

# ARE HIGH SCHOOL STUDENT ATHLETES TICKING TIME BOMBS?

## THE IGNORED LEGAL AND ETHICAL REALITY OF STUDENT ATHLETE CONCUSSIONS

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## I. INTRODUCTION

This article will examine and evaluate the legal liability of secondary schools, both public and private, as it pertains to injuries sustained by their student athletes during participation in school sanctioned sporting activities. These elite athletes which are both a source of pride and revenue for many schools are being placed by their schools in a position where they are being subjected to short term and long term physical and mental injury stemming from repeated concussive blows of varying types, while playing sports purportedly under the watchful eye of their schools. The potential dollar value of such injury can be seen in the 70 million dollar settlement awarded to former NCAA Eastern Illinois football player Adrian Arrington for his mental injuries sustained as a result of play. The doctrines of *In Loco Parentis*, Negligence, Consent, and the Duty of Care owed to an invitee will be compared to demonstrate the issues which are seemingly being ignored by secondary schools. A less than comprehensive scholastic policy along with mixed perception of legal obligations to the students will be examined along with the ethical implications of those policies, regardless of potential legal liability. Finally, I will conclude with a recommendation for the most suitable policy to meet the obligations under the law as well as the needs of the students and schools given constrained resources.

## II. SECONDARY SCHOOL LEGAL LIABILITY/OBLIGATION: WHOSE JOB IS IT?

It is always beneficial to view the present in light of the past. Thus, in order for us to understand current school policies regarding student safety, we must examine how that legal obligation has changed over time. It is also important to consider whether a student athlete involved in a school sponsored sporting event is potentially in a unique position different from that of a student not participating in a school sponsored activity.<sup>1</sup>

### A. *In Loco Parentis*, Not Just a Latin Phrase

The doctrine of *in loco parentis* is a Latin phrase which has its origins in the English common law and which means, “In place of a parent,” or “charged with a parents, rights, responsibilities and duties”.<sup>2</sup> In Blackstone’s commentaries during a discussion of a parent’s rights over his children, Blackstone states: “He may also delegate part of his parental authority during his life, to the tutor or schoolmaster of his child; who is then *in loco parentis* [in place of a parent], and has such a portion of the power of the parent committed to his charge, *viz.* that of restraint and correction, as may be necessary to answer the purposes for which he is employed”.<sup>3</sup>

Though Blackstone’s commentaries reference opinion from 1765 they were reiterated as recently as 2007 by the United States Supreme Court in *Morse v. Frederick*:

“As early as 1837, state courts applied the *in loco parentis* principle to public schools:

One of the most sacred duties of parents is to train up and qualify their children, for becoming useful and virtuous members of society; this duty cannot be effectually performed without the ability to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits ....

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<sup>1</sup> Some of the concepts and ideas mentioned in this paper were originally published in the Berkeley Journal of Entertainment and Sports Law Volume 6 (2017). They related to a different group and or subset.

<sup>2</sup> *In loco parentis*, BLACK’S LAW DICTIONARY (5th ed. 1979).

<sup>3</sup> 1 WILLIAM BLACKSTONE, COMMENTARIES \*446, \*453.

The teacher is the substitute of the parent; ... and in the exercise of these delegated duties, is invested with his power.”<sup>4</sup>

The language cited in 2007 by the United States Supreme Court and originally stated almost 200 year ago is compelling. It is a “most sacred duty of parents”.<sup>5</sup> Where the child is being trained and qualified for an ultimate purpose, which is “to be a useful and virtuous member of society”.<sup>6</sup> Note the elevation of the language utilized. It is not merely a duty, which from our legal perspective would be sufficient, but rather a “sacred duty”.<sup>7</sup> Thus, the outcome is not to be a member of society alone but rather a “useful and virtuous member” of society.<sup>8</sup> The court is making it quite clear by referring to God and the notion of virtue that this is a task which must be treated with the utmost care. The child through the teachings of the school will become a useful and virtuous member of society. It therefore follows that they are to be protected. If such protection is not established for the child’s welfare, students may face serious harm during their formative years. Thus the school will be unable to achieve the goal of transforming the student into a virtuous member of society.

The duty and obligations of protection are naturally given to the parent during the child’s formative years. Once the child begins to attend school, however, these responsibilities fall on the teacher and the school to which they are employed through the principal of *Respondiat Superior*. All of these requisites for the parent, that of care, direction, discipline, and protection are bestowed upon the teacher who “is the substitute of the parent.”<sup>9</sup>

The teacher should be thought of in the same context as a parent with a sacred duty to be a guardian of the student. The teacher should be a counselor, a smith who tempers the student’s metal, who helps shape and mold that metal from a collection of unfocused and undisciplined thoughts and emotions to one with

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<sup>4</sup> *Morse v. Frederick*, 551 U.S. 393, 414 (2007) (quoting *State v. Pendergrass*, 19 N.C. 365, 365–66 (1837)).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

keen razor sharpness and control.<sup>10</sup> The teacher and schools which employ them now become those charged with creating and guarding the next custodians of our society.

Yet, the extent of this custodial protection remains a troublesome question. A historical analysis shows the breadth of power held by teachers, or as they were called in the 19<sup>th</sup> century, Masters. One cornerstone of their power lay in the maintenance of discipline and order in routine school administration.

“To accomplish th[e] desirable ends [of teaching self-restraint, obedience, and other civic virtues], the master of a school is necessarily invested with much discretionary power .... He must govern these pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn. He must make rules, give commands, and punish disobedience. What rules, what commands, and what punishments shall be imposed, are necessarily largely within the discretion of the master, where none are defined by the school board.”<sup>11</sup>

Note that the end to be achieved here is the creation of a person with civic virtue. Again, the school’s vision is long term. They are not only concerned with the present but with what society will reap by their hand in the future. The school is vested in creating someone who would be a benefit to society, a person who is not slothful, or disobedient, and who is virtuous.

A school’s ability to control the student’s physical wellbeing was also clear though the degree of punishment which could be imparted.<sup>12</sup> In the late 1890s, the Supreme Court of Alabama held that the only restraint on teacher discipline was if it was excessive and induced by legal malice, allowing liability where the “punishment inflicted is immoderate, or excessive, and ... it was induced by legal *malice*, or wickedness of motive.”<sup>13</sup> In other courts, the requisite of legal malice was not required but merely that the punishment was excessive.<sup>14</sup>

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<sup>10</sup> David E Missirian, *Student Athlete Concussions: The Often Overlooked legal and Ethical Minefield*, 6 BERKELEY J. OF ENT. & SPORTS L. 23, (2017).

<sup>11</sup> *Patterson v. Nutter*, 7 A. 273, 274 (Me. 1886).

<sup>12</sup> *Morse*, 551 U.S. at 416.

<sup>13</sup> *Boyd v. State*, 7 So. 268, 269 (Ala. 1890).

<sup>14</sup> *Morse*, 551 U.S. at 416. See also *Lander v. Seaver*, 32 Vt. 114, 124 (1859).

In both instances, though the extent of punishment was different, one requiring proof of legal malice and the other requiring on a showing of excessive punishment, it was never questioned that the schools could exercise physical control of the students and the degree to which that control might be exercised.<sup>15</sup>

The importance of this weighty responsibility is further exemplified through an understanding of the division of time that a child spends under the care of their teacher and that of their parent.

A boarding school is a residential school where pupils live and study during the school year.<sup>16</sup> Today there are approximately 500 boarding schools across England, Wales, Scotland, and Northern Ireland.<sup>17</sup> In the United States there are approximately 272 boarding schools.<sup>18</sup> The impact that these schools have on their students based on time alone is immense. In England, the school year is done on a trimester where the students are living on campus potentially for 10 months of the year.<sup>19</sup> In the United States the school year runs for approximately 9 months. At these basically full time institutions, the school has charge of the students activities for approximately 79% of the students life, from ages 7 through potentially 12. There are 33,619 private schools in the United States, serving 5.4 million PK-12 students. Private PK – 12 school enrollments is **10 percent** of all PK-12 students.<sup>20</sup> If we look at public school attendance, we have approximately 486 million students who spend 6 or 7 of their waking hours at school. This accounts for between 43% and 68% of their time at school under the teacher's guidance and supervision.

The significance of a school's involvement in a student's life was not lost on our courts and was even expanded from the grade schools to colleges and universities in the early 20<sup>th</sup> century. One of

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<sup>15</sup> *Id.*

<sup>16</sup> British Council, *The UK education system: Boarding schools*, <https://study-uk.britishcouncil.org/options/education-system/boarding-schools>.

<sup>17</sup> *Id.*

<sup>18</sup> Boarding School Review, *Boarding Schools by State/Country*, <http://www.boardingschoolreview.com/boarding-schools-by-state>.

<sup>19</sup> Boarding School Finder, *Boarding in...:United Kingdom (UK)*, <http://www.boarding-school-finder.com/en/articles/boarding-in-/united-kingdom-uk->.

<sup>20</sup> Council for American Private Education, *Facts and Studies*, [www.capenet.org/facts.html](http://www.capenet.org/facts.html).

the most significant expansions can be seen in the case of *Gott v. Berea College* in 1913.<sup>21</sup>

“College authorities stand *in loco parentis* concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.”<sup>22</sup>

The court in *Gott* equated the role of the school with that of the parent.<sup>23</sup> The range of power the court envisioned extended to “make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose”<sup>24</sup>. How far that grant of power might ultimately go can only be gleaned by looking at a quote utilized by the *Gott* Court from the 1866 case of *People v. Wheaton College*. In *People v. Wheaton College* the court said:

“But whether the rule be judicious or not, it violates neither good morals nor the law of the land, and is therefore clearly within the power of the college authorities to make and enforce. A discretionary power has been given them to regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family.”<sup>25</sup>

The significance of this granting of power in these cases cannot be underestimated in its significance. Keep in mind that these

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<sup>21</sup> Theodore C. Stamatakos, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 Ind. L. J. 471, 474 (1990).

