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# Assumption of Risk in NFL Concussion Litigation: The Offhand Empiricism of the Courtroom

Jeffrey Standen\*

Liability for defective athletic equipment can be difficult to prove.<sup>1</sup> In the fast-paced environment of contact sports, establishing the element of causation can be insuperable. For example, in *Testerman v. Riddell*, where a football player alleged that the manufacturer's representative fitted him with undersized shoulder pads and thus caused him serious injury during a scrimmage, the appellate court upheld the trial court's ruling that the plaintiff's case failed for lack of definitive proof of causation.<sup>2</sup> The plaintiff's expert failed to establish whether or not the injury resulted from the opponent's blow or contact with the ground, whether or not the injured area was covered by the pad at the moment of impact, and whether or not larger pads would have precluded the injury in the circumstances.<sup>3</sup> Assuming causation can be established, sports equipment manufacturers may be held liable for negligence,<sup>4</sup> breach of warranties,<sup>5</sup> and defective prod-

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Commonly available defenses include lack of privity and incurred risk. See generally DAN DOBBS, *THE LAW OF TORTS* §§ 369-374 (2000); *Moore v. Sitzmark Corp.*, 555 N.E.2d 1305, 1307 (Ind. Ct. App. 1990) (incurred risk).

<sup>2</sup> *Testerman v. Riddell, Inc.*, 161 F. App'x. 286, 288, 290 (4th Cir. 2006); see also *Byrns v. Riddell, Inc.*, 550 P.2d 1065, 1069 (Ariz. 1976) (football helmet design defective).

<sup>3</sup> *Testerman*, 161 F. App'x. at 289; see also *Fort Lauderdale Country Club, Inc. v. Winemore*, 189 So. 2d 222, 224 (Fla. 4th Dist. Ct. App. 1966) (holding golf club liable in golf cart accident, even where the driver of cart was negligent, and finding the golf club negligent in failing to keep carts locked away, in that, negligence of an intervening actor should have been foreseen).

<sup>4</sup> *McCormick v. Lowe & Campbell Athletic Goods Co.*, 144 S.W.2d 866, 871-72 (Mo. Ct. App. 1940) (finding a negligent failure to test pole used in pole vault); *Dudley Sports Co. v. Schmitt*, 279 N.E.2d 266, 274 (Ind. Ct. App. 1972) (finding a negligent design and manufacture of pitching machine); *James v. Hillerich & Bradsby Co.*, 299 S.W.2d 92, 94 (Ky. 1957) (finding that although shattered baseball bat was defective, defendant was not negligent because the risk of bats breaking is common knowledge and therefore, not an unreasonable risk).

<sup>5</sup> *Hauter v. Zogarts*, 534 P.2d 377, 387 (Cal. 1975) (finding misrepresentation that a golf device was safe and a breach of implied warranty of merchantability); *Bell Sports, Inc. v. Yarusso*, 759 A.2d 582, 592-93 (Del. 2000) (holding that representations found in helmet's manual created express warranties that formed a basis for manufacturer's liability for off-road motorcyclist's

ucts,<sup>6</sup> much like any other manufacturer. Similarly, stadium owners can be held liable for defective field conditions.<sup>7</sup>

The defense of assumption of risk is disfavored as a general matter in modern tort law.<sup>8</sup> The widespread adoption of comparative fault schemes has rendered such absolute defenses to liability no longer as relevant.<sup>9</sup> Nevertheless, assumption of risk remains a viable doctrine in tort cases arising out of sporting contests.<sup>10</sup> However, assumption of risk has provided a defense only in actions for negligence and not for those in which intentional or reckless conduct is alleged.<sup>11</sup> In addition,

neck injury that resulted in paraplegia); *Seaside Resorts, Inc. v. Club Car, Inc.*, 416 S.E.2d 655, 662 (S.C. Ct. App. 1992) (finding breach of implied warranty of merchantability for golf cart battery charger plugs, which caused fire damaging plaintiff's club house).

<sup>6</sup> *Nissen Trampoline Co. v. Terre Haute First Nat'l Bank*, 332 N.E.2d 820, 825–26 (Ind. Ct. App. 1975) (finding liability for failure to warn about danger from trampoline springs); *Brett v. Hillerich & Bradsby Co.*, No. CIV-99-981-C, 2001 WL 36162669, at \*1, 6 (W.D. Okla. Oct. 29, 2001) (discussing manufacturer's liability where a pitcher was injured by a batted ball due to the bat being defective in allowing batted balls to reach dangerous speeds); *Everett v. Bucky Warren, Inc.*, 380 N.E.2d 653, 658–59 (Mass. 1978) (finding defective design of hockey helmet).

