77] However, athletes do not consent or assume the risk of injury from fellow players behaving in an unexpected way, unsportsmanlike, and reckless manner.[78] Lastly, the policy behind providing the assumption of risk defense in a sports context is "to facilitate free and vigorous participation in athletic activities."[79]

The assumption of risk defense is particularly applicable in the football context. As noted by one court, "[n]o prospective player need be told that a participant in the game of football may sustain injury. The fact is self evident. It draws to the game the manly; they accept its risks, blows, clashes and injuries without whimper."[80]

In the high-school football context, however, the availability of the assumption of the risk defense, as applied to minors, will be determined after taking into consideration the minor's age, knowledge and experience in the sport, and the circumstances under which the injury occurred.[81]

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[76] *Benitez v. N.Y. City School Bd.*, 541 N.E.2d 29, 32 (N.Y. 1989) (citing Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 174 (N.Y. 1929)).
[77] *Benitez*, 541 N.E.2d at 32 (citing Turcotte v. Fell, 502 N.E.2d 964, 968 (N.Y. 1986).
[78] SCHUBERT, *supra* note 70, at 230.
[79] *Benitez*, 541 N.E.2d at 33 (N.Y. 1989) ("[a]ssumption of risk in competitive athletics "is not an absolute defense but a measure of the defendant's duty of care" (citing Turcotte v. Fell, 502 N.E.2d 964, 968 (N.Y. 1986) and Arbegast v. Board of Educ., 480 N.E.2d 365, 372 (N.Y. 1985))).
[80] *Vendrell v. Sch. Dist. No. 26C*, 376 P.2d 406, 413 (Or. 1962).
[81] *Kelly v. McCarrick*, 841 A.2d 869, 882 (citing Thomas R. Hurst & James M. Knight, *Coaches' Liability for Athlete's Injuries and Deaths*, 13 SETON HALL J. SPORTS L. 27, 39-41 (2003) to consider whether 13 year old softball player assumed risks attributable to coaching); *Benitez*, 541 N.E.2d 29, 33 (N.Y. 1989) (applying standard in context of high school football by stating that "[a]wareness of the risk assumed is "to be assessed against the background of the skill and experience of the particular plaintiff" (citing Maddox v. City of New York, 487 N.E.2d 553, 556-557 (N.Y. 1985))).

However, at least one court has held that minors of high-school age should be held to the same degree of care as adults in realizing danger and exercising caution to avoid it.[82]

An often cited case applying the assumption of the risk defense to a high-school football fact pattern is *Benitez v. N.Y. City School Board*, 541 N.E.2d 29 (N.Y. 1989).[83] In *Benitez*, the plaintiff suffered a broken neck and was paralyzed during a high-school football game. Plaintiff alleged his injury was caused by the school board's negligence in mismatching his team with a team of superior ability and for playing plaintiff while he was tired. The court dismissed the complaint and held that the plaintiff was aware of the dangers inherent in football and, therefore, assumed the risks of being injured.[84] In addition, the court held that suffering a neck injury was a risk inherent to playing football and that "a 19-year old senior star football player and college scholarship prospect [does not] fall within [an] extra protected class of" athletes.[85]

Another example of the assumption of risk defense being applied in a high-school football injury context is *Vendrell v. Malheur County*, 376 P.2d 406 (Or. 1962).[86] In *Vendrell*, plaintiff alleged his coaches were negligent in not informing him that "if he used his head as a battering ram," he might be injured.[87] In rejecting the plaintiff's claims, the court noted that in a game less than two weeks before plaintiff's injury, he ran head on into an opposing player causing his helmet to split down the middle.[88] The court found this fact to be evidence of plaintiff's knowledge of the potential for injury in striking an opposing player with his head

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[82] *Hale v. Davies*, 70 S.E.2d 923, (Ga. Ct. App. 1952) ("a person [who is 16 years old] is presumed to be capable of realizing danger and exercising caution to avoid it. Presumptively, he would be chargeable with the same degree of care in this respect as an adult" (citing Muscogee Mfg. Co. v. Butts, 94 S.E. 821, 821 (Ga. Ct. App. 1918) and Central R. & Bkg. Co. v. Phillips, 17 S.E. 952, 953 (Ga. 1893))).
[83] *Benitez v. N.Y. City School Bd.*, 541 N.E.2d 29, 33 (N.Y. 1989)
[84] *Id.* at 34.
[85] *Id*.
[86] *Vendrell v. Sch. Dist. No. 26C*, 376 P.2d 406, 412-413 (Or. 1962).
[87] *Id*. at 16-17.
[88] *Id*. at 17.

and therefore plaintiff assumed the risk of sustaining the injury that befell him.[89] Although this case is no longer good law in Oregon, since Oregon has abolished the assumption of the risk defense[90], the holding still provides an excellent illustration of the application of an assumption of the risk defense in a high-school football context.