<sup>22</sup> *Gott v. Berea Coll.*, 161 S.W. 204, 206 (Ky. 1913).

<sup>23</sup> Originally published in the Berkeley Journal of Entertainment and Sports Law Volume 6 Page 3 (2017)

<sup>24</sup> See 22 above.

<sup>25</sup> *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186, 187 (1866).

decisions related to college age individuals, presumably close to or over the age of majority for whom protection and guidance one might believe was less needed. Yet, the courts were loath to remove the duty from Universities of their assigned task.

*B. Not all High Schools are created equal.*

There are two major divisions in our educational system here in the United States. There is the public school system, which is primarily run by individual cities and towns under the auspices of their individual states. Then there is a private school system, which is run by individual non-governmental legal entities.<sup>26</sup> It is important to recognize this distinction because they each benefit from different legal protections and as a result different legal liabilities. Public schools, as a general premise, have enjoyed the benefit of what is called governmental immunity.<sup>27</sup> This governmental immunity has its roots in the concept of sovereign immunity, i.e. “the King can do no wrong.”<sup>28</sup> The possibility of the King being the one who promulgates the rules or laws and thereafter being potentially liable for their action under those rules or laws is irreconcilable. It is as if one is being hoisted on their own petard.

In 1903, the Supreme Court of the United States put it thusly:

“A sovereign is exempt from suit not because of any formal conception or obsolete theory, but on the logical and practical ground that there can be no legal right as against the authority that makes the law on which the right depends...”<sup>29</sup>

The notion of sovereign immunity was gradually broadened to include cities and municipalities,<sup>30</sup> and then ultimately termed governmental immunity.<sup>31</sup> Yet despite this seemingly impenetrable

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<sup>26</sup> Peter Greene, *What Is a Public School System, Really?*, HUFFPOST: THE BLOG, (Mar. 21, 2015) [http://www.huffingtonpost.com/peter-greene/what-is-a-public-school-s\\_b\\_6575790.html](http://www.huffingtonpost.com/peter-greene/what-is-a-public-school-s_b_6575790.html).

<sup>27</sup> Matthiesen, Wicker T. & Lehrer, S.C. *State Sovereign Immunity and Tort Liability in all 50 States*.

<sup>28</sup> *Kawananakoa v. Polyblank*, 205 U.S. 349, 351 (1907).

<sup>29</sup> *Id.* at 353.

<sup>30</sup> *Russell v. Men of Devon*, 100 Eng. Rep. 359 (1798).

<sup>31</sup> Compare RESTATEMENT (SECOND) OF TORTS §§ 495A, 495B, with RESTATEMENT (SECOND) OF TORTS § 495C (1-4A Premises Liability—Law and Practice § 4A.04)

safe haven for public schools by way of their being an arm of a city or town, inroads have been made to place chinks in that armor which will be discussed later.

On the other hand, private schools do not have the benefit of sovereign immunity and are treated more like private individuals. Therefore, they become susceptible to various causes of action, such as negligent supervision, negligence in hiring, and strict liability.<sup>32</sup> Parochial schools, a type of religious private school, though not public in nature, may in some instances find relief from suit in the concept of charitable immunity. “Charitable immunity originated in England in 1846, and was adopted in the United States in 1876.”<sup>33</sup> The primary rationale for charitable immunity is that, without it, the financial strains of liability would reduce the capacity of charitable corporations to provide valuable goods and services to the community.<sup>34</sup> Additionally, “by furnishing societal benefits, charitable institutions relieve government of the burden and costs it would otherwise confront if responsibility for public goods were left primarily to for-profit businesses.”<sup>35</sup>

Despite these seeming disparate camps, history has shown that as to children they can sometimes be more similar than dissimilar.

### *C. The Breadth of In Loco Parentis Historically*

The notion of school liability for purported student injury has varied over time based on nature and cause of the injury. Early cases revolving around injury the result of disciplinary action found for the schools. Even at the University level where presumably there would be less freedom to discipline, the Florida Supreme court in 1927 stated:

“As to mental training, moral and *physical discipline*, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their

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<sup>32</sup> 1 Landau & Martin, *Premises Liability Law and Practice* § 4A.02 (perm. ed., rev. vol. 2017).

<sup>33</sup> See Prosser, Wade & Schwartz, *Torts: Cases and Materials* 634 (10th ed. 2000).

<sup>34</sup> Kenneth R. Kohlberg, *Modern Reflections on Charitable Immunity*, 89 MASS. L. J. 163, 164.

<sup>35</sup> *Id.*

government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.”<sup>36</sup>

It is a significant illustration of societal norms that in 1924 the court would allow the University and presumably a school to do anything, “so long as such regulations do not violate divine or human law”<sup>37</sup> Their reference to divine law shows their viewpoint of how significant divine laws were to them even in their capacity as Judges. They even go so far as to say that the courts have no more authority to interfere in school policy and application, then they have to control the domestic discipline of a father in his family.”<sup>38</sup> These references paint a very different picture of the relationship between the family, the school and the court system, than exists today.

The relationship being described in 1924 between the school and the student is an intimate one. The references to divine law and to the discipline metered out by a father to his family paint a picture which is quite compelling against today’s vision of that relationship.

In the 1930s, this concept of school protection revolving around discipline was naturally expanded to the children’s welfare. In 1937, the Michigan Supreme Court stated:

“At least in a limited sense the relation of a teacher to a pupil is that of one *in loco parentis*. We are not here concerned with the law applicable to punishment of a pupil by a teacher; but rather with the law applicable to the duties of a teacher in the care and custody of a pupil. In the faithful discharge of such duties the teacher is bound to use reasonable care, tested in the light of the existing relationship.”<sup>39</sup>

As the interchangeability between parent and school grew so too did the school’s obligation to protect the child. “In its fullest form the doctrine of *in loco parentis* permits colleges to devise,

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<sup>36</sup> John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924) (emphasis added).

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> Gaincott v. Davis, 275 N.W. 229, 231 (Mich. 1937)

implement and administer student discipline and to foster the physical and moral welfare of students.”<sup>40</sup>

Even into the Fifties, the power of schools to set their own rules regarding discipline were held firmly in the school’s grasp. In Massachusetts, Brandeis University withheld a graduate student’s scholarship for disciplinary reasons. The Massachusetts Court said this in upholding the school’s unfettered right to discipline:

“a privately endowed institution, by regulation which is set forth in its General Catalog, ‘reserves the right to sever the connection of any **student** with the university for appropriate reason.’ The problem of what constitutes an appropriate reason must clearly be left to those authorities charged with the duty of maintaining the standards and **discipline** of the school.”<sup>41</sup>

Additionally the court said:

“The court is in a poor position indeed to substitute its judgment for that of the university, particularly in this case which involves a graduate **student** enrolled in a very small department where the major part of instruction is given on an individual and personal basis.”<sup>42</sup>

Given the courts position, on the rights of a graduate student to challenge the discipline of a school how loth would the Courts be to challenge the discipline and guidance offered to a secondary school student? One wonders though why the court feels it is “in a bad position to substitute its judgment for that of the University.” Is not part of their function to protect the rights of individuals? The answer to this question is yes, but with the caveat that certain classes of individuals, such as children and those in school are best protected by those whose charges they are, to wit the school itself.

It is clear by the tenor of the language used that at least through the end of the Fifties, the courts were to give wide latitude

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<sup>40</sup> Theodore C. Stamatakos, Note, *The Doctrine of In Loco Parentis, Tort Liability and the Student-College Relationship*, 65 IND. L. J. 471, 474 (1990).

<sup>41</sup> *Dehaan v. Brandeis Univ.*, 150 F. Supp. 626, 627 (D. Mass. 1957) (emphasis added).

<sup>42</sup> *Id.* (emphasis added).

to the school system in their protection and disciplining of children and it appears adults.

*D. The Sixties Brought an End to Business as Usual.*

The sixties ushered in an era of rebellion. It was a time where those in college began asserting rights which had long been denied to them. The courts up until this point had allowed *in loco parentis* to extend throughout the school system and even into graduate school.<sup>43</sup> Therefore, it would take some type of societal paradigm shift to cause the court system to look at schools in a different and maybe with a more critical eye as it applied to those with whom they were entrusted. A recent Article in US News and World Reports outlined the reason for that shift thusly:

“During the course of the Sixties, “everything changed,” says Democratic pollster Geoff Garin, who was born in 1953 and came of age in the Sixties. “It was much different in the Sixties compared to what it meant to be growing up in the Fifties.” He points to the movement for women’s rights, civil rights for blacks, an increase in tolerance for differences and diversity, and technological breakthroughs among the most important trends of the decade. “The sky literally became the limit in terms of what was possible technologically,” he says. There was affluence on an unprecedented scale for most Americans but also a rising sense of social conscience based on the idea that millions of people of color and other disadvantaged groups were being left behind.”<sup>44</sup>

As that social conscience grew so too did the courts feelings that maybe the time has arrived to look more closely at *in loco parentis*. The scope of the review was not that the concept should be removed entirely, but rather that some limits might now be in order. Social change and normality was in flux and the courts appeared cognizant of the issue.

The college student seemed to be at the epicenter of that flux. After all, they were predominantly adults who were being placed

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

<sup>44</sup> Kenneth T. Walsh, *The 1960s: A Decade of Promise and Heartbreak*, U.S. NEWS & WORLD REPORT (Mar. 9, 2010), <http://www.usnews.com/news/articles/2010/03/09/the-1960s-a-decade-of-promise-and-heartbreak?page=2>.

under the auspices of a legal construct that of, *in loco parentis*, was better suited to minors.

