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AN ANALYSIS OF BROWN v. NATIONAL FOOTBALL LEAGUE

DARRYL M. HALCOMB LEWIS*

I. INTRODUCTION.

On December 19, 1999, during a professional football game between the Cleveland Browns and the Jacksonville Jaguars, offensive tackle Orlando Brown suffered an injury when hit by a referee’s penalty marker.¹ More recently, Korey Stringer of the Minnesota Vikings died while participating in an August 1, 2001 preseason training camp.² These occurrences once again bring attention to participants’ rights to compensation for injury and death in con-

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1. Orlando Brown was a six-foot-seven, 350-pound offensive tackle for the Cleveland Browns. In 1998, Orlando Brown had signed a six-year $27 million free agent contract with the Cleveland Browns. See Tom Withers, Brown’s Brown Fails Physical, ASSOCIATED PRESS, June 2, 2000, available at 2000 WL 21989134. Brown was in the second year of that contract. See id. At the time of his injury, he had already collected a $7.5 million signing bonus. See id. He was released from the team in September 2000 for failure to pass the team’s physical examination. See id. Brown suffered an eye injury after being hit by a referee’s thrown penalty flag during a professional football game played between the Cleveland Browns and Jacksonville Jaguars on December 19, 1999. See id. “The Browns have never given an exact medical definition of what is wrong with [Orlando] Brown’s eye . . . [though he] . . . still has pain and occasionally suffers from ‘very quick and occasional white flashes’ [from] . . . trauma to the eye.” Id. Allegedly, “[t]he NFL instructed its referees to weight penalty flags with popcorn kernels. But the official who threw the flag that resulted in a career-ending injury to Orlando Brown used BBs instead, according to the lawyer for the former Cleveland Browns offensive lineman.” Alan Rubin, Ref Blamed For Eye Injury, N.Y. DAILY NEWS, Mar. 30, 2001, available at 2001 WL 17945647. However, there is no allegation in Brown’s petition of the referee altering the flag. Even if popcorn had been used, it is mere speculation that an injury nonetheless would have occurred had the object struck the plaintiff’s eye.

2. Korey Stringer played his entire professional football career with the Minnesota Vikings. See ASSOCIATED PRESS, Vikings’ Tackle Stringer Dies From Heatstroke, July 31, 2001, at http://espn.go.com/nfl/news/2001/0731/1233494.html. Stringer suffered his unfortunate and untimely death during the Vikings’ training conducted on the campus of Mankato State College in Mankato, Minnesota. See id. At the time this paper was written, neither the National Football League (“NFL”) nor the Minnesota Vikings have been sued by the Stringer’s estate. It may be anticipated, however, that at least one of the arguments advanced by Brown (negligent supervision), might be used by Stringer’s estate in his death. This paper does not highlight the Korey Stringer case. It can be anticipated that if this case should be filed, that Stringer’s estate would argue that the policies of the NFL contributed to his death. Further, an assumption-of-the-risk defense would be a certain response. It is herein suggested that similar legal theories would be advanced by Orlando Brown.

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nection with providing professional football services. These players most likely received benefits under their respective contracts, the collective bargaining agreement between the National Football League ("NFL") and the National Football League Players' Association ("NFLPA") and workers' compensation law. For strategic rea-


This paper focuses on the injury incurred by Brown. Certainly "services" include a player's performance at "regular" season game performances. However, it may also include preparatory events including pre-season training and games, and off-season physical exercising in preparation for the season. See Farren v. Balt. Ravens, Inc., 720 N.E.2d 590, 594 (Ohio 1998) (concluding that summary judgment inappropriate in determining whether unsigned player was employee when injured during off-season conditioning). A fortiori, Florida's workers' compensation exclusion for professional athletes was held applicable "at all times a player participates in training and other athletic endeavors required of him in his efforts to make the team roster, as long as the player is under contract and being compensated for his services during such training activity." Rudolph v. Miami Dolphins, Ltd., 447 So. 2d 284, 289 (Fla. 1983) (emphasis added).

4. Paragraph ten of the Standard NFL Player Contract provides:

Workers' Compensation. Any compensation paid to Player under this contract or under any collective bargaining agreement in existence during the term of this contract for a period during which he is entitled to workers' compensation benefits by reason of temporary total, permanent total, temporary partial, or permanent partial disability will be deemed an advance payment of workers' compensation benefits due Player and Club will be entitled to be reimbursed the amount of such payments out of any award of workers' compensation.

Under the collective bargaining agreement between the NFL Management Council and the NFLPA, a player is entitled to an injury protection benefit if he:
sons, however, Orlando Brown is suing the NFL, rather than the Cleveland Browns. This paper explores workers' compensation and traditional tort law as applied to a professional football player when a game-related injury is caused by a non-opponent participant. Depending on the theories advanced, these areas of law are

(a) if physically unable, because of a severe football injury in an NFL game or practice, to participate in all or part of his Club's last game of the season of injury . . ., (b) has undergone whatever reasonable and customary rehabilitation treatment his Club required of him during the off-season following the season of injury, and (c) has failed the pre-season physical examination given by the Club physician for the season following the season of injury because of such injury and as a result his Club . . . terminated his contract for the season following the season of injury.

Article XII (1), NFL-NFLPA Collective Bargaining Agreement.

The injury protection benefit is a one-time entitlement of fifty percent of his contract salary for the season following the season of injury, up to a maximum payment of . . . $175,000 in the 1994-96 League Years, $200,000 for 1997-99 League Years, $225,000 for the 2000-02 League Years, and to $250,000 for the 2003-04 League Years . . . such benefit shall be reduced by any salary guaranteed to the player for the season following the season of injury.

Most states do not differentiate professional athletes from other workers under their statutory workers' compensation schemes. Conversely, Florida and Massachusetts specifically exclude professional athletes from such coverage. See FLA. STAT. ANN., § 440.02(15)(c)(3) (West 1991); MASS. ANN. LAWS ch. 152 § (1)(4)(B) (Law. Co-op 1989). Texas law states that "[a] professional athlete employed under a contract for hire or a collective bargaining agreement who is entitled to benefits for medical care and weekly benefits that are equal to or greater than the benefits provided under this subtitle may not receive benefits under this subtitle . . . under [Texas' workers' compensation law]." TEX. LAB. CODE ANN. § 406.095 (a) (Vernon 2000). Other states offset workers' compensation benefits against wages. See, e.g., LA. REV. STAT. ANN. § 23:1225(D) (West Supp. 1997); MO. ANN. STAT. § 287.200 (West 1993); OHIO REV. CODE ANN. § 4123.45(C) (Anderson Supp. 1993). Palmer v. Kan. City Chiefs Football Club, Inc., 621 S.W.2d 350 (Mo. 1981), which held that injuries sustained during a professional football game were not compensable accidental injuries, appears to be legislatively repealed by the Missouri legislature. Rowe v. Balt. Colts, 454 A.2d 872 (Md. 1983), based on similar rationale as Palmer, seems to have comparable vitality.
a canyon and crevice of authority for Orlando Brown and those like him. Several factors illustrate the importance of this issue. Nearly seventy percent of those who play professional football will incur an injury requiring medical care or treatment. A NFL team is not required to expend continued medical care and treatment to an injured player beyond the duration of the injured player’s contract.

rev’d, 601 F.2d 516 (10th Cir. 1979) (explaining that professional football players assume the risk of game-related injuries). See supra note 1 and accompanying text for description of Orlando Brown’s injury.

Many cases and articles discuss the liability of players who negligently, intentionally or recklessly inflict injuries on an opponent during an athletic contest. See supra notes 3-4 and infra note 129. Some authority gives a sports official grounds to hold responsible a player whose negligence causes the official’s injury. See, e.g., Stewart v. D & R Welding Supply Co., 366 N.E.2d 1107, 1111 (Ill. 1977) (cause of action reinstated where umpire was injured by player who carelessly swung bat with rings on it between innings). But see, Dillard v. Little League Baseball, Inc., 390 N.Y.S.2d 735, 737-38 (1977) (holding that umpire injured during Little League Baseball game assumed the risk of injury). Some discussions even explore the liability of sports officials for judgment errors and arbitral failure to maintain a safe playing surface. See Darryll M. Halcomb Lewis & Frank S. Forbes, A Proposal For A Uniform Statute Regulating the Liability of Sports Officials for Errors Committed in Sports Contests, 39 DePaul L. Rev. 673, 682-707 (1990). However, the author has found no cases involving a sports official’s liability to a player for injuries sustained by an instrumentality under the control of the sports official. See id.

7. Workers’ compensation could be a two-edged sword for an injured professional football player. See Rudolph, 447 So. 2d at 288-92. In most states, although benefits are provided for work-related injuries, the exclusivity doctrine can prevent an employee from pursuing common-law remedies. See id. A worker may try to circumvent workers’ compensation coverage either because (1) its benefits are minuscule compared to common-law tort damages, or (2) although the injured player desires coverage, the status of a professional athlete subjects the injured player to statutory exclusion. See id. Accordingly, in one case, professional football players unsuccessfully argued that they were not professional-athlete-employees since they were injured trying to make the team. See id.

8. This prediction is an extrapolation of the results of an injury study conducted by the NFLPA. See William Nack, The Wrecking Yard, SPORTS ILLUSTRATED, May 7, 2001, at 60.

A 1990 Ball State study, commissioned by the NFLPA and covering the previous [fifty] years of league history, revealed that among 870 former players responding to a survey, [sixty-five percent] had suffered a “major injury” while playing - that is, an injury that either required surgery or forced them to miss at least eight games . . . . [A] leading orthopedic surgeon who has been operating on pro football players for almost [thirty] years, sees a correlation between the worsening of injuries and the size and power of the modern player . . . . [and] is witnessing the rise of a phenomenon that was almost unheard of only [fifteen] years ago. Id. at 60-61.

9. Paragraph 9 of the Standard NFL Player Contract states that “if Player is injured in the performance of his services under this contract . . . then Player will receive such medical and hospital care during the term of this contract as the Club physician may deem necessary, and will continue to receive his yearly salary for so long, during the season of injury only and for no subsequent period covered by this contract, as Player is physically unable to perform the services required of him by this contract because of such injury . . . .”
A player's contract is not renewed if he cannot pass the physical examination for the ensuing year(s). Of course, a player suffering a debilitating injury cannot successfully pass the team physical, and his salary expectations will be terminated along with the contract. Serious questions exist for players who are injured while trying to "make the team" or players who are injured in preparation for the upcoming season. It is debatable if these individuals are employees since they have not signed the aforementioned employment agreement. Workers' compensation benefits may be a final recourse to many professional football players. The League and the players have agreed that "[i]n any state where workers' compensation coverage is not compulsory, a Club will voluntarily obtain coverage under the compensation laws of that state or otherwise guarantee equivalent benefits to its players . . . ."

The sports article *The Wrecking Yard* typified the plight of many former professional football players. The article describes the post-career experiences of eight professional football legends.

10. "If an athlete is injured during the contract period the team will usually continue to pay salary and medical expenses for the remainder of the year; however, if the athlete cannot pass the following year's physical examination, the contract may be considered void and the athlete could end up paying medical expenses for a lifetime of chronic work-related physical problems." Frederic Pepe & Thomas P. Frerichs, *Injustice Uncovered? Workers' Compensation and the Professional Athlete*, in *Sports and the Law* 18 (Charles E. Quirk ed., 1996). See *supra* note 4 for specific provisions of the collective bargaining agreement.

11. See *supra* note 9 discussing the effect on an athlete's contract where the professional athlete is unable to play. Also, many states provide a dollar-for-dollar reduction of salary for the payments of workers' compensation. See *Dombrowski v. New Orleans Saints*, 764 So. 2d 980, 982 (La. 2000). See *supra* note 4 for a brief discussion of the various workers' compensation schemes.

12. See, e.g., *Rudolph*, 447 So. 2d at 289. See *supra* note 3 discussing pre-season and preparatory injuries under workers' compensation law.


14. See *id.* (holding summary judgment inappropriate in determining if unsigned player was employee when injured).

15. A revered legendary professional football player injured as a result of playing professional football for many years, "[Johnny] Unitas has demanded disability compensation from the league but says he has been turned down for various reasons, among them that he didn't apply by age fifty-five though his right hand didn't fail him until he was sixty - and that the league pays him a pension of $4,000 per month. The NFL adds that, in its opinion, Unitas is not 'totally and permanently disabled.'" *Nack*, *supra* note 8, at 66.


17. See *Nack*, *supra* note 8, at 60.

18. *Id.* The article discusses the miseries of former professional football greats and their duration in the NFL: Earl Campbell (1978-85), Harry Carson...
Summarily, these conditions included constant pain, inability to bend over, amputations, broken limbs, torn ligaments, headaches, memory loss, back spasms, tremors, achy and arthritic hands, knees and back, herniated and bulging disks, inability to walk long distances, replaced hips and knees, inability to use extremities and fused vertebrae. Add the eye injury of Orlando Brown and the sudden and unfortunate death of Korey Stringer to that list.

II. BROWN’S CASE UNDER WORKERS’ COMPENSATION LAW

In most states, disputes related to professional athletes’ injuries are resolved by the application of workers’ compensation principles. However, there is still an undercurrent of resistance to work-
ers’ compensation coverage because workers’ compensation is an expensive part of operating a professional athletic club. The majority of states appear to cover injuries sustained by professional athletes while participating in sporting events. Workers’ compensation law is triggered when an employee suffers an accidental injury which arises out of and in the course of the employment. Historically, workers’ compensation was the outgrowth of under Louisiana Workers’ compensation law, employer is entitled to dollar-for-dollar reimbursement for benefits provided to injured player); Rowe v. Balt. Colts, 454 A.2d 872, 878 (Md. 1983) (workers’ compensation benefits denied since injuries sustained in football game not considered accidental); Bolden v. Detroit Lions, Inc., 483 N.W.2d 673, 675 (Mich. 1992); Palmer v. Kan. City Chiefs Football Club, 621 S.W.2d 350, 356 (Mo. 1981) (denying workers’ compensation benefits because injury was “expected incident of the usual work task done in the usual way” of football game); Farren v. Balt. Ravens, Inc., 720 N.E.2d 590, 594 (Ohio 1998) (in determining employment status under Ohio workers’ compensation law, summary judgment improper where player was injured during off-season weightlifting exercise where player “had not signed with another team” and employer-club “had tendered a one-year contract”); Pittsburgh Steelers Sports, Inc. v. Workmen’s Comp. Appeal Bd., 604 A.2d 319, 322 (Pa. 1992) (holding advance injury protection payments in lieu of workers’ compensation, and not wages); Station v. Workmen’s Comp. Appeal Bd., 608 A.2d 625, 633 (Pa. 1992) (remanding grant of workers’ compensation to recompute injured professional football player’s average weekly wage); McGlasson v. Workmen’s Comp. Appeal Bd. (Philadelphia Eagles Football Club), 557 A.2d 841, 843 (Pa. Commw. 1989) (signing bonus not part of wages for workers’ compensation purposes).

23. Florida and Massachusetts bar professional athletes from workers’ compensation coverage. See FLA. STAT. ANN. § 440.02(15)(c)(3) (West 1991); MASS. ANN. LAWS ch. 152 § 1(3) (Law. Co-op. 1989). A recent effort by the California legislature was defeated. See Palmer, 621 S.W.2d at 357; Estate of Gross v. Three Rivers Inn, Inc., 706 N.E.2d 741, 741 (N.Y. 1998) (holding professional athlete’s injuries not compensable under workers’ compensation law because injuries not “accidental”).

The cost of workers’ compensation insurance can pose a barrier to entry or an inducement to exit the professional sports industry. In Arena Football League, Inc. v. Roemer, 9 F. Supp. 2d 889, 891 (N.D. Ill. 1998), two professional arena football teams threatened to “sit out the 1993 season if they could not obtain lower annual [workers’ compensation insurance] . . . .” The premiums for two arena teams, Tampa Bay Storm and Albany Firebirds, “[were] slated to be increased . . . from $60,000 to between $400,000 and $500,000 - and Albany’s . . . from $90,000 to $428,000.” See id.


The compensation law protects against injury the result of accident, that is: trauma from an unexpected or unforeseen event in the usual course of occupation . . . . That enactment simply does not contemplate that the deliberate collision between human bodies constitutes an accident or that injury in the usual course of such an occupation is caused by an unexpected event.
legislative intervention in a litigious feud between labor and industry. Before the advent of workers' compensation, injured workers sued their employers for damages under common-law negligence and intentional torts. Employers, in kind, defended with the traditional common law defenses of assumption of risk, contributory negligence and the fellow servant doctrines. This litigation was lengthy, costly, and with no guarantee of success by either litigant. As workers navigated the channels of common-law tort law, they often encountered the Sirens' fatal voices of assumption of

621 S.W.2d at 356; see also Neb. Rev. Stat. § 48-120 (Michie 1998) (stating that the employer is liable for all reasonable medical, surgical, and hospital services, including plastic surgery or reconstructive surgery, but not cosmetic surgery when the injury has caused disfigurement, appliances, supplies, prosthetic devices, and medicines as and when needed, which are required by the nature of the injury and which will relieve pain or promote and hasten the employee's restoration to health and employment, and includes damage to or destruction of artificial members, dental appliances, teeth, hearing aids, and eyeglasses, but, in the case of dental appliances, hearing aids, or eyeglasses, only if such damage or destruction resulted from an accident which also caused personal injury entitling the employee to compensation therefor for disability or treatment, subject to the approval of and regulation by the . . . Workers' Compensation Court, not to exceed the regular charge made for such services in similar cases). There are several theories defining the "arising out of the employment" requirement. Generally, however, if an injury results from risk factor associated with the employment, the injury is deemed to have arisen out of the employment. See generally Arthur Larson, Workmen's Compensation Law, § 3.00 (1991).

An injury is said to arise in the "course of the employment" when it takes place within the period of the employment, at a place where the employee reasonably may be, and while he is fulfilling his duties or engaged in doing something incidental thereto. See generally id. at § 12.00.

Orlando Brown does not allege that the National Football League is his employer. However, see supra note 9 addressing the employment status of player injured during off-season or while trying out for the team, or unsigned veterans.


27. See generally Dan B. Dobbs, The Law of Torts § 392, at 1097 (2000). "Nineteenth century employers owed a duty of care to . . . provide employees with a reasonably safe place in which to work, reasonably safe tools and appliances, warnings of dangers likely to be unknown to employees, a sufficient number of suitable fellow servants, and rules that would make work safe." Id.

28. See Priestly v. Fowler, 150 Eng. Rep. 1030 (Exch. 1837) (stating plaintiff knew of risks involved in working as defendant's assistant); Butterfield v. Forrester, 11 East 60 (K.B. 1809) (holding plaintiff was injured because he was not using ordinary care).

29. See Dobbs, supra note 27 § 392, at 1097. "[M]uch of the work around machinery was unavoidably dangerous, so that injuries occurred often enough even without provable fault. All these things plus the delay and uncertainty of compensation made life for the injured worker almost intolerably difficult . . . ." Id.

30. Assumption of risk, contributory negligence, and fellow-servant doctrines referred to as the "Three Wicked Sisters." See W. Page Keeton et al., Prosser and Keaton on the Law of Torts § 80, at 573 (5th ed. 1984). This mythological com-
risk, contributory negligence and fellow-servant doctrines. Those plaintiffs who successfully navigated those straits saddled industrial employers with huge jury awards.\textsuperscript{31} Both industry and labor were losers.\textsuperscript{32} State legislatures fashioned a system that took the quiver, shield and bow and arrows from both sides of the contention. With a certain genius, the laws mandated that workers could not sue their employers based on theories of negligence while employers were disabled from asserting the fellow-servant rule, assumption of risk, and contributory negligence as defenses.\textsuperscript{33} Instead, a system was devised for industrial injuries which guaranteed workers a quick, but limited recovery.\textsuperscript{34} This system assured employers a cap on their liability.\textsuperscript{35} With this legislative improvisation, labor and industry laid down their weapons.

The exclusivity doctrine prohibits common-law actions against an employer for work-related injuries.\textsuperscript{36} No such bar exists, however, when the plaintiff seeks remedies from non-employers, such

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parison demonstrates the dark fatal effect of these since-abrogated common-law doctrines. See \textit{id.}
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\textsuperscript{31} It is clear that the structure of workers' compensation systems "show a strong intent to limit significantly the employers' liabilities." DoBbs, \textit{supra} note 27, § 392 at 1098.

\textsuperscript{32} The implementation of the workers' compensation "has been most satisfactory in that injured employees receive immediate relief, a fruitful source of friction between employer and employee has been eliminated, . . . a tremendous amount of burden and expensive litigation has been eliminated, and a more harmonious relation between the employers and employees exists than was possible under the old system." Keeton, \textit{supra} note 30, at 573-74.

\textsuperscript{33} See \textit{id.}

\textsuperscript{34} The passage of workers' compensation acts [were] modeled upon the statute already in existence in Germany. Increasing agitation at last brought about the first statutes, in England in 1897, and in the United States, for government employees, in 1908. This was followed by the first state statute in New York in 1910. By 1921 all but a few of the American states had enacted such legislation. It is now in effect in all of the states, with Hawaii the last to fall into line in 1963. \textit{Id.} at 573.


\textsuperscript{36} The limitation on recovery is achieved through the concepts of "scheduled" injuries. See generally, Carlin & Fairman, \textit{supra} note 24.

\textsuperscript{37} \textit{See generally} Larson, \textit{supra} note 25, at § 100.03. "The exclusiveness rule relieves the employer [and its insurer] not only of common-law tort liability, but also of statutory liability under all state and federal statutes, as well as of liability in contract . . . for an injury covered by the compensation act." \textit{Id.}. Orlando Brown has not alleged that the NFL is his employer. However, the issue will be addressed \textit{infra}. See \textit{supra} note 9 addressing the employment status of players injured during the off-season, while trying out for the team, or unsigned veterans.
as third parties. Orlando Brown sues the NFL under the latter theory. For Brown to be successful under workers' compensation law, he must establish that Referee Jeff Triplette or the National Football League was his employer at the time of his injury. Workers' compensation is an injured employee's sole and exclusive remedy against the worker's employer. However, workers' compensation would permit an injured worker a common-law remedy against a responsible non-employer third party. The NFL was one such non-employer.

The contention by either party that the NFL was Orlando Brown's employer at the time of his injury is problematic, perhaps even dubious. Although not controlling, the NFL has unsuccessfully argued that it is a "single entity" for antitrust purposes. Instead, the court has held that "[t]he NFL teams are separate

37. See generally Larson, supra note 25, at § 110.00 (stating "[T]he class of persons amenable to third-party suit has been in most jurisdictions narrowed to exclude . . . co-employees and sometimes persons working on the same project, or an employer or insurer [possessing] a second legal persona creating independent duties . . . .").

38. Korey Stringer would be bound by these same postulates. Orlando Brown, in his petition, does not seek workers' compensation benefits, nor does he allege that the NFL is his employer. Instead, he asserts that "[the NFL] is jointly and severally liable for all of plaintiff's damages, including but not limited to plaintiff's non-economic loss . . . by reason of the fact that [the NFL] is vicariously liable for the negligent acts and omissions of others [e.g., Referee Jeff Triplette] who caused or contributed to the plaintiff's damages." Plaintiff's Petition at ¶ 60, Brown (No. 1:01/CIV-4086).

39. It is undisputed that Jeff Triplette was an employee of the NFL. Although Triplette was the referee who threw the penalty marker in the Browns-Jaguars game, he was not named as a party-litigant in the Brown-NFL suit. See infra notes 57-59 and accompanying text discussing Orlando Brown's decision not to sue Referee Triplette. See Farrell v. Dearborn Mfg. Co., 330 N.W.2d 397, 397 (Mich. 1982) (holding professional game officials employees of league, not players).

If the NFL was held to be Orlando Brown's employer, then, the workers' compensation court would be required to adjudicate the interesting situation where a claimant (Orlando Brown) is injured by a co-worker (Jeff Triplette) of the same enterprise (the NFL). This suit would be barred by most states under the exclusivity provision, which has subsumed the fellow-servant doctrine.

40. It is unlikely that Orlando Brown could establish that the NFL was the alter ego of the Cleveland Browns, or conversely, that the Cleveland Browns were the alter ego of the NFL for the purposes of workers' compensation. Therefore, even the hypothetical argument that the Cleveland Browns were a corporate subsidiary of the NFL would not, by itself, make the NFL Orlando Brown's employer.

41. In essence, this is Orlando Brown's characterization of his present suit against the NFL.

42. Section 1 of the Sherman Act prohibits "every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states . . . ." 15 U.S.C. § 1 (2002). The NFL argued that its comprising teams constituted a "single entity" unable to conspire with itself. See generally Radovich v. NFL, 352 U.S. 445 (1957).
economic entities engaged in a joint venture." Even if the NFL was a single entity, that alone would not establish that it was Orlando Brown's employer for workers' compensation purposes. In most states, whether a party is the employer of an injured worker pivots on whether the defendant has the right to control the details of the claimant's work. Orlando Brown's contract of employment was with the Cleveland Browns, not the NFL; therefore, the Browns controlled the details of Orlando Brown's work, not the NFL.

III. BROWN'S CASE UNDER THE COMMON LAW

If neither the NFL nor Referee Jeff Triplette is the employer of Orlando Brown, then common-law principles respecting unintentional torts will govern Brown's suit. In the context of sports, courts have been reluctant to hold participants liable for injuries incurred while participating. Courts have held that a plaintiff fails to state a cause of action if it does not establish that the defendant acted recklessly or intentionally. Similarly, courts have ruled that an action is barred because the plaintiff assumed the risk. In this case, a game official injured a player by hitting him with a penalty marker.

43. See N. Am. Soccer League v. NFL, 670 F.2d 1249, 1252 (2d Cir. 1982) (making comparison between football and soccer teams).

44. See Darryll M. Halcomb Lewis, After Further Review, Are Sports Officials Independent Contractors?, 35 Am. Bus. L.J. 249, 256-57 (1998). While not at issue in this case, generally, there are three tests used to determine an employment relationship: (1) the right-to-control test, (2) the relative nature of the work test, and (3) the economic reality test. See id. Often, these tests are used to distinguish an independent contractor from an employee. See id.; see also Larson, supra note 25, at §§ 5.20, 5.30.

45. It was the Cleveland Browns that possessed the right to terminate, and indeed terminated Orlando Brown's contract because he failed to pass the physical examination. See Gardner, C., Ex-Browns' Lineman Air Up Beef With Team, CHI. SUN TIMES, Nov. 13, 2000.

Because discipline is a factor in determining who has the right to exercise control in a work environment, it is mentioned that the NFL and the NFLPA have mutually established maximum disciplinary actions to be meted out by the teams. Article VIII, NFL-NFLPA Collective Bargaining Agreement.

46. Orlando Brown groundlessly alleges in his Petition that the NFL's "wrongful conduct was intentional." At best, the Plaintiff may establish that the defendant NFL knew, understood, and appreciated the risk of injury from improperly thrown penalty markers and failed to act. However, to suggest that the defendant's nonfeasance was intentional is an exaggeration of a reality. See Plaintiff's Petition at ¶ 62, Brown v. NFL (S.D.N.Y. 2001) (No. 1:01/CIV-4086) (contending NFL jointly and severally liable because wrongful conduct intentional).

47. See supra notes 3-5 discussing the identity of participants.

48. See infra note 127 discussing the adoption of recklessness standard of care.

49. See infra notes 119-42 and accompanying text discussing players' assumption of risk.
marker. Thus, the classic case of player-versus-player is not before the court. Although Orlando Brown sues the NFL for negligently training and supervising its officials, this article explores the defendant’s exposure based on the respondeat superior and assumption-of-risk doctrines. Whether these principles will be applied to Orlando Brown’s case is unclear.

It seems that Orlando Brown will seek to hold the NFL liable based on two separate theories. Although this article explores both propositions as alternative theories of liability, to the benefit of the NFL, the plaintiff cannot simultaneously advance these notions. In Brown’s first argument he asserts that the NFL is directly liable for negligently training and supervising its officials. The existence of this tort would be independent of the negligence of Referee Triplette. Alternatively, Orlando Brown could argue that the NFL is vicariously liable by virtue of the respondeat superior doctrine. This argument would require showing that Referee...

50. See supra note 3 and infra notes 82-93 and accompanying texts discussing a player’s duty of care to other players.

51. Under the respondeat superior doctrine, “employers are generally jointly and severally liable along with the tortfeasor employee for the torts of employees committed within the scope of employment.” Dobbs, supra note 27, § 333, at 905. The author suggests that the common-law defense of plaintiff’s assumption of risk would defeat the plaintiff’s respective claims of negligent training, vicarious liability of the defendant and the alleged negligence of Referee Triplette. For additional information regarding Brown’s suit for negligent training and supervision, see infra notes 69-78; see also Plaintiff’s Petition at ¶¶ 29, 32-33, 45, Brown (No. 1:01/CIV-4086) (listing various NFL “duties”).

52. Brown’s first theory alleges that the NFL negligently trained and supervised its officials. See Plaintiff’s Petition at ¶ 45, Brown (No. 1:01/CIV-4086). Brown’s second theory alleges that the NFL is vicariously liable for the negligence of Referee Jeff Triplette. See infra notes 60-62.

53. See infra notes 80-81 and accompanying text discussing the incompatibility of the doctrines involving respondeat superior and negligent training.

54. See infra notes 69-78; see also Plaintiff’s Petition at ¶¶ 29, 32-33, 45, Brown (No. 1:01/CIV-4086) (listing duties that NFL allegedly breached).

55. “An employer . . . might have negligently hired, trained, or supervised a dangerous employee. In that case, the employer might be liable for his own negligence in hiring or supervising. Such liability, however, is not vicarious liability.” Dobbs, supra note 27, § 333, at 906. Perhaps, in part, this explains Orlando Brown’s omission of Referee Triplette as a party-defendant in this suit. This argument also complicates the in personam jurisdiction question because the State of New York is the domicile of the decision makers. Further, the relevant decisions regarding the training of its officials probably were made at the NFL’s corporate headquarters in New York, New York. Conversely, the plaintiff’s injury occurred in Ohio.

56. Orlando Brown alleges that the NFL is “vicariously liable for the negligent acts and omissions of others who caused or contributed to the plaintiff’s damages.” Plaintiff’s Petition at ¶ 60, Brown (No. 1:01/CIV-4086). Also, Brown alleges that the NFL is jointly and severally liable, but does not specifically explain his reason(s). See Plaintiff’s Petition at ¶¶ 57-62, Brown (No. 1:01/CIV-4086) (listing dam-
Triplette was negligent while acting in the scope of the employment. Under the *respondeat superior* doctrine, if Triplette is absolved, then his principal, the NFL, cannot be liable under that theory. Brown attempts to hold the NFL responsible for his *entire* loss proximately caused by the NFL's alleged acts of negligence in training and supervising its agents.

### IV. The Cause of Action

In his petition, Brown weaves a vignette of the NFL's alleged tortious complicity with its agent, Referee Triplette. Orlando Brown further alleges that the NFL is jointly and severally liable. This approach would require a finding that the referee, Jeff Triplette, was negligent. "It is fundamental that to recover in a negligence action a plaintiff must establish that the defendant owed him a duty to use reasonable care, and that it breached that duty." This requirement of establishing a duty is true notwithstanding the identity of the defendant. With respect to the allegations advancing joint and several liability, New York law indicates that

when a verdict or decision in an action or claim for personal injury is determined in favor of a claimant in an actions for which NFL is jointly and severally liable). Brown pleads that "defendant owed the plaintiff a non-delegable duty of care." Plaintiff's Petition at ¶ 58, *Brown* (No. 1:01/CIV-4086).

57. Employers have been found to be vicariously liable for tortious acts committed outside the scope of employment if the employer could have reasonably anticipated the employee's acts. See *Riviello v. Waldron*, 391 N.E.2d 1278, 1282-83 (N.Y. 1979) (holding employer vicariously liable to patron of employer when acts by knife-wielding employee found to be outside the scope of employment). In holding the employer vicariously liable, the *Riviello* court stated:

[When] acting within the scope of his employment, the employer need not have foreseen the precise act or the exact manner of the injury as long as the generally type of conduct may have been reasonably expected .... [I]t suffices that the tortious conduct be a natural incident of the employment. Hence, general rather than specific foreseeability has carried the day even in some cases where employees deviated from their assigned tasks.

*Id.*

58. See *infra* notes 80-81 and accompanying text discussing the incompatibility of the doctrines involving *respondeat superior* and negligent training.

59. See *infra* notes 69-78 and accompanying text for Brown's allegations.

60. This must be the foundation of Plaintiff's assertion of joint and several liability. See Plaintiff's Petition at ¶¶ 57-62, *Brown* (No. 1:01/CIV-4086) (listing reasons for joint and several liability).


62. *Turcotte v. Fell*, 502 N.E.2d 964, 967 (N.Y. 1986) (holding that by participating in horse race, plaintiff consented that duty owed to him by other participants was mere duty to avoid reckless or intentional harmful conduct).
tion involving two or more tortfeasors jointly liable . . . the liability of a defendant is found to be fifty percent or less of the total liability assigned to all persons liable, the liability of such defendant to the claimant for non-economic loss shall not exceed that defendant's equitable share determined in accordance with the relative culpability of each person causing or contributing to the total liability for non-economic loss . . . .

New York allows defendants to be severally liable for (1) "any liability arising by reason of a non-delegable duty or by reason of the doctrine of respondeat superior," (2) in "actions requiring proof of intent," (3) persons "held liable for causing claimant's injury by having acted with reckless disregard for the safety of others," or (4) "any parties found to have acted knowingly or intentionally, and in concert . . . ." Of course, Orlando Brown alleges each of these exceptions. Brown first anchors his claim in allegations of Triplette's negligence:

That on the 19th day of December 1999, the plaintiff ORLANDO BROWN, was caused to be struck in the eye by an unsafe, unsuitable, inappropriate and dangerous penalty flag, which was negligently thrown by said servant, agent, employee, referee, official and/or representative of the defendant [NFL], while participating and/or playing in a football game conducted by and/or under the guidelines and jurisdiction of said defendant.

Brown asserts that the NFL caused his injury. In essence, Brown alleges that the NFL negligently, recklessly, and intentionally:

64. N.Y. C.P.L.R. § 1602(2)(iv) (Consol. 2001). This basis of exception was alleged in Brown's complaint. See Plaintiff's Petition at ¶ 59, Brown (No. 1:01/CIV-4086) (providing basis of exception for Plaintiff's complaint in contending action falls within exception).
65. N.Y. C.P.L.R. § 1602 (5) (Consol. 2001); see also Plaintiff's Petition at ¶ 62, Brown (No. 1:01/CIV-4086) (providing basis of exception for Plaintiff's complaint in contending that NFL conduct intentional).
66. N.Y. C.P.L.R. § 1602 (7) (Consol. 2001); see also Plaintiff's Petition at ¶ 59, Brown (No. 1:01/CIV-4086) (providing basis of exception for Plaintiff's complaint in alleging that NFL acted with reckless disregard).
67. N.Y. C.P.L.R. § 1602 (11) (Consol. 2001); see also Plaintiff's Petition at ¶ 61, Brown (No. 1:01/CIV-4086) (providing basis of exception for Plaintiff's complaint by asserting that NFL acted knowingly and intentionally).
68. Plaintiff's Petition at ¶ 42, Brown (No. 1:01/CIV-4086).
69. See Plaintiff's Petition at ¶ 62, Brown (No. 1:01/CIV-4086) (asserting wrongful conduct intentional).
failed to "ensure that penalty flags be safely, properly and appropriately weighted . . . ," 70
(2) employed a referee who "negligently [threw an improperly weighted penalty flag] . . . ," 71
(3) "knew or could and should have known that the penalty flag used by . . . the referee . . . had been dangerously, improperly and unsafely weighted by him prior to and/or during said game . . . previously, periodically, frequently, and/or regularly . . . ," 72
(4) failed to "adequately supervise, inspect, examine and ensure that penalty flags not be dangerously thrown . . . ," 73
(5) failed to properly equip and protect the players, 74
(6) failed to provide guidance as to the "type of penalty flag to be used and the proper manner in which the flag is to be thrown," 75
(7) failed to train and use competent officials, 76 and
(8) failed to "provide for and/or ensure the safety, protection and well-being of . . . players, including . . . [Orlando Brown]." 77

The NFL demurred to the petition. 78

Orlando Brown does not sue, name as a defendant, or seek to hold Referee Triplette negligent in the performance of his duties. 79

70. Plaintiff's Petition at ¶ 22-27, Brown (No. 1:01/CIV-4086) (discussing penalty flags).
72. Plaintiff's Petