THE CONNECTION BETWEEN CONCUSSIONS AND CHRONIC TRAUMATIC ENCEPHALOPATHY (CTE) IN PROFESSIONAL ATHLETICS: A NECESSARY CHANGE IN THE “SPORTS CULTURE” IN LIGHT OF LEGAL BARRIERS

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I. INTRODUCTION

It is widely accepted that injuries are commonplace in contact sports such as football and ice hockey. “Body contacts, bruises, and clashes are inherent in the game. There is no other way to play it. No prospective player need be told that a participant may sustain injury. That fact is self evident. It draws to the game the manly; they accept its risks, blows,
clashes, and injuries without whimper.” The current “sports culture” leads the public to both expect and promote what can be characterized as rough play in contact sports such as football and hockey, and even players alike expect such play from themselves and their teammates.

Logic following such a universal characterization of contact sports, liability for injuries incurred is most often limited, especially in the context of professional athletics. However, the increasing prevalence of professional athletes suffering from serious head injuries and even death warrants a closer analysis and possible modification of such a standard. Generally, this Note will examine the standard of liability for injuries incurred in professional athletics. It will specifically analyze the liability in the context of the recent National Football League (NFL) lawsuits, as well as recent National Hockey League (NHL) players’ deaths. This Note will also analyze the significant legal boundaries that future plaintiffs may face due to the non-statutory labor law exemption and the leagues’ collective bargaining agreements.

Current research has drawn connections between concussions suffered in professional games and the debilitating disease of Chronic Traumatic Encephalopathy (CTE). In light of such research, this Note will argue that although remedies under state tort law may not be ultimately successful, an overall change in the culture of sports is necessary to ensure that professional sports teams provide proper supervision and medical monitoring, both to their retired players and, most importantly, their current players.

II. BACKGROUND

A. NFL Lawsuits

In July 2011, 75 retired NFL players sued both the NFL and helmet-maker Riddell, the NFL’s official helmet supplier, in Los Angeles, alleging the concealment of the harmful effects of concussions. Further,
on August 17, 2011, seven former players sued the NFL for “training players to hit with their heads, failing to properly treat them for concussions and trying to conceal for decades any links between football and brain injuries.” The plaintiffs asserted that the NFL showed both negligence and intentional misconduct in their response to the reports from players with concussion-like symptoms, and sought medical supervision and financial assistance for injured players. One of the players named in the most recent lawsuit, former NFL quarterback Jim McMahon, suffers from severe memory loss at only 51-years-old, which he believes is due to injuries suffered during his football career, including playing through five concussions. The other plaintiffs include ex-players Joey Thomas, Ray Easterling, Wayne Radloff, Gerry Feehery, Mike Furrey, and Steve Kiner, all of who have suffered similar symptoms.

Following the initial lawsuits, more NFL players have sued under similar claims. In December, several ex-players filed a suit in Atlanta, including Jamal Lewis, Dorsey Levens, Fulton Kuykendall, and Ryan Stewart. This lawsuit similarly alleges that the NFL was aware of the grave medical risks associated with concussions, but concealed the proper information from the players. Instead, players suffering from concussions were returned to play as soon as possible, following the NFL’s general protocol. Over two-dozen players, including Patrick Surtain and Oronde Gadsden, also filed lawsuit in Miami, citing “severe and permanent brain damage they say is linked to concussions suffered on the job.” This lawsuit also specifically addresses the allegation that the NFL hid evidence linking concussions to future neurological problems, and additionally that the NFL downplayed the seriousness of the injuries, returned players to games quickly, and generally promoted

damage and football. Although the NFL had been studying such effects since early 1990s, players state that it wasn’t until June 2010 that they were warned of the harmful consequences of concussions, including dementia, CTE, and memory loss).

5. Players Accuse, supra note 4.
6. Id.
7. Id.
8. Id.
10. Id.
11. Id.
an “aggressive style of football that would attract viewers.” In response, the NFL has pointed to a 1994 study of concussions that was published in 2003, finding “no long-term negative health consequences associated with concussions.” This study, however, was performed by a committee of researchers that were not independent, but rather affiliated with the NFL, prompting some to question possible in-house bias.

One of the most recent NFL lawsuits, filed in New Orleans in mid-February 2012, includes several former New Orleans Saints players. This particular lawsuit, like many of the others, alleges that the plaintiffs have developed mental and physical problems stemming from the concussions that they suffered while playing in the league. In an interesting twist, the New Orleans Saints have also been in the news recently due to the exposure of their “bounty program,” under which the team paid players generous bonuses for targeting opponents. The program, which was active during the 2009, 2010, and 2011 seasons, paid players $1,000 for “cart-offs” and $1,500 for knocking players completely out of the game. The program also targeted high-profile players, such as Brett Favre, and offered increased compensation for “hits” in playoff games. Referencing the “bounty program’s” obvious disregard for the well-being of the players, Commissioner Roger Goodell stated, “the bounty program is squarely contrary to the league’s most important initiatives—enhancing player health and safety and protecting the integrity of the game.” Investigation of the program has led to the suspensions of the Saints General Manager for the first eight games of the 2012 season, the head coach for the entire season, and the defensive coordinator (who fronted the “program), indefinitely.

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13. Id.
14. Id.
15. See id.
17. Id.
20. Id.
An article published by the Associated Press in December 2011 outlined the opinions of 44 current NFL players on concussions and subsequent neurological damage.\(^{23}\) When asked specifically whether they would hide a concussion during a game and continue to play, 23 of the 44 players interviewed answered that they would.\(^{24}\) In his answer, the 2011-2012 season’s leading rusher Maurice Jones-Drew referenced how many NFL players feel injuries are inherently part of the game: “But this is what I signed up for. Injuries are part of the game. If you don’t want to get hit, then you shouldn’t be playing.”\(^{25}\) However, there does seem to be a recent shift in some players’ beliefs: 5 of the players indicated that, although they would have hid a concussion in 2009, they would not with what they know now.\(^{26}\) League Commissioner Roger Goodell spoke of his hope to change the culture of football and the “just walk-it-off” mentality that many of the league’s players have.\(^{27}\) He believes that there is a stigma attached to leaving the field and not playing through an injury.\(^{28}\) However, he does believe that recent information has begun to change such feelings. It appears that players similarly believe in this change; 28 of the 44 interviewed believe that the NFL is safer than it was in 2009, citing increased awareness, greater fines for illegal hits, and changes to kickoff rules among other things.\(^{29}\) Although a majority of players believed the league to be safer, 18 players posited that more action was needed to protect players from head injuries.\(^{30}\) Dr. Robert Cantu, the senior adviser to the NFL committee on head injuries and also the co-director of the Center for Study of CTE at Boston University School of Medicine, agreed that there has been a culture change in the NFL but that more needs to be done.\(^{31}\) He cited a need for more information, specifically on CTE and its effects, as well as the possibility of an independent neurologist on the sidelines for NFL games.\(^{32}\) Two-thirds of the players interviewed similarly wanted such a neurologist.\(^{33}\)

In follow-up to the recent player interviews, several players have spoken-up about the apparent disregard for the effects of concussions.