Like Oregon, many jurisdictions have abolished the assumption of the risk defense and instead apply principals of comparative negligence in cases traditionally governed by the assumption of the risk defense.[91] As noted above, in jurisdictions that have abolished the assumption of the risk defense, defendants in high school football injury cases will instead allege that they had no duty to warn the plaintiff of the obvious and inherent risks of the sport.[92]

For example, because Oregon has abolished the assumption of the risk defense, if the *Vendrell* case were tried today then the defendant would need to assert that he had no duty to protect the plaintiff from injuries due to using his head as a *battering ram* because that is an inherent risk of the sport. Conversely, if a case with facts similar to *Vendrell* were before the California courts, the same principle could be asserted defensively; the coach would argue that plaintiff had assumed the risk of his injury inherent to the sport and, therefore, is completely barred from recovery.[93]

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[89] *Id*.
[90] OR. REV. STAT. § 31.620 (2003) (abolishing the doctrine of implied assumption of the risk).
[91] 57B AM. JUR. 2D *Negligence* § 954 (2004) ("[t]he term "comparative negligence" is usually associated with the concept that a plaintiff's negligence, which concurs with that of the defendant in causing the plaintiff's injury, should not relieve the defendant entirely from liability, but should merely diminish the damages the plaintiff can recover. Under the "comparative negligence doctrine," negligence is measured in terms of percentage, and any damages allowed shall be diminished in proportion to the amount of negligence attributable to the person for whose injury, damage, or death recovery is sought" (citing Burton by Bradford v. Barnett, 615 So.2d 580 (Miss. 1993)).
[92] McCaskey, *supra* note 10, at 29 (discussing a coach's duty to warn of obvious and inherent dangers).
[93] *Knight v. Jewett*, 843 P.2d 696, 708 (Cal. 1992) ("[i]n cases involving "primary assumption of risk"—where, by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes no legal duty to protect the plaintiff from the particular risk of harm that caused the injury—the doctrine continues to operate as a complete bar to the plaintiff's recovery").

B. Sovereign Immunity

"Immunities are different from defenses. A defense justifies or excuses what would otherwise be a tortious wrong. Immunities and limitations on liability do not justify the wrongful conduct; they simply deprive the injured party of the right to sue."[94]

Typically, defendants in a negligence action arising out of a high school football injury will be either a school district or one of its employees. Because "public schools are governmental agencies, coaches, administrators, and school boards serve as governmental agents."[95] Thus, a potential plaintiff in a suit against any of these parties needs to be aware of the doctrine of sovereign immunity. Under the doctrine:

> "As a general rule…governmental or sovereign immunity bars actions against the state, its counties, and its public officials sued in their official capacity…"[96]

However, there are vast differences in state laws regarding sovereign immunity and thus it is more difficult to formulate a general rule, which would apply to all jurisdictions,[97] than above definition implies. "Therefore, the law of the particular jurisdiction in question must be consulted."[98]

For example in the case of *Garza v. Edinburg School District*, the Texas Court of Appeals held that providing high-school football was a governmental function for which the defendant school district was entitled to immunity. The Court stated that the "school district is an agency of the state and, while exercising governmental functions, is not answerable for its

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[94] SCHUBERT, *supra* note 70, at 208.
[95] Andrew F. Beach, NOTE, *Dying to Play: School Liability and Immunity for Injuries That Occur as a Result of School-Sponsored Athletic Events*, 10 SPORTS LAW J. 275, 278 (2003) (citing Gravely v. Lewisville Indep. Sch. Dist., 701 S.W.2d 956, 957 (Tex. App. 1986) and Cobb v. Fox, 317 N.W.2d 583, 585-587 (Mich. App. 1982).
[96] 57 Am. Jur. 2d Municipal, County, School, and State Tort Liability § 1 (2001).
[97] McCaskey & Biedzynski, 6 Seton Hall J. Sports L. at 66.
[98] *Id*.

negligence in a suit sounding in tort."[99] In making its determination that providing a football program is a governmental function for which the School District was entitled to immunity the Court noted that: "As a general rule, 1) activities which are carried on pursuant to the State's obligation for the general welfare of the public generally, or which are voluntarily assumed for the benefit of the public at large rather than for the primary benefit of its residents, are performed in a governmental capacity and as a governmental function…"[100]

