Allocation of Risk Based on the Mechanics of Injury in Sports: A Proposed Presumption of Non-Fault

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by GERALD J. TODARO*

Introduction

Catastrophic injury\(^1\) or death resulting from participation in amateur sports\(^2\) stimulates a visceral fear of litigation.\(^3\) Growing sophistication in coaching, training, sports technology and medical care has not only enhanced athletic performance but, paradoxically, has increased the incidence of lawsuits as well.\(^4\) While professional organizations and associations develop and implement safety practices for various sports, their efforts have inspired injured athletes to seek redress under traditional theo-

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1. For purposes of this article, “injuries” shall be defined as traumatic and non-traumatic physical conditions which cause life threatening and severe disabling conditions, whether long term or temporary. Minor medical problems that interrupt athletic participation for short periods are not included.

2. In professional sports, the maturity level of the participants, fan expectations, and commercial considerations create an atmosphere of competition far removed from the amateur level. Claims of professional athletes based upon unsafe conditions or practices have met with disfavor unless the tortious conduct is both intentional and specifically designed to injure an opponent. See, e.g., Maddox v. City of New York, 66 N.Y.2d 270, 487 N.E.2d 553 (1985); Heldman v. Uniroyal, Inc., 53 Ohio App. 2d 21, 371 N.E.2d 557 (1977).


ries of negligence and products liability. The imprecise legal management of the element of risk in contact sports plagues the tort system for the following reasons. First, the application of the doctrine of assumption of risk impairs the jury's ability to weigh the defendant's negligence against the athlete's expectations. When the athlete's injury is characterized as a direct result of the defendant's negligent supervision and instruction, the jury may conclude that the athlete never contemplated the defendant's misconduct that was so instrumental in bringing about the injury sustained. Second, the technical concept of duty to warn used in design defect litigation may present an overbroad and unworkable solution when advising athletic participants about inherent risk of injury. Third, the doctrine of informed consent imposes a burden upon the coach or supervisor to explain the extent of the risks rarely contemplated by an athlete (or his parents) before entering an organized sports program.

This article examines the inherent risk of injury existing in sports participation and the practical difficulties confronting the legal system in the formulation of a feasible procedural device to overcome inequitable determinations of liability for sports injuries.


9. In medical "informed consent" situations, the physician must exercise due care by divulging information that would allow the patient to knowledgeably evaluate the risks of and alternatives to a specific medical procedure. The physician has a duty to reasonably explain, in nontechnical terms, the procedure and its risks and benefits. In addition, the physician must balance the decision to disclose against the effect that disclosure may have upon the patient's mental well-being. See Canterbury v. Spence, 464 F.2d 772 (D.C. Cir.), cert. denied, 409 U.S. 1064 (1972).

Contrary to the doctor/patient relationship, where the patient consents to medical procedures of imminent risk, the athlete would be consenting to playing a sport with risk less definable but substantially more remote based on injury rates per hour of participation, level of competition and history of previous injuries.
Part I of this article discusses the development of sports medicine and the impact of sports injury analysis, which has led to rule changes and safety practices designed to reduce the incidence of injury.

Part II reviews judicial attempts to unravel the entangled concepts of inherent risk, assumption of risk and risk caused by negligence.

Part III addresses the Inherent Danger Rule, wherein the author proposes a rebuttable presumption of non-fault. This presumption endeavors to balance the unreasonable risk of injury against the achievements of sports safety practices and procedures, without impeding a fair judicial determination of the responsibility for injury.

I
Development of Sports Industry
Standards of Safety

A. Sports Medicine

In the past two decades, injury prevention has been the principal objective in the field of sports medicine. Advancements in injury prevention result from sports injury analysis which scrutinizes the biomechanics of sports injuries. For example, studies of professional, college and high school football injuries to the thorax, trunk, pelvis, and extremities yielded statistics showing that about fifty percent of the injuries occurred as a result of blocking at knee level. As a direct result of these studies, the National High School Rules Committee eliminated blocking below the waist essentially
eliminated in high school football.\(^{13}\)

Studies that identify anatomical structures subject to high injury rates have enabled researchers to assess the injury potential of various sports.\(^{14}\) This process is known as sports specific injury analysis.\(^{15}\) By understanding which areas of the body are subject to stress and trauma in specific sports, coaches and athletes may minimize or even prevent disabling injuries through pre-participation physicals and conditioning programs.\(^{16}\)

The sporadic application of prevailing principles of sports medicine at the amateur level often falls short of the optimal expectations of sports medicine specialists. In high school and many small college programs, budget limitations and an over-emphasis on moneymaking often results in a lack of team physicians for other school-sponsored sports.\(^{17}\) In addition, marginal and even unqualified health care providers often volunteer

\(^{13}\) NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, OFFICIAL HIGH SCHOOL FOOTBALL HANDBOOK 19 (1985-86). It states: "Blocking below the waist is prohibited outside the free-blocking zone during all plays. Using an above-the-waist block in the open field accomplishes the same purpose as the below-the-waist block but reduces the possibility of injury to the legs of the opponent."  Id.

\(^{14}\) See NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, NCAA SPORTS MEDICINE HANDBOOK 18, 19 (2d ed. 1983). Studies of thoracoabdominal injuries stress the need for knowledge and awareness of these injuries to abate potentially life-threatening situations. Mustalish & Quash, \emph{Sports Injuries to the Chest and Abdomen}, in PRINCIPLES OF SPORTS MEDICINE 226 (1984). A thorough "understanding of the dynamics of a [particular] sport, coupled with a basic knowledge of the anatomy of the chest and abdomen" will precipitate greater recognition and emergency treatment of these injuries.  \emph{Id.}

\(^{15}\) Myers & Garrick, \emph{The Preseason Examination of School and College Athletes}, in SPORTS MEDICINE 237 (R. Strauss ed. 1984). Different sports produce different types of injuries, and "sports specific" refers to the need for awareness of the frequent medical problems of each particular sport.  \emph{Id.} at 245.

\(^{16}\) See Albright, Van Gilder, Khoury, Crowley & Foster, \emph{Head and Neck Injuries in Sports}, in PRINCIPLES OF SPORTS MEDICINE, supra note 14, at 40. Equipment changes, rule changes, pre-season examinations, medical care standards, and strength training and testing are examples of significant factors responsible for the diminished incidences of catastrophic head and neck injuries.  \emph{Id.} at 44-45. \emph{See also} Friedman & Nichols, \emph{Conditioning and Rehabilitation}, in PRINCIPLES OF SPORTS MEDICINE, supra note 14, at 396. Research suggests that advances in strength building and conditioning programs exhibit a direct correlation with the improvement of athletic performance and the decrease of athletic injuries. \emph{Id.} at 399. \emph{See also} R. Birrer, \emph{Special Considerations in the Injured Child}, in SPORTS MEDICINE FOR THE PRIMARY CARE PHYSICIAN 249 (1984) (school-age sports participants should be screened for any condition that may disqualify them from competition).