\(^{23}\) Players still willing, supra note 2.
\(^{24}\) Id.
\(^{25}\) Id.
\(^{26}\) Id.
\(^{27}\) Id.
\(^{28}\) Id.
\(^{29}\) Players still willing, supra note 2.
\(^{30}\) Id.
\(^{31}\) Id.
\(^{32}\) Id.
\(^{33}\) Id.
from current players, coaches, and owners. “Yeah, I understand you paid me to do this, but still yet, I put my life on the line for you, I put my health on the line. And yet when the time comes, you turn your back on me? That’s not right. That’s not the American way,” stated Tony Dorsett, a Hall of Fame Cowboys running back and a party in one of the many current NFL lawsuits. Pointing both to multiple brain scans that show his brain is not receiving enough oxygen and to his many symptoms such as lack of organization and memory loss, Dorsett has no doubt that the concussions he suffered during his career had a profound and devastating effect on his life. Other players described the sordid NFL culture that promoted such long-term effects: the widespread and regular use of painkillers to mask injuries instead of treating them and the stigma attached to not returning to a game or playing through an injury.

Changes have been made to the game of football since this time and the NFL even aired a one-minute commercial during the Super Bowl, intended to emphasize these rule changes that have made football safer. Ironically, instead of promoting positive public response, the commercial drew harsh criticisms. The ad aired during the Super Bowl features a player running down the football field while time and the sport evolve around him. The commercial depicts several maneuvers that are now in fact illegal in the game of football, including the “flying wedge” and the “horse-collar tackle.” Some view these inclusions as an NFL oversight, while others contend that these subtle references are meant to emphasize the evolution of safer rule changes.

Changes that the NFL has made to the game to increase safety include the revamping of return-to-play guidelines, a change in the co-chairman of the committee on concussions, and after Cleveland Browns quarterback Colt McCoy returned to a game in December 2011 after not being checked for a head injury, increased surveillance of head injuries through certified athletic trainers in booths above the field as well as

35. Id.
36. Id.
37. Id.
38. Id.
40. Id. The “flying wedge” is a blocking technique banned soon after its debut in 1892, and a “horse-collar tackle” is a recently banned method of grabbing ones’ opponent by grabbing the back-inside of their shoulder pads. Id.
41. Id.
video feeds on the sidelines.\textsuperscript{42} Although these changes have been made, Dorsett, among others parties in the nearly 20 lawsuits to date, is primarily seeking health insurance for life.\textsuperscript{43} The NFL Players Association has responded to such requests by stating that lifetime medical insurance has not been sought by either former or current union leadership, that such a plan would cost an extravagant $50 million a year, and that current U.S. health care laws should cover most players’ pre-existing conditions.\textsuperscript{44}

Currently, the NFL and the players union provide financial assistance to players suffering from dementia and similar brain injuries through their “88 Plan.”\textsuperscript{45} The plan pays for the cost of medical and custodial care for those eligible, with a maximum annual benefit of $88,000 for those who are institutionalized, and a maximum annual benefit of $50,000 for those who are not.\textsuperscript{46} Some argue that these funds are not adequate to cover the extensive costs associated with these debilitating injuries, including the costs of in-home care and funds to replace the income of those who can no longer work.\textsuperscript{47} Further, although the plan may offer at least some of the financial assistance necessary for the care of injured players who qualify, the plan only gives help after-the-fact, and seems to ignore the integral need for reform in safety procedures and medical monitoring prior to the injuries’ progression.\textsuperscript{48}

\textbf{B. Recent deaths of NHL players}

During the summer of 2011, three NHL players (Rick Rypien, Derek Boogaard, and Wade Belak) tragically died at a young age—two from suicide and the third of an overdose of alcohol mixed with prescription drugs.\textsuperscript{49} The characterization of all three players as “hockey enforcers” has caused great speculation about whether the frequency of head injuries incurred during games played a part in their respective deaths. The role of an “enforcer” is typically described as “one of the toughest

\begin{footnotes}
\item[42] Dorsett, \textit{supra} note 34.
\item[43] Id.
\item[44] Id.
\item[46] Id.
\item[47] \textit{Players Accuse, supra} note 4.
\end{footnotes}
positions in hockey”— their main goal is to “target other players for payback and try to knock their lights out.”\(^{50}\) Inherent in such a job are hard hits, frequent fights, and consequently, concussions.\(^{51}\) Just as research has demonstrated a link between frequent concussions and the development of CTE, studies have further connected concussions with depression.\(^{52}\) Statistically, the rate of depression in the general population is estimated between 5 to 10 percent; while roughly 40 percent of head trauma patients exhibit depression.\(^{53}\) Using MRIs, researchers have discovered that athletes suffering from concussions and medical patients with major clinical depression both exhibit similar patterns of brain activation and inactivation, further finding that the main area of the brain that was inactive in both groups was located behind the forehead—”an area that is often the target for boxers, football players and NHL enforcers.”\(^{54}\)

Rangers “enforcer” Derek Boogaard died in May 2011, due to an accidental mix of alcohol and the painkiller oxycodone.\(^{55}\) Boogaard had been battling addiction at the time of his death and had reportedly “played in pain for years.”\(^{56}\) During his career, the 28 year-old had suffered from three reported concussions and described his time spent recovering from his most recent concussion as “isolated.”\(^{57}\) Friends and family described Boogaard during this time as manic, sullen, and lonely; one friend and former teammate said “he didn’t have a personality anymore.”\(^{58}\) Due to symptoms similar to those who have suffered from CTE, Boogaard’s family has donated his brain to researchers at Boston University.\(^{59}\) Although the results have not been formally published, \textit{The New York Times} reported that a neuropathology team at Boston University has confirmed that Boogaard’s brain showed the characteristic

\(^{50}\) Id.  
\(^{51}\) Id.  
\(^{52}\) Id.  
\(^{53}\) Id.  
\(^{54}\) Id. (showing research by Dr. Alain Ptito and her team at the Montreal Neurological Institute of McGill University that looked at functional MRIs to examine the brains of athletes who demonstrated signs of depression).  
\(^{56}\) Id.  
\(^{57}\) Id.  
\(^{59}\) Id.
CTE lesions.\(^{60}\) Dr. Ann McKee who studied Boogaard’s brain, found the progression of CTE surprising, and posited that if he had survived, his CTE would have worsened into “middle-age dementia.”\(^{61}\)

Comparably, Winnipeg Jets player Rick Rypien committed suicide in August 2011 after two leaves-of-absence and a long-standing battle with depression.\(^{62}\) The 27 year-old center was known in the league for fighting larger opponents and was described as “one of the toughest pound for pound guys in the league.”\(^{63}\) In November, Rypien was granted an indefinite leave of absence due to an undisclosed personal matter, following a six-game suspension in the preceding season for grabbing a fan.\(^{64}\) Although Rypien had been battling depression, and had even publicly shared his struggles to help those similarly situated, those close to Rypien thought that his new one-year contract and seemingly positive attitude boded well for him.\(^{65}\)

Finally, recently retired player Wade Belak was found dead in Toronto in the same month as Rypien.\(^{66}\) He reportedly also suffered from depression.\(^{67}\) These three deaths, as well as the recent revelation by Boston University researchers that signs of CTE were found in the brain of former NHL player Bob Probert, warranted a closer look at the possible nexus between the “enforcer” role and brain damage.\(^{68}\)

Prompted by the concussion-related ailments that have kept NHL superstar Sidney Crosby out most of the 2010-2011 season, Michigan Technological University professor Syd Johnson promoted a closer look at the effects of concussions in hockey of all levels.\(^{69}\) “Solving the CTE problem will require radical changes to football and hockey. It’s a condition that can’t be diagnosed, doesn’t have clear symptoms, and


\(^{61}\) Branch, supra note 58.

\(^{62}\) Ed Willes, Rypien wanted story told to help others battling depression, MONTREAL GAZETTE, Aug. 22, 2011.


\(^{65}\) Id.


\(^{67}\) Id.

\(^{68}\) Id.

can’t be treated,” according to Johnson.\textsuperscript{70} Johnson’s suggestions for necessary changes in hockey leagues include teaching players not to use their heads as “battering rams,” making the ice surface bigger, downsizing equipment so players don’t feel “invincible,” and, most controversially, banning all fighting.\textsuperscript{71}

While the NFL seems to have made some progress on increasing the safety of their league play, the NHL has “been slow to follow suit.”\textsuperscript{72} NHL players are not currently penalized for hitting other players’ heads into the glass unless officials determine it to be intentional, and further flat-out fights during games only result in five-minute penalties to the players involved.\textsuperscript{73} The league commissioner, Gary Bettsman, stated that there is no interest in pursuing harsher penalties or deterrence at this time and that the link between hockey and CTE is only speculative: “[t]he experts who we talked to, who consult with us, think that it’s way premature to be drawing any conclusions at this point.”\textsuperscript{74}

\textbf{C. Link of Concussions and Chronic Traumatic Encephalopathy (CTE)}

Chronic Traumatic Encephalopathy (CTE) is a degenerative disease, originally referred to as “punch-drunk” syndrome from the resultant symptoms.\textsuperscript{75} CTE has been found to result from the accumulation of an abnormal protein called “tau” found in the brain.\textsuperscript{76} High accumulations of tau in the brain also function as a sign of Alzheimer’s disease, resulting in memory loss and dementia.\textsuperscript{77} Research has associated the disease with repeated head traumas or concussions that did not properly heal, and has outlined symptoms such as memory loss, depression, impulsive behavior, and rage.\textsuperscript{78} CTE can only be diagnosed posthumously and has been found present in the brains of 20 dead former NFL players, as well as many boxers.\textsuperscript{79}

Some of the most notable research was conducted by the Boston University Center for the Study of Traumatic Encephalopathy

\begin{footnotesize}
\begin{enumerate}
\item[70.] Id.
\item[71.] Id.
\item[72.] Gever, \textit{supra} note 60.
\item[73.] Id.
\item[74.] Id.
\item[75.] \textit{Chronic Traumatic Encephalopathy}, SPORTS LEGACY INSTITUTE (last visited June 27, 2013), http://sportslegacy.org/research/what-is-cte/.
\item[77.] Id.
\item[78.] Id.
\item[79.] Branch, \textit{supra} note 58.
\end{enumerate}
\end{footnotesize}
“Center”), including autopsies on the brains of former athletes. Accordingly, 14 of the 15 athletes studied by the Center were found to have CTE, including former Chicago Bears player David Duerson, who committed suicide in February 2011, leaving the request for his brain to be donated to further research on CTE. During his NFL career, Duerson suffered from a minimum of ten known concussions, some of which even resulted in his loss of consciousness. Duerson’s ex-wife described her husband’s symptoms as horrible headaches and loss of cognition including his growing inability to form sentences or even spell. Results from studies at the Center indicate that Duerson had “severe involvement of areas [in his brain] that control judgment, inhibition, impulse control, mood and memory,” and very clearly had the classic pathology of CTE. In February, 2012, the family of Duerson filed a wrongful death suit against the NFL, claiming that the league failed to appropriately prevent and treat the concussions that resulted in the severe damage to Duerson’s brain, and subsequently his death. Among other things, the lawsuit accused the NFL of negligence in their failure to warn Duerson of the negative effects of his multiple concussions. “[The NFL] not only dropped the ball, they maintained until current times that there was no connection between playing football, receiving concussions and brain damage,” stated Thomas Demetrio, the attorney representing the Duerson family.

Ending similarly was former NFL lineman Shane Dronett’s battle with CTE, who committed suicide at the age of 38. Before his death, Dronett suffered from many of the characteristic symptoms of CTE including paranoia, fear, confusion, and rage. Dronett’s wife depicted his tragic deterioration by explaining his almost constant nightmares and his uncharacteristic violence. Researchers at the Center pointed out that

81. Smith, supra note 76.
82. Id.
83. Id.
84. Id.
86. Id.
87. Id.
89. Id.
90. Id.
a possible attribute of Dronett’s development of CTE could be his position as NFL lineman—a position that takes almost constant hits during play.91

The extensive recent research on the harmful connection between repeated concussions and CTE has created a substantial impetus for the recent NFL lawsuits, as well as a basis for future lawsuits and player health and safety improvements. However, the present and future lawsuits will likely face legal barriers, making necessary changes in safety more easily implemented through a promotion of cultural change rather than through legal channels.

III. Analysis

A. Workers’ Compensation

Benefits under workers’ compensation laws may be a potential remedy for both the professional football players currently involved in lawsuits, as well as the professional hockey players suffering from the effects of CTE. Workers’ compensation is an “administrative remedy designed to speed an employee’s compensation while insulating both employer and employee from the costs and delays inherent in purely judicial adversarial positions.”92

1. Professional Athletes Covered?

The first inquiry in determining whether the Workers’ Compensation Act applies to professional athletes is whether the professional sports organization is considered a business, and thus, whether the players are considered employees and therefore covered.93 The second question is whether the Act was intended to apply to “high price athletes.”94 The answer to that question can be found in Bayless v. Philadelphia Nat. League Club.95 In that case, a former professional baseball player sought damages for mental illness that he argued was caused by pain-killers prescribed to him by a Philadelphia Phillies team physician after he complained of back pain.96 Finding that Pennsylvania’s version of the act applied to all employees, regardless of earnings, the court held that “[i]f

91. Id.
93. Id.
94. Id.
96. Id. at 627.
professional athletes were excluded from coverage, then hundreds and possibly thousands of low as well as high priced athletes...would be deprived of the humanitarian benefits and protection the Act affords."

Currently, professional athletes are covered under workers’ compensation laws in a majority of the states. The law regarding these claims differs in various states, raising the question of whether players should be allowed the ability to file claims in states where their team is not based. Team owners are concerned that this would lead to players “forum-shopping in the hopes of maximizing their potential compensation.” In California, for instance, retired players can seek workers’ compensation benefits from a former team if they have played at least one game in that state. This exception allows players injured during an away game to file in that state for benefits. California is ideal for players due to its lengthy statute of limitations and its typically high payouts, prompting many to seek benefits there.

Other states, such as Florida, do not recognize professional athletes as employees in regards to worker’s compensation under a state statute, and do not provide any compensation. In Rudolph v. Miami Dolphins, Ltd., the court held that the statutory exclusion of professional athletes did not violate the equal protection clause; instead, the court found that the exclusion had a reasonable relationship to a legitimate state purpose. Specifically, the court considered in their decision that the players were well-paid, there was a high risk inherent in the sport, and serious injuries were frequent and repetitive. Similar decisions and statutes in other states have only served to increase the number of athletes who seek benefits in California. Future changes in the law may result in an increased number of professional athletes being barred from bringing workers’ compensation claims.

97. Id. at 631.
98. Id.
101. Schwarz, supra note 99.
102. Id.
103. Id.
104. Shields, supra note 92.
106. Id.
107. See Schwarz, supra note 99.
Was the injury an “accident?”

The next step is determining whether the injuring event is considered an “accident,” as required under the relevant workers’ compensation statutes. In Palmer v. Kansas City Chiefs Football Club, the court held that the “deliberate collision between human bodies” in a professional football game did not constitute an “accident”, and thus, an injury resulting from such an expected event did not qualify under the Act. Furthermore, in Rowe v. Baltimore Colts, the court found that the key to an “accidental injury” was “whether the occurrence was an unusual or unexpected happening in the course of employment.” The court went on to hold that injuries were frequent and even commonplace in football and thus were “neither unusual nor extraordinary.” Following such a conclusion, they held that normal injuries suffered in either actual or simulated play were not covered under Maryland’s workers’ compensation law.

In contrast, the Virginia Court of Appeals in Pro-Football, Inc. v. Uhlenhake rejected the argument that football injuries were not accidental merely because of the probability of their occurrence and found that players were not exempt from coverage of the Virginia Workers’ Compensation Act. The court further held that foreseeability and the physical nature of employment did not dictate whether an injury was defined as an “accident” under the applicable statute. However, the court did ultimately hold that one player’s knee injury was due to cumulative events and thus not compensable.

Cases that did hold that an injury suffered during a professional athletic event was an “accident” include Swift v. Richardson Sports, Ltd. In that Swift, a professional football player broke his fibula and damaged his ankle tendons. After undergoing surgery and seemingly recovering from his injury, Swift was never able to perform up to his former standards and was released.
was compensable under the act because the accident occurred while he was playing for the football team, the injury was “unusual and unexpected,” and Swift took reasonable measures to protect himself from such an injury. An additional case with a similar holding was Renfro v. Richardson Sports, Ltd. In Renfro, football player Dusty Renfro injured his wrist during a pre-season practice with the Carolina Panthers. The court ultimately held that Renfro’s injury was an accident and compensable due to the fact that Renfro was forced by another player to utilize an awkward blocking technique that resulted in the injury. Another example is found in Albrecht v. Industrial Commission, in which a former football offensive lineman’s career ended when he injured his back during a game. The court ruled that the injury was compensable, and found that a wage loss differential award was appropriate since the back injury resulted in impairment to the player’s earning capacity. Additionally, in Pittsburgh Steelers, Inc. v. W.C.A.B. (Williams), a professional football player suffered from a degenerative joint disease in his knee, which prevented him from continuing his career. The court considered the physician’s findings, which showed that the repetitive trauma and force that players are exposed to accelerated the degenerative process to the knee. The court held that the player’s employment was a “substantial contributing factor” in the condition of the knee.

ii. Is the workers’ compensation remedy exclusive?

A professional athlete may be limited in his or her available remedies if workers’ compensation applies to the situation. An illustration of this limitation appears in Bayless v. Philadelphia Nat. League Club. In Bayless, defendants contended that plaintiff’s action was barred, his exclusive remedy was available under the Pennsylvania Workman’s

119. Id. at 139-40.
121. Id. at 178.
122. Id. at 183.
124. Id. at 761-62.
126. Id. at 794.
127. Id. at 793.
128. Shields, supra note 92.
Compensation Act, and sought summary judgment.\textsuperscript{130} The District Court found that:

An employee’s common law right to damages for injuries suffered in the course of his employment as a result of his employer’s negligence is completely surrendered in exchange for the exclusive statutory right of the employee to compensation for all such injuries, and the employer’s liability as a tortfeasor is abrogated.\textsuperscript{31}

Following this, the plaintiff’s exclusive remedy was compensation through the act, and the court then considered the act’s applicability in the context of the specific circumstances.\textsuperscript{132} The court stipulated that the “…Act provides coverage for injuries and death resulting from accidents occurring in the course of employment for all employees of employers who have agreed to accept the provisions of the Act.”\textsuperscript{133} The court’s inquiry then turned on whether “accident” under the meaning of the act included an injury suffered in the course of play.\textsuperscript{134} Ultimately, the court held in the affirmative, finding that injuries resulting from an employer’s failure to provide proper medical treatment were compensable under the Act.\textsuperscript{135}

Further, if a professional athlete chooses to seek another remedy, they may be barred from a workers’ compensation remedy. In \textit{Gulf Insurance v. Hennings}, the court held that a professional football player who had accepted his contract or collective bargaining benefits could not subsequently recover under Texas’ Workers’ Compensation law.\textsuperscript{136} Due to the exclusivity of the workers’ compensation remedy in some states, a team can be essentially immune to a tort action.\textsuperscript{137} Applying New York law, the court in \textit{Rivers v. New York Jets} held that workers’ compensation law banned a player’s claim that his team breached its

\textsuperscript{130} Id. at 627.
\textsuperscript{131} Id. at 628.
\textsuperscript{132} Id. at 627; see also \textit{Ellis v. Rocky Mtn. Empire Sports, Inc.}, 43 Colo. App. 166 (1979) (holding that an employment relationship existed between the player and the team and thus the player’s exclusive remedy would be under the applicable workers’ compensation).
\textsuperscript{133} \textit{Bayless}, 472 F. Supp. at 627.
\textsuperscript{134} Id. at 628.
\textsuperscript{135} Id. at 629.
\textsuperscript{137} \textit{Shields}, supra note 92.
contract by failing to provide medical care and wrongfully concealing the true nature of his injuries and overall physical health.\(^{138}\)

However, some state laws include an intentional injury exception to the exclusivity of workers’ compensation awards.\(^{139}\) Only a few sports cases have examined this exception, and most have rejected it as in \emph{Ellis v. Rocky Mountain Empire Sports, Inc.}\(^{140}\) In \emph{Ellis}, a football player asserted a tort claim alleging that his team, specifically its coaches and physicians, required him to return to contact football drills prior to his full recovery from an off-season injury.\(^{141}\) This case has set the precedent that intentional torts are still covered under the Act.\(^{142}\) Following that conclusion, however, the court ultimately held that a professional athlete cannot recover under this exception to workers’ compensation immunity by asserting that he or she suffered an injury as a result of the coach’s decision to return that player to play before proper recovery.\(^{143}\)

\section*{2. Application to CTE scenarios}

The NFL players involved in the current lawsuits and NFL and NHL players involved in future lawsuits may or may not have a workers’ compensation remedy, depending primarily on jurisdiction. On its face, a workers’ compensation remedy is applicable when suing the NFL and NHL since professional sports teams are recognized as businesses and their players are similarly recognized as employees. However, whether workers’ compensation applies in a specific scenario depends primarily on the jurisdiction.

If workers’ compensation does apply, then the next hurdle is demonstrating that the concussions suffered by the players and the subsequent development of CTE are considered “accidental injuries.” \emph{Pittsburgh Steelers, Inc. v. W.C.A.B. (Williams)} demonstrated that a degenerative joint disease is compensable.\(^{144}\) A degenerative joint disease is quite similar to a degenerative brain disease like CTE, thus, it is logical that a court would find that CTE could be found an “accidental injury” in the workers’ compensation context. Further, CTE could be


\(^{139}\) \textit{Ellis}, 43 Colo. App. at 170.

\(^{140}\) \textit{Id.} at 166.

\(^{141}\) \textit{Id.} at 167.

\(^{142}\) \textit{Id.} at 170.

\(^{143}\) \textit{Id.}

deemed as not a normal and reasonable injury expected during the course of a sporting event, but rather a unique and unusual injury, following the holding in *Rowe v. Baltimore Colts*. Although courts could find that concussions are a reasonable and common injury in a high-impact sports, such as football or hockey and thus not an “accidental injury,” it is also possible that courts may find injuries that progress to CTE compensable under workers’ compensation.

Finally, even if the players successfully clear the aforementioned hurdles, the respective sports leagues are likely to argue that an award under workers’ compensation excludes other claims such as in tort law. Specifically, in *Rivers v. New York Jets*, the court held that an injured football player was barred from bringing an action very similar to the claim being alleged in many of the current NFL lawsuits.145 It is highly likely that the current NFL lawsuits will be contested on this point, and that the defendants will assert that the only remedy for the retired NFL players is under workers’ compensation law. Unfortunately, such a remedy does not provide the compensation necessary to aid and assist either the retired NFL players or the current NFL and NHL players, who will be similarly disabled in the future. However, there is a good possibility that a court could interpret the disregard and even concealment of important medical information, as well as allowing and even requiring players to return to games before healed, as falling under the “intentional exception” to workers’ compensation exclusivity. Thus, the main consideration in workers’ compensation becomes not whether it would apply to a player’s claim but rather whether it restricts the player’s claim to only workers’ compensation—barring other remedies they may wish to seek. Even if the player presents a valid workers’ compensation claim, the claim will still be evaluated under the pertinent state law and the collective bargaining agreement under which the player is subject.146

3. Labor Law and Collective Bargaining Agreements

i. Labor exemption to Antitrust law (Mackey Test)

Initially subject to antitrust law, claims involving professional sports leagues are now subject to labor law under the non-statutory labor exemption, created under the Clayton Act of 1914.147 This exemption

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permits unions to enter into agreements, which formerly would have been prohibited under antitrust law as a restraint of trade. Since 1968, the NFL has been governed by the labor organization—National Football League Players Association (NFLPA). The association represents both current and retired players in matters such as wages, hours, and working conditions; protects the athletes’ rights in regards to the terms of the collective bargaining agreement; and serves as a tool for negotiation in regards to benefits. In context of the recent lawsuits, the NFL could argue that, through the NFLPA, the players could have sought better protection and greater benefits in negotiation. Similarly, the NHL is governed by its own labor organization (National Hockey League Players’ Association (NHLPA)), which provides for a parallel negotiation process.

The test to determine whether a potential lawsuit meets the non-statutory labor exemption was developed in Mackey v. National Football League. This three-part test asks whether the restraint on trade primarily affects only the parties to the collective bargaining agreement, whether the agreement sought to be exempted concerns a mandatory subject of collective bargaining, and whether the agreement is a product of bona fide arm’s-length-bargaining. Essentially, the labor exemption protects terms in any union agreement that have been negotiated in good faith from an antitrust challenge.

ii. Federal Preemption & Mandatory Arbitration

The Collective Bargaining Agreement (CBA) controls the legal remedies available to players in both the NFL and NHL. Due to these agreements, it is often asserted that lawsuits are subject to preemption under Section 301 of the Labor Management Relations Act (LMRA), and thus subject to mandatory arbitration. The scope of the preemption doctrine in the NFL was examined in Stringer v. National Football League. In Stringer, the spouse of a deceased player brought suit.

148. Id.
149. Id.
150. Id.
153. Id. at 615.
154. Kaplan, supra note 147.
155. Id.
alleging that the NFL was negligent in causing her husband to die after practicing football in extreme heat.\footnote{157} The plaintiff claimed that the NFL breached its duty to the players by both failing to use ordinary care in regulating the elements of the practice sessions, and by failing to provide appropriate information to players, coaches, and trainers regarding heat-related illnesses.\footnote{158} In its holding, the federal district court utilized a two-part test to be used to determine whether a state-law tort claim survived Section 301 preemption.\footnote{159} The first step is whether the state-law claim is based on a provision of the CBA or in other words, whether the CBA is the source of the duty allegedly violated.\footnote{160} If the state law claim survives the first step, the second step is then to determine whether the state law claim is “dependent” upon an analysis or interpretation of the relevant provisions of the CBA.\footnote{161} If the state law claim fails either step of the \textit{Stringer} test, then the dispute is subject to mandatory arbitration.\footnote{162}

In a case somewhat similar to the current NFL lawsuits, the court in \textit{Sherwin v. Indianapolis Colts, Inc.} held that a suit alleging inadequate medical care and the intentional withholding of medical information was in fact pre-empted by Section 301(a) of the LMRA.\footnote{163} Pointing to specific provisions of the CBA, the court found that the claims relating to inadequate medical care could only be resolved through interpretation of the clauses of the CBA that established such duties.\footnote{164} Ultimately, the court held that the plaintiff’s claims were subject to arbitration.\footnote{165} A contrasting holding was made in \textit{McPherson v. Tennessee Football, Inc.} where the court instead found that Section 301 did not pre-empt the state-law tort claim.\footnote{166} In that case, a player was injured when struck by a vehicle driven by the opposing team’s mascot during halftime.\footnote{167} Using the two-part test from \textit{Stringer}, the court found that there was not a specific provision of the CBA concerning mascots or field safety during halftime.\footnote{168} Further, the court found that the provision that did create the duty for player’s injuries only covered injuries that affected the player’s

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157. \textit{Id.} at 898.
159. \textit{Id.} at 900.
160. \textit{Id.}
161. \textit{Id.}
164. \textit{Id.}
165. \textit{Id.} at 1179.
167. \textit{Id.}
168. \textit{Id.}
ability to perform under his contract with the NFL team.\textsuperscript{169} Due to their findings, the court concluded that the state-law claims had an independent basis and did not necessitate interpretation of the CBA.\textsuperscript{170}

\textit{iii. Application to NFL & NHL contexts}

It is likely that the current NFL lawsuits will be challenged on the basis that they are pre-empted according to the terms of the CBA, and are thus subject to mandatory arbitration. Specifically, the league may emphasize the provisions in the CBA that refer to the Joint Committee on Player Safety and Welfare, created “for the purpose of discussing the player safety and welfare aspects of playing equipment, playing surfaces, stadium facilities, playing rules, player-coach relationships, and any other relevant subjects.”\textsuperscript{171} In response to this defense, the court would have to determine whether each state-law tort claim was sufficiently independent to survive pre-emption by looking to the test articulated in \textit{Stringer}. Since these CBA provisions are essentially the source of the duty the lawsuits allege, and further since the claims would seemingly be dependent upon interpretation and analysis of these specific provisions, it is probable that the current NFL lawsuits would satisfy the two-part \textit{Stringer} test, and thus be subject to Section 301 pre-emption.

Any future NHL lawsuits would certainly face similar challenges, since NHL players are also subject to the provisions of their CBA and the LRMA under labor law. However, the provisions relating to player safety and welfare in the current NHL’s CBA are not nearly as extensive and relevant as the safety and welfare related provisions found in the NFL’s CBA. Currently, the NHL CBA includes provisions that discuss the injury grievance procedure, the procedure for determining disabled player status, early retirement and possible benefits for the disabled, and disciplinary practices and sanctions for players causing excessive injuries to others.\textsuperscript{172} It is unclear whether these provisions would pass the \textit{Stringer} test or not. Further, the NHL will soon begin negotiations for their new CBA, with the current one expiring in September 2012. Current meetings indicate that player safety may be at the forefront, including updates of the League’s concussion monitoring, the supplemental discipline process, the possible reintroduction of the red

\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{172} NHL-NHLPA Collective Bargaining Agreement, \textit{supra} note 151.
line, and proposals to streamline player equipment. Due to the general tenor of these recent meetings, the new CBA could implement provisions that would make pre-emption even more likely for future concussion-related lawsuits against the NHL.

4. Tort Law—Theories of Liability for Sports Injuries

If a players’ claim is not pre-empted by Section 301 of the LMRA and thus subject to mandatory arbitration, then it may be subject to the respective states’ tort law. The theory of liability under which the case will be assessed depends on the state in which it is tried. Different theories that may be utilized in a jurisdiction are primary implied assumption of risk, secondary assumption of risk, negligence, or express assumption of risk.

i. Primary Implied Assumption of Risk

Most prevalently, injuries suffered in the course of athletics are analyzed under the standard of primary implied assumption of risk. Under this standard, an injured athlete is precluded from suing for injury “resulting from an inherent risk of a sport.” Generally, when individuals participate, “they assume the ordinary…risks of [the] activity.” Traditionally, assumption of risk doctrine requires two elements: “(1) knowledge of the risk and appreciation of its magnitude, and (2) voluntarily proceeding in the face of that known risk.” Primary assumption of risk most often applies when the plaintiff and defendant are co-participants in the sport or activity. This doctrine specifically centers on two elements: “the nature of the activity or sport, in order to determine the inherent risks, and the relationship of the plaintiff and defendant to that activity or sport to determine whether defendant owed plaintiff a duty to prevent the risk.”

173. Dan Rosen, GM meetings open with focus on player safety, NHL.COM (March 12, 2012), http://www.nhl.com/ice/news.htm?id=621720 (The “red line” disallows two-line passes and thus slows the game of hockey down).
175. Id.
176. Id.
177. Id.
178. Restatement (Second) of Torts § 500, Reckless Disregard of Safety Defined (1965).
180. Id.
181. Id.
While these questions have not been frequently analyzed in the context of professional athletics, case law nonetheless provides a valuable foundation. In *Turcotte v. Fell*, the Court of Appeals of New York used an assumption of risk standard in holding that the defendant had no duty and was thus not liable for injuries to the plaintiff. In *Turcotte*, the plaintiff, a professional jockey, was thrown from his horse during a race, when the defendant, a co-participant, cut the plaintiff’s horse off. The court found that participants in a sport “consented... to those injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation,” and also that professional athletes are more likely to assume these risks. Additionally, in *Knight v. Jewett*, the Supreme Court of California analyzed an informal game of touch-football under the primary assumption of risk doctrine. During the game, the plaintiff was knocked over by the defendant who then stepped on her hand, severely injuring it. The court held that these acts were not “outside the range of the ordinary activity involved in the sport,” and subsequently held that she had assumed such a risk.

A plaintiff in a sports injury case can overcome the defense of no duty under the primary assumption doctrine in two ways. First, a plaintiff can demonstrate “that the defendant acted intentionally or recklessly in causing the plaintiff’s injury.” To act recklessly, the defendant must know or reasonably should have known that his or her conduct creates an unreasonable risk of physical harm to the plaintiff. Second, a plaintiff can demonstrate that, although defendant acted negligently, the conduct “increase[d] the risks beyond those inherent in the sport.” Upon this showing, the injury will instead be analyzed under the doctrine of secondary implied assumption of risk, and will be evaluated under comparative fault.

Both the current NFL lawsuits and any similar future lawsuits would have to refute the presumption of no duty under this doctrine. The first relevant argument to be made could emphasize that the facts of the particular case do not satisfy the elements of the primary assumption of risk. Since a plaintiff must both have knowledge and appreciation of the

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183. *Id.* at 435-36.
184. *Id.* at 439.
186. *Id.* at 300.
187. *Id.* at 320-321.
189. *Id.*
190. *Id.*
191. *Id.*
risk and then voluntarily proceed to play regardless of that risk, the plaintiff could argue that since he or she was denied both general information about the importance of concussion recovery as well as specific information about the extremely harmful consequences of CTE, he or she was not apprised of the proper risk, and thus, did not proceed in the face of that risk. A second potential argument would portray the league’s behavior as reckless—in that they created the risk of death and serious injury by CTE by not providing the relevant information or treatment to assuage it. This argument has its potential pitfalls because it may be difficult to characterize the league’s actions as reckless rather than merely negligent. A third argument, perhaps the strongest, would be to argue that the league’s behavior increased the risks beyond those that are inherent and foreseeable in the sport, and should be subject to comparative fault under secondary assumption of risk.

ii. Secondary Assumption of Risk

Secondary assumption of risk is used most often when the defendant is a co-participant, organization, promoter, or sponsor. Once the plaintiff has established that the defendant owed a duty of care and then breached it, the parties’ relative responsibilities are considered. Although a defendant generally has no duty to protect a plaintiff from the inherent risks in a sport or activity, a defendant does have a duty to not to enhance or increase the risks beyond those inherent in the sport.

Examples of conduct that has been found to increase the risk inherent in sports include negligent supervision or coaching and the failure to provide safe equipment or facilities. A useful example of negligent supervision is shown in Wattenbarger v. Cincinnati Reds. In Wattenbarger, the plaintiff injured his arm while trying out for a professional baseball team. During the course of pitching drills, the plaintiff heard his arm “pop” and alerted the coaches present. After receiving no response, the plaintiff threw another pitch and experienced

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192. Id.
193. Id.
194. 114 Am. Jur., supra note 174
195. Id.
196. Wattenbarger v. Cincinnati Reds, Inc., 28 Cal. App. 4th 746 (Cal. Ct. App. 1994); see also Applbaum v. Golden Acres Farm & Ranch, 333 F.Supp.2d 31 (N.D.N.Y. 2004) (holding that summary judgment based on the implied assumption of risk defense was not appropriate when a question of fact existed on whether the defendant’s operating procedure increased the risk of horseback riding beyond that which was foreseeable).
198. Id.
It was ultimately discovered that plaintiff’s arm was severely injured: the tendon had been separated from the bone and an action for negligence followed. The court held that although the injury suffered by the plaintiff was one inherent in the sport of baseball, a special duty existed due to the nature of the relationship between the defendants and the plaintiff. “Defendants were not co[-]participants in the sport or activity but were instead in control of it.” The court then analyzed whether this duty of care extended to “restricting participation by an injured player to avoid aggravation of an injury” and held that it was “primarily a question of foreseeability.” In determining foreseeability, the court outlined several factors, including the degree of certainty of injury, the “closeness of the connection between the defendant’s conduct and the injury,” the moral blame to defendant’s conduct, and the policy of preventing future harm. After analyzing these factors, the court held that the defendants did owe a duty of care to protect the plaintiff from aggravating his injury during tryouts, and thus the primary assumption of risk doctrine was inapplicable.

Injuries in the context of CTE are similar to the case presented in Wattenbarger, where the court ultimately held that the injury suffered by the plaintiff was in fact one inherent in the sport of baseball. Although the injury was inherent, the court further emphasized both the special duty that existed between the plaintiff and the defendants and analyzed several factors of foreseeability that may contribute to create a risk beyond one inherent. A similar analysis in the current NFL lawsuits could obtain a similar conclusion by the court. The development of CTE through multiple concussions, while potentially inherent due to the physical nature of football, also warrants further analysis due to the other factors Wattenbarger articulated. Ultimately, the court found that there was a duty to protect the plaintiff from aggravating an existing injury, which was essentially enhancing or increasing the risks beyond those inherent. Although injury and even death may be considered an inherent aspect of contact sports that can be as ruthless as football and hockey, a crippling and degenerative brain disease that may stem partly from

199. Id.
200. Id.
201. Id. at 754.
202. Id.
204. Id.
205. Id. at 756.
206. Id. at 753.
207. See id. at 755.
improper medical care and monitoring, could be found unforeseeable and could weigh heavily when analyzing the *Wattenbarger* factors.\footnote{\textit{Wattenbarger}}

\textit{iii. Negligence}

In limited jurisdictions, the courts apply a negligence standard in sports injury cases because the assumption of risk doctrine has been abolished.\footnote{\textit{Wattenbarger}} Other jurisdictions, as previously discussed, still apply the assumption of risk doctrine but analyze using a standard of negligence or “impose a duty to exercise reasonable care” when the defendant’s conduct enhanced or increased an inherent risk in the sport or created a new one not inherent in the sport.\footnote{\textit{Wattenbarger}} The three main theories of negligence that have been accepted by courts in sports injury cases include unsafe facilities or equipment, failure to supply safety equipment, and inadequate coaching or supervision.\footnote{\textit{Wattenbarger}} However, other theories of negligence have, in certain cases, resulted in the plaintiff’s recovery including permitting mismatched players to compete, negligently moving an injured player, permitting an injured or unfit player to participate or compete, or unreasonably pressuring a person to participate or compete.\footnote{\textit{Wattenbarger}} The issue of permitting an injured or unfit player to participate or compete in the context of medical monitoring was analyzed in *Cerny v. Cedar Bluffs Junior/Senior Public School*.\footnote{\textit{Cerny}} In that case, a high school football player was allowed to re-enter a game after injuring his head and exhibiting symptoms such as dizziness, disorientation, and weakness.\footnote{\textit{Cerny}} Although plaintiff suffered from subsequent headaches, he continued to practice with the team and experienced a hit resulting in what his family physician described as a “closed-head injury with second concussion syndrome.”\footnote{\textit{Cerny}} The Supreme Court of Nebraska ultimately held that the district court erred in excluding the testimony of certified athletic trainers and held defendants to a substantially different standard of care.\footnote{\textit{Cerny}}

\begin{thebibliography}{9}
\bibitem{Wattenbarger} See id.
\bibitem{Wattenbarger} 114 A.M.JUR., supra note 174.
\bibitem{Wattenbarger} Id.
\bibitem{Wattenbarger} 15 A.M.JUR., supra note 1.
\bibitem{Wattenbarger} Id.
\bibitem{Wattenbarger} Id.
\bibitem{Wattenbarger} 213. *Cerny v. Cedar Bluffs Junior/Senior Public School*, 262 Neb. 66 (NE 2001); see also *Maldonado v. Gateway Hotel Holdings, LLC*, 154 S.W.3d 303 (holding that defendants’ failure to provide medical monitoring after a boxing match precluded analysis under the primary assumption doctrine).
\bibitem{Wattenbarger} 214. *Cerny*, 262 Neb. at 68.
\bibitem{Wattenbarger} Id. at 69.
\bibitem{Wattenbarger} Id. at 76-77.
\end{thebibliography}
Supreme Court remanded, emphasizing that the proper standard was whether the defendants acted in accordance with the conduct required under the circumstances of the case, and further found that medical testimony was allowable in determining this proper standard.217

Improper supervision was emphasized in Zalkin v. American Learning Systems.218 In Zalkin, a high school football player injured his shoulder during a game and his coach subsequently told him to obtain medical assistance and limited his practice and weight lifting.219 The plaintiff was allowed to play in a game ten days later, where he further injured his shoulder.220 The court held that “although [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.”221

Following the reasoning in both Cerny and Zalkin, professional athletes affected by CTE could argue that although they may have assumed the risks inherent in playing a contact sport, those risks do not include injuries that result from improper supervision and lack of effective medical attention. Subsequently, it could be argued that the league was negligent in not providing the proper medical information and attention to the players in jurisdictions that have abolished the assumption of risk doctrine.

iv. Express Assumption of Risk

Liability for injuries that occur in professional athletics may also be analyzed under express assumption of risk and potentially barred.222 If the injured plaintiff signed a release or wavier, this may relieve the defendant of a duty to care to the plaintiff, as to risks encompassed by the agreement.223 In the context of professional sports, the leagues’ respective collective bargaining agreement could serve as such a waiver or release, and thus bar potential state law tort actions, as discussed previously.224

217. Id.
219. Id.
220. Id.
221. Id. at 1021.
222. 114 AM. JUR., supra note 174.
223. Id.
IV. CONCLUSION

The current NFL lawsuits will likely face significant legal obstacles and may even be pre-empted by federal labor law or subject to mandatory arbitration. If legal remedies are not adequately available for players suffering from CTE and similar health conditions, then a cultural change is instead necessary to promote greater transparency between the league and its players, but more importantly to promote a standard system of medical monitoring that can eliminate the progression from concussion to degenerative brain disease. The necessary change in the culture of contact sports has been recognized at different play levels and in diverse ways. Following the increased recognition of the long-term consequences of head injuries, many institutions have implemented their own research to gauge these effects. Just recently, the NCAA granted $400,000 to researchers of the National Sport Concussion Outcomes Study Consortium to begin a longitudinal study of concussions and other head injuries among college athletes.225 One of the goals of the study, as stated by founding member Steven Broglio, is to “find ways to influence the long-term effects of those brain injuries in positive ways.”226 Ultimately, the information gathered from the study will aid in developing a more complete understanding of concussions.227 Along with increased research, there have been advancements in technology that also promote a greater protection of player safety. Currently, helmet makers have been using the latest technology available in an attempt to lessen the impact of hits that often lead to such debilitating injuries.228 While making helmets safer is certainly a step towards better player protection, many are quick to point out the necessity of change elsewhere, and emphasize that recent rule revisions have promoted this change in direction.229 “‘Over the past year to two years, there has been a dramatic change in how the game is played, what’s allowed, what’s called, what we do at practices,’ said Stefan Duma, head of the Virginia Tech/Wake

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226. Id.  
227. Id.  
229. Id.
Many changes have been made in the NFL to promote player safety, including moving the kick-off line five yards forward, as well as encouraging teams to keep players off the field upon exhibiting memory problems. In addition, changes in technology and increased research in the specific area of head injuries will create even more positive changes.

In the face of possible legal barriers, and while the culture of contact sports is in transition, players can find some potential relief in negotiations with their respective players’ associations. These negotiations can lead to increased protections in the collective bargaining agreements. The NHL collective bargaining agreement expires in September 2012, and it is likely that the NHLPA will lobby for increased player health and safety controls. One topic of discussion in negotiation could certainly be limiting on-ice fighting. Former NHL “enforcer” Jim Thomson promotes greater restrictions on fighting while acknowledging the reluctance of fans to change their perceptions of violence as part of the game. Further, while the NFL collective bargaining agreement certainly provides more protections for players than its counterpart in the NHL, negotiations for more protections can only have positive consequences.

While changing long-established perceptions of contact sports will undoubtedly be a resisted process, the extensive and horrific consequences of degenerative conditions such as CTE necessitate a closer look at what can and should change in the games to ensure greater protection for the players’ health. The mentality of violence towards the opposition as shown through the New Orleans Saints “bounty” scandal, as well as the mantra of “playing through the pain,” as shown through the recent exposé of NFL players’ attitudes, demonstrate that a change in the belief system of contact sports is necessary before any standard of medical or legal intervention can be successful.

230. Id. (moving the kick-off line five yards forward will result in more touch-backs, and thus less kick-off/punt returns during which players are often injured).

231. Id. (moving the kick-off line five yards forward will result in more touch-backs, and thus less kick-off/punt returns during which players are often injured).


233. Saints Coach Payton, supra note 19.

234. Players still willing, supra note 2.