In the case of *Harris v. McCray*, the Mississippi Supreme Court found that the defendant football coach and school district were immune from liability, not because providing a football program is a governmental function, but instead pursuant to an exception from liability provided for in the Mississippi Tort Claims Act.[101] That exception provided that "where the governmental conduct is a discretionary act, governmental entities and their employees are entitled to immunity…"[102] In determining that the coach's conduct in regulating his practice in a particular manner constituted a discretionary act the Court stated that, "When an official is required to use his own judgment or discretion in performing a duty, that duty is discretionary."[103] The court held that the coach's decisions on how to run his practices met the preceding standard.[104] The court stated a strong policy argument in favor of finding a football coach's duties to be discretionary in nature and thus entitled to immunity; to find otherwise would result in a coach losing his ability to control and discipline his team. [105]

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[99] 576 S.W. 2d 916, 917 (1979).
[100] *Id* at 918.
[101] 867 So. 2d 188, 190 (2003).
[102] *Id* at 188 citing *Miss. Code Ann.* § 11-46-9(1)(d) (Supp. 2003). See also 51 Okl. St. § 155(20) (2004) (Stating that "A political subdivision or an employee acting within the scope of his employment shall not be liable if the a loss results from: (20) Participation in or practice for any interscholastic athletic contest).
[103] *Id* at 190.
[104] *Id*.
[105] Id (Who knew the football players of the 1995 Jefferson County High School football team better than Coach McCray? He knew what players would complain only when hurt and what players would complain at a drop of a hat simply to be able to take a break from football practice on a hot August day. Coaches have to know what motivates

Many states have consented to suits in tort by enacting tort claims statutes, and thereby have limited or eliminated their ability to raise the sovereign immunity defense.[106] Typically these statutes provide that "every public body is subject to action or suit for its torts and those of its officers, employees and agents acting within the scope of their employment or duties, whether arising out of a governmental or proprietary function."[107] However, these state statutes usually provide, as does the Mississippi Tort Claims Act, for an exception to liability for the exercise of discretion on behalf of state or local governmental agencies and their employees.[108] Thus, the question becomes what kinds of school official conduct would not be considered discretionary and, therefore, not entitled to immunity?

A common example of conduct that would be considered discretionary was illustrated in the *Harris* case discussed above. When the coach made the judgment call that his player was "faking it" when he complained of fatigue and asked for water, the judgment call was a discretionary act. The Court held that because the coach exercised his judgment and discretion

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their players and what does not. Coaches know that in order to discipline football players, each one is a different human being - one player may be disciplined by a mere stern look from the coach, while a military-style drill sergeant chewing out will not faze another player. Coaches will know their players well enough to know who may holler "wolf" and who will not. When Victor Harris complained of feeling weak and needing a water break, Coach McCray told Harris he was "faking it." Unfortunately, he was not. Harris's injuries and resulting damages are not to be treated flippantly. However, we cannot fast-forward past the facts of this case and the applicable law just to arbitrarily impose liability in an attempt to right a perceived wrong.

While the facts of Victor Harris's case are no doubt tragic, we must realize the consequences of our decision today were we to find Coach McCray and the school district liable on the facts of this case. High school football coaches around the state would lose their ability to control their football teams. Discipline of a football team would become non-existent. If a coach refused a player's request to have a water break - to see a trainer - to not have to run any more wind-sprints - to not have to do any more one-on-one blocking/tackling drills, because of that player's complaint of "feeling weak" or "not feeling good" or simply "not feeling like it," that coach would be very much aware of the fact that he/she would be running the risk of being successfully sued along with other school officials and the school district, should that player later suffer physical/medical problems related to the coach's failure to cow to the player's every whim and wish. On the other hand, if the coach, in fear of a successful lawsuit, should cow to the player's every whim, wish and demand, then the coach would lose the respect of the players, and discipline and morale would be lost).

[106] Schubert, Smith & Trentadue, *Sports Law* at 213.

[107] O.R.S § 30.265(1) (2003).

[108] Schubert, Smith & Trentadue, *Sports Law* at 213. See O.R.S. § 30.265(3)(c) (2003) (Stating "(3) Every public body and its officers, employees and agents acting within the scope of their employment or duties…are immune from liability for: (c) Any claim based upon the performance of or the failure to exercise or perform a discretionary function or duty, whether or not the discretion is abused").

in determining how his practices would be run such decisions were entitled to immunity.[109] In contrast, a situation in which a coach's conduct would not be considered discretionary would be illustrated on the following facts: a coach is instructing his players on how to execute a proper block and in doing so demonstrates the correct technique on a player, and during such demonstration hits the player too hard breaking the player's arm. Here the demonstrative act does not involve an exercise of the coach's judgment.