\(^{17}\) Rovere, Adair, Yates, Miller & Malek, \emph{A Survey of Team Physician and Trainer Availability and Participation in Intercollegiate Football}, 12 PHYSICIAN & SPORTS MED. 91 (Nov. 1984). The larger, more prestigious, schools generally offer much better medical care than smaller, less well-known schools.  \emph{Id.}
their services as team doctors. While many well-intentioned health care providers volunteer their services because a son or daughter is involved in a program, these volunteers may be untrained and unaware of the preparation necessary for emergency intervention in life-threatening situations.

B. The Effect on Athletics

The enthusiasm for sports medicine accounts for the proliferation of committees, conferences, and organizations which disseminate informative literature about injury prevention and treatment. Scientific evaluations of the mechanisms responsible for injury have resulted in rule modifications that prevent injury.

1. Football

One significant example of sports medicine affecting the manner in which a sport is played is the adoption, by college and high school governing bodies, of rules restricting player contact in football. Research of head and neck injuries has led to a ban on head butting, spearing, and stick blocking. Physicians studying the mechanics of injury have identified hyperflexion of the neck and a physical phenomenon termed "axial loading" as being responsible for cervical quadriplegia in football. Research has shown that striking an opponent with the top of the helmet is the predominant factor responsi-

19. See, e.g., National Collegiate Athletic Association, NCAA Football Rules and Interpretations (D. Nelson ed. 1986) [hereinafter NCAA Football Rules and Interpretations]. These rules prohibit: the use of the helmet to intentionally butt or ram an opponent, spearing, striking a runner with the crown or top of one's helmet, chop blocking, and the grasping of the face mask or any helmet opening of an opponent. Id. at FR-89 (Rule 9-1 (k)(p)). See also National Federation of State High School Association, Official High School Football Rules (1986).
20. See Schneider, Peterson & Anderson, supra note 11, at 57.
22. Axial loading is the transmission of force from the skull to the brain, spinal cord and supporting vertebra. See Schneider, Peterson & Anderson, supra note 11, at 25-28.
ble for serious neck and spinal cord damage. Appropriate rule changes that recognize these injury-prone mechanisms have resulted in a reduction of injuries, by two-thirds, to the cervical spine associated with quadriplegia.

2. **Gymnastics**

Studies of patterns of injury in particular sports have led to specific data faulting coaches for the high incidence of injury. In gymnastics, high injury rates are considered controllable and reducible through proper coaching. The national governing body for gymnastics, the United States Gymnastics Federation, publishes a safety manual which outlines spotting procedures, proper use of equipment, and approved methods of instruction intended to reduce injuries.

3. **Boxing**

While sports medicine has altered the rules of various athletic contests in the interest of athletic safety, no sport generates more interest and controversy than boxing. The American Medical Association has called for rule changes to eliminate blows to the head, or alternatively, to abolish the sport. The medical evidence uncovered by animal and experimental studies exposes the price paid by those pursuing a

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24. Due to the head being used as, essentially, a battering ram, the rapidly decelerated head and the continued momentum of the body may compress the fragile vertebra in the neck. The compression effect from the force of impact can shut off blood supply to the brain or cause intracranial bleeding, massive cerebral swelling, or a devastating fracture of the vertebra which may result in the severing of the spinal cord. See Schneider, Peterson & Anderson, supra note 11, at 25-28.

25. See Torg, *Exchange Review: Epidemiology, Pathomechanics, and Prevention of Athletic Injuries to the Cervical Spine*, 17 *MED. & SCIENCE IN SPORTS & EXERCISE* 295 (1985). Although the author emphasizes that appropriate rule changes recognizing the mechanism of injury have resulted in a reduction of football quadriplegia by two-thirds, those injuries occur not only from inadequate coaching technique, but also from the failure of coaches to curb and prohibit the usage of intentionally improper techniques by the aggressive athlete. Id. at 298.

26. Weiker, *Injuries in Club Gymnastics*, 13 *PHYSICIAN & SPORTS MED.* 63, 66 (Apr. 1985) ("spotting" verified as being "the most significant controllable factor in determining the rate of injury").


dream as a boxer: a subtle diminishing quality of life and, occasionally, death. Medical investigations of head injuries in boxing refute claims that wearing head gear or increasing the amount of padding in a boxing glove will prevent permanent brain damage. Although these medical problems are found primarily in professional contestants, who do not wear head protection in matches, the epidemiological studies demonstrate the potential for brain injury to amateur boxers, as well.

Boxing highlights two inherent problems in contact sports. First, athletes rarely understand and comprehend the actual risk of long-term serious injury. Second, wearing protective equipment provides a false sense of protection from serious injury.

4. Future Role of Sports Medicine

Continued research that describes the mechanics of sports injury will play a significant role, although not without objection, in changing the sports community’s preconceived notions of the inherent risk of injury.

Rule changes demand modification of coaching techniques, but many injured athletes are victims of inadequate compliance with, and enforcement of, new rules. Intentional violations of


31. Although medical researchers continue to debate whether brain injury occurs from a single “knock-out” punch or whether it is dose related, substantial evidence now establishes that left hooks and right crosses twist the head, causing the brain to glide and rotate within the skull, tearing vessels and nerve fibers. Unterharnscheidt, supra note 30, at 468. Another type of impact, translational (linear) acceleration, exemplified by a straight directional blow to the face, causes brain swelling as a result of the brain banging against the interior of the skull. Id. at 462-63. Although a boxer may be wearing headgear, a blow that causes the participant to fall and strike his head on a canvas will, nevertheless, continue to create a violent impact upon the brain, causing lesions and bruises in the brain itself. Id. at 463-64. See also Corsellis, Bruton, Freeman-Browne, The Aftermath of Boxing, 3 PSYCHOLOGICAL MED. 270 (1973); Brain Injury in Boxing, 249 J. A.M.A. 254 (1983); Casson, supra note 29, at 2663; Unterharnscheidt, About Boxing: Review of Historical and Medical Aspects, 28 TEX. REP. BIOLOGY & MED. 421 (1970).

32. Estwanick, Boitano & Ari, supra note 30, at 123; see also Moore, The Challenge of Boxing — Brain Safety in the Ring, 8 PHYSICIAN & SPORTS MED. 101 (Nov. 1980).

33. At the high school level, the use of the helmet to hit or butt an opponent was condemned by the National Federation Football Rules Committee. NATIONAL FEDERATION OF STATE HIGH SCHOOL ASSOCIATIONS, OFFICIAL HIGH SCHOOL FOOTBALL HANDBOOK, supra note 13, at 45. However, despite rule changes and warnings of po-
rules designed to limit the risk of injury constitute only a small part of liability problems involving organized college and high school athletics. A more common theme of liability concerns whether a teacher or coach created an unreasonable risk of injury through negligent supervision or instruction.

Hopefully, rule changes eliminating dangerous competitive conduct, limitations on training and practice, physical screening of participants, and better coaching techniques will continue to reduce the risk of injury. As successful methods for the overall management of athletes by coaches become standard, the tort system evaluating the conduct of coaches should adopt and apply the minimum standards of prudent care.

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tential injuries, coaching techniques changed very little. See Schneider, Peterson & Anderson, supra note 11, at 28-29. The National Federation Football Rules Committee stresses that coaches must do everything possible to discourage any use of the helmet in blocking or tackling, except as a protective piece of equipment for the wearer's aid. The Committee states:

Those sponsoring interscholastic football have a responsibility to the participants to do everything possible to eliminate the number and seriousness of head fatalities. . . . All groups concerned with football, including the rule makers, coaches and officials are involved in a cooperative campaign to eliminate these illegal uses of the helmet which cause unnecessary injury hazards.

National Federation of State High School Associations, Official High School Football Handbook, supra note 13, at 47.

34. See, e.g., National Federation of State High School Association Soccer Rule Book Rule 12-6, art. 1, at 31 (1986-87), which states: “A player shall not participate in dangerous play, which is an act an official considers likely to cause injury to any player. This includes playing in such a manner which could cause injury to self or another player (opponent or teammate).” Id.

35. See, e.g., NCAA Sports Medicine Handbook (2d ed. 1983). The NCAA Committee on Competitive Safeguards and Medical Aspects of Sports develops, collects, and disseminates information on pertinent sports medicine topics. For example, the Committee specifies guidelines for the prevention of heat illness during early season practice in football. Id. at 10. The guidelines also advise against the use of self-propelled blocking and tackling mechanisms because of the apparent undue risk of head and neck injury. Id. at 13. See generally Policy No. 9 (additional Committee policies concerning the authority to medically disqualify a student-athlete); Policy No. 11 (medical evaluations); Policy No. 12 (nontherapeutic drugs); Policy No. 13 (equipment); Policy No. 14 (participation by impaired athletes). Id. at 14, 16.

36. See, e.g., United States Gymnastics Federation, Gymnastics Safety Manual, supra note 27. The effects of litigation in the sports industry are seen in the message by the executive director of the United States Gymnastics Federation, who states that the safety manual itself does not give standards by which a program is to be run or a child is to be taught. Id. at iii. This statement is designed to defeat the admissibility of the manual on the issue of the standard of care.
II
Development of Standards of Safety
by the Courts

A. Judicial Expansion

Few courts distinguish between the conflicting expectations of athletes on one side, and coaches and administrators on the other. In general, coaches in the more competitive sports expect athletes to pay the price of commitment and to accept the consequences of training and practice, including bumps, bruises and painful injuries. On the other hand, the athletes, especially minors and their parents, expect coaches to possess, and bring to bear, the state of the art in instruction, supervision, equipment, training, safety practices and necessary medical care. Recently, at least one jurisdiction analyzed this conflict and found that incompatible assumptions exist between coaches and athletes as to injurious conditions and circumstances accepted as part of the game.

Theoretically, the traditional concept of foreseeability re-

37. Schneider, Peterson & Anderson, supra note 11, at 1. The authors of this article refer to the book, You HAVE TO PAY THE PRICE, written by former Army and Dartmouth coach, Earl "Red" Blaik and sports writer, Tim Cohane. The book emphasizes "the price" one pays when engaging in the game of football. A good example of an athlete paying and accepting "the price" is Ohio State football player Shawn Bell, brother of Todd Bell, former Ohio State star and all-pro safety with the Chicago Bears. Shawn, engaging in pre-season workouts, broke his fibula in a pile up during a scrimmage. Typical of many highly competitive athletes, Bell commented upon his injury and rationalized its occurrence with a "paying the price" attitude:

This is just a negative part of the game and football has its ups and downs. But, I would never get down on football because of this injury, because football has been too good to me. . . . It's one of those things you have to bounce back from and remain as positive as possible.
Columbus Evening Dispatch, Aug. 16, 1986, at 1C, col. 3.

38. Rutter v. Northeastern Co. School Dist., 283 Pa. Super. 155, 423 A.2d 1035 (1980), rev'd, 496 Pa. 590, 437 A.2d 1198 (1981). The case addresses an important problem dealing with the practical application of the assumption of the risk doctrine: "What risks can appellant be said to have voluntarily assumed?" Id. at 1207. The court suggests that one possibility is that he assumed the risk of all injuries related to training for and playing football. A second possibility is that he assumed the risk of all injuries related to training for and playing football while under the direction of coaches who furnished watchful supervision and protective equipment when needed.

Id. at 1207-08. The court narrowly defined "risk" in the latter sense when analyzing an athlete's voluntary engagement in athletics. Furthermore, the court stressed that "the voluntariness of appellant's act must be proximately related to the danger (or the risk) which caused the injury." Id. at 1208.
quires the coach to anticipate conduct and conditions that enhance the risk of injury. This approach emphasizes the coach’s duty not only to protect against injury, but also to anticipate conditions precipitated by human behavior or other circumstances which increase the potential for injuries. Therefore, as advances in sports medicine expands our knowledge of the biomechanics of injury, the scope of the defendant’s responsibility increases while the athlete’s assumption of risk of injury decreases.

The courts in sports injury litigation frequently have measured reasonableness in terms of the risk reasonably perceived. The range of reasonable apprehension of injury defines the defendant’s duty, i.e., the level of care to be exercised under the circumstances. While the risk of injury perceived in a sport gives dimension to the duty of care required of the defendant, courts have further complicated the issue by rarely delineating between avoidable and unavoidable risk of injury. Neither the sports community nor the courts have addressed the issue of the _degree_ of risk of injury acceptable in athletic activity. Rather, the courts have ineffectively adjudicated the issue of inherent risk by utilizing the unmanageable concept of assumption of risk.

The doctrine of assumption of risk should be transformed into legal acceptance of unavoidable injuries in sports. The tort system must look to the nature of the injury, the mechanics of such injury, the preventability or minimization of such injury by proper coaching and supervision, and the imperfect nature of human performance by both athletes and coaches under competitive stress. This step-by-step approach may yield a

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39. See Leahy v. School Bd. of Hernando Co., 450 So. 2d 883 (Fla. 1984). The testimony in _Leahy_ established that the speed and experience of the athletes were factors likely to affect the proper execution of drills designed to develop specific skills of the game. _Id._ at 886. Consequently, a coach would be expected to recognize the increasing level of injury potential when inexperienced players participate in practice sessions which require proficiency drills to be performed at faster and faster paces.

40. See, e.g., Meese v. Brigham Young Univ., 639 P.2d 720 (Utah 1981); _Leahy_, 450 So. 2d at 883.

41. See Brahatcek v. Millard School Dist., 202 Neb. 86, 273 N.W.2d 680 (1979). The court imposed a duty upon a high school golf instructor to anticipate danger, requiring effective observation and supervision of the participants.

42. Cf. DeMauro v. Tusculum College, 603 S.W.2d 115 (Tenn. 1980). Here, the court not only delineated between avoidable and unavoidable risks of injury, but also recognized that the issue of unavoidable accident should have been submitted to the jury with proper instructions. _Id._ at 120.

43. See _infra_ notes 64-78 and accompanying text.
functional legal concept of "unavoidable yet reasonable risk of injury" accepted by all athletes who voluntarily participate in athletics.  

**B. Duty to Supervise**

Lawsuits alleging lack of supervision usually relate to physical education classes and interscholastic athletic programs and name school principals, teachers or coaches as defendants. Plaintiffs rely on the fundamental proposition that school employees owe a duty to supervise students adequately. Commentators warn that the highest percentage of claims brought against schools and coaches charge neglect or ignorance of up-to-date coaching techniques and advances in safety principles. For example, in 1982, a Seattle jury traumatized the sports community by awarding a multi-million dollar verdict in favor of a cervical quadriplegic high school football player. The mechanism of injury was traced to improper instruction on the fundamental techniques of blocking, tackling and ball carrying, resulting in the improper positioning of the plaintiff’s head at the point of contact with an opposing player.

44. See infra notes 53-57, 72-76 and accompanying text.

45. See, e.g., Brahatcek, 202 Neb. at 86, 273 N.W.2d at 680 (the administratrix of an estate of a deceased ninth grade student sued the school district and the high school golf instructor after the plaintiff was accidentally killed after being struck by a golf club during a physical education class); Carabba v. Ancortes School Dist., 72 Wash. 2d 939, 435 P.2d 936 (1967) (claim against the school district for injuries sustained by participant in a high school wrestling match); Montague v. School Bd. of Thornton, 57 Ill. App. 3d 828, 373 N.E.2d 719 (1978) (student participating in high school gym class sued the school board and instructor for an injury occurring during a vaulting horse exercise); Sutphen v. Benthian, 165 N.J. Super. 79, 397 A.2d 709 (1979) (plaintiffs sued the instructor and school board for injuries sustained during a floor hockey game).


47. See, e.g., UNITED STATES GYMNASTICS FEDERATION, GYMNASTICS SAFETY MANUAL, supra note 27, at 10. The area of supervision is divided into two categories, environmental and interventional. Environmental supervision refers to the creation of an environment that is reasonably risk controlled. Interventional supervision means the opportunity to intervene between the onset of an accident sequence and the potential accident. Id.


49. Id.
C. Rule Violations

In negligence actions, plaintiffs seek to establish the defendant's failure to exercise reasonable care.\(^{50}\) In sports injury claims, evidence of rules of play and policy statements which incorporate prevailing safety practices can supply the trier of fact with objective standards by which to measure the defendant's conduct.\(^{51}\) Courts have permitted such crucial testimony on relevant rules and practices.\(^{52}\)

D. Immunity and Consent

The increasing threat of litigation has spawned a quick-fix movement in the sports community. Litigation-proof devices, such as qualified immunity statutes and immunity legislation, attempt to eliminate all but intentional or grossly reckless conduct from culpability.\(^{53}\) The sports community's apprehension has also prompted the NCAA to urge colleges and universities

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\(^{50}\) Generally, lawyers litigating injury claims are more effective in the courtroom if their arguments to a jury, on the issue of liability, are based upon violations of rules, regulations, and policies formulated by a group or organization whose purpose is safety oriented. Lane's Goldstein Trial Technique §§ 2.23 - 2.28 (3d ed. 1984).

\(^{51}\) See, e.g., Nabozny v. Barnhill, 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975). Where safety regulations contain set rules governing the conduct of athletic competition, a participant in such competition, trained and coached by knowledgeable personnel, is charged with a legal duty to every other participant to refrain from conduct prescribed by this safety rule. Although the claim in Nabozny was one based on an intentional tort, a coach's deviation from appropriate rules of instruction or supervision designed to protect participants from serious injury provides a powerful and objective argument to a jury. Cf. Oswald v. Township High School Dist., 84 Ill. App. 3d 723, 406 N.E.2d 157 (1980). The court held that to permit recovery for injuries sustained as a result of an athlete's breach of a safety rule in an athletic competition involving bodily contact liability cannot be predicated upon ordinary negligence, but must be based upon a showing of willful and wanton misconduct. Id. at 159-60.

\(^{52}\) See Meese v. Brigham Young Univ., 639 P.2d 720 (Utah 1981). The court permitted testimony by an expert in the field of biomedical engineering, suggesting that plaintiff was injured while skiing because the bindings were set too tight or the toe piece was not adjusted properly, preventing the boot from releasing from the ski. Id. at 723-24. See also, Rutter v. Northeastern Co. School Dist., 283 Pa. Super. 155, 423 A.2d 1035 (1980), rev'd, 496 Pa. 590, 437 A.2d 1198 (1981). The court held that a former high school coach should be allowed to testify as an expert on customs and safety standards utilized by coaches of high school teams, and on the rules imposed to ensure minimum safety, since such knowledge was not within the common knowledge of the jury.

to obtain an athlete’s informed consent. To obtain an athlete's informed consent.54

Both immunity legislation and informed consent miss the mark. First, courts and commentators have consistently declined to accept the premise that a plaintiff can consent to the defendant's negligence. At least a few courts have dismissed the idea that an athlete can consent in advance to negligent coaching techniques which directly increase the risk of injury. Second, because injury prevention and risk avoidance techniques depend on a continuing education process, immunity and consent forms offer little incentive for the deterrence of unnecessary injuries in sports. Although such things may reduce and limit litigation, no practical benefit is conveyed to the athlete.

Information disclosure of the risk of injury should address two types of risks. First, coaches should disclose the intrinsic risk of injury, where no amount of instruction, protective equipment or rule change can prevent such risk. Second, information disclosure should include continual instruction on injury prevention and risk avoidance techniques.

Nevertheless, since no plaintiff as of 1986 has successfully based a claim on a coach's failure to instruct on the intrinsic risk of injury in sports, the duty to warn means the duty to inform: When Are You Exempt from Civil Liability?, 14 PHYSICIAN & SPORT MED. 147 (Feb. 1986).

Such legislation is imprudent. For example, in Ohio, legislation is pending to provide civil immunity to coaches and officials accused of negligence while involved in nonprofit recreational sports programs, as long as they have completed an unsophisticated annual safety orientation and training program. Public schools and athletes over age 19 are excluded. See, H.B. No. 1002, 116th GEN. ASSEMBLY, Regular Sess. (1985-86).

Ironically, volunteer coaches and officials with little experience, desire and time to commit to a systematic program of safety awareness seem to be the least likely candidates for civil protection. To foster immunity in order to encourage volunteers in youth sports programs results in a trade-off of safety for numbers.

54. NCAA SPORTS MEDICINE HANDBOOK, supra note 35, at 9 (Policy No. 2: Sport Safety Guidelines Offered). The NCAA offers the following guideline for use by school administrators: Acceptance of risk — “informed consent” or “waiver of responsibility” by athletes (or their parents if of minority age) should be based on an informed awareness of the risk of injury being accepted as a result of the student-athlete’s participation in the sport involved. Not only does the individual share responsibility in preventive measures, but also the athlete should appreciate the nature and significance of these measures.

Id.


56. See Rutter, 496 Pa. Super. at 590, 437 A.2d at 1198.
instruct on the principles of injury prevention, avoidance and minimization.\footnote{57}

E. Protective Equipment

Historically, the bulk of litigation concerning protective athletic equipment has involved strict products liability claims against manufacturers.\footnote{58} To help address the need for adequate equipment, the sports community has established various standard-setting organizations.\footnote{59} These organizations have developed industry standards for equipment, with an emphasis on both the quality and proper use of sports equipment. Even so, liability based on a coach's faulty instructions or warnings pertaining to the use of athletic equipment may ultimately rest with coaching personnel as opposed to the manufacturer.\footnote{60}

\footnote{57. In Thompson, No. 851-225 (Wash. Super. Ct. Jan. 11, 1982), instead of advancing the dubious claim that a high school athlete participated in a high school football game unaware of the potential for injury, the plaintiff based the claim upon a duty to warn of a higher risk of catastrophic injury associated with lowering the head at the point of contact. Actually, the duty to warn in this instance was no more than a component of the general duty and responsibility of the coach to instruct a participant in the proper technique used by ball carriers when making contact with an opposing player. Unfortunately, some commentators argue that this case stands for the proposition that an athlete may now recover if not warned or informed of the risks inherent in football. United States Gymnastics Federation, Gymnastics Safety Manual, supra note 27, at 10. However, a careful analysis of the claim in Thompson reveals that the inadequate warning was based on the coach's failure to tell the young football player not only how to meet an opposing tackler, but also the consequence of paraplegia that may occur when failing to follow the proper technique. Plaintiff's Trial Brief at 2, Thompson v. Seattle Pub. School Dist., No. 851-225 (Superior Court of Washington for King County, filed January 11, 1982).


59. For example, the National Operating Committee on Standards for Athletic Equipment (NOCSAE) promotes voluntary standards developed to reduce head injuries by establishing minimum requirements of impact attenuation for football helmets and baseball batting helmets. This group was formed in 1969 and includes the NCAA, the National Association of Intercollegiate Athletics, and the National Federation of State High School Associations, among others. Other groups concerned with protective equipment include the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports, the Joint Commission on Competitive Safeguards and Medical Aspects of Sports, and the American Society for Testing and Materials (ASTM) (eye safety).

60. See, e.g., Everett v. Bucky Warren, Inc., 376 Mass. at 280, 380 N.E.2d at 653. Here, even though the school and the manufacturer were required to exercise reasonable care not to provide a chattel which they knew or had reason to know was dangerous for its intended use, the coach, being a person with substantial experience in the
F. Medical Attention

The availability of competent medical care is frequently a question of economic feasibility. In NCAA Division I schools, football programs generate sufficient revenue to provide for the medical needs of all athletes, scholarship and nonscholarship. In contrast, many smaller universities, community colleges and most high schools lack the necessary funds to provide certified trainers, sports medicine specialists and physicians knowledgeable in the treatment and prevention of sports injuries. Occasionally, inexcusable delays in rendering medical care and the mismanagement of emergency situations have resulted in liability for schools and institutions.

III
The Inherent Danger Rule

Most athletes willingly run the nonspecific risk of injury incidental to athletic participation. However, the combination of intrinsic danger in sports and indeterminate injury-producing factors virtually precludes the assumption of risk defense as a suitable legal instrument to distinguish between inherent dangers and negligent causes of injury. This doctrine is too vague
and injury-causing factors are too complex to allow continued reliance on the assumption of risk defense. A better approach than assumption of risk and consent is a rebuttable presumption of non-fault. In this section, the inadequacies of assumption of risk and consent are discussed, and a rebuttable presumption is proposed.

A. Assumption of Risk

The doctrine of assumption of risk has been found to add nothing but confusion to modern tort law. Most jurisdictions have either abandoned or severely curtailed the doctrine, instead adopting the doctrine of comparative fault. Primarily, courts have found that assumption of risk is an ambiguous and hazardous legal tool bound to create confusion. The most popular form of the doctrine involves the principle of implied assumption of risk. Under this theory, courts may presume that the plaintiff consented to the risk of injury with-
out expressly having done so.  

Comparative fault states have eliminated implied assumption of risk as a separate defense which completely bars recovery. Some states have enacted legislation which merges implied assumption of risk with contributory negligence.

Since the defense of implied assumption of risk is either unavailable or merges with contributory negligence, a separate instruction on the inherent risk of injury assumed by the participant would seem inappropriate. Rather, the court and trier of fact are theoretically confined to the question of whether the plaintiff acted reasonably. Presumably, a reasonable assumption of known injurious factors created by the defendant will not reduce the plaintiff's damages.

Although the defense of unreasonable assumption of a known risk is judicially managed in the same fashion as contributory negligence, the standard applied to determine the plaintiff's knowledge must be clarified by the courts. Traditionally, a subjective standard was used to gauge the plaintiff's actual awareness of danger. However, if the true meaning of comparative fault is comparative responsibility, then the reasonable man test, an athlete exercising ordinary care for his personal safety, should effectuate a more precise measure for the trier of fact's evaluation of fault. When subjecting the plaintiff to the reasonable athlete standard, the trier of fact should be encouraged to evaluate the circumstances in which the athlete participates.

69. W. Prosser & W. Keeton, supra note 55, at 368.
70. See V. Schwartz, Comparative Negligence 153-80 (2d ed. 1986).
71. Id. at 167-70. Also, some comparative negligence states have retained implied assumption of risk as a separate and complete defense. These states include Georgia, Mississippi, Nebraska, Rhode Island, and South Dakota. Id. at 162-63.
72. Some courts have held that it is error to give a separate instruction on assumption of the risk. See Loup-Miller v. Brauer & Assoc.-Rocky Mountain, Inc., 572 P.2d 845 (Colo. 1977); see also Lambert v. Will Bros., 596 F.2d 799 (8th Cir. 1979); Segoviano v. Housing Auth., 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983).
73. Unif. Comp. FAULT ACT § 1, 12 U.L.A. 39 (Supp. 1987). Specifically, an athlete's unreasonable assumption of known injurious factors or conditions incident to an athletic activity must be weighed against the previously established negligent conduct of the defendant.
74. See V. Schwartz, supra note 70, at 173. The author states: "Most comparative negligence states have now established the same pattern with respect to the legal effect of merger. Reasonable implied assumption of the risk is no longer a defense." Id. at 173 n.35.
75. Today's standard of fault is measured in terms of objectivity, based upon a uniform standard of behavior. See W. Prosser & W. Keeton, supra note 55, at 173-74.
76. V. Schwartz, supra note 70, at 180 n.80.
A substantial number of injuries can be prevented under optimal conditions. Deviations from accepted standards of coaching that increase the risk of injury should constitute the threshold inquiry for the trier of fact. Thus, if the trier of fact concludes that the defendant created an increased risk for the plaintiff, the question then becomes whether the risk reaches the necessary level of unreasonableness. Errors in judgment should not entitle the athlete to compensation under the reasonable man test, unless the mistake in judgment is so erroneous as to be inconsistent with due care.

The next factual determination is whether the athlete’s conduct is reasonable under the circumstances of the athletic endeavor in which he engaged. Since the athlete’s conduct may be reasonable whether or not he knew of the increased danger, it may be entirely appropriate for the trier of fact to find that the athlete acted free of negligence. For example, head-butting an opponent in a high school football game is both an illegal tactic and a highly dangerous method of blocking or tackling. The question should be: Was the player coached on this unacceptable technique, or was it an isolated incident contrary to the defendant coach’s customary methods of instruction?

The trier of fact’s focus should begin with the coach’s instruction on injury avoidance techniques, then proceed to the athlete’s compliance or noncompliance with rules controlling “point of contact” with an opponent. This analysis differs from the traditional approach in that the focus is no longer on the known danger of a specific injury, but on the reasonableness of both parties’ conduct given the circumstances leading up to the actual injury.

The comparative fault system fails to take into account that one who voluntarily engages in a dangerous activity, even though he does so in a reasonable manner, should bear the consequences of injury. This argument arises from two distinct principles which underlie the assumption of risk defense. The first, the lack of duty concept, involves the primary assumption

77. See supra notes 10-36 and accompanying text.
79. V. SCHWARTZ, supra note 70, at 180. The author criticizes the supreme courts of Wisconsin and Minnesota, which have held that reasonable implied assumption of risk should not diminish the amount of the plaintiff’s recovery. He argues that “when a person’s conduct under the facts is truly voluntary and when he knows of the specific risks he is to encounter, this is a form of responsibility that the jury should evaluate.” Id.
of risk by the plaintiff, and operates as a general denial of negligence.\textsuperscript{80} The second, \textit{volenti non fit injuria} (to one who is willing, no wrong is done) enlists the defense of consent.\textsuperscript{81} While the consent defense presupposes the plaintiff's acquiescence to the nonspecific dangers of physical activity, it essentially merges into the defendant's evidence of no liability. In effect, the defendant prematurely shifts the trier of fact's inquiry to the plaintiff's conduct, which technically is reserved for consideration only after finding the defendant negligent. This serves to strengthen the defendant's case by a procedural quirk rather than the use of admissible evidence.

The elimination of the defense of consent forces the defendant to forfeit substantial leverage against the injured athlete. In addition, tort reform has jeopardized the element of inherent danger, which formerly gave the defendant a strategic advantage.

In light of recent trends, few serious disabling injuries will escape litigation; fewer still will be accepted as part of the game. Given society's increasing litigiousness and rising expectations of fiduciary responsibility,\textsuperscript{82} the sports community must examine alternatives to the defense of assumption of risk in order to reinstate the compelling argument of inherent danger.

B. Consent to Reasonable Risk

Even if catastrophic injuries and death are identified as inherent in specific types of sports activity, the threat of liability remains problematic when the plaintiff resorts to the tort theory of the failure to warn.\textsuperscript{83} Injury avoidance and prevention measures necessarily embody communication of precautionary information to athletes. However, an injured plaintiff could claim a lack of sufficient knowledge about the inherent risk of a specific sport, which has prevented him from intelligently deciding whether to forego participation. Such a possibility arises when a unique injury occurs in which the mechanics of injury are not the subject of a safety practice. It seems unrealistic to expect a coach to explain every conceivable manner in which the participant may be injured. The sports community cannot provide a laundry list of reasonable risks of injury.

\textsuperscript{80} See supra note 59 and accompanying text.  
\textsuperscript{81} See, e.g., W. Prosser & W. Keeton, supra note 55, at 480.  
\textsuperscript{83} See W. Prosser & W. Keeton, supra note 55, at 207.
Unlike hazards in products, adverse reactions to drugs, complications of medical procedures and dangers known to land and home owners, hazards in aggressive sports are easily identifiable. No one can claim that he is unfamiliar with common injuries associated with football or baseball, assuming that he has either observed or played the game. In contrast, the duty to warn in products liability and medical procedure cases is intended to provide consumers and patients with information about unknown dangers that is essential for intelligent decisions. Applying this general observation to contact sports, the potential for traumatic injuries would seem self-evident, even to most participants. However, in noncontact sports the sporadic occurrence of sudden death is most alarming because such an event is incorrectly assumed to be a risk limited to violent contact sports.

Although inherent but reasonable risk of injury in sports ought to be excluded from litigation, it is unlikely that the courts will deny recovery for failure to warn when the resulting injury is serious. Indeed, the idea that amateur athletes must be warned about all the unavoidable dangers of an obvi-


87. See, e.g., W. PROSSER & W. KEETON, supra note 55, at § 63.

88. In Columbus, Ohio, the indoor soccer leagues are closed out because of the sport's tremendous popularity. In talking with parents, the author has found that soccer is popular partly because parents perceive that there is less likelihood of injury than in other sports, such as football. Although soccer exists at the intercollegiate and professional levels in the United States, its national following is minimal compared to football. Nevertheless, even parents with little appreciation of the game of soccer can determine that kicking or butting a ball from one end of the field to another obviously involves substantially less trauma and a considerably less chance of injury than, for example, football.

89. See generally, 1 L. FRUMER & M. FRIEDMAN, PRODUCT LIABILITY 153-54 (1960) (discussing the superior knowledge of manufacturers in this age where more and more complicated products, with potentiality for harm, require product warnings to prevent injury to the relatively inexperienced layman).
ously dangerous, injury-producing sport may be the product of a tort system which is too responsive to enterprising plaintiffs’ attorneys. Nevertheless, the sports community, intimidated by the perceived threat of legal accountability for lack of informed consent, has begun urging its constituents to obtain the athlete’s consent before participation.  

Theoretically, a written consent may be necessary not only where the risk is inherent, but also where the mechanism of injury is disassociated from prevailing injury avoidance techniques. If sports safety research continues to identify the mechanics of injury, the net result will facilitate expansion of the instructional capability of coaches while the amount of risk will be reduced. As risks of injury increasingly become a prerogative of proper coaching techniques, the sports community’s concern for potential litigation, based purely on the lack of athletic consent, should decrease.

C. Presumptions

Teachers, coaches and school administrators who exercise reasonable care in dealing with amateur athletes ought not to be responsible for injuries intrinsic to the sport. The best means for achieving this end is a rebuttable presumption of non-fault.

1. Evidentiary Presumptions of Fault

In 1979, Colorado adopted comparative fault and abrogated the defense of assumption of risk. In 1979, the Colorado legislature also passed the Ski Safety Act, which created a rebuttable presumption that a skier is at fault whenever he collides with an object defined by the statute. Thus, a skier who col-

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91. For example, trauma to the lower back may result in the loss of a kidney. Except when tackling an opponent or blocking close to the line of scrimmage, blocking an opponent in the back is a rule violation. Nevertheless, incidental contact may involve contact above and below the waist and in the front and back of a participant. Thus, a direct blow to the kidney may occur without violating the rules of the game. Although such an injury is remote and not common in the sport of football, hypothetically, the potential for loss of a kidney exists.
93. Id. The statute reads:
Each skier has the duty to maintain control of his speed and course at all times when skiing and to maintain a proper lookout so as to be able to avoid other skiers and objects. However, the primary duty shall be on the person
lides with persons, natural objects, or properly marked man-
made structures is presumed to be at fault. Rejecting a long list
of constitutional challenges to the presumption, the Colorado
Supreme Court in
Pizza v. Wolf Creek
upheld this formidable
legal barrier and thereby reduced a plaintiff’s chances for
recovery.

The decision openly departed from the traditional eviden-
tiary practice of the disappearing presumption. Under this old
view, once sufficient evidence was introduced to rebut a pre-
sumption, the presumption disappeared and the jury was not
instructed as to its existence or content.95 The burden of pro-
ducing evidence must shift from one party to another, but the
burden of persuasion remained fixed by common law and the
rules of procedure.96

This approach to judicial management of presumptions, held
by most legal scholars, requires the opposing party to produce
sufficient evidence to rebut the presumption of fault.97

The Colorado Supreme Court in
Pizza v. Wolf Creek sanctioned the jury’s consideration of the presumption, conse-
quently foreclosing judicial decision on whether or not the
evidentiary facts upon which it was established were rebut-
ted.98 One must assume that the traditional disappearing pre-
sumption theory was abandoned because such practice would
have defeated the strong economic and social considerations be-
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skiing downhill to avoid collision with any person or objects below him. It is
presumed, unless shown to the contrary by a preponderance of the evidence,
that the responsibility for collisions by skiers with any person, natural object,
or man-made structure marked in accordance with Section 33-44-107(7) is
solely that of the skier or skiers involved and not that of the ski area operator.
Id. § 33-44-109(2) (emphasis added).
95. See C. McCormick, McCormick on Evidence § 344 (3d ed. 1984). If the trial
judge determines that the evidence introduced is sufficient to support a finding con-
trary to the presumed fact, then the presumption is spent and disappears and, conse-
quently, the jury will not be instructed as to the presumption. Id. at 974-75. However,
the existing minority view criticizes this approach, suggesting that it is too harsh: “[i]f
the policy behind certain presumptions is not to be thwarted, some instruction to the
jury may be needed despite any theoretical prohibition against a charge of this kind.”
Id. at 976.
96. Id.; see also 1 G. Weisserenger, Ohio Evidence § 301 (1980).
97. G. Weisserenger, supra note 96, at § 301.3; see also, C. McCormick, supra
note 95, at 974.
98. C. McCormick, supra note 95, at 978 nn.31-33.
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resurrected as a presumption of fault on the part of an injured skier, alleviating the burden on the defendant to plead and prove assumption of risk. The presumption relieves the defendant of the responsibility to introduce testimony disputing the typical argument advanced by the plaintiff that he did not know of the risk of actual injury.

Indeed, the Colorado Supreme Court seems to have endorsed both the imbalance sanctioned by the legislative presumption and the legal barricade impeding legitimate recovery of a skier victimized by the negligence of ski area operators. Buttressing the court’s rationale was the legislative reclamation of a natural inference flowing to ski area operators: injuries inherent in the sport of skiing are not compensable in court.99

The presumption confers a windfall on the defendant while increasing the burden of proof on the plaintiff in two ways. First, the plaintiff no longer comes into the courtroom in a neutral position. Instead, he must present credible evidence rebutting the presumption before incurring the benefits of comparative fault.100 Second, the defendant ski area operator is relieved from proving misconduct on the part of the plaintiff. The presumption of fault represents an extreme departure from fundamental notions of fairness. The end result barely achieves a more equitable resolution than previously obtained through utilization of the doctrine of assumption of risk, whereby the judge or jury could easily bar the plaintiff from recovery. However, the injured skier will more than likely survive a motion for a directed verdict. He will have his day in court, and his conduct will be compared to the defendant’s, but the burden of persuasion will be substantial.

To broadly extend the language of this presumption to sports involving students or minors might present serious constitutional impediments. In Pizza, the ski area operators survived the constitutional challenges of vagueness, lack of rational evi-

99. Pizza, 711 P.2d at 678-79.

100. Id. The Court considered whether “[t]he skier must prove he was not ‘solely responsible’ by proving he was not at all responsible; or, second, that the plaintiff must prove that he was not ‘solely responsible’ by presenting evidence of the operator’s negligence which outweighs the presumption of the skier being solely negligent.” Id. at 677. The court rejected the first alternative. Instead, the court construed the language “as consistently as possible with common law principles of negligence.” Id. The court then held that “[t]he skier has the burden of rebutting the presumption by presenting evidence of the ski area operator’s negligence which outweighs the presumption of the skier’s sole negligence.” Id.
dentary basis, and violation of equal protection guarantees because the statutory presumption precisely describes the factual setting where the injuries and presumption arise.\footnote{See id. at 677-78.} In addition, the presumption was equated to an economic regulation, subjecting it to less exacting constitutional standards.\footnote{Id. at 676.}

2. \textit{Evidentiary Presumption of Non-Fault}

Although state colleges and high schools possess ample economic arguments as well as strong interests in health, education and welfare, the rational evidentiary basis requirement may pose difficulties. In skiing cases, a collision with a downhill object is the only fact requiring proof before the presumption of fault applies.\footnote{See supra note 59 and accompanying text.} In some sports, however, contact with one's opponent (such as blocking and tackling in football) is permitted by the rules. Consequently, a legislative presumption involving contact with an opponent is entirely too general.

To some extent, the comparative fault system impairs the natural inference of the defendant's nonresponsibility drawn from the factual setting of inherent danger. A more equitable resolution is a presumption of non-fault. Such a presumption will encourage the trier of fact to reject claims which stem from injuries shown to be inherent in the sport. A non-fault presumption might read:

\begin{quote}
Every participant engaged in amateur, high school or collegiate athletics has the duty to reasonably control his conduct in accordance with proper coaching techniques based upon written rules and principles of sports safety designed to promote safe conduct in sports. Unless shown by a preponderance of the evidence that a specific injury is unlikely to occur, it is presumed that death and chronic disabling injuries despite compliance with rules and principles of sports safety are inherent in the sport and not the fault of the school, club, coach or instructor.

Under this presumption, a method is created by which the inherent risk defense may coexist with comparative fault, without unduly obstructing a fair resolution of the injured athlete's claim.

The proposed presumption is predicated on the idea that some injuries inherent in sports and impervious to safety meas-
ures are not compensable. This ensures a more balanced approach to separating inherent injuries from injuries due to tortious conduct.

3. **Concepts and Terminology in a Presumption of Non-Fault**

Some of the concepts and terminology used in the proposed presumption are further discussed.

a. **Interscholastic Sports**

State affiliated high school and collegiate sports are directly related to the state's interest in health, education and welfare of young people. Independent sports organizations, such as gymnastic schools and diving clubs for young adults, also further the state's interest in athletics. If the language of the statute limits its application to state-sponsored athletic activities, finding a compelling state interest is not troublesome. As for recreational athletics, unless it reaches the level of economic importance of the ski industry in Colorado, the presumption may be subject to close scrutiny to determine a legitimate state interest.¹⁰⁴

b. **Written Rules and Principles of Sports Safety**

Where written rules govern the conduct of participants for clear reasons of safety, properly coached athletes cannot legitimately make a claim that the meaning of the rule is vague.

Safety practices implemented by manuals and other written materials are separate from rules governing the manner in which the contestants play the sport. Nevertheless, extending the presumption to written guidelines on prevailing industry-wide safety practices ought to be part of the statute's language. Including safety manuals in the presumption will encourage the development and enforcement of written safety guidelines, as opposed to reliance upon loose principles of custom and practice.¹⁰⁵

c. **Specific Injuries**

As stated earlier, injuries outside the expectations of the ath-

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¹⁰⁴ Pizza, 711 P.2d at 679.
¹⁰⁵ See, e.g., United States Gymnastics Federation, Gymnastics Safety Manual, supra note 27, at iii.
lete are neither accepted nor realistically comprehended, even though coaches and sports administrators expect the athlete to assume all dangers in sports. If specific injuries cannot be avoided by sound coaching techniques, the defendant ought to be entitled to a presumption which eliminates the necessity of proof of the participant’s knowledge and awareness of potential injury.

Placing emphasis upon the mechanics of injury is critical to eliminating confusion between negligent and inherent injuries. For example, rather than approaching sports injury claims by questioning whether or not brain damage is part of boxing, evaluation of the mechanics of the injury by which brain damage can result will reduce the ambiguity facing the court as to the meaning of inherent risk of injury.

d. Rebuttable Presumption

The question remains as to what constitutes sufficient evidence to rebut the presumption. The court in Pizza v. Wolf Creek reconciled a rebuttable presumption with the principles of negligence and comparative negligence, by deciding that the presumption could be rebutted (but did not disappear) when the plaintiff simply presented evidence of the defendant’s negligence. The defendant’s argument in Pizza assumed that sufficient rebuttal evidence required the skier to prove he was not negligent by a preponderance of the evidence. The statute was silent on the issue of sufficient rebuttal evidence; therefore, the court rejected the stringent requirement of proving a negative.

This author’s proposed presumption can be rebutted by evidence supporting the argument that the injury occurred because the defendant created a risk of injury unlikely to occur and deviated from prevailing coaching or instructional techniques.

Whether the evidence must present a prima facie case or constitute a preponderance seems inconsequential in comparative fault jurisdictions. Mentioning the presumption to the jury serves to place additional emphasis on the inherent risk of sports by channeling the jury’s fact-finding process toward con-

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106. See supra note 35 and accompanying text.
107. Pizza, 711 P.2d at 678.
108. Id. at 678-79.
sideration of *avoidable* versus *unavoidable* injuries as opposed to *known* versus *unknown* injuries.

e. Death and Chronic Disabling Injuries

Death and chronic disabling injuries in sports often spur litigation because of the severe economic and emotional costs. Nevertheless, extending the presumption of non-fault to all injuries, disabling or not, has merit especially when considering the options for judicial management of frivolous cases.\(^\text{109}\) Arguably, the presumption will discourage plaintiffs’ lawyers from filing lawsuits for minor injury claims.

The rebuttable presumption of non-fault would reinforce the proposition that injuries inherent in sports are ultimately the responsibility of the injured party. A necessary corollary to this presumption of non-fault is the need for a jury instruction equating inherent injuries of athletic participation to acceptable and reasonable risk, which are not compensable in the tort system.\(^\text{110}\)

The sports community has adopted consent forms not so much to provide an informed choice to the prospective athlete, but rather to serve as a litigation defense tactic.\(^\text{111}\) The issue of an informed choice generally arises only after an injury has occurred and the theory of negligence is unavailable to support a claim for damages. Considering the role of sports in our society, an informed choice of athletic participation, in realistic terms,

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109. Although frivolous litigation may mean strictly nonmeritorious claims, it is used in this context to include minor injuries and very small claims where the potential award may not justify the cost of litigation and the lawyer’s time and effort.

110. A jury instruction might be worded as follows:

   Football is a contact sport in which trauma and certain injuries are inherent and considered by law to be reasonable risks of participation. The mere fact that an injury occurs does not, of itself, raise an inference of an unreasonable risk of injury to a participant. Ordinarily, therefore, you may not find defendant’s conduct to have constituted negligence without having before you some evidence from which you are able to infer that the defendant created an unreasonable risk of injury endangering the participant. 

   Cf. ALEXANDER’S JURY INSTRUCTIONS ON MEDICAL ISSUES § 2-11 (2d ed. 1980).

111. For example, in Washington, the Seattle School District requires each parent and student to sign an assumption of the risk release form that is tailored to specific sports such as football, baseball and basketball. The sports specific consent forms not only identify a multitude of potential injuries but also include language releasing the Seattle School District from liability for ordinary negligence. Unless a school district is statutorily immune from ordinary negligence, the release portion of this form may be in violation of public policy. Such a finding would eliminate any benefit from a signed form other than the information disclosing potential injury. See also supra note 79 and accompanying text.
may simply mean a disclosure of serious physical consequences of athletics. Once serious injuries and potential long-term physical impairments are identified for the participant, the athlete’s opportunity to reduce risk has been provided.

**Conclusion**

Various refinements and adjustments to the tort system may engineer a more equitable resolution for individual responsibility for injury in athletics. The interrelationship among sports, medicine and law, with each discipline offering a distinct reasoning process, may provide the answer to these problems.

By directing the tort system's focus toward the mechanics of injury, the parties will address and differentiate between inherent risks and perilous conditions created by the defendant. To the extent that reasonable risks of injury are incidental to a given sport, a rebuttable presumption of nonresponsibility underscores the evidentiary necessity to prove that the plaintiff’s injury resulted from injurious factors created by the defendant. To the extent that inherent risks are characterized as reasonable, and risk factors created by the negligence of the defendant are synonymous with unreasonable conduct, the sports community can be assured that the trier of fact will not only maintain an inherent risk perspective, but will more readily perceive the weight to be given to the reasonable risk of injury in the comparative fault evaluation.