<sup>7</sup> *Maddox v. City of New York*, 487 N.Y.S.2d 354, 358–59 (N.Y. App. Div. 1985) (finding the defendant was not liable for wet outfield); *Heldman v. Uniroyal, Inc.*, 371 N.E.2d 557, 567 (Ohio Ct. App. 1977) (discussing assumption of risk where player was injured while playing on a tennis court with bubbles on the playing surface); *Zachardy v. Geneva Coll.*, 733 A.2d 648, 651 (Pa. Super. Ct. 1999) (finding the defendant not liable for divot in baseball field).

<sup>8</sup> Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481, 482 (2002) (“the Restatement (Third) of Torts: Apportionment of Liability, recently adopted by the American Law Institute, explicitly repudiates the defense, rejecting the provisions of the Restatement (Second) of Torts that recognized it.”) (citing RESTATEMENT (THIRD) OF TORTS §§ 2 cmt. i, 3 cmt. c (2000)) (noting that the modern view is that assumption of risk should be completely merged or assimilated within comparative fault and abolished as a distinct doctrine); *see, e.g., Li v. Yellow Cab Co.*, 532 P.2d 1226, 1229 (Cal. 1975) (holding that “the doctrine of comparative negligence is preferable to the ‘all-or-nothing’ doctrine of contributory negligence from the point of view of logic, practical experience, and fundamental justice.”).

<sup>9</sup> Presently, only Alabama, Maryland, North Carolina and Virginia have retained contributory negligence. The other 46 states have rejected contributory negligence and adopted some form of comparative negligence. *See* Kathleen M. O'Connor & Gregory P. Sreenan, *Apportionment of Damages: Evolution of a Fault-Based System of Liability for Negligence*, 61 J. AIR L. & COM. 365, 369-70, nn.20-21 (1996); In the federal sphere, comparative negligence has been the rule since 1908, in cases arising under the Federal Employers' Liability Act, *see* 45 U.S.C. § 53 (2006), and since 1920, in cases arising under the Jones Act, *see* 46 U.S.C. § 30104 (2006), and the Death on the High Seas Act, *see* 46 U.S.C. § 30304 (2006).

<sup>10</sup> *See generally* Keya Denner, *Taking One for the Team: The Role of Assumption of the Risk in Sports Tort Cases*, 14 SETON HALL J. SPORTS & ENT. L. 209 (2004); Timothy Davis, *Avila v. Citrus Community College District: Shaping the Contours of Immunity and Primary Assumption of the Risk*, 17 MARQ. SPORTS L. REV. 259 (2006).

<sup>11</sup> *Ordway v. Superior Court*, 243 Cal. Rptr. 536, 542 (Cal. Ct. App. 1988); *Turcotte v. Fell*, 502 N.E.2d 964, 970 (N.Y. 1986) (finding failure to allege intentional misconduct rendered the defense of assumption of risk available to preclude the claim); *Tomjanovich v. California Sports, Inc.*, No.H-78-243, 1979 WL 210977, at \*1 (S.D. Tex. Oct. 10, 1979) (finding a defendant may not prevail on an assumption of risk defense in a case involving a punch to the jaw of the plaintiff where the intent to injure and the force used is far greater than necessary to accomplish a legitimate objective within the score of play); *Kabella v. Bouschelle*, 672 P.2d 290, 294 (N.M. Ct. App. 1983) (holding that “a cause of action for personal injuries between participants incurred

even if a participant has assumed the inherent risks of sport, that assumption does not necessarily include an assumption of the risk of negligence.<sup>12</sup> In products liability cases, assumption of risk typically requires that the plaintiff be aware of the risk of defendant's conduct and that the plaintiff have subjectively agreed to accept the risk and to encounter it.<sup>13</sup> With this type of assumption of risk, the plaintiff must subjectively understand the danger, and then voluntarily and not negligently decide to accept the risk.<sup>14</sup> Moreover, some courts have determined that being compelled to take a risk by an employer obviates the "voluntariness" requirement of the assumption of risk defense.<sup>15</sup> An employee who is aware of the risk but is required by his employer to use the product has not voluntarily accepted the risk.<sup>16</sup>

### A. Courtroom Empiricism

In the *Ordway* litigation, veteran horse jockey Judy Casella was thrown from her horse during a race and injured when her mount rolled over her.<sup>17</sup> Casella's horse had stumbled after becoming entangled with another race-horse, whose jockey, it was later determined by the California Horse Racing Board, violated a racing rule by "crossing over without sufficient clearance, causing interference."<sup>18</sup> As a result of his violation, the jockey was suspended from racing for five days.<sup>19</sup>

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during athletic competition must be predicated upon recklessness or intentional conduct, 'not mere negligence.');

Ross v. Clouser, 637 S.W.2d 11, 13-14 (Mo. 1982) (holding that "a cause of action for personal injuries incurred during athletic competition must be predicated on recklessness, not mere negligence.").

<sup>12</sup> Konesky v. Wood Cnty Agric. Soc'y, 844 N.E.2d 408, 412 (Ohio Ct. App. 2005) (finding "the risk of being trampled by runaway horse was not an inherent risk of horse racing, and thus doctrine of primary assumption of risk did not apply"); Ashcroft v. Calder Race Course, Inc., 492 So. 2d 1309, 1311 (Fla. 1986) (finding jockey did not assume risk of negligently located exit gap on the racetrack).

<sup>13</sup> RESTATEMENT (SECOND) OF TORTS § 496A cmt. c (1965).

<sup>14</sup> *Id.*

<sup>15</sup> *E.g.*, Staub v. Toy Factory, Inc., 749 A.2d 522, 526 (Pa. Super. Ct. 2000) (finding "'a plaintiff will not be precluded from recovering except where it is beyond question that he voluntarily and knowingly proceeded in the face of an obvious and dangerous condition and thereby must be viewed as relieving the defendant of responsibility for his injuries.'" (quoting Struble v. Valley Forge Military Acad., 665 A.2d 4, 6 (Pa. Super. Ct. 1995))).

<sup>16</sup> Tew v. Sun Oil Co., 407 A.2d 240, 243-44 (Del. Super. Ct. 1979) (noting that an individual who faces a known dangerous condition, rather than risk of losing his job, cannot be said to have voluntarily assumed the risk of injury); Cremeans v. Willmar Henderson Mfg. Co., 566 N.E.2d 1203, 1207 (Ohio 1991) (abolishing assumption of risk in the employment setting in Ohio, and holding that an employee does not voluntarily assume the risk of injury when that risk must be encountered in the normal performance of required duties).

<sup>17</sup> *Ordway v. Superior Court*, 243 Cal. Rptr. 536, 537 (Cal. Ct. App. 1988).

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

Subsequently, Casella brought a negligence suit.<sup>20</sup> The court dismissed Casella's complaint on the grounds that she had assumed the risk that another contestant would violate a racing rule.<sup>21</sup> "[B]y participating in the horse race, she relieved others of any duty to conform their conduct to a standard that would exempt her from the risks inherent in a sport, where large and swift animals bearing human cargo are locked in close proximity, under great stress and excitement."<sup>22</sup> In sports, the court added, "[i]f the defendant's actions, even those which might cause incidental physical damage in some sports, are within the ordinary expectations of the participants . . . no cause of action can succeed based on a resulting injury."<sup>23</sup> The scope of "ordinary expectations," the court made clear, includes conduct that comprises "routine rule violations" that are "common occurrences" and "within the parameters of the athletes' expectations."<sup>24</sup> Less common misfeasances are "jury material;" where a player's misconduct was obviously outside of the normal expectations of participants in the sport, liability is appropriate.<sup>25</sup>

It is upon the distinction between expected and unexpected occurrences that most sports tort litigation turn. Here, the unimpressive fact-finding methodology of the legal system is visible. An answer to the question of the type of conduct athletes expect when playing a game appears to demand an empirical inquiry that plumbs the subjective understanding of veteran players. How often, for instance, must bean-balls occur for them to be deemed "reasonably expected" by the

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 544. For a different understanding of the relationship between assumption of risk and comparative fault, see *Segoviano v. Hous. Auth.*, 191 Cal. Rptr. 578, 579–80, 583 (1983) (involving an injury in a touch football game, holding that comparative fault precludes application of assumption of risk, unless such assumption were explicit).