Although discretionary immunity is a formidable defense for a plaintiff to overcome, not all jurisdictions find that school districts and their employees are entitled to governmental immunity, regardless of whether an act was discretionary or not.[110] For example, in "California, 'the immunity that once protected school districts from liability for negligence has been fully abrogated, either legislatively or judicially.'"[111] Furthermore, in other states "such as North Carolina, school boards may waive immunity just by purchasing liability insurance."[112] The state of Oregon follows a similar rule.[113] Because the law of sovereign immunity is not uniform, parties to lawsuits in which this defense may be an issue should conduct a through examination of the relevant jurisdiction's law regarding the topic.

C. Conduct of Defendant Satisfied the Duty of Care Owed the Player

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[109] 867 So. 2d at 190.

[110] See *Hall v. Fort Frye School District*, 111 Ohio App. 3d. 690, 676 N.E.2d 1241 (1996) (holding that maintenance of the practice field, did not require judgment or discretion of the type immunized under the Ohio Tort Claims Act). See also *Morris v. Union High School Dist.*, 160 Wash. 121, 294 P. 998 (1931) (holding that a school district was liable for the negligence of a high-school football coach who persuaded a player to play in a game while having knowledge that the player was still suffering from a prior injury and the player was injured further as a result of such negligence).

[111] Beach, supra note 75, at 291 citing John P. Lenich, Commentary, *One Strike and You're out: An Overview of Negligence and High School Athletics*, 40 Educ. L. Rep. 1, 2, (1987).

[112] *Id* citing *Daniel v. City of Morgantown*, 479 S.E.2d 263, 267 (N.D. Ct. App. 1997) (purchasing liability insurance is not a total waiver of governmental immunity) See also Vendrell, 360 P.2d at 290-91 (holding that a school district without liability insurance is immune, but if such insurance is purchased, the school district waives its immunity only to the extent

[113] McCaskey & Biedzynski, supra at 69 citing *Vendrell*, 360 P.2d at 290-91 (holding that a school district without liability insurance is immune, but if such insurance is purchased, the school district waives its immunity only to the extent of the liability insurance).

A defendant's satisfaction of the applicable standard of care is not a typical affirmative defense where the defendant has the burden of proving its existence. Instead, this is a method of negating a defendant's liability by disproving an element of the plaintiff's prima facie case of negligence. In a negligence case arising out of a high-school football injury a defendant would serve himself well if he expended effort to prove that his conduct satisfied the applicable standard of care.

Generally, the duty owed by those involved in sporting events is a limited duty to exercise care to make the conditions as safe as they appear to be and if the risks of the activity are fully comprehended or perfectly obvious, a plaintiff has consented to them and defendant has satisfied their duty.[114] Courts have stated the general standard of care that will satisfy the duty owed to high-school football players in various ways. Nevertheless, these different descriptions of the applicable standard of care are generally stating the same proposition. For example, in *Cerny v. Cedar Bluffs School Dist.*, the Nebraska Supreme Court phrased the applicable standard of care by which to judge the conduct of a high-school football team's coaching staff as that of a reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement.[115] Conversely the New York Court of Appeals described the applicable standard of care owed as one of "only reasonable care to protect student athletes in sports competitions from injuries arising out of unasssumed, concealed, or unreasonably increased risks.[116] The Oregon Supreme Court stated a coach's duty to his players as one of preparing his players to safely encounter risks inherent in the game of football.[117] The Court held the coach satisfied this

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[114] *Kelly*, 155 Md. App. at 102.
[115] *Cerny*, 267 Neb. at 962.
[116] *Benitez*, 73 N.Y.2d at 653 (holding that a board of education, its subordinate employees and interscholastic athletic organizations must exercise only reasonable care to protect student athletes in sports competitions from injuries arising out of unassumed, concealed, or unreasonably increased risks).
[117] *Vendrell*, 233 Or. 1 (1962).

duty by training his players in the "fundamentals of football such as tackling, running, blocking and the proper position of the head and body while in play."[118]

The basic theme underlying the various descriptions of the applicable standard of care is that one must exercise reasonable care to prepare players to safely confront the inherent risks of the game and to act reasonably so at to not increase the risk of harm beyond what is inherent in the game; one is not obligated to protect players from the inherent risks of the game. Plaintiffs will argue that their injuries were not suffered as a consequence of the inherent risks of the game and that the coach should have acted reasonably to protect them from the acts which caused their injuries.[119] Defendants in negligence cases stemming from a high-school football injury will attempt to establish that plaintiff's injury was an inherent risk of the game and that their conduct satisfied the requisite level of care. Coaches will assert that they cannot insure against what was one of the inevitable injuries the game can produce.

IV. CIRCUMSTANCES UNDERWHICH LIABILITY IS LIKELY TO BE FOUND

Those involved in sporting events do not have a duty to protect players from the inherent risks of the game. Instead they have a limited duty to exercise care to make the conditions as safe as they appear to be and if the risks of the activity are fully comprehended or perfectly obvious, a plaintiff has consented to them and defendant has satisfied his duty.[120] The question, then, is when are courts likely to find a coach liable? An examination of some cases where coaches were found liable provides a feel for what essentially is a fact-based inquiry.

In *Leahy v. Hernando County*, the Court found circumstances justifying liability to exist when the plaintiff was instructed to participate in a light contact drill without having been issued

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[118] *Id*.
[119] *Foronda v. Haw. Int'l Boxing Club*, 96 Haw. 51, 70, 25 P.3d 826 (2001) (holding defendant's conduct did not create a risk not inherent in the sport of boxing and therefore had no duty to protect from the inherent risk that caused plaintiff's injury).
[120] *Kelly*, 155 Md. App. at 102.

a helmet.[121] The court held that the plaintiff had "not assumed the risk of participating in a training drill which was improperly supervised and for which he had improper and insufficient equipment."[122]

In *Zalkin v. American Learning Systems*, the plaintiff injured his shoulder in a game and informed the coach of his injury.[123] Ten days later the coach had the plaintiff play in another game and the injured shoulder suffered further injury.[124] The court held that although the plaintiff "may have waived risks inherent in the sport itself – those that arise from the bodily contact with the other players – those risks did not include the failure to have proper supervision."[125]

In *Cruz v. City of New York*, the plaintiff was injured when he ran into a 200-pound blocking sled that had been left three or four feet from the sideline, and which was usually kept as far from the field as possible.[126] The court noted that by engaging in a sport, participants consent to "appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation, including the risks associated with the playing field and any open and obvious conditions on it."[127] However, the court held that the push sled was negligently left on the sideline and that the plaintiff "did not assume the risk of an injury caused by a collision with the sled since its location 'created a dangerous condition over and above the usual dangers' inherent in the sport of football."[128]

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[121] 450 So. 2d. 883 (1984).
[122] *Id* at 887.
[123] 639 So. 2d. 1020, 1020 (1994).
[124] *Id*.
[125] *Id*.
[126] 733 N.Y.S. 2d 112, 113, 288 A.D.2d 250 (2001).
[127] *Id*.
[128] *Id*.

In *Vendrell* the Oregon Supreme Court held that the coach had satisfied the duty owed to his players by instructing them in the fundamentals of football.[129] The court took note of the fact that the coach had trained his players in tackling, running, blocking and the proper position of the head and body while in play.[130] But if the player had suffered injury and had been provided little or no instruction in these basic football skills, or had been instructed in way that was likely to increase his chances of injury (by making his head the primary point of impact when blocking or tackling, for example) the player would have had a solid claim of negligence against his coach.[131]

A plaintiff will best be able to establish liability for his injury if he can prove negligence based on either: having been supplied with improper equipment; inadequate training or instruction; improper supervision; or the failure to provide proper post-injury procedures to protect against aggravation of the injury. The harm suffered under these circumstances will not be considered to have occurred as a result of the inherent risks of the game. Therefore, the lack of duty or defense of assumption of the risk will be overcome and liability is possible.

V. CONCLUSION

The question of whether or not liability is possible all comes down to a factual inquiry as to whether the harm that befell the plaintiff stems from an inherent risk of the game? What is critical in making this determination is a lawyer's knowledge of the sport and his ability to convince a jury that either the injury was an inherent risk of the sport or was not an inherent risk of the sport.

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[129] 233 Or. at
[130] *Id*.
[131] Kelly, 155 Md. App. At 113 (stating that inadequate instruction and training claims have progressed to trial only when a coach provided little or no training before asking the injured athlete to engage in a significantly dangerous play, and compounded that omission by failing to adequately supervise that play).

A coach should be held liable when his conduct increases his player's chances of suffering harm. Not preparing a player to adequately encounter inherent risks of the sport of football or failing to protect a player from risks outside those inherent in the game of which the coach has knowledge, should be actionable. However, a coach should not be held liable for injuries that are only avoidable by refraining from participation in the sport. Bumps, bruises, broken bones and sadly enough, much more severe injuries are part of the sport of football. All that can be expected of a coach is to train his players to encounter these risks in the safest possible manner, and to act in a way that does not increase his player's chances for injury.