Tom Hayden an activist of the day expressed the tenor of college and university students in this way: “We are the people of this generation bred in at least modest comfort, housed now in universities, looking uncomfortably to the world we inherit.”<sup>45</sup> The University student no longer wanted to be molded or shaped, by a school administration as they were beholden to no one. They no longer needed parental supervision. They wanted to be set free from the norms of yesterday.<sup>46</sup> Students needed and found a way to demonstrate their independence and individuality.

Visible signs of their opposition to traditional society were hard to ignore. Highly distinctive dress marked the first obvious difference in the young’s appearance: blue jeans (not the designer type of today; rather the faded, sometimes dirty, patched and bell-bottomed type) brightly-colored and often embroidered shirts, love beads, head bands, arm bands, fringed vests, American Indian designs on leather clothing, hand-made sandals were some of the characteristics of the new generations style. Hair worn long on men and natural on women (straight, curly or frizzy, but never rolled in curlers and definitely not bouffant :). If other people lived separately, the new generation lived in communes. If others worked for large corporations with massively complex technology, the new generation worked alone making things by hand. If others drank alcohol and made marijuana illegal, the new generation denounced alcohol and smoked pot.<sup>47</sup>

### III. SHIFTING SANDS

The societal furor began by students at the college level asserting the constitutional rights which had a profound influence

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<sup>45</sup> Kenneth T. Walsh, *The 1960s: Polarization, Cynicism, and the Youth Rebellion*, U.S. NEWS & WORLD REPORT (Mar. 12, 2010), <http://www.usnews.com/news/articles/2010/03/12/the-1960s-polarization-cynicism-and-the-youth-rebellionredirect>.

<sup>46</sup> Originally published in the Berkeley Journal of Entertainment and Sports Law Volume 6 Page 5 (2017)

<sup>47</sup> Linda Churney, *Student Protest in the 1960s*, YALE-NEW HAVEN TEACHERS INSTITUTE, <http://www.yale.edu/ynhti/curriculum/units/1979/2/79.02.03.x.html> (last visited Aug. 2, 2016).

on how the courts viewed the action of colleges and universities as it applied to *in loco parentis*. The myriad of suits brought by college and University students across the country necessitated the courts taking a hard look at the long revered *in loco parentis*.

A. *A Death and A Distinction, the Fall of In Loco Parentis?*

As students' suits began to flourish with college and university students proclaiming their constitutional rights, the courts began to view these individuals as what they were, men and women of majority. They were no longer children. They did not need protecting in the broadest sense. They deserved respect.

Yet despite this judicial respect, Universities still tried to rein in the authority and freedom of students to express themselves. In 1968 a group of students at the University of Colorado were involved in a student demonstration that blocked access to various University facilities. Because of the student's actions they were dismissed from the University.<sup>48</sup>

The students fought that expulsion in court and though ultimately losing the suit the courts discussion of *in loco parentis* exhibit the court's feelings despite their ultimate decision. The appeals court said:

We agree with the students that the doctrine of 'In Loco Parentis' is no longer tenable in a university community; and we believe that there is a trend to reject the authority of university officials to regulate "off-campus" activity of students. However, that is not to say that conduct disruptive of good order on the campus should not properly lead to disciplinary action.<sup>49</sup>

So, here in 1968, not only do we have a court flatly rejecting *in loco parentis* in at least one situation i.e. that of off campus activity, we also have the court stating outright that "In Loco Parentis' is no longer tenable in a university community."<sup>50</sup> They did not go so far as to say blocking University access was allowable but, one would not have expected that.

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<sup>48</sup> Originally published in the Berkeley Journal of Entertainment and Sports Law Volume 6 Page 6 (2017)

<sup>49</sup> *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968).

<sup>50</sup> *Id.*

This dictum, regarding *in loco parentis*, flies directly in the face of the case against Brandies University from 1957 where the court said that, “The court is in a poor position indeed to substitute its judgment for that of the university, particularly in this case which involves a graduate **student** enrolled in a very small department where the major part of instruction is given on an individual and personal basis.”<sup>51</sup>

Apparently ten years is sufficient time, coupled with University student uprisings for the courts to indicate that maybe unfettered use of *in loco parentis* may not be such a good idea.

Also, a year earlier in 1967 in California, students were expelled for engaging in an on-campus protest. Though the expulsion was upheld, the court made several important points which show the vastness of the change occurring nationwide. The court acknowledged that students do have a right of free speech and that universities cannot in an unbridled fashion curtail that speech.<sup>52</sup> They said, “Unquestionably, the achievement of the University’s educational goals would preclude regulations unduly restricting the freedom of students to express themselves.”<sup>53</sup> Then the court clarified what restrictions it would allow:<sup>54</sup>

Broadly stated, the function of the University is to impart learning and to advance the boundaries of knowledge. This carries with it the administrative responsibility to control and regulate that conduct and behavior of the students which tends to impede, obstruct or threaten the achievements of its educational goals. Thus, the University has the power to formulate and enforce rules of student conduct that are appropriate and necessary to the maintenance of order and propriety, considering the accepted norms of social behavior in the community, where such rules are reasonably necessary to further the University’s educational goals.<sup>55</sup>

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<sup>51</sup> *Supra* note 39.

<sup>52</sup> Originally published in the Berkeley Journal of Entertainment and Sports Law Volume 6 Page 6 (2017)

<sup>53</sup> *Goldberg v. Regents of Univ. of Cal.*, 248 Cal.App.2d 867, 879 (1967).

<sup>54</sup> Originally published in the Berkeley Journal of Entertainment and Sports Law Volume 6 Page 6 (2017)

<sup>55</sup> See footnote 53 at 879.

What a leap the courts have made. They began at a place where parental rights as bestowed upon educational institutions should not be challenged or questioned. Now, they are allowing those students to express their constitutional rights in potential opposition to desires of the educational facility which had used its power of *in loco parentis*.

Again in 1968, the Federal District Court in *Soglin v. Kauffman* formalized the concept that student's constitutional rights overrode *in loco parentis*. The *Soglin* case involved students being expelled from the University without having a hearing or being told the reasons for their expulsions.<sup>56</sup> The Federal Court acknowledged that historically universities had been given wide latitude in disciplinary proceedings against students but saw that the relationship between students and universities had evolved.<sup>57</sup>

Underlying these developments in the relationship of academic institutions to the courts has been a profound shift in the nature of American schools and colleges and universities and in the relationships between younger and older people. These changes seldom have been articulated in judicial decisions but they are increasingly reflected there. The facts of life have long since undermined the concepts, such as *in loco parentis*, which have been invoked historically for conferring upon university authorities' virtually limitless disciplinary discretion.<sup>58</sup>

The court in *Soglin* stated that the Universities actions cannot take place without consideration of the Bill Of Rights. Though student's constitutional rights were normally enforced outside of the University environment, it was now time for them to awaken even in the mist of *in loco parentis*.<sup>59</sup> The court acknowledged that these students were individuals and as such were entitled to the protection of their constitutional rights. The court further stated that no longer did we need to treat them as children with a need to be protected.<sup>60</sup>

The case of *Soglin*, contains language which bears great influence on the course and application of *in loco parentis* both

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<sup>56</sup> Originally published in the Berkeley Journal of Entertainment and Sports Law Volume 6 Page 7 (2017)

<sup>57</sup> *Soglin v. Kauffman*, 295 F. Supp. 978, 986 (W.D. Wis. 1968).

<sup>58</sup> *Id.* at 988.

<sup>59</sup> *Id.* at 989.

<sup>60</sup> *Id.*

generally and how it will be applied to the grade school environment. The case itself posits three important premises which bear on the secondary school relationship between schools and their charges. First, it entertains that *in loco parentis* is not a cart blanche method for schools, be the secondary or University level to do whatever they want, as they stand in substitute of parent. Secondly, constitutional rights take precedence over *in loco parentis* in at least the university setting. In fact as to universities, *in loco parentis* has no place.<sup>61</sup> Thirdly, the case points to the fact that secondary students need to be protected a fact which may or may not terminate upon entrance to college or university.<sup>62</sup> Keep in mind that this court was looking at all of the judicial turmoil around them surrounding college students and then making broad brush statements. I think that most of us can agree that under other legal theories the duty to protect college students does exist. But it is that precept that children need to be protected, that I find so alluring. Protected to what extent? Do secondary students have the same constitutional rights as college students? Is *in loco parentis* still alive at the secondary level?

### B. *In Loco Parentis* hangs on in the Secondary Schools

We can see from the discussions above that the Sixties had a profound impact on colleges and universities visa vie *in loco parentis*. That seismic level shift did not go unnoticed as it applied to secondary schools. But, there were other elements in the mix which on occasion colored the outcome. A case was heard in Illinois in 1972 about a boy named Raymond Merrill. He was 12 years old and a 7th grade student at a parochial school in Wadsworth, Illinois, who sent by his teacher to a room to cut lengths of wire from a coil to be used for making sculptures in art class. While doing so he was struck in the left eye by the end of the wire on the coil with the result of loss of vision in that eye.<sup>63</sup>

Applicable to this case, in 1965, the Illinois legislature passed a statute which codified the concepts of *in loco parentis*. "In all

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Merrill v. Catholic Bishop*, 290 N.E.2d 259, 260 (Ill. App. Ct. 1972).

matters relating to the discipline in and conduct of the schools and the school children, they stand in the relation of parents and guardians to the pupils. This relationship shall extend to all activities connected with the school program and may be exercised at any time for the safety and supervision of the pupils in the absence of their parents or guardians.”<sup>64</sup>

The court in reaching its decision to side with Catholic Bishop School cited a prior case involving injury to an eight year-old who was kicked in the head by a fellow student. The child suffered permanent injury.