<sup>22</sup> *Ordway*, 243 Cal. Rptr. at 543; *contra* *Knight v. Jewett*, 834 P.2d 696, 705 (Cal. 1992) (en banc) (stating that the assumption of risk analysis in *Ordway* was a misinterpretation of California law, and noting that "it is thoroughly unrealistic to suggest that, by engaging in a potentially dangerous activity or sport, an individual consents to . . . a breach of duty by others that increases the risks inevitably posed by the activity or sport itself, even where the participating individual is aware of the possibility that such misconduct may occur.").

<sup>23</sup> *Ordway*, 243 Cal. Rptr. at 544.

<sup>24</sup> *Id.* *Contra Knight*, 834 P.2d at 709 (noting that a proper application of the assumption of risk doctrine in the sports context does not depend on the particular plaintiff's subjective knowledge of potential risk, but rather the nature of the defendant's duty).

<sup>25</sup> *Griggas v. Clauson*, 128 N.E.2d 363, 366 (Ill. App. Ct. 1955) (finding a jury verdict in favor of plaintiff proper where defendant hit plaintiff twice from behind during basketball game); *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520–21, 527 (10th Cir. 1979) (discussing plaintiff's rights where defendant struck plaintiff's neck during professional football game); *Averill v. Luttrell*, 311 S.W.2d 812, 814–15 (Tenn. Ct. App. 1957) (baseball club not liable for catcher's assault on batter); *Overall v. Kadella*, 361 N.W.2d 352, 356 (Mich. Ct. App. 1984) (holding a hockey player was permitted to recover when defendant player intentionally punched him in the face at the conclusion of the game).

baseball player? The answer to the aforementioned question should also be provided by a jury, the finder of fact, in a tort suit. Instead, the cases are replete with instances of judges resolving the assumption of risk defense as a matter of law, deciding whether or not a particular course of conduct lies within or without the normally expected conduct incidental to the sport.<sup>26</sup> Because judges must often announce the basis for their decisions, the grounds for the finding are amenable to analysis. Typically, judges rely on the trial testimony of witnesses, plus a recitation of similar cases, to resolve the issue of whether or not certain conduct falls within the normally expected occurrences in the game.<sup>27</sup> Thus, the opinions of a few witnesses, coupled with apparent connections to similar cases, form the basis for findings of judicial fact as to an empirical matter.

## B. Expectations Defined

What is problematic about this methodology, apart from the fact that it may well produce incorrect answers, is that the judicial finding, once announced, sets the standard for future cases.<sup>28</sup> Once a court determines, on the basis of testimony and similar cases, that a baseball batter “expects” to be subject to an intentional bean-ball from the pitcher, for example, then a batter in a subsequent game, who is subject to an identical harm, may not claim he did not expect it.<sup>29</sup> The judge’s determination of expectations defines the sport itself.<sup>30</sup>

For example, in *Bourque v. Duplechin*, during a softball game, the defendant, running from first to second base, veered a few feet out of the base path in an effort to prevent the second baseman, the plaintiff, from completing a double play.<sup>31</sup> The court held that the plaintiff as-

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<sup>26</sup> *Knight*, 834 P.2d at 706 (holding that “the question of the existence and scope of a defendant’s duty of care is a legal question which depends on the nature of the sport or activity in question and on the parties’ general relationship to the activity, and is an issue to be decided by the court, rather than the jury.”); *Shin v. Ahn*, 165 P.3d 581, 584 (2007) (stating that “a court need not ask what risks a particular plaintiff subjectively knew of and chose to encounter, but instead must evaluate the fundamental nature of the sport and the defendant’s role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk of harm.”) (quoting *Avila v. Citrus Cmty. Coll. Dist.*, P.3d 383, 392 (Cal. 2006)).

<sup>27</sup> See, e.g., *Knight*, 834 P.2d at 708-12.

<sup>28</sup> See *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 393, 395 (Cal. 2006).

<sup>29</sup> See *id.* at 393 (finding, as a matter of law, being intentionally hit by a bean-ball is an inherent risk of baseball.).

<sup>30</sup> See *id.* at 395 (noting that “the boxer who steps into the ring consents to his opponent’s jabs; the football player who steps onto the gridiron consents to his opponent’s hard tackle; the hockey goalie who takes the ice consents to face his opponent’s slapshots; and, here, the baseball player who steps to the plate consents to the possibility the opposing pitcher may throw near or at him.”).

<sup>31</sup> *Bourque v. Duplechin*, 331 So. 2d 40, 41 (La. Ct. App. 1976).

sumed the risks from a batted ball, or from a runner, both “common occurrences,” if the plaintiff had remained on the base path.<sup>32</sup> The plaintiff did not, however, “assume the risk of [the defendant] going out of his way to run into him at full speed when [the plaintiff] was five feet away from the base.”<sup>33</sup> This conduct, the court held, was “unexpected and unsportsmanlike.”<sup>34</sup>

Decisions on these grounds are intensely factual and thus incapable of easy generalization.<sup>35</sup> It is speculative to assess which fact of the defendant’s conduct comprised the unexpected, and thus unconsented-to aspect, that gave rise to the defendant’s liability: the fact that the collision came at full speed, or was outside the baseline, or was five feet outside that line and not four or three feet outside the line. Yet the court in *Bourque* ruled as a legal matter that the plaintiff did not assume the risk of defendant’s conduct, thus precluding the defendant’s main defense.<sup>36</sup> Despite the elusiveness of capturing the scope of plaintiff’s consent as to base runners, the decision is illustrative of the unmistakable import from this and other decisions: through tort decisions, the courts have come to define the expectations of participants in sporting contests.<sup>37</sup>

One notable case stemmed from a collegiate baseball game in which a pitcher for a California junior-college team hit an opposing batter on the head, splitting his helmet and causing injury.<sup>38</sup> Because the pitcher’s teammate had been hit the previous inning, the purpose of the pitch was seemingly retaliatory.<sup>39</sup> One defense offered by the District, which operated the college and hosted the game, was that the batter, by choosing to play in a baseball game, “assumed the risk” of being thrown at by an opposing pitcher, even if the pitch was intentionally aimed at his head in anger.<sup>40</sup>

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<sup>32</sup> *Id.* at 42. *Bourque* held the defendant liable based on proof of negligence. One key aspect of the decision, however, was the court’s determination that the defendant’s unexpected conduct resulted from a reckless lack of concern for other participants. Thus, *Bourque* may fairly be understood as partaking of the more general modern trend to require recklessness for tort liability arising from a sports contest.

<sup>33</sup> *Id.* at 43.

<sup>34</sup> *Id.*

<sup>35</sup> See *Picou v. Hartford Ins. Co.*, 558 So. 2d 787-788, 790 (La. Ct. App. 1990) (finding in women’s softball game, risk of collision at second base inheres in game; standard of care is reasonably prudent base runner attempting to gain second base).

<sup>36</sup> *Bourque*, 331 So. 2d at 43.

<sup>37</sup> *Knight v. Jewett*, 834 P.2d 696, 706 (Cal. 1992).

<sup>38</sup> *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 385-386 (Cal. 2006).

<sup>39</sup> *Id.* at 385-386, 393-394. Curiously, the appellate decision does not mention whether or not the pitcher, on cross-examination, admitted to throwing at the batter intentionally.

<sup>40</sup> *Id.* at 391, 400 (arguing that the District owed Avila no duty of care).

California divides the doctrine of assumption of risk into two categories: primary and secondary.<sup>41</sup> Under the latter, the pitcher in this case would owe the batter a duty of care, a duty not to negligently or intentionally injure the batter, and the question would be whether the batter knowingly exposed himself to the risk of the pitcher's failure to meet that duty.<sup>42</sup> However, under the former, "primary" assumption of risk doctrine, the pitcher owes the batter no duty of care at all.<sup>43</sup> Being thrown at is just part of the game, and no liability attaches regardless of the pitcher's intent or the batter's knowledge. The California Supreme Court applied the doctrine of primary assumption of risk to hold that, as a matter of law, a pitcher intentionally throwing at a batter is part of the game, and thus one of the risks the batter assumes when he steps into the box.<sup>44</sup>

The determination that batters reasonably expect bean-ball pitches appears to be a factual, empirical question, yet the court's answer to this question was derived from anecdote: the court's opinion recites various instances of bean-balls and statements concerning bean-balls and concludes that they are within the common expectation of batters.<sup>45</sup> This form of offhand empiricism is a poor substitute for the real thing. Yet grand empirical pronouncements based on anecdote, if based on anything at all, permeate legal decisions.<sup>46</sup> With this decision, whether true as a factual matter or not, as a matter of law in California the intentional bean-ball is within the field of risks that batters assume.<sup>47</sup>

Although the *Avila* court posed an empirical question, it may have not been interested in a "correct" empirical answer. Instead, as is repeatedly the case in the application of the assumption of risk defense, the more plausible observation is that the California court chose to define the sport of "baseball" to include the bean-ball. This choice

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<sup>41</sup> See *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1229, 1235 (Cal. 1975) (abrogating doctrine of contributory negligence and adopting rule of comparative negligence); *Knight*, 834 P.2d at 703 (interpreting the *Li* decision and defining primary and secondary assumption of risk). See also Cal. Civ. Code § 1714 (2012).

<sup>42</sup> See *Knight*, 834 P.2d at 703, 704.

<sup>43</sup> See *id.* at 704.

<sup>44</sup> *Avila*, 131 P.3d at 394.

<sup>45</sup> *Id.* at 393.

<sup>46</sup> See, e.g., *Shin v. Ahn*, 42 Cal. 4th 482, 486, 585 (2007) (finding that being struck by a carelessly hit ball is an inherent risk in golf, the court noted "[w]hile golf may not be as physically demanding as . . . basketball or football, risk is nonetheless inherent in the sport. Hitting a golf ball at a high rate of speed involves the very real possibility that the ball will take flight in an unintended direction. If every ball behaved as the golfer wished, there would be little 'sport' in the sport of golf. That shots go awry is a risk that all golfers, even the professionals, assume when they play.").

<sup>47</sup> *Avila*, 131 P.3d at 394 (finding "[f]or better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball.").

suggests a larger role for the assumption of risk defense, one that is infused with policy considerations.

First, courts in tort suits arising from sports contests are clearly concerned about the introduction or intrusion of tort liability into sporting activities.<sup>48</sup> Imposing tort liability for wrongful pitches would require judges and juries to assess the unstated intentions of pitchers. It would also require evaluating whether the club or the coach followed the proper standard of care in training the pitcher, and did not negligently employ a pitcher without adequate control so as to avoid wild pitches. As a result, the introduction of tort law would put a premium on control pitchers over hard-throwing but comparatively wild pitchers. This might introduce a measure of self-dealing into game decisions, as coaches might put less effective but better-control pitchers on the mound in order to avoid personal liability, even if the team's interests were otherwise.

Second, courts liberally applying the assumption-of-risk defense might conclude that opposing teams can minimize the frequency and danger of brush-back pitches better than judicial tribunals. By concluding that the batter "assumed the risk" as a matter of law, the California court was effectively deciding that the intentional harm done by the pitcher would result in no legal remedy.<sup>49</sup> Under these circumstances, the batter's remedy is retaliation: the pay-back pitch where his teammate throws at an opposing batter. The denial of a legal remedy makes sense if the teams can minimize the joint risks of batting by working together, under the implicit threat of retaliation, to avoid unnecessarily throwing at opposing batters.

### C. Football Head Injuries

Oddly, the fact that so many former football players suffer from injuries resulting from concussive and sub-concussive head traumas militates in favor of the defense. The more common the event, the

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<sup>48</sup> *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992) (noting that, "even when a participant's conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of legal liability for such conduct might well fundamentally alter the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule."); *Avila*, 131 P.3d at 394 (noting that "it is one thing for an umpire to punish a pitcher who hits a batter by ejecting him from the game, or for a league to suspend the pitcher; it is quite another for tort law to chill any pitcher from throwing inside.").

<sup>49</sup> *Avila*, 131 P.3d at 394 (finding "[i]t is not the function of tort law to police such conduct.").

more plausible is the claim of assumption of risk.<sup>50</sup> In the offhand empiricism of the courtroom, anecdote is evidence, and the claim that an omnipresent aspect of the game of professional football such as heads colliding causes injury seems, by the very evidence the plaintiffs will adduce, widespread and thus part of the game. In short, the game of football, as the court will likely come to define it, inevitably includes repeated blows to the head, thus precluding participants injured by those blows to complain about their ineluctable consequences.

The fact that the employer-employee relationship in the NFL is established through collective bargaining also militates in favor of the defense. Players are aware of the risks of the game and bargain over the terms and conditions of employment on a regular basis. Unlike other instances of risks allegedly hidden by the defendant, such as the allegations against tobacco company defendants in some of the cigarette litigation,<sup>51</sup> here the plaintiffs are not faceless consumers but instead are unionized employees with substantial input into all facets of the game, including the rules of the game. The decision of the players, acting collectively and through their bargaining unit, to voluntarily accept the rules of the game also suggests they voluntarily accepted the consequences of those rules. Those consequences include repeated blows to the head.

On average, it would appear that much football head trauma, although certainly not all of it, resulted from “legal” conduct, that is, from conduct on the field that is explicitly or implicitly permitted by the rules of the game. The two most common activities that cause hits to the head are blocking and tackling, both permitted activities.<sup>52</sup> Although “leading with the head” is counseled against, the head is attached to the shoulders, and it is going to be in harm’s way whenever the upper body is used to block or tackle, which is to say on nearly every play. If the damaging blows to the head came exclusively or primarily from conduct not permitted by the rules of the game, such as from spearing or head-butting, for example, then the plaintiffs’ claims would be stronger. The players in that scenario could claim that the scope of their consent was limited to conduct permitted by the game rules, and excluded conduct expressly prohibited by the game rules.

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<sup>50</sup> See, Prosser & Keeton, *TORTS* § 18 (5th ed. 1984) (“One who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the understood rules of the game.”).

<sup>51</sup> See, e.g., *Phillip Morris USA v. Williams*, 549 U.S. 346 (2007) (“In this state negligence and deceit lawsuit, a jury found that Jesse Williams’ death was caused by smoking and that petitioner Philip Morris, which manufactured the cigarettes he favored, knowingly and falsely led him to believe that smoking was safe.”).

<sup>52</sup> Roger Goodell, *OFFICIAL PLAYING RULES AND CASEBOOK OF THE NATIONAL FOOTBALL LEAGUE* § 3, 34, R. 3 (2012), available at <http://www.nfl.com/rulebook>.

The players could then argue that the game's owners or employers should have taken stronger measures to protect players from extra-legal conduct outside the assumed risks. But the facts are the opposite: the players appear to have been injured by legal conduct, unmistakably of the kind to which they expressly consented and anticipated in playing the game. They had a choice. They could have walked off the field.<sup>53</sup>

Finally, the plaintiffs will attempt to avoid the assumption of risk defense by claiming that the NFL had information about the long-term risks of playing the game and withheld that information from the players. Unaware of the true risks involved in the sport, the plaintiffs cannot be deemed to have assumed them. This contention will lie at the heart of the trial advocacy concerning assumption of risk. Undoubtedly some "smoking gun" memorandum or email will be discovered wherein some NFL consultant fretted out loud about the risks of head injuries, only to be told to proceed cautiously or gather more evidence by league superiors. This sort of evidence can have great appeal to a jury. It may not move a judge, however, who will assess the empirical claim about expectations and known risks as a matter of law. A substantial body of literature about football injuries and their effect on long-term health has appeared for many years in the popular press.<sup>54</sup> As a matter of law, the players have as much access to that literature as does the NFL. It will be difficult for the players to claim that they played the game unaware of the risks inherent in the sport.

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<sup>53</sup> *Maddox v. City of New York*, 487 N.Y.S.2d 354, 358-359 (N.Y. App. Div. 1985) (finding player could have refused to play on slippery outfield, thus assumption of risk negates claim against facility and employer for unsafe work condition); *Zachardy v. Geneva Coll.*, 733 A.2d 648 (Pa. Super. Ct. 1999) (holding assumption of risk barred baseball player from recovery from injury sustained on baseball field with ruts and depression because he voluntarily continued to play); *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 395 (Cal. 2006) (finding that because Avila voluntarily participated in the baseball game his consent would bar any battery claim as a matter of law).

<sup>54</sup> *Head Injuries in Football*, N.Y. TIMES (Dec. 10, 2012), [http://topics.nytimes.com/top/reference/timestopics/subjects/f/football/head\\_injuries/index.html](http://topics.nytimes.com/top/reference/timestopics/subjects/f/football/head_injuries/index.html) (The New York Times has published articles related to football head injuries dating from 1894 to the present).