Tort Liability in Sports Products Liability

By Tara Di Luca

Sporting events in America have always provided an escape from the realities of the stressful hustle and bustle of living in a technologically advanced, commercialistic society. Whether involving participants or spectators, amateurs or professionals, sports provides the inevitable backdrop for the average American's weekend leisure activities. However, behind the scenes, behind the football masks, soccer balls, hockey pucks and flashy uniforms, sports give way to a mass of litigation.

Like any performance, preparation for a sporting event requires cooperation from a number of different people to secure the premises from disruption to ensure that the event runs smoothly and is enjoyable. These people include coaches, facility operators and even the athletes themselves. Yet what about the darker side of sports, such as incidents arising from the use of defective equipment and inadequate warnings on sporting gear and products? What happens when an athlete is seriously injured, or even killed? Who is to blame?

This article addresses such serious questions. It will briefly introduce the background of products liability law and will then explore the evolution of products liability law in sports, particularly how the law applies to specific sports injuries, including manufacturer and coaches' liability. This article will also cover defenses and the related issue of spectator injury, in addition to an exploration of the possibility for reform in products liability law generally and in that specific area. Finally, it will conclude that although manufacturers are continuously creating innovative design techniques for their products, there is no guarantee that any product is necessarily "safer" and will prevent all injuries from occurring.

Background

The most common claims brought in products liability suits include manufacture defect, design defect and failure to give adequate warnings or instructions.[1] A consumer bringing a products liability suit has the burden of proving that 1) the defendant manufactured the product, 2) the product was defective, 3) the product caused the injury and 4) the product defect existed when the consumer bought it.[2]

Products liability law is relatively new, and has defined a number of different theories over the years. Products liability is generally considered a strict liability offense. Therefore, the degree of carefulness exercised by the defendant is irrelevant; if there is a defect in the product that causes harm, the defendant will be held liable for it. In its 1963 decision in *Greenman v. Yuba Power Products*, the California Supreme Court announced this remedy of tort liability that did not require the necessity of proving negligence.[3] This new strict liability in tort found a manufacturer strictly liable when the article that it placed into the market proved to have a defect that caused injury to a human.[4] In *Greenman*, the plaintiff was seriously injured when a piece of wood he was working on suddenly flew out of the Yuba power tool he was using and struck him in the forehead. Based on expert witnesses' testimony, the court concluded that the defective design and construction of the Shopsmith power tool caused the wood to fly out from the machine. To establish the manufacturer's liability, the court found that it was sufficient that the plaintiff proved that he was injured while using the Shopsmith power tool in a way it was intended to be used, and was injured as a result of the defect in design and manufacture.[5]

In 1965, as a result of the *Greenman* decision, the authors of the *Restatement (Second) of Torts* published section 402A, proposing strict liability in tort for any person who sells a product in a defective condition unreasonably dangerous to the user or consumer or his property. This amendment suggested a consumer expectations standard for what represents an unreasonably dangerous condition. Courts will usually determine whether a product is unreasonably dangerous by reference to whether the article sold was dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchased it, with the ordinary knowledge common to the community as to its characteristics.[6] While products liability law varies from state to state, the *Restatement (Second)*, and most recently the *Restatement (Third)* provide persuasive authority and guidance for courts to follow. The most prominent products liability amendment is published in section 2(b) of the new *Restatement (Third)*. This section requires a plaintiff in a products liability case to provide evidence of a reasonable alternative design to prove a design defect.[7] Although tort law varies from state to state, the authors of the *Restatement* assert that this rule represents the law in the majority of American jurisdictions. However, many courts disagree, and continue to follow the *Restatement (Second) of Torts*.[8]

Liability for Sports Injuries

Manufacturers

Products liability claims may be based on negligence, strict liability or breach of warranty of fitness.

The most common products liability claims in sports litigation suits are based on strict liability and negligence. Strict liability arises when the product becomes unreasonably dangerous by virtue of a defect. Negligence claims occur when there are defects in design, manufacture or warning labels. One may prove fault by showing a breach of a duty, poor workmanship or a history of problems with a particular product. Perhaps the most common subject matter of product liability in sports-related cases concerns product defects and failure to warn.

One area of extensive litigation that has defined products liability law in sports involves protective helmets. These cases involve situations in which helmets failed to prevent particular injuries and in which the helmets themselves were alleged to have caused a particular injury. For example, in 1992, Dennis Byrd of the New York Jets broke his neck after running headfirst into the chest of teammate Scott Mersereau. The collision resulted in paralysis from the waist down.[9] This incident was deemed a freak accident, and no investigation was commenced to determine whether Byrd's helmet was a contributing factor. It seemed apparent that the paralysis occurred as a result of the position of his body when he collided headfirst into his teammate. As catastrophic injuries are not uncommon among both professional and amateur athletes, players and manufacturers of helmets continue to find themselves engaged in lengthy and expensive lawsuits.

A prominent case in this area of product liability concerned a Texas high school football player, Jose Rodriguez. In *Rodriguez v. Riddell Sports Inc*., the Texas Court of Appeals held Riddell Sports Inc. strictly liable for a design defect in the helmet and ordered it to pay $14.62 million in damages to Rodriguez to compensate for a severe brain injury suffered by Rodriguez during a high school scrimmage.[10] Rodriguez's injury caused permanent brain injury and put him in a vegetative state. The court evaluated the defect in light of the economic and scientific feasibility of safer alternatives. It found that a safer helmet design had been readily available to the manufacturer prior to the injury's occurrence.

A similar case involved another Texas high school football player, Mark Daniels. In *Rawlings Sporting Goods Co. v. Daniels*, the Texas Court of Appeals held that the manufacturer had a duty to warn users that its helmet would not provide protection against head and brain injuries.[11] The failure to do so led to a strict liability claim, as the failure to warn rendered the piece of equipment unreasonably dangerous for the user.