In *Woodman v. Litchfield Community School Dist. No. 12*, the court, in referring to section 24-24 said:

This statutory enactment would protect a teacher from liability for mere negligence in supervision or maintaining discipline because of the status conferred; that of a parent or guardian in relation to all the pupils in the classroom. No liability would attach to a parent or one having the relation of parent absent an event constituting willful or wanton conduct.”<sup>65</sup>

Both of these cases occurred in or around the time of college and university change. They both reiterated that schools stood as substitute parents for the discipline and protection of the children in their charge.<sup>66</sup> Yet, both cases held for the schools despite severe injury to the children while under the supervision of the schools. In one case the student lost an eye and in the other the child suffered brain damage. Despite these injuries, they quoted statutory language which mirrored *in loco parentis* and additionally stated that the schools would only be liable if their conduct amounted to willful and wanton conduct.

This retention of *in loco parentis* while at the same time raising the bar for liability to willful and wanton, is reminiscent of the Florida Supreme Court case from 1927:

“As to mental training, moral and *physical discipline*, and welfare of the pupils, college authorities stand in loco parentis and in their discretion may make any regulation for their government which a parent could make for the same purpose,

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<sup>64</sup> *Id.* (quoting ILL. REV. STAT. 1965, ch. 122, § 24).

<sup>65</sup> *Merrill*, 290 N.E.2d at 260.

<sup>66</sup> *Id.*

and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.”<sup>67</sup>

Thus while throughout many parts of the country, the rights of students were being broadened and strengthened, in other parts such as the aforementioned Illinois this was not the case. States which followed Illinois were loath to interfere in the actions of a surrogate parent, i.e. the school, even if that lack of supervision caused the loss of an eye and/or brain damage to a student in their charge..

*C. What is it that makes the court view the status of the child in the way it does?*

One can see that that there might be sympathy for an actual parent who through mere negligence caused injury. But here it is an institution that stands *in loco parentis*. Their relationship with the child is transitory. A school may have its student under its charge for a certain time and then it is over. A parent retains in their mistakes made with their child for life. The dissatisfaction with *in loco parentis* becomes apparent.

As the decade moved into the 1980’s a subtle shift began to occur. Some courts across the country began to find that broad protections of governmental immunity or protection under the guise of *in loco parentis* were no longer applicable.

For example, Bruce Lawrence was a student at Dry Prong High School. At the time of the accident young Lawrence, age 14, was attending an agriculture class wherein the students were learning welding. Bruce while using a power saw with its protective guard removed, chopped off some of his fingers. The instructor for the class had left the room as he had done many times before leaving the class unsupervised. Evidence was presented at trial that the students were instructed not to use the power saw.<sup>68</sup>The court found:

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<sup>67</sup> John B. Stetson Univ. v. Hunt, 102 So. 637, 640 (Fla. 1924).

<sup>68</sup> Lawrence v. Grant Parish School Bd., 409 So. 2d 1316, 1318 (La. Ct. App. 1982)

“The law is well settled that in order for a school board to be liable it must have had actual knowledge or constructive knowledge of a condition unreasonably dangerous to the children under its supervision. The school board had actual knowledge of the existence of the saw, it ordered its storage. The record shows that it knew of the dangerous condition in which the saw was stored. It knew young children were present in this class daily, and, therefore, owed a duty to exercise a greater degree of care towards these students. . Despite the duty, the saw was stored with a blade, without a safety guard, in an operative condition in a classroom in which students were attending. These actions by the school board constituted a breach of its duty to the minor which was a cause of his injury.”<sup>69</sup>

The appeals court did not find the student contributorily negligent, nor did they offer the school any unbridled protection. In fact they commented on what many might feel are common sense understandings of youth. The court said, “A 14 year old boy is certainly capable of contributory negligence. However, the application of the doctrine is not a mechanical rule which can be applied to determine the capability of a child to observe and avoid danger.”<sup>70</sup>

Note that ten years have passed since the Illinois cases and the Louisiana courts above have shifted the burden from the student proving that the schools were willful and wanton in their conduct to the schools showing that the student’s action needed for a defense of contributory negligence must be that the student had gross disregard of his own safety, requiring that he know and perceive of the danger. In the case above, the Louisiana court further placed a greater burden of protecting the students on the shop teacher and by virtue of *respondeat superior*, the school board.<sup>71</sup>

Bruce Lawrence’s only wrong was to use a saw he was told not to use. This simple disobedience does not constitute contributory negligence. The duty of the School Board encompassed acts such as those of Bruce Lawrence and his classmate. It is foreseeable that

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<sup>69</sup> *Id.* at 1318-19.

<sup>70</sup> *Id.* at 1320.

<sup>71</sup> *Id.* at 1319.

kids will do things they are told not to do. The School Board owed a duty to all the students not to store a dangerous power saw in an area that was easily accessible to the students. *Prier v. Horace Mann Insurance Company*, supra. The School Board knew or should have known that someone would attempt to use the saw as the plaintiff did.<sup>72</sup>

This case demonstrates a movement to protecting children from injury with less reliance on the schools broad authority under *in loco parentis* or under public school immunity. In 1972, the courts seemed reticent to simply give extreme deference to schools in the discipline and supervision. But, in the 1980's, the courts are now looking more at the welfare of the children.

In Florida in 1984, a freshman who was playing football brought an appeal from a directed verdict for defendant (the school board) on the issue of tort liability in a case arising out of an injury resulting from a football drill.<sup>73</sup> In this case the student freshman was participating in a football training exercise which involved contact with another player despite the fact that he was not issued a helmet and the player he was training with was.<sup>74</sup> The appellant's face collided with the lineman's helmet. There also was testimony that the appellant's hands slipped off the lineman's shoulder pads before the impact. The appellant suffered facial injuries and his front teeth were shattered. Appellant presented expert testimony to the effect that no player should be permitted to participate in a drill like this without a helmet.<sup>75</sup> The appeals court said:

"The school board in the instant case owed a duty to properly supervise the activity, which was an approved school activity and one in which the school's employees had the authority to control the behavior of the students.<sup>[1]</sup> Regarding school athletic activities, it has generally been held that:

"The duty owed an athlete takes the form of *giving adequate instruction* in the activity, *supplying proper equipment*, making a reasonable selection or matching of

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<sup>72</sup> *Id.* at 1320.

<sup>73</sup> *Leahy v. School Bd. of Hernando County*, 450 So. 2d 883 (Fla. Dist. Ct. App. 1984)

<sup>74</sup> *Id.* at 885.

<sup>75</sup> *Id.*

participants, *providing nonnegligent supervision* of the particular contest, and taking proper post-injury procedures to protect against aggravation of the injury.”<sup>76</sup>

The court, again made statements which many reasonable people might feel are self-evident, i.e. that adequate instruction was given, which here it was not, that proper equipment be given, again here we have a contact drill where one participant has a helmet and the other does not. Lastly, the court indicated that adequate supervision need be given. They also concluded their discussion with something which today may not be politically correct to say aloud, but which apparently the court had no hesitancy to say which was:

“[W]e should not close our eyes to the fact that... boys of seventeen and eighteen years of age, particularly in groups where the herd instinct and competitive spirit tend naturally to relax vigilance, are not accustomed to exercise the same amount of care for their own safety as persons of more mature years.” Recognizing that a principal task of supervisors is to anticipate and curb rash student behavior, our courts have often held that a failure to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student may constitute negligence.”<sup>77</sup>

So, here we have it. We began in 1972 where a 12 year old could lose an eye while participating in a school activity where the school was not found at fault to a place where in a 1984 court, a high school freshman presumably of more sense than a 12 year old who had his teeth smashed out in a football exercise, potentially at fault for negligent supervision.

I believe the freedom now enjoyed by College and University Students as a result of their protest from the 60's and early 70's made society examine the school student dynamic more closely. Things which were taken as a given in the past such as school prerogative as to discipline and safety, were being re-evaluated. That review of the student school relationship on the college level, naturally led to a similar review of how secondary students were being protected. It may also be worthwhile to consider that some of

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 886.

the participants in student protests in the 60's may now have children of their own in secondary schools, and while students of college age certainly should deserve the full measure of their constitutional rights being protected, this same group may now feel that their own children deserve being protected in a more general sense as well.

*D. But What about Governmental Immunity?*

Despite the shift in some quarters of the country to lessen the protections granted to schools, in other situations governmental immunity still raised its protective shield, regardless of the injury involved.

In Michigan, as part of a school contest, Teri Eichorn a high school senior attending Lamphere High School in Madison Heights, along with others, built a homecoming float.<sup>78</sup> The theme for the float was Snoopy and the Red Barron where Ms. Eichorn was to be Snoopy Riding on the Float.<sup>79</sup> These floats were part of a school competition where students were to design and build their respective floats.<sup>80</sup> To insure safety and compliance with the competition rules the assistant principal and the class sponsor each visited the homes where the floats were being constructed prior to the parade<sup>81</sup> They would again be inspected just prior to the parade by the school's assistant principal Mr. Kline<sup>82</sup>

The following day when the float was transported to the staging area, a police officer asked all people on the float to leave the float during its transport.<sup>83</sup> Everyone got off the float save Ms. Eichorn who was dressed in a snoopy costume and sat inside the float's dog house.<sup>84</sup> As the float rounded a turn being pulled by a truck, the dog house fell off the float with Ms. Eichorn inside. She sustained grave injury to her head and died as a result thereafter.<sup>85</sup>

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<sup>78</sup> Eichorn v. Lamphere Sch. Dist., 421 N.W.2d 230, 232 (Mich. App. 1988).

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 232-3.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

The parents therein sued the school. At the district court level, the Eichorns lost against the school district and appealed.

Despite the close involvement of the school district in the injury and the severity of the injury, the appellate court found against the Eichorns, citing a 1984 Michigan Supreme Court case *Ross v Consumers Power Co.* Quoting from *Ross* the court said:

“Under the rules set out in *Ross*, governmental agencies, such as the Lamphere School District herein, are immune from tort liability when they are engaged in the exercise or discharge of a governmental function. The term “governmental function,” especially when viewed in the context of “the four narrowly drawn statutory exceptions,” is to be interpreted in a broad manner. Thus, a governmental function is any activity “which is expressly or impliedly mandated or authorized by constitution, statute, or other law.”<sup>86</sup>

The exceptions quoted in *Ross* were injuries from unclear highways, negligent operation of a government motor vehicle, dangerous or defective condition in a government building, and the commission of an act while performing a proprietary function.<sup>87</sup> Here, we have none of those exceptions present and the court indicated that the functions performed by the vice principal where decision making functions which fall under the protections of governmental immunity rather than ministerial functions where immunity might fail.<sup>88</sup> The distinction between discretionary functions (those protected) and ministerial functions (those not being protected) are quoted by the court in *Ross*.

The Michigan Supreme Court emphasized that, in a nutshell, the distinction between “discretionary” acts, for which immunity is available, and “ministerial” acts, for which liability exists, is that

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<sup>86</sup> *Id.* at 234.

<sup>87</sup> *Id.* at FN 6 (“The four categories of activity for which tort liability may be imposed, despite the general rule that state and local governmental agencies enjoy the cloak of immunity, include bodily injury and property damage arising out of the failure to keep highways in reasonable repair, MCL 691.1402; MSA 3.996(102); the negligent operation of a government-owned motor vehicle by an agency’s officer, agent or employee; MCL 691.1405; MSA 3.996(105); the dangerous or defective conditions in public buildings under the agency’s control, MCL 691.1406; MSA 3.996(106); and the commission of an act while engaged in a proprietary function, MCL 691.1413; MSA 3.996(113). See *Ross*, *supra*, pp 593-594.”).

<sup>88</sup> *Id.* at 236.

“the former involves significant decision-making, while the latter involves the execution of a decision and might entail some minor decision-making.”<sup>89</sup>

Despite what seems to be a reasonable distinction the appellate court viewed the principal’s duties as discretionary as opposed to ministerial:

“Hadden established a program which provided little or no supervision over the construction of homecoming floats by student classes at Lamphere High School. This decision apparently reflected Hadden’s assessment regarding the best method of realizing the fulfillment of the purposes underlying the float-making portion of the homecoming program. As such, it involved decision-making and not the mere execution of a decision. Moreover, if plaintiff’s allegation that Hadden negligently appointed Catherine Maxwell as the supervisor of the float project were established, immunity would still protect Hadden since the permissible hiring of personnel constitutes a discretionary act.”<sup>90</sup>

The court justifies its finding of immunity of Principal Hadden and the school board on the idea that because Principal Hadden chose not to properly supervise the activity of homecoming float construction, with the addition of choosing inappropriate persons to verify the construction of the float, that this improper action or inaction constitutes a decision and not mere execution of a decision. Therefore it is not a ministerial function.

The court’s logic is somewhat self-severing and flawed. It decides to find for the school board preserving a long tradition of governmental immunity and then bolsters that decision with poor logic. Their argument is that inaction or inappropriate action of a governmental person or body is a conscious choice and therefore should be protected by governmental immunity. Thus, if you plan poorly or not at all, this appellate court will call it a decisive action based on a conscious decision made and therefore protected under governmental immunity.

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.*

The conclusion of the court that the appropriate finding is one of governmental immunity seems strained when juxtaposed with the death of a high school senior. The death may have been unforeseen, or an accident or possibly negligent, but to absolve an entire school system for the death of a child during an activity which they set up seems grossly unfair. The conscience of the court is missing that small voice within them saying that what happened is wrong was absent. Is there no justice for the Teri, or does the court include itself in the ‘just us’ of the school district? To quote a famed philosopher Jiminy Cricket: “What’s a conscience! I’ll tell ya! A conscience is that small voice that people won’t listen to. That is just the trouble with the world today.”<sup>91</sup>

*E. Old English Tort Law May be a snare lying in wait for Secondary schools*

As schools began to feel the results of increasing scrutiny in the care of their charges, old English property law concepts, as to third party liability, may be lying in wait to add even more avenues for attacking the “*watchful eyes*” of the schools both public and private.

The Restatement (Third) of Torts, classifies third parties present on property into three major categories of trespasser, licensee, and invitee, with trespasser being further subdivided into child trespassers and adult trespassers.<sup>92</sup> A trespasser is one who intentionally and without consent or privilege enters another’s property.<sup>93</sup> An invitee is a person who has express or implied invitation to enter or use another’s premises, such as a business visitor or member of the public to whom the premises are held open. The occupier has a duty to inspect the premises and to warn the invitee of dangerous conditions.<sup>94</sup> A licensee is one, who has permission to enter or use another’s premises, but only for one’s own purposes and not for the occupier’s benefit.<sup>95</sup>

For the purposes of discerning potential liability of the schools for injury to children on the school grounds, we must first classify

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<sup>91</sup> PINOCCHIO (Walt Disney Productions 1940).

<sup>92</sup> RESTATEMENT (THIRD) OF TORTS § 51A (2009).

<sup>93</sup> BLACK’S LAW DICTIONARY (9th ed. 2009).

<sup>94</sup> BLACK’S LAW DICTIONARY (10th ed. 2014).

<sup>95</sup> *Id.*

the child into one of the three aforementioned groups. To put it another way, what is the legal status of secondary school children while they are attending school? Which of the three categories best suit the student's situation? I suggest that depending on the circumstance, their categorization might change. Say for example a student is engaged in practicing a school sport or activity on school property, but not when formal classes are in session. From a liability perspective, would it be better for the school to be treated as a trespasser?

The Restatement of Torts Second Section 333 states, "a land possessor does not owe a duty of reasonable care to a trespasser."<sup>96</sup> What if the trespasser is a child? Remember, these are secondary school children who are under the age of majority. Here, the Restatement of Torts Second (hereinafter Restatement) imposes on the landowner a reasonable duty of care.<sup>97</sup>

The Restatement Second having the child classified as a trespasser places many protective burdens upon the school such as eliminating a condition which the school knows or has reason to know will involve unreasonable risk of death or serious bodily injury to the child.<sup>98</sup> The school must also exercise reasonable care in protecting the child from dangers or by otherwise failing to protect them.<sup>99</sup>

What if they were invitees? Private schools are open for children to enter their programs and those children may only attend those schools upon invitation from the school. Is that a better position for the school to be in from a liability perspective? Unfortunately not, as stated by the Restatement: "A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger or will fail to protect themselves against it."<sup>100</sup>

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<sup>96</sup> RESTATEMENT (THIRD) OF TORTS § 51A (2009).

<sup>97</sup> RESTATEMENT (SECOND) OF TORTS § 339 (1977).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id. at § 341A*

Remember the statements made by the Florida Court of Appeals in 1984 as to the watchfulness and care of children. They said children are: “are not accustomed to exercise the same amount of care for their own safety as persons of more mature years”<sup>101</sup> When speaking of the vigilance of schools, the Appeals Court stated: “... a principal task of supervisors is to anticipate and curb rash student behavior.”<sup>102</sup>

For the protection of children, it would seem that private schools could seek no quarter under the guise of child trespassers or invitees under property law. Their burden is to protect the children in their care from even the children’s own folly.

Are public schools any the safer from suit? Individual state statutes have a great deal to do with the level of liability; but the Judge’s interpretation of that activity does as well.

In 1995, a student in California was working out in the Hamilton gym under the supervision of assistant gymnastics coach Louis Thomas. He was practicing a new maneuver on the high bar. While practicing this maneuver the student missed catching the bar, fell and landed on his neck. He was rendered quadriplegic.”<sup>103</sup>

During the District Court trial, the school board successfully asserted the defense of Governmental immunity using the California statute which extended Governmental immunity to students who were injured when participating in a “hazardous recreational activity” within the meaning of Gov. Code, § 831.7.<sup>104</sup>

The California Appeals Court reversed the decision by, “hazardous recreational activities” do not include school-sponsored extracurricular activities, under the supervision of school personnel. Nothing in § 831.7 or its history demonstrates a clear legislative intent to immunize school districts from liability resulting from negligent supervision of extracurricular activities in

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<sup>101</sup> Leahy v. School Bd. of Hernando County, 450 So. 2d 883 at 887 (Fla. Dist. Ct. App. 1984), “[W]e should not close our eyes to the fact that... boys of seventeen and eighteen years of age, particularly in groups where the herd instinct and competitive spirit tend naturally to relax vigilance, are not accustomed to exercise the same amount of care for their own safety as persons of more mature years.” Recognizing that a principal task of supervisors is to anticipate and curb rash student behavior, our courts have often held that a failure to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student may constitute negligence.”

<sup>102</sup> *Id.*

<sup>103</sup> Acosta v. L.A. Unified Sch. Dist., 31 Cal. App. 4th 471, 474 (1995).

<sup>104</sup> *Id.*

general or athletics in particular. Nor is such immunity conferred by necessary implication.”<sup>105</sup>

The California Appeals Court further explained that if it were to allow immunity from all school sponsored supervised activities then any and all sports engaged in by students would grant the school immunity from suit in the event of negligent supervision. This is clearly not the intention of the California Legislature.<sup>106</sup>

In 1988, a student was injured when his hand got caught in a milling machine that was being used in his high school shop class.<sup>107</sup> Despite the fact that the machine was not attached to the building, the Michigan Court allowed in testimony that the machine was sufficiently attached to the building to come under the public building exception under the Michigan’s governmental immunity statute.<sup>108</sup>

In the Mississippi Appeals Court case of *Delmont v. Harrison County Sch. Dist.*, when reviewing an injury sustained by a student who was injured when she tripped over a cheerleading mat while playing basketball in an aerobics class, the court indicated that a dangerous condition located on school property did not fall under the veil of governmental immunity.<sup>109</sup>

In both the Michigan and the Mississippi cases, the courts were utilizing property law concepts in their immunity and liability analysis. In Michigan, their state statute had an exception for defect building conditions and the court used the notion of a fixture, i.e. the milling machine though not attached, was part of the building and allowed recovery on the part of the student through the state’s exception to the immunity statute through a defective building condition.<sup>110</sup>

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<sup>105</sup> *Id.*

<sup>106</sup> *Id. at 477* (“If the term “hazardous recreational activity” is interpreted to include school sponsored and supervised activities, schools would be immune from liability for the negligent supervision of students engaged in virtually every extracurricular sport (e.g., football, basketball, baseball, gymnastics, soccer, wrestling), as well as activities which are often part of a school’s physical education program such as archery and trampolining. As we explain below, this would constitute a major revision of California law with respect to school district tort liability.”).

<sup>107</sup> *Velmer v. Baraga Area Schs.*, 424 N.W.2d 770 (1988).

<sup>108</sup> *Id.*

<sup>109</sup> *Delmont v. Harrison City. Sch. Dist.*, 944 So. 2d 131, 133 (Miss. App. 2006).

<sup>110</sup> *Supra* note 100.

In the Mississippi case the court followed the Restatement Second concept that a dangerous condition, which was known to the property owner (in this case the school), which caused injury, would impose liability on the school.<sup>111</sup>

*F. The Restatement of Torts Catches Up to Judicial Sentiment*

As time progressed more courts did not require proof of a special relationship for proof of liability on the part of schools, be they public or private. The Restatement of Torts Third evolved with the changing times as a result.<sup>112</sup>

Section 52 of the Restatement of Torts Third changed a long standing relationship by placing a greater burden on landowners and, as a consequence, schools.

Section 51 entitled General Duty of Landowners, superseded prior sections in the Restatement of Torts Second, which made separate categories of entrants onto land. The new section 51 stated:

Subject to Section 52 a land possessor who owes a duty of reasonable care to entrants on the land with regard to:

- (a) conduct by the land possessor that creates risks to entrants on the land;
- (b) artificial conditions on the land that pose risk to entrants on the land;
- (c) natural conditions on the land that pose risks to entrants on the land; and

other risks to entrants on the land where any of the affirmative duties provided in chapter 7 is applicable.<sup>113</sup>

Section 51 comment I acknowledges the duty of the landowner, in this instance schools, to discover dangerous conditions on the land and to eliminate or ameliorate them.<sup>114</sup> The commentators to the Restatement Third noted that in considering reasonable

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<sup>111</sup> RESTATEMENT (SECOND) OF TORTS § 343 (1965).

<sup>112</sup> RESTATEMENT (THIRD) OF TORTS § 51, cmt. a (2009).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at § 51, cmt. i.

conduct on the part of the landowner, things to be considered were the foreseeability and likeliness of the harm, the foreseeability and severity of any potential harm, and the burden on the landowner to eliminate or reduce the risk.<sup>115</sup> As a result of this change, the need of a special relationship for liability to attach need not be shown and students who are on the land of the school by invitation or statutory requirement might now assert that the dangerous condition to which they were exposed is the responsibility of the landowner to remove. This was clearly a raising of the bar of protection for people coming onto the land of another, and in this instance a public or private school. Thus, the Restatement Third advanced the idea that if an activity is sponsored by a school or controlled by a school that is indeed hazardous, then said activity will place upon the obligations to use due care in the safekeeping of its students.<sup>116</sup>

#### IV PRIVATE AND PUBLIC SCHOOL COMPLACENCY MAY LEAD TO THEIR OWN DOWNFALL

The exact beginning of organized high school football is unknown, but the earliest occurrence of youth football was in 1929 in Philadelphia.<sup>117</sup> The Junior Football League was formed to keep teenage boys busy in sports, rather than vandalizing a local factory. By 1933, the league included 16 teams and was renamed the Pop Warner Conference after Temple head coach Pop Warner. The National Federation of State High School Associations, formed in 1920 to govern high school sports, established the first official high school football rules in 1932.<sup>118</sup>

##### A. *What's Wrong with Football? I Played Football.*

Today, the concept of football as an all-American sport with the prestige and mystic surrounding it seems to transcend the reality of those engaged in its play. The first intercollegiate football

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<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at § 51 cmt. a.

<sup>117</sup> Natasha Puryear, *How Did Football Get Started in America?*, LIVESTRONG (Jul. 28, 2015) <http://www.livestrong.com/article/338693-how-did-football-get-started-in-america/>.

<sup>118</sup> *Id.*

contest was played on November 6th, 1869, at New Brunswick, New Jersey. Rutgers beat Princeton 6 goals to 4.<sup>119</sup> What may not be so well known is that the sport was rife with unparalleled brutality, so much that Columbia University, the third college to adopt the sport, threatened to ban the sport entirely if changes were not made.<sup>120</sup> The game of football was considered so dangerous that in 1905 President Theodore Roosevelt brought together the coaches of Harvard, Yale and Princeton and threatened to take federal action unless the schools found a way to make the game safer.<sup>121</sup> Public concerns over the games brutality lead to the creation of the NCAA in 1910, which added a rule-making component to the play that was clearly needed.<sup>122</sup>

While it is true that the NCAA has promulgated rules of play one might think that makes play safer. The real question is how much safer, and how many people are playing sports at a competitive level? Remember that in the late 1800's, people died while playing football. Any improvement over not dying might be considered progress despite there being significant physical injury.

From 1960 to today, the number of NCAA colleges and universities that offer football competitively has risen by 600% to 675 schools.<sup>123</sup> Additionally, there are over 891 colleges and universities that offer football scholarships of some sort. For those of limited financial means there is a tremendous impedes for high school students to attempt to garner those scholarships.<sup>124</sup> There are over 90,136 college students participating in football, between varsity, junior varsity and practice squads.<sup>125</sup> Yet, with the average cost of attending a private college at \$33,480 for 2016 -2017 and the

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<sup>119</sup> Robert M. Orus, *Introduction: A Brief History of College Football*, COLLEGE FOOTBALL POLL [http://www.collegefootballpoll.com/history\\_of\\_college\\_football.html](http://www.collegefootballpoll.com/history_of_college_football.html).

<sup>120</sup> *Id.*

<sup>121</sup> *The Impact of Concussions on High School Athletes: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. (2010).

<sup>122</sup> *The Impact of Concussions on High School Athletes: Hearing Before the H. Comm. on Educ. & Labor*, 111th Cong. (2010).

<sup>123</sup> NATIONAL FOOTBALL FOUNDATION, *Colleges and Universities Continue Adding Football Teams in 2014*, (July 16, 2014), <http://www.footballfoundation.org/tabid/567/Article/54835/Colleges-and-Universities-Continue-Adding-Football-Teams-in-2014.aspx>.

<sup>124</sup> SCHOLARSHIP STATS, *College Football & Scholarship Opportunities*, (last visited Aug. 5, 2016), <http://www.scholarshipstats.com/football.html>.

<sup>125</sup> *Id.*

average cost of in-state tuition being \$9,650 excluding room and board, there is tremendous pressure for many students to participate in sports in the hopes of getting a scholarship.<sup>126</sup>

According to a US News and World report article, there are over 7.6 million high school students who participate in sports of varying kinds.<sup>127</sup> Of that group, there are over 1.1 million students who play football.<sup>128</sup> To get a sense of what that number represents, CNS News reported that, “by themselves, the 1,083,308 high school boys who played football in the United States in the 2015 season outnumbered the boys and girls combined who played any other high school sport.”<sup>129</sup>

Given the large numbers of secondary students who are engaging in one sport or another, with football participation leading all sports is that participation a good thing or a bad thing?

### B. *It’s Only a Game, What’s the Harm?*

The worn phrase, “it’s only a game”, or “it’s not like they are playing professionally”, demonstrates our naiveté. Let us look at some statistics compiled by the National College Athletic Association (NCAA). In a recent study by the National Collegiate Athletic Association (NCAA) Injury Surveillance System (ISS), the information covered 16 sporting categories, which included: men’s baseball, men’s basketball, women’s basketball, women’s field hockey, men’s fall football, men’s spring football, men’s gymnastics, women’s gymnastics, men’s ice hockey, men’s lacrosse, women’s lacrosse, men’s soccer, women’s soccer, women’s softball, women’s volleyball, and men’s wrestling. Data collection for a 17th sport, women’s ice hockey, began in the 2000–2001 season.<sup>130</sup>

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<sup>126</sup> Trends in College Pricing 2016  
[https://trends.collegeboard.org/sites/default/files/2016-trends-college-pricing-web\\_1.pdf](https://trends.collegeboard.org/sites/default/files/2016-trends-college-pricing-web_1.pdf)

<sup>127</sup> National Federation of State High School Associations, *Company Brochure 2*  
<https://www.nfhs.org/media/885655/nfhs-company-brochure.pdf>.

<sup>128</sup> Terence P. Jeffrey, *1,085,272 Players: Football Remains No. 1 H.S. Sport in USA*, CNS NEWS (Aug. 26, 2016), <http://www.cnsnews.com/news/article/terence-p-jeffrey/1085272-players-football-remains-no-1-hs-sport-usa>.

<sup>129</sup> *Id.*

<sup>130</sup> Jennifer M. Hootman, PhD, et al., *Epidemiology of Collegiate Injuries for 15 Sports: Summary and Recommendations for Injury Prevention Initiatives*, 42 J. ATHLETIC TRAINING 311 (2007).

Based on the data collected, the annual average number of concussions suffered and reported between the 15 sports aforementioned was 3,753.<sup>131</sup> Football had the highest number of reported concussions (fall and spring combined,  $n = 5016$ , 55% of all concussions recorded), but women's ice hockey had the highest rate (0.91 injuries per 1000 A-Es, 95% CI = 0.71, 1.11; significantly higher than for all other sports).<sup>132</sup> This meant college football players suffered over 1,876 reported concussions per year, based on the NCAA study.

Presumably, this is not a bad figure considering how many players are involved in sporting activities. But is that really the correct takeaway? I would suggest the answer is a resounding no. The data presented when taking in context shows the fallacy of the result. The conclusion is based on there being 697 NCAA schools. The report states that there are 3,753 concussions yearly in all sports. Therefore, there are approximately 5.4 concussions suffered per school per year. Given the numbers of varsity sports teams, UCLA for example having 232 teams, having 5.4 concussions per year overall seems either amazingly lucky or rather doubtful. That numeric curiosity is borne out by the language used in the report. In the NCAA report, regarding injuries suffered by college athletes or concussions suffered by those athletes over the span of their investigation, the word "reported" was used 20 times in the context of the figures assembled. The implication of the use of this word so many times being that they are not commenting on how many injuries or concussions are unreported. Thus, the report while sounding very positive, does not give us the true picture of what is going on in sports.

A recent study by Harvard and Boston University, quoted in a 2014 ESPN article stated that:

"Despite years of education and growing public awareness about head injuries, college football players report having six suspected concussions and 21 so-called "dings" for every

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<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

diagnosed concussion, with offensive linemen being the least forthcoming to trainers and team personnel.”<sup>133</sup>

We can conclude from this Harvard/Boston University study that rather than there being 5.4 concussions university wide for all sports, and 2.6 concussions university-wide for football, the number is closer to sixteen concussions per academic year. The sixteen concussions per year are as deceptive as what is not reported in the 336 “dings” which players suffered.

Additionally, the Harvard/Boston University study broke down the football statistics by positions and found that offensive linemen reported significantly higher numbers of post impact symptoms than other positions.<sup>134</sup> These symptoms, which were reported as “dings”, included dizziness, headache, and “seeing stars.”<sup>135</sup> Despite these symptoms:

“Offensive linemen reported having returned to play while experiencing symptoms more frequently and participating in more full-contact practices than other groups. These findings suggest that offensive linemen, a position group that experiences frequent but low-magnitude head impacts, develop more post-impact symptoms than other playing positions, but do not report these symptoms as a concussion.”<sup>136</sup>

So what can we take away from this? It means that the number of concussions suffered by students may be much higher than we anticipate. The number of concussions suffered by college students only playing football is potentially much higher than 32 per year per school, and recall that there are ten times the numbers of high school students playing football.<sup>137</sup> The potential long-term effects

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<sup>133</sup> Tom Farley, *Study: 1 in 27 head injuries reported*, ESPN (Oct. 3, 2014), [http://espn.go.com/espn/otl/story/\\_id/11631357/study-says-26-27-potential-concussions-unreported-college-football](http://espn.go.com/espn/otl/story/_id/11631357/study-says-26-27-potential-concussions-unreported-college-football).

<sup>134</sup> Christine M. Baugh et al., *Frequency of head impact related outcomes by position in NCAA Division I collegiate football players*, JOURNAL OF NEUROTRAUMA, March 2015, at 2.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Terence P. Jeffrey, *1,085,272 Players: Football Remains No. 1 H.S. Sport in USA*, CNS NEWS (Aug. 26, 2016) <http://www.cnsnews.com/news/article/terence-p-jeffrey/1085272-players-football-remains-no-1-hs-sport-usa>.

on the students who suffer an undiagnosed concussion are severe. An undiagnosed concussion is problematic because athletes who sustain additional brain trauma while recovering from a previous injury are at risk of more severe neurologic consequences.<sup>138</sup> So if students are injured, why don't they report the problem to their coach or athletic trainer? Research suggests that student athletes fail to report concussive symptoms due to a variety of factors present in their athletic environment, such as whether making a report would let down their team or whether the injury is serious enough to even report.<sup>139</sup>

Another potential consideration for college football players is a scholarship based on their ability to play.

### *C. Concussions, the Myth and the Science*

Given the number of high-impact sports and the large percentage of student athletes who may be suffering concussions, understanding what a concussion is and why we should be afraid of them is vital.

A concussion is the shaking of the brain inside the skull that changes the alertness of the injured person. That change can be relatively mild. It can be profound. Both fall within the definition.<sup>140</sup>

Symptoms of a concussion fall into four major categories: somatic (headaches, nausea, vomiting, dizzy spells), emotional (sadness to the point of depression even suicide, nervousness, irritability), sleep disturbances (sleeping more or less than usual or trouble falling asleep), and cognitive (difficulty concentrating, troubles with memory feeling mentally slow or as if they are in a fog that will not lift).<sup>141</sup> As Doctor Robert Cantu said, "Rest is the hallmark of concussion therapy. The best we can do for the patient is to shut things down physically and cognitively."<sup>142</sup>

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<sup>138</sup> ROBERT CANTU, M.D. & MARK HYMAN, CONCUSSIONS AND OUR KIDS 4 (2013, Mariner Books). See also Originally published in the Berkeley Journal of Entertainment and Sports Law Volume 6 Page 3 et seq. (2017)

<sup>139</sup> *Id.* at 5.

<sup>140</sup> *Id.* at 2.

<sup>141</sup> *Id.* at 8.

<sup>142</sup> *Id.* at 10.

According to Dr. Cantu, a world renowned expert in the field and preeminent neurologist of Massachusetts's Emerson Hospital's Concussion Center, most concussions resolve in seven to ten days and athletes return to their normal activities in two weeks.<sup>143</sup> Unfortunately, twenty percent of concussions are post-concussion syndrome cases.<sup>144</sup> These are cases where the injury can last at least one month and can persist, with the patient experiencing unusually intense symptoms.<sup>145</sup> Dr. Cantu asserts that rest is the only effective therapy and sports should stop completely until a patient is symptom free.<sup>146</sup>

The difficulty surfaces when athletes lie about their symptomology in the hopes of returning to play. T.J. Cooney, a former football player for Catholic University, describes this well through his own experience. T.J. was raised to believe that football players were tough, nearly indestructible.<sup>147</sup> There were injuries which could not be played through but those were few and they did not happen to tough guys.<sup>148</sup> For nearly his entire playing career he thought that extreme headaches were part of the game.<sup>149</sup>

During his sophomore year T.J. suffered a concussion during practice, leaving him with a severe headache. He suffered two more concussion nine days later during the first half of a game.<sup>150</sup> He chose not to inform his coach of his difficulties, but during the second half of the game he collapsed, falling flat on his face.<sup>151</sup> It took eight months for him to recover from his injuries, though he will never have a full recovery.<sup>152</sup>

Further, there are numerous myths regarding concussions. Dr. Cantu highlights a few in his book, "Concussions and Our Kids," discussed below.<sup>153</sup>

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<sup>143</sup> *Id.* at 71.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 72.

<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 132.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 132.

<sup>152</sup> *Id.* at 133.

<sup>153</sup> *Id.* at 105.

“You can’t have a concussion without being hit on the head.”<sup>154</sup> However, many concussions do not occur as the result of a blow to the head. Rather, they are a result of the head experiencing rotational forces which impact the brain inside the skull or through accelerational forces which whip the head around bruising the brain inside the skull.<sup>155</sup>

“To have a concussion you need to be knocked unconscious.”<sup>156</sup> In fact, 95% of athletes who suffered concussions are not knocked unconscious.<sup>157</sup>

“Helmets prevent most concussions.”<sup>158</sup> It is true that a well-padded, well-constructed helmet worn properly will diffuse a direct hit to the helmet. It can even dramatically reduce the chances of bleeding of the brain and skull fractures. However, even the best helmets do not protect well against “off center” hits or slams to the body, which cause the head to whip from one side to another.<sup>159</sup> These violent motions of sudden acceleration or deceleration cause the brain to shake within the skull, potentially causing concussive damage to the brain.<sup>160</sup>

These long-held notions paired with an athlete’s desire to stay in the game can inadvertently reinforce remaining silent because spotting the occurrence of a concussion during a game of practice can be difficult. In a 2010 study of hockey players from ages 16 to 21, researchers found that concussions were seven times more frequently than that observed by coaches, reported by athletes, or caught by physician observers.<sup>161</sup> During the study, researchers were told by students that coaches instructed the athletes to continue playing even when advised not to by medical professionals.<sup>162</sup> Taking that confession with a grain of salt, it is not unreasonable to speculate that coaches can experience external pressure, causing them to make errors in judgement.

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<sup>154</sup> *Id.*

<sup>155</sup> *Id.* at 106.

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 106.

<sup>158</sup> *Id.* at 107.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* at 16.

<sup>162</sup> *Id.* at 15.

Retention would not be high for coaches with multiple losing seasons as result of allowing star players to sit out as a result of a “ding.” Is a coach concerned about letting a player who received a “ding” play, even if it means losing the big game? If a College scout is at that big game and a child was sidelined, do you think his/her parents would complain and raise the issue with the coaches’ superiors? Lastly, and perhaps most disturbing, are there coaches that simply see their players as a means to an ends, i.e. prestige, fame, higher pay, going to heavily weight the potential health repercussions of letting the athlete continue playing?

*D. What is CTE? Is it Catching?*

Despite the many benefits of participating in sports, there are significant risks. What are those risks? We do know that total brain trauma (concussive and sub-concussive blows) are a risk factor in developing Chronic Traumatic Encephalopathy (CTE)<sup>163</sup>. The amount of blows, concussive or sub-concussive, to cause CTE is currently unknown.<sup>164</sup> A recent study has shown that CTE is a progressive degenerative brain disease, diagnosed in people who have been exposed to brain trauma over many years, including concussive and sub-concussive blows.<sup>165</sup> Physical manifestations of CTE include lose of critical brain functions (memory, impulse control) and a decline in their general ability to think and reason.<sup>166</sup>

CTE commonly manifests itself over many years. However, there are cases where the victims are much younger.<sup>167</sup> Nathan Stiles was a star high school athlete who was both a running back and a linebacker.<sup>168</sup> Nathan died during a game after he intercepted a pass and was tackled.<sup>169</sup> After the tackle and prior to his death, he told his coach “his head really hurt”.<sup>170</sup> He was taken out of the game, whereupon he collapsed and later died as a result of a

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<sup>163</sup> *Id.* at 13.

<sup>164</sup> *Id.*

<sup>165</sup> *Id.* at 90.

<sup>166</sup> *Id.* at 92.

<sup>167</sup> *Id.* at 96.

<sup>168</sup> *Id.* at 97

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at 97.

cerebral re-bleed from a concussive impact suffered earlier.<sup>171</sup> An autopsy performed after his death revealed the cause of death, but also revealed that Nathan was suffering from early stages of CTE.<sup>172</sup>

According to Dr. Cantu, CTE can only be diagnosed after death by postmortem neuropathological analysis, contrary to claims by some purveyors of preventative athletic equipment.<sup>173</sup> Therefore, the only way to know for sure that a patient is suffering the early stages of CTE is to dissect their brain.<sup>174</sup>

We have a situation where a potentially debilitating disease may lie in wait in our youth and young adults for decades with the ability to cripple their cognitive abilities. For the families of these injured people, how is a causal chain to be established for liability? Additionally, if proof of the person's mental and psychological decline is gradual, how do we assess when they are eligible for monetary damages? From the schools perspectives, should they be liable for a possibility of injury?

#### V. SECONDARY SCHOOLS ATHLETIC NUMBERS INCREASE TO DANGEROUS LEVELS.

High schools have had sports programs since the early 1900s.<sup>175</sup> The numbers of children participating at younger ages has also increased. Mandatory attendance in school originated in the State of Massachusetts in 1852.<sup>176</sup> As mandatory schooling advanced across the country today, the numbers of children participating in high school sponsored sports has reached the number of 7.6 million children.<sup>177</sup> If we look at younger children between the ages of 5 & 19, there is an additional 3 million children who participate in competitive soccer.<sup>178</sup>

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<sup>171</sup> *Id.*

<sup>172</sup> *Id.* at 98.

<sup>173</sup> Interview with Dr. Robert Cantu, at Emerson Hospital (August 3, 2017).

<sup>174</sup> *Id.*

<sup>175</sup> Robert Pruter, *The Rise of American High School Sports and the Search for Control: 1880-1930* (2013, Syracuse University Press).

<sup>176</sup> Hilary Levey Freidman, *When Did Competitive Sports Take Over American Childhood?*, *THE ATLANTIC*, (Sept. 20, 2013), <https://www.theatlantic.com/education/archive/2013/09/when-did-competitive-sports-take-over-american-childhood/279868/>.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

*A. The Cost of Those Numbers*

Sometimes the cost of an activity is hard to quantify. In business, these are called “hidden costs”. A hidden cost is an, “[e]xpense not normally included in the purchase price of an equipment or machine, such as for maintenance, supplies, training, and upgrades.”<sup>179</sup> Presumably high schools know the yearly cost to outfit their school teams. But do they realize the hidden cost? In the United States we spend on average twice as many tax dollars of high school athletes than we do on our high school math students.<sup>180</sup> This leaves us with two important questions. (1) What is the return on that investment for the school, and more importantly, (2) what is the return or possible cost to the student participants? How many of their student athletes have suffered multiple concussive and sub-concussive blows while participating in sports? How many of those shining athletes will be saddled with lifelong debilitating injury as a result of continued play?

A recent article entitled “National High School Sports-Related Injury Surveillance Study” published in the Journal of American Medical Association included a study showing that in 2005 approximately 9% of participants in high school sports had suffered a concussion during their year of play. The same study show that in 2014 that number had risen to 24%.<sup>181</sup> That is a 266% increase in the number of concussions suffered. What does this say about how we value our young athletes?

If we look at potential liability for the school’s activities, the Restatement of Torts Second has advocated long-term that landowners be responsible for activities which the landowner created but where the invitee might not be cognizant of the danger.<sup>182</sup> And now in the Restatements or Torts Third, a duty of

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<sup>179</sup> *Hidden Cost*, BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/hidden-cost.html> (last visited Aug. 5, 2016).

<sup>180</sup> Amanda Ripley, *The Case Against High-School Sports*, THE ATLANTIC, Oct. 2013, <https://www.theatlantic.com/magazine/archive/2013/10/the-case-against-high-school-sports/309447/>.

<sup>181</sup> National High School Sports-Related Injury Surveillance Study Table 13.5 Most Common Injury Diagnoses by Year, High School Sports-Related Injury Surveillance Study, US, 2005/06-2014/15 School Years, P111

<sup>182</sup> RESTATEMENT (SECOND) OF TORTS § 341A cmt. a (1977).

the landowner (the school) has now been broadened to include a duty to discover dangerous conditions on the land and to eliminate or ameliorate them.<sup>183</sup> The Restatement looks to the following areas when determining reasonable actions on the part of the landowner: the foreseeability and likeliness of the harm, the foreseeability and severity of any potential harm, as well as the burden required on the land possessor to eliminate or reduce the risk.<sup>184</sup>

High school and secondary schools provide the sporting equipment for their students to play in various sports. They supervise the sport itself with coaches, referees, and athletic trainers. They have even set aside large areas of land on the school campuses to be used exclusively by the students participating in these activities. It would seem laughable for a school to assert that they have no control over the field of battle or its participants. It is also unlikely that they will be able to assert that they are unaware of the potential for concussive injury in their various sporting activities, given the numerous available literature on topic and the knowledge that most institutions do some basic level of concussive testing. In fact, an advertisement for ImPact a concussive testing protocol, states that its product “is used by more than 7,400 high schools, 1,000 colleges and universities”<sup>185</sup>

If 7,400 schools are using a concussive testing protocol, how can schools deny that they are fostering an activity where a likely outcome for at least 24% of its participants is a concussion? If one in 4 are suffering a concussion, when will the numbers of injured students reach the tipping point?

Dr. Julian Bailes, one of the lead researchers of a new UCLA study, claims to have diagnosed CTE in living subjects.<sup>186</sup> If Dr. Julian’s testing procedure is validated, the landscape for law suits against schools public and private, secondary and high school will be forever changed. What are the compensatory damages for destroying a child’s future? What is the penalty for purposefully

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<sup>183</sup> RESTATEMENT (THIRD) OF TORTS § 51, cmt. i (2009).

<sup>184</sup> *Id.*

<sup>185</sup> IMPACT APPLICATIONS, INC., *About ImPACT Applications, Inc.*, <https://www.impacttest.com/about/> (last visited Aug. 5, 2016).

<sup>186</sup> Rick Westhead, *A possible breakthrough on testing CTE*, TSN (Feb. 19, 2015), <http://www.tsn.ca/a-possible-breakthrough-on-testing-cte-1.210725>. See also Originally published in the Berkeley Journal of Entertainment and Sports Law Volume 6 Page 3 et seq. (2017)

neglecting your duty to protect, educate, and make these children useful members of society?

Consider the position of the parent, the child, and the school in assessing when a child is injured. The school, by way of their coaching staff on the field of play, designing the practice of play, setting out the rules and regulations for play, is in the best position to determine the child's ability.

## VI. CONCLUSION

Considering the most recent statistics, what should schools do? Should they rely on the parents to make the decision to play sports even if it places the child at risk? Should they stand *in loco parentis* and do what is in the best interests of the child despite a parent's ignorance? And what if protecting the children hurts the schools chances of winning sporting championships ultimately diverts funds away from a given school?

It seems clear that if parents are not in a position to know that their child is in jeopardy or could be injured, it is up to the schools to take the lead, both ethically and legally. It is true that you are your brother's keeper. It is also true that the youngest of us who lack sufficient skills to protect themselves should be protected.

There are steps which can be taken today. Schools can also preform scholastic testing to preemptively notice a decline in the student's performance, hopefully detecting previously received concussions. There are systems available that can detect excessive G forces experienced on a body. For example, Fitguard by Force Impact technologies created wearable appliances to determine when concussive force has been sustained by an individual.<sup>187</sup> This system uses a mouth guard which transmits data to a receiver when a force is detected above a given threshold.<sup>188</sup> This is only one example of many possibilities.

Given the technology available to protect our children, and the research available to help schools make policy mandates regarding a child's ability to play, are we too proud or too blind? When we

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<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

destroy or mentally cripple our children, we are merely serving to aid in our own demise.

As stated by Nelson Mandela in 1995:

“Our children are the rock on which our future will be built, our greatest asset as a nation. They will be the leaders of our country, the creators of our national wealth who care for and protect our people.”<sup>189</sup> Will we squander our greatest resource and harm the children and youth we love?

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<sup>189</sup> Nelson Mandela, South African President, Address by President Nelson Mandela at the dedication of Qunu and Nkalane Schools (June 3, 1995).