In *Daniels*, a high school football player suffered severe and permanent brain damage when he collided with a teammate. The force of the impact produced an indentation in Daniels' helmet. Daniels' mother sued the manufacturer, claiming that the helmet was defectively made. The court agreed and found that the helmet was a "producing cause of player's injuries."[12] The court further stipulated that the manufacturer's failure to warn that its helmet would not protect against subdural hematomas exposed the player to an unreasonable risk of harm, and was the proximate and negligent cause of his injury.[13] The court reasoned that the primary purpose of a football helmet is to protect the wearer against "head" or "brain" injuries.[14] Rawlings Sporting Goods Co. had known for some time that its helmets did not protect against brain injuries and subdural hematomas; that almost all fatal football injuries result from head and neck injuries and that when a person uses a football helmet for its intended purpose of protecting the head while playing football, there is still a significant risk of brain injury.[15] In spite of this knowledge, the defendant made a conscious decision not to warn users that the helmet would not protect the brain from this type of injury. As a result, Daniels was awarded $1.5 million.

Daniels became a landmark case, as it prompted helmet manufacturers to develop adequate warning labels. As a result of this case, every football helmet now includes the following warning:

> WARNING: DO NOT STRIKE AN OPPONENT WITH ANY PART OF THIS HELMET OR FACE MASK. THIS IS A VIOLATION OF FOOTBALL RULES AND MAY CAUSE YOU TO SUFFER SEVERE BRAIN OR NECK INJURY, INCLUDING PARALYSIS OR DEATH. SEVERE BRAIN OR NECK INJURY MAY ALSO OCCUR ACCIDENTALLY WHILE PLAYING FOOTBALL. NO HELMET CAN PREVENT ALL SUCH INJURIES. YOU USE THIS HELMET AT YOU OWN RISK.[16]

Since this warning first appeared, there has been a marked decline in successful lawsuits against helmet manufacturers. However, there are still a few loopholes. Manufacturers will still be held liable if a helmet is found to be defective despite an adequate warning label, and if that defect is not "open and obvious."[17]

Yet even with the loopholes, defendant manufacturers can prevail. For instance, four years after *Daniels*, the court in *Lister v. Bill Kelley Athletic, Inc.*, held that the inherent danger of a football helmet was not a proper basis in which to hold the manufacturer strictly liable for a spinal injury.[18] The manufacturer did not have any duty to warn because the helmet was not defectively designed or constructed, and the possibility of injury resulted from a common propensity of the helmet,

which was "open and obvious."[19] In *Lister,* the plaintiff consumer, a high school football player, appealed a judgment of the lower court, which ruled in favor of defendant helmet manufacturer. The plaintiff's sole contention on appeal was that the manufacturer's liability for failure to warn was established as a matter of law. He maintained that the football helmet in question was defective because it failed to warn that it could not protect against injuries to the cervical spine, which might result in quadriplegia or death.[20] The court in *Lister* reasoned that the helmet was not defective and did not cause the injuries suffered.[21] The consumer knew he could get hurt playing football, so the failure to warn against spinal injuries was not negligent. The analysis applied by the court in that case appeared to shift some of the liability to the consumer athlete. The court in *Lister* discussed the plaintiff's knowledge of potential injury evidenced by the fact that he was taught to tackle his opponents with his head up, as to avoid serious or fatal injury to the head, neck, and spine.[22]

What exactly did the court in *Lister* mean by "open and obvious?" It seems that the court relied on common sense, logic and experience. The test applied reflected what the reasonable person would conclude.[23] Similarly, in *Berkner v. Bell Helmets, Inc*., the court held that any reasonable person could draw the conclusion that a black bicycle helmet did not warn drivers of an approaching bicyclist, and it was "open and obvious" that the helmet was not a lighter color and that it did not have reflective material.[24] In *Berkner*, the plaintiff sued a bicycle helmet manufacturer, claiming that its black colored helmet was defective because it lacked conspicuity. In addition, the plaintiff claimed that the helmet manufacturer negligently designed the helmet, was strictly liable for the defective helmet, and had failed to warn customers of the helmet's lack of conspicuity. The court held that the lack of conspicuity was an obvious and patent danger and thus the helmet manufacturer did not have a duty to warn of the open and obvious dangers or characteristics. Therefore, the helmet was not found to be defective. The lack of a safety feature and conspicuity was observable from a simple visual inspection. Any reasonable person could draw the conclusion that a black bicycle helmet does not warn drivers of an approaching bicyclist.[25]

While *Daniels* sets the standard for strict adherence to adequate warnings, *Lister* advocates at least some responsibility to the consumer athlete. This reasoning can most likely be resolved by analyzing the football helmet as a piece of "protective equipment." The helmet is designed with features to protect the face, head and brain from serious or fatal injury, but is not designed to protect the neck and spinal area. It seems logical, then, that a manufacturer is not liable for failure to adequately warn against an injury which its product was never designed to prevent and that it never alleged to prevent. The court in *Liste*r rejected the idea of expanding strict liability to cases involving neck and spinal injury, absent any defect in the helmet itself. If the helmet provides adequate warnings, as established in *Daniels*, the court will most likely find an absence of negligence or defect on the part of the manufacturer. It would not be feasible to conclude that consumer expectation encompasses the guarantee that football helmets will prevent neck and spinal injuries. On the other hand, consumers can expect that the helmet will provide adequate protection against face, head and brain injuries if used in an appropriate fashion.

A recent case of interest involves an alleged defect of a particular brand of hockey helmets and facemasks. In *Mohney v. USA Hockey*, the court permitted evidence showing that the helmet Mohney was wearing at the time of the accident contained a warning in three places: 1) On the helmet itself, 2) on a hang-tag attached to the helmet and 3) on the box containing the helmet, stating:

> ICE HOCKEY IS A COLLISION SPORT WHICH IS DANGEROUS. THIS HELMET AFFORDS NO PROTECTION FOR NECK OR SPINAL INJURY. SEVERE HEAD, BRAIN OR SPINAL INJURIES, INCLUDING PARALYSIS OR DEATH, MAY OCCUR DESPITE USING THIS HELMET. DO NOT USE THIS HELMET IF THE SHELL IS CRACKED OR IF THE INTERIOR PADDING IS DETERIORATED. READ INSTRUCTIONS CAREFULLY BEFORE WEARING.[26]

The court found that the plaintiff knew of the risks involved in playing hockey, and that the helmet was not designed to protect against spinal or neck injuries. Manufacturers cannot be held liable based on the failure of their products to do something they were not designed to do.[27] The district court observed, "it appears to be undisputed that there is no viable way to design a face mask and/or helmet to provide protection against spinal injuries while permitting hockey players sufficient freedom of movement to play the game effectively."[28] However, on appeal, the court found that Mohney never had a fair chance to establish a genuine issue of material fact as to the product liability claims. Since the court independently adjudicated the plaintiff's product liability claims without giving him a proper opportunity to discover and present evidence on these claims, the case was remanded. The Court of Appeals determination was certainly a logical and sound result, consistent with the goals of product liability claims. The plaintiff in *Mohney* was not given the adequate opportunity to present his claim and "have his day in court."

In *Peisino v. Riddell, Inc.*, the plaintiff, a high school quarterback, was injured when he tripped and the top of his helmet collided with an opposing player's thigh.[29] The plaintiff claimed that the helmet was defectively and negligently designed because the padding in the helmet's lining had been insufficient to reduce the force to a noninjurious level.[30] Riddell, Inc. claimed that the plaintiff used an incorrect playing technique, and therefore contributed to his own injury.

The plaintiff presented evidence of helmet testing by the National Operating Committee on Standards for Athletic Equipment, or NOCSAE, which demonstrated that the helmet worn by Peisino scored last of all helmets subjected to safety testing in protecting against impacts to the top of the helmet. The plaintiff presented additional standards, which showed that his football helmet did not pass tests that other football helmet models passed. Finally, he used self-devised tests to show the force of impact on the neck and shock reduction characteristics with different helmet padding designs. This evidence, coupled with the defendant's in-house records of testing, which indicated that it only conducted preliminary investigations regarding the correlation between helmet design and neck injury, supported the plaintiff's theory that his injury occurred from shock transmitted through the helmet to his spine.[31]

The jury awarded the plaintiff $ 3.5 million, finding that a reasonably safe helmet would have sufficiently reduced the force level to the spinal cord below the threshold necessary to prevent injury. The court in *Peisino* relied heavily on the testing results presented by the NOCSAE.[32]

Football helmet manufacturers have regularly been held liable for accidents on the playing field. Frequent and costly lawsuits have driven insurance rates skyward, and helmet manufacturers out of business.[33] Currently, Riddell Adams USA and Schutt remain the major football helmet manufacturers. Riddell Adams USA is the official licensed manufacturer of the NFL and most college football teams. That company has been the most innovative in its mission to improve product safety more effectively and efficiently than any other manufacturer.[34] Representatives of Riddell Adams USA and Schutt recently appeared before a Senate subcommittee to argue that restricting the rights of injured victims to sue is necessary to counter the skyrocketing cost of insurance premiums and other expenditures associated with lawsuits. Further, they argued that a severe restriction on the rights of consumers to sue manufacturers of defective products was necessary.[35]

Due to the technologically advanced age of American industry, many manufacturers offer a "state-of-the-art" defense when faced with products liability suits. "State of the art" refers to the existing level of technological expertise and scientific knowledge relevant to the particular industry at the time when a product is designed. This analysis determines whether there was the availability of a reasonable alternative design at the time when the product was manufactured, the omission of which renders the product not reasonably safe.[36] In *Eldridge v. Riddell*, the court found that the manufacturer Riddell had not acted negligently when it failed to market an accessory chin roll to a football helmet.[37] The plaintiff's son died from neck injuries suffered as a result of a collision with an opponent during a football game. The plaintiff based his claim on strict liability product defect, and argued that the chin roll, if used, would have prevented the type of injury suffered by the decedent. The plaintiff asserted that by adding a chin roll device to the chinstrap, the neck area, not the head, could be protected from severe injury.

However, the court found that the helmet in question was not defective in design when it was manufactured and sold in 1980, and was not defective at the time of the accident in 1986.[38] The chin roll device was not patented until 1982, and was not manufactured by any helmet company at that time. Further, helmet manufacturers did not market the roll until Rawlings added it to its 1987 catalogue, one year after the accident in this case. Therefore, the manufacturer was not liable for failure to include a chin roll device with its helmets. Further, there was absolutely no evidence tending to prove that the chin roll was a widely adopted safety device.[39] On the contrary, the idea of a chin roll never gained acceptance in the sports industry as a safety device.

On the other hand, there have been cases where the plaintiffs proffered evidence that there were more effective, alternative designs available and that the manufacturers knew of those alternatives. In *Braverman*, the plaintiff was thrown from his bicycle during a cycling race and suffered injuries to his head.[40] He brought an action against the manufacturer, Kucharik Bicycle Clothing Co., alleging that he was wearing its leather safety helmet at the time of the accident. The plaintiff alleged that the helmet was defectively designed, in that it did not provide adequate protection when being worn in an ordinary and usual manner. Experts testified that the defendant manufacturer's polyester-filled leather hairnet helmet did not meet industry standards for protective headgear. One particular expert reached this conclusion by studying the helmet's design and specifications.[41] Further, the manufacturer represented and promoted its leather helmets as "providing superior protection when compared to hard shell plastic helmets," which the court interpreted as proof that the manufacturer was aware of an existing alternative design.[42]

Manufacturers have also been held liable for breach of an express warranty. An express warranty is made when the seller or manufacturer makes a material representation as to a product's composition, durability, performance or safety.[43] This sort of a warranty can be made by way of spoken comment or advertisements. In *Yarusso v. International Sport Marketing*, the plaintiff became a quadriplegic following an accident on his off-road motorcycle.[44] The plaintiff's express warranty claim against the manufacturer was based on the promise that the non-resilient inner liner of its helmet would crush in the event that there was a blow to the helmet, thereby reducing the wearer's injury to the head. The plaintiff offered evidence showing that the helmet he was wearing did not crush during his accident, and as a result he was awarded damages.[45]

In a more severe case, a child was left brain-dead after he was struck in the head with a golf ball when his "Golfing Gizmo" toy malfunctioned.[46] The packaging of the Golfing Gizmo displayed the message: "Completely Safe—Ball Will Not Hit Player." The Supreme Court of California held that the words on the box were more than just decorative "sales talk," and that the language itself amounted to an express warranty.[47]

What can consumers do to protect themselves from unexpected accidents? To help consumers become aware of defective products, the United States government created the Consumer Product Safety Commission (CPSC).[48] Numerous publications, press releases and product safety alerts are available 24 hours a day. Consumers are notified of recent recalls of defective or dangerous products, and can even call a free 24-hour hotline with questions. Companies that find a defect or dangerous characteristic in their products may voluntarily recall the product. This can save consumers from further serious injury and save manufacturers from further liability and harm to reputation. For example, consumers became alerted when Bell Sports Inc. of San Jose, California, recalled about 5,800 bicycle helmets used for BMX, downhill mountain biking and racing. A defect with the helmet chinstrap rivets was causing it to come off the rider's head in the event of a fall or crash.

Further, National Sporting Goods Corp. of Passaic, New Jersey, voluntarily recalled about 3,600 men's and women's 100 Series Bullet speed skates. Consumers were cautioned that the wheel and axle assemble may break off during skating, resulting in injury to the skater. K2 Corp. of Vashon, Washington, also recalled about 12,000 "FLIGHT ALX" brand in-line skates. The skate's plastic brake mount tended to crack and fail, causing the skater to fall and suffer serious injury.

King Athletic Goods of Fairfield, New Jersey, in cooperation with the CPSC, offered an update kit to repair a possible defect on the "King Sport" aluminum bat. Commission reports indicated that the rubber grips on these aluminum baseball bats became loose, worn, torn or otherwise damaged.[49] According to Commission staff, this created a risk of injury, because a bat while in use may separate from a deteriorated grip, be propelled through the air and strike a person. To prevent this, King Athletic offered the update kit free of charge.

In cooperation with the CPSC, Rawlings Sporting Goods Co. Inc. of St. Louis, Missouri, voluntarily recalled about 45,000 slow-pitch softball bats. The tops of the bats tended to shear off during use, posing an injury hazard to batters and bystanders.

Also in cooperation with the CPSC, Huffy Sports Co., of Sussex, Wisconsin, recalled about 70,000 portable basketball systems. The basketball hoops had a sharp protruding bolt on the players' side of the pole that could cause serious leg or body lacerations to consumers. Basketball players might be cut when they collided with the poles as they drove toward the baskets or when they fell or were pushed into the poles. CPSC and Huffy Sports received 11 reports of injuries from protruding bolts that included scrapes and lacerations.

Further, in cooperation with the CPSC, Irwin Sports of Toronto, Ontario, announced the recall of about 8,400 faceguards for baseball catchers' combination faceguard helmets. Adjusting the wire faceguard too low on the helmet allowed a ball to pass through it, leading to serious injuries to the face or head.

In March 2003, MOSA Sports of Hermosa Beach, California, voluntarily recalled about 1,250 bicycle helmets. The helmets failed impact testing required under the CPSC's Safety Standard for Bicycle Helmets, violating the Consumer Product Safety Act. Riders wearing these helmets were not adequately protected from falls and could suffer head injuries.[50]

Most recently, on April 17, 2003, in cooperation with the CPSC, Dynacraft Industries of San Rafael, California, voluntarily recalled about 52,900 BMX bicycles. The stems on these bicycles were prone to loosen during use, causing riders to lose control and fall.[51] As evidenced, the CPSC provides an informational forum where consumers can investigate a certain product, receive 24-hour guidance and educate themselves on proper safety techniques.

Coaches

Liability for sports injuries is not limited to product manufacturers. Coaches have been held liable for injuries to athletes as well. In 1982, a landmark case awarded a high school football player $6.4 million for an injury that left him a quadriplegic.[52] The injury occurred during practice, when the player lowered his head while being tackled. The coach was sued for fail-

ure to warn the athlete of the dangers inherent in the sport and for improper coaching instruction. This case was important because it shifted a great deal of responsibility for the inherent risks involved in sports from the participant athlete to the coaches.[53]

Coaches may have one of the most important functions in maintaining a safe environment for their athletes. Coaches must use reasonable care to avoid the creation of foreseeable risks to the athletes under their supervision.[54]

Coaches have a number of duties that, when breached, can lead to liability. First and foremost, they have a duty to take all reasonable steps necessary to minimize the possibility of injury. This duty can be fulfilled by instructing and helping the athletes to understand safety procedures and methods to minimize injury; by providing safe and effective protective equipment; and by making sure the athletes are in proper physical condition. A coach can be held liable if he fails to provide sufficient training, conditioning, equipment and supervision.[55]

In *Woodson v. Irvington School Board of Education*, a track athlete was recruited for football and severely injured while tackling an opposing player on an interception. He had only practiced one session on tackling. The court held that tackling is an extremely dangerous aspect of the sport, and that the correct technique and manner, including keeping the head up, must be reinforced by repeated practice. The plaintiff was also not provided with sufficient pre-season training, including weight training to strengthen neck muscles, which was essential to minimize injury to the neck and spine.[56] The absence of proper instruction and physical training contributed to the plaintiff's catastrophic injuries.

In *Everett v. Bucky Warren, Inc*., a hockey coach was found negligent in supplying his team with a certain type of three-piece helmet, when he should have known that an alternate helmet with a safer single-piece design was readily available at that time.[57] The single-piece feature was in fact known to the coach at the time of the accident, but was sold at a slightly higher price than the three-piece helmet. The court held that the experienced hockey coach should have known that the three-piece design was faulty and that another more safely designed helmet was available. The court appeared to apply more of a subjective standard, taking into account that particular coach's high level of experience. As a result, the coach was held to a higher standard than the average person.

However, coaches' negligence will not relieve the manufacturer from liability where the product is found to be defective. If so found, courts will apply comparative fault liability.[58]

Although a coach's liability does not get the manufacturer off the hook if a piece of athletic equipment is in fact defective, manufacturers can still defend against a products liability claim by asserting that the product was misused or that the athlete was not instructed properly. In such a case, a coach may be held jointly liable.[59]

Defenses

Introduction to Defenses

Assumption of the risk is defined as a voluntary assumption, expressed or implied, of a known risk.[60] While athletes do not assume the risk of dangerously defective equipment, there are some risks inherent in sports that are so obvious that the courts will consider them assumed by all players. For example, in the sport of football, body contacts, bruises and clashes are inherent to the game. No prospective player needs to be told that a participant in the game of football may sustain injury. That fact is self-evident.

In *Passantino v. Board of Education of the City of New York*, a high school baseball player suffered a paralyzing accident when he slid headfirst into home plate, using his head as a battering ram in order to run over the catcher.[61] The plaintiff was permanently paralyzed and became a quadriplegic as a result of the collision. He filed suit, claiming negligence against the New York City Board of Education and his baseball coach. The lower court awarded him $1.8 million in damages for his tragic injury. However, in a controversial opinion, the Court of Appeals reversed on the ground that the player had participated voluntarily in the sport and should have known the risks associated with sliding headfirst.

This case is unsettling, since the court's holding focused on the voluntary participation in the sport rather than the coach's failure to warn his player of the dangers associated with sliding headfirst. In fact, the coach actually praised his player for sliding similarly in another game. If the court had determined that the coach's failure to warn his athlete constituted a breach of his duty as a coach, then they probably would have found that such a breach was the proximate cause of injury to the player. However, courts weakened the assumption of the risk doctrine six years after *Passantino* in *Thompson*, which was discussed earlier.[62] A defendant can defend against a plaintiff's strict liability claim by showing the plaintiff's assumption of the risk. This defense requires a high showing, consisting of the plaintiff's actual subjective knowledge of the hazard and subsequent voluntary encounter with that hazard.

In *Vendrell v. School District No. 26C, Malheur County*, the plaintiff was injured in a high school foot-

ball game and sued the school district for negligence, claiming improper and insufficient instruction.[63] Until he amended his complaint three times, the plaintiff had failed to allege that he had played with defective equipment. The court held that he had assumed the risk, reasoning that if the equipment were unsuitable in any way to the plaintiff's needs, he would have been intimately familiar with the defect, but still proceeded to play.[64] Therefore, the plaintiff's injury was the proximate cause of his awareness of the risk and his subsequent voluntary participation.[65]

Contributory Negligence

The theory of contributory negligence consists of conduct that falls below the standard a plaintiff should meet for his own protection, and which is the contributing cause of his injuries.[66] A manufacturer cannot defend against a plaintiff's claim of strict liability on this theory, as the athlete does not have an affirmative duty to discover a defect in a product, or to guard against the possibility of its existence. However, a plaintiff's conduct may be relevant in a negligence-based strict liability suit, for example where the athlete did not pay attention to coaches' instructions. In sum, a plaintiff will not recover for negligently inflicted injuries if she proximately contributed to her own injury.

In a case concerning a health spa slip and fall, a spa member who allegedly slipped and fell on a foreign substance in the shower was found to be contributorily negligent where she had used the spa facilities on several occasions and was aware that the showers were slippery, filthy and dirty.[67] The court found that she exposed herself to the risk without considering the condition of the showers on that day. Other examples of contributory negligence might include injuries arising from roughhousing in the locker room.

Comparative Fault

Under comparative fault, the trier of fact compares the proportionate fault of the defendant to that of the plaintiff. Most states, including New York, have replaced contributory negligence and assumption of risk with comparative fault.[68] Under this theory, the plaintiff will be allowed to recover at least a proportion of the damages sustained if his negligence was proportionally less than the defendant's negligence. However, assumption of the risk is not necessarily merged into the defense of contributory negligence under principles of comparative negligence. For example, an experienced skater who intentionally and voluntarily chose to perform an unsupervised traverse on a ramp while holding a ski pole in each hand had assumed the risk of injury.[69]

A high school football player brought an action against the manufacturer of a football helmet to recover for injuries sustained in a high school football game.[70] The plaintiff attempted to tackle an opposing ball carrier who was running for a touchdown. The two players collided and the ball carrier somersaulted into the end zone and scored a touchdown. The plaintiff, his tackle attempt unsuccessful, lay motionless on the ground, suffering from a spinal cord injury that rendered him permanently a quadriplegic. The state's comparative negligence statute reduced the damages awarded in proportion to the amount of negligence attributable to the plaintiff. With respect to the negligence count, the jury found that "of all the negligence which proximately caused plaintiff's injuries, 40 percent was attributable to plaintiff and 60 percent was attributable to defendant."[71]

Situation Analysis

In some situations it is difficult to determine who, if anyone, is responsible for an athlete's injury. Do accidents really exist? Is human action or inaction determinative? These questions presented themselves in a recent tragic incident involving a Pennsylvania State University pole-vaulter. Kevin Dare died when he attempted to clear the crossbar, but instead tumbled backward from approximately a 15-foot height and landed head first into the 8-inch-deep exposed solid steel vaulting pit, crushing his skull. Pole-vaulting is a complex event with many different products involved, any of which if designed defectively, can result in tragedy. There is the actual pole, which is usually comprised of fiberglass. There is a crossbar and a vaulting pit, usually made of either steel or fiberglass. In addition, there is padding provided around the pit consisting of a certain width, length, depth and composition. Dare was a 19-year-old experienced pole-vaulter, having won the U.S. Junior Track and Field National Championships in the event the preceding year. He was also an All-American top ten collegiate pole-vaulter.[72]

This tragic incident raised a series of issues. Did the athletic equipment contain a design defect? Did the equipment contain adequate warning labels? Did the facility operators of the vaulting pit take precautionary measures to minimize harm by expanding the padded areas around the pit? If product liability claims were brought against the manufacturer of the pit, the court would have to determine whether there was a design defect, whether there was awareness and actual use of a safer design in the industry and whether there was a mechanical feasibility of a safer design. If an action were brought against the manufacturer of the pole itself, the court would look to the adequacy of the warning. In this specific situation, the following warning label was affixed on the pole:

> VAULTING IS A DANGEROUS ACTIVITY. SEVERE INJURY, PARALYSIS AND DEATH MAY OCCUR.

This incident also raised the issue of a coach's liability and breach of duty. Coaches must use reasonable care to avoid the foreseeable risks to athletes under their supervision. Dare was using a 16-foot pole, which was a foot longer than the pole that he was used to. While coaches have a duty to instruct their athletes regarding safety procedures and methods to minimize injuries, should this duty extend to minimizing the possibility of injury by preventing an athlete from using an unfamiliar pole? Or in the alternative, did Dare simply assume the risk by voluntarily engaging in this activity knowing of the inherent risks involved? Dare's father has become an advocate for safer industry vaulting equipment.

Some athletic equipment does not contain warnings. As a competitive hurdler, I have noticed that hurdles used in track and field competition do not contain any warning label affixed on the exterior of the hurdle. However, hurdling can become a dangerous activity when the hurdle is misused. Two examples of misuse include jumping the hurdle when it is backward or when it is set at an incorrect height. Hurdles are set at a different height for high school, college, men and women. The potential for danger seems obvious, and therefore warning labels are probably unnecessary. In my personal experience, competitive hurdlers have relied on their coaches for instruction and guidance.

When a severe injury occurs at any sporting event, the standards for safety are re-evaluated and in some instances are increased. Dare's tragic death lead to the crusade for increased safety measures in that particular event. Starting in 2003, the overall size of the pole-vault landing pad was increased in width, dimension and depth, thereby creating the new industry standard. In an attempt to help minimize risk, the placement of the landing pad immediately behind the planting pit was repositioned to reduce hard surfaces between the planting pit and the landing pad.

Spectator Injury

This section will focus on spectator injury, assumption of risk and facility liability. Some of the incidents that will be discussed did not result in lawsuits, thereby leaving much open to analysis and interpretation. The particular incident that prompted this research involved the death of 13-year-old Brittanie Cecil, who died as a result of being struck in the head with a hockey puck at a professional hockey game involving the Columbus (Ohio) Blue Jackets.[73] There were many questions surrounding this tragedy. Did Brittanie, as a spectator, assume the risk of being struck in the head with a puck? Or were the facility operators liable for failing to provide reasonably safe conditions for spectators, thereby breaching their duty of care?

Under the assumption of risk doctrine, spectators will usually not recover for injuries resulting from the ordinary, common and foreseeable risks so inherent in the sporting activity that they are attending, provided that the owner of the facility has exercised reasonable care to protect spectators from harm.[74] These risks can include getting hit with a foul ball at a baseball game or a puck at a hockey game. As a matter of law, the mere fact that a spectator attends a baseball game or hockey game signifies that she impliedly assumes those risks. A 1953 case provided precedent for this reasoning. In *Schentzel v. Philadelphia National League Club*, a female spectator was hit by a foul ball at a baseball game.[75] While this was her first visit to the park, she had watched television broadcasts and had viewed foul balls being hit into the grandstands. The court found that stray balls were a matter of common everyday practical knowledge, and as a matter of law, the spectator had impliedly assumed the normal and ordinary risk inherent to attendance at a baseball game.[76]

Baseball clubs have taken measures to actually warn fans of the risk of sitting in unprotected areas, specifically those seats behind home plate, nearest the dugout and down the first and third base lines. These fans are considered in the "assumption of the risk zone" and most likely will have no recourse if they are hit by a ball or bat during the course of play.

Spectator injuries have also been a major concern for NASCAR since Bobby Allison's 1987 crash in Talladega, Alabama.[77] During the event, Allison blew a tire and his car became airborne. A woman lost an eye after being hit by debris from Allison's car after it flew into the air and tore down nearly 100 feet of fencing. Although there have been no spectator deaths in NASCAR events, major changes have occurred as a result of this tragedy. NASCAR now mandates the use of restrictor plates to reduce the air intake through the carburetor, thereby reducing the flow of fuel into the engine and reducing the average speed of the car to about 193 miles per hour. Without restrictor plates, the cars are capable of going at an average speed of 230 miles per hour.[78]

Courts often take into account the capability of a minor to assume the risk. The minor must know and understand the risk that she incurs and the choice to incur this risk must be voluntary. If the Cecil matter had proceeded to court, the trier of fact would have taken into account the fact that Brittanie was an avid hockey fan. Although this was her first trip to a live NHL game, she frequently watched hockey games on television. It would be difficult to show that she was not aware that a puck might hit a spectator, and therefore difficult to assert the "ignorance of the basic play of the game" defense.

A facility operator owes spectators a reasonable duty of care to keep them out of harm's way.[79] Courts still apply an objective standard of negligence, but specific knowledge of the risks of the game gives rise to a duty to exercise reasonable care. Operators are business inviters and will be liable for conditions which cause harm to invitees if: 1) The operators know or should have known that the conditions existed; 2) the conditions imposed an unreasonable risk to spectators, that they could not discover or protect themselves against and 3) if the operators failed to exercise reasonable care for the protection. To determine whether an operator breached its duty, courts will focus on the facility owner's knowledge of unsafe conditions, whether the conditions were foreseeable and what precautions were taken to prevent such risks. The spectator must prove that the acts of the defendant operator were a breach of the duty of care and that the breach was the proximate cause of the injury. The operator's affirmative duty can include making sure measures were taken for the installment of netting, screens or Plexiglas at a certain height; public address announcements alerting fans of possible injury and the posting of warnings to spectators. For example, in 1999, a Florida Marlins fan sitting near the bullpen was severely injured by a wild pitch that flew over the screening. The jury determined that the team should have known that the screening was too low. The spectator was awarded $2.5 million.

In the Cecil situation, it does not seem likely that facility operators at the arena breached any duty of reasonable care. The Plexiglas at the arena conformed to accepted NHL standards, and there was no other evidence of any facility negligence or breach of duty. However, as Judge Learned Hand stated in *TJ Hooper,* an entire industry standard can be wrong.[80] In that case, a tugboat's cargo was lost, in part because it did not have a radio on board, which would have allowed the captain to hear of an approaching storm. Judge Hand found that it was not customary for tugboats to carry such radios; he nonetheless held the owner of the tugboat liable for failing to use technology then in common use elsewhere. Hand reasoned that no group of individuals and no industry or trade could be permitted to adopt careless and slipshod methods to save time, effort or money, and set its own uncontrolled standard at the expense of the rest of the community.[81] Hand further reasoned that if the only test was to be what had always been done, no one would ever have any great incentive to make progress in the direction of safety.[82] Therefore, it follows that whenever the particular circumstances, risk or other elements in the case are such that a reasonable man would not conform to the custom, the actor may be found negligent in conforming to it; and whenever a reasonable man would depart from the custom, the actor may be found not to be negligent in so departing.[83] Industry standards may point to a standard of care, but by doing so do not establish a blanket standard of care.

Sometimes it is difficult to ascertain how an injury occurred and who was responsible, if anyone. At an Army-Navy football game in 1998 at Veterans Stadium in Philadelphia, a loose railing gave way on the temporary stands as Army fans were celebrating Ty Amey's 70-yard touchdown.[84] About 10 West Point Army cadet spectators were injured when they fell 15 feet to the ground, with one cadet breaking his neck as a result. Lawsuits were brought against the city of Philadelphia, the stadium and the United States Military Academy. The facts revealed that fans were leaning and pounding on the railing and standing and stomping on their seats. One issue raised in this case was whether the stadium event staff and/or the Army staff were negligent in failing to keep that section under control. Another issue was whether the stadium facilities were inspected for safety on a regular basis. In a press statement, the mayor of Philadelphia declared that although witnesses saw duct tape on the railings, its purpose was not for support, rather, it was intended to keep people from climbing between the rails. He believed that the railing collapse was a result of a clean break and that there was no rusting or decay.[85] The case eventually settled after all sides took into account the possible negligence on behalf of the stadium, the city of Philadelphia, the manufacturer and the Army fans themselves.

Product Liability Reform

Recent reform in products liability law has presumably made it more difficult for consumers to recover on a strict liability theory. The consumer-friendly section 402A of the *Restatement (Second) of Torts* was replaced by a more rigid standard. Section 402A of the *Restatement (Second)* has dominated American products liability law since the 1960s. This section allowed recovery against product manufacturers and sellers on a strict liability basis, even if the product was produced with all reasonable care.[86]

In May 1997, the American Law Institute replaced section 402A with a new "anti-consumer" oriented *Restatement (Third) of Torts*, consisting of 21 new separate rules. The area of product design defects was most affected. This new *Restatement* rejects the widely used "consumer expectation" test, and instead requires proof of a "reasonable alternative design."

The new rule stipulates that traditional strict liability, or liability without fault, now only applies to products involving manufacturing defects, specifically, those defects in which a product deviates from design specifications. The new standard for determining manufacturing defects provides:

Section 2(a)—Manufacturing Defect

> A product . . . contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product.[87]

Design and warning defect cases, however, are governed by an entirely different standard. While the *Restatement* avoids the terminology of "strict" and "negligence" liability, the new standard makes clear that something very close to conventional negligence is required. The new standard for determining design defect provides:

Section 2(b)—Design Defect

> A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.[88]

Design defect claims are now subject to reasonableness and risk utility tests. The new standard accepts that no design is totally risk-free, and further recognizes that trade-offs are made to accommodate practical realities such as cost, consumer preferences, marketability and safety. The new standard also reflects the general policy that sellers should be held liable for defective design only when harm from the design was reasonably preventable by adoption of an alternative design that was practical and available at the time of sale.

To establish liability under the new section 2(b), plaintiffs must show that 1) an alternative design; 2) which is reasonable; 3) and which was available at the time of sale of the product in question; 4) would have reduced the foreseeable risk of injury; 5) without affecting the overall safety of the product; and 6) the decision by the manufacturer not to use the alternative design made the product unreasonably unsafe.[89]

Various factors can be used to determine whether an alternative design is reasonable, and whether the decision not to use the alternative design made the product unreasonably unsafe. These factors are similar to those considered by the manufacturer when designing a product for sale. For example, what risks of harm does the product present, as compared to the alternative design? How likely is it that somebody will be injured, and what degree of injury is likely? How well do instructions and warnings aid in reducing the risk of injury? How would the alternative design affect production costs, product longevity, maintenance, repair and aesthetics? How are consumer choices affected? The new rule reflects a presumption that the manufacturer made a reasonable choice in coming up with a particular design. Plaintiffs now have the burden to show, on an objective basis, that the manufacturer's choice was unreasonable.

Despite the strict standards set out in the new *Restatement*, the *Restatement (Second) of Torts* is still followed by courts as a secondary authority, even though the *Restatement (Third)* attempts to codify what the courts are actually doing. Manufacturers will, of course, urge adoption of the *Restatement (Third)* view on design defect, arguing that the *Restatement (Third)*'s approach reflects the clear trend of authorities. Consumer plaintiffs, on the other hand, will seek rejection of the new standard, pointing to the uneven positions between consumer and manufacturer, social and economic policies that support spreading the cost of risks, and the impropriety of adopting a new rule that radically departs from long-established and well-settled case law. Manufacturers have a tough fight ahead of them since the courts are more likely to appeal to the "powerless consumer," and since products liability law is so well established.

In this new industrial era of highly technical and sophisticated gadgets, consumers assume the responsibility of sharp shoppers. They should be forced to investigate product safety themselves. The information age of the Internet provides various avenues for consumers to "check out" a product. As discussed at length earlier, the CPSC provides consumers with 24-hour telephone and Internet service. Consumers will also have to weigh the risks of purchasing a particular product.

Manufacturers such as Riddell, Inc. have succeeded in creating innovative design techniques for their products. Riddell is in the process of introducing a new football helmet called the Revolution, a helmet designed with the intent of reducing the risk of concussion, one of the most common and serious contact sport injuries.[90] The design of the Revolution helmet is based on the findings of a long-term study of professional football players conducted by Biokinetics & Associates, an independent engineering consulting firm. The research revealed that of all the hits that resulted in concussions, nearly 70% were to the side of the face or jaw area.[91] The new helmet includes the Tru-Curve protective shell, which extends to the jaw area and has been designed by computer to fit around the head's center of gravity in order to offer superior front-to-back fit and stability.[92] The helmet also features padding that can inflate to offer a custom fit to each player's head shape. Riddell, Inc. has increased the distance from the helmet shell to the player's head, allowing for greater room to

manage the types of hits that can cause concussions. Riddell, Inc.'s Revolution will have a significant presence at the professional, collegiate and high school levels.[93] However, even Riddell, Inc. agrees that no helmet is concussion-proof. Due to liability issues, it shies away from words such as "safer." In fact, Riddell, Inc. discouraged University of Pittsburgh fullback Dustin Picciotti, who missed the entire last season due to a concussion (his second in as many years), from switching to the Revolution this year, presumably out of concern that, if he had a third concussion, the helmet might be disparaged as ineffective.

Conclusion

Although manufacturers continue to create "innovative" products to meet consumer demands, they will never be immune from products liability suits. Science and technology will never create an infallible product. Hopefully, joint communication among all levels of athletic competition will help relieve the burdens associated with sports injuries. Courts will have to create a careful balance to ensure that both manufacturers and consumers continue to rely on each other.

Endnotes

1. John L. Diamond, Lawrence C. Levine, & Stuart M. Madden, Understanding Torts § 17.01 (A) (2d ed. 2000).
2. Restatement (Second) of Torts § 402A (1965).
3. *See id.* at § 17.03 (3).
4. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57 (1963).
5. *See id.*
6. *Byrns v. Riddell, Inc.*, 113 Ariz. 264 (Sup. Ct. 1976).
7. Restatement (Third) of Torts § 2(b) (1997).
8. *See* http://www.bakerdaniels.com.
9. Charles E. Quirk, Sports and the Law, p. 8 (Charles E. Quirk ed., Garland Publishing 1999).
10. *Rodriguez v. Riddell Sports, Inc.*, 242 F.3d 567 (5th Cir. 2001).
11. *Rawlings Sporting Goods Co. Inc. v. Daniels*, 619 S.W.2d 435 (Tex. App. Ct.) (10th Cir. 1981).
12. *See id.*
13. *See id.*
14. *See id.*
15. *See id.*
16. *See* Quirk, Sports and the Law, *supra* note 9, at 9.
17. Restatement (Second) Torts § 402A (Strict Liability).
18. *Lister v. Bill Kelley Athletic, Inc.*, 137 Ill. App. 3d 829, (Ill. App. Ct. 1985) (Plaintiff suffered injuries to his spine during a high school football game while wearing manufacturer's helmet, which left him a quadriplegic).
19. *See id.*
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.*
24. *Berkner v. Bell Helmet Inc.*, 9 F.3d 121 (11th Cir. 1993).
25. *See id.*
26. *United States v. Mohney Inc.*, 77 F. Supp. 2d 859 (1999) (Mohney suffered paralysis when he crashed headfirst into the hockey arena walls during a game).
27. *See id.*
28. *See id.*
29. *Peisino v. Riddell*, No. 83-C-SE-129 (Del. Super. Ct. July 7, 1989). *See also* Shea Sullivan, *Football Helmet Product Liability*, 3 Sports Law. J. 233 (1996).
30. *See id.*
31. *See id.*
32. The NOCSAE was established in 1969 to combat sports injury problems. It is comprised of the American College Health Association, the National Collegiate Athletic Association (NCAA), the National Federation of State High Schools Association (NFSHSA), and the Sporting Goods Manufacturers Association. The NOCSAE's purpose in this combined effort was to institute research directed toward injury reduction and prevention.
33. *See Consumer & Media Resources, available at* http://www.atla.org.
34. *See* http://www.nicks-picks.com.
35. *See* http://www.kraftlaw.com/Articles/Hypocrites.htm.
36. *See* Diamond, et al., Understanding Torts, *supra* note 1, § 17.04.
37. *Eldridge v. Riddell Inc.*, No. 92-0875, 1993 Fla. App. LEXIS 5960 (Fla. App. June 2, 1993).
38. *Braverman v. Kucharik Bicycle Clothing Co.*, 287 Ill. App. 3d 150 (Ill. App. Ct. 1997).
39. *See id.*
40. *See id.*
41. *See id.*
42. *See id.*
43. *See* Diamond, et al., Understanding Torts, *supra* note 1, § 17.03.
44. *Yarusso v. International Sport Mktg.*, No. 93C-10-132SCD, 1999 WL (Del. Super. Ct. Apr. 1, 1999).
45. *See id.*
46. Michael E. Jones, Sports Law, p. 105 (John Larkin ed., Prentice Hall Publishing 1999).
47. *Hauter v. Zogarts*, 14 Cal. 3d 104, 534 P.2d 377 (1975).
48. *See Recalls and Product Safety News, available at* http://www.cpsc.gov.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Thompson v. Seattle Pub. Sch. Dist.* (unpublished decision, 1982).
53. *See* Quirk, Sports and the Law, *supra* note 9, at 15.
54. *See id.*
55. J. Coburn, *Woodson v. Irvington Board of Education* (1987), 3 Nat'l Jury Verdict Rev. & Anal. 10 (No. 8, 1988).
56. *See id.*
57. *Everett v. Bucky Warner, Inc.*, 380 N.E. 2d 653 (Mass. 1978) (College hockey player suffered severe injuries when he was struck in the head with a puck wearing three-piece helmet).
58. *See* Quirk, Sports and the Law, *supra* note 9, at 16.
59. *Id.* at 17.

60. *See Sports Law in a Nutshell* p. 156.
61. *Passantino v. Board of Educ. of the City of New York,* 395 N.Y.S. 2d (N.Y. App. Div. 1976).
62. *See Thompson v. Seattle Pub. Sch. Dist.* (unpublished, 1982). (The assumption of the risk doctrine can only be used as a defense if the coach can prove that the athlete knew of the inherent risks involved, understood the full implications of the risk and then voluntarily chose to participate. This case shifted more responsibility to the coach).
63. *Vendrell v. School Dist. 26C, Malheur County*, 376 P.2d 406 (Or. 1962).
64. *See id.*
65. *See id.*
66. *See supra*, Nutshell, note 60, at 167.
67. *See* Quirk, Sports and the Law, *supra* note 9, at 12.
68. *See supra*, Nutshell, note 60, at 169.
69. *Gary v. Party Time Co., Inc.*, 434 So. 2d 338 (Fla. App. Ct. 1983).
70. *See id.*
71. *See* Quirk, Sports and the Law, *supra* note 9, at 12.
72. *See College News*, *available at* http://www.teamjam.org.
73. *See id. The Death of a Fan*, *available at* http://www.cnnsi.com.
74. *Brown v. San Francisco Baseball Club*, 99 Cal. App. 2d 484 (1950). (Certain risks are inherent and incident to the game).
75. *Schentzel v. Philadelphia Nat'l League Club,* 96 A.2d 181 (Pa. Super. Ct. 1953).
76. *See id.*
77. *See* www.NASCAR-info.net.
78. *See id*.
79. 45 AMJUR 3d 407.
80. *TJ Hooper*, 60 F.2d 737 (2d Cir. 1932).
81. *See id.*
82. *See id.*
83. *See id.*
84. *See* http://www.augustasports.com.
85. *See id*.
86. *See* American Law Institute.
87. Restatement (Third) § 2(a).
88. Restatement (Third) § 2(b).
89. *See id.*
90. *See Football Helmet Technology*, *available at* http://www.neuroskills.com.
91. *See id.*
92. *See id.*
93. *See id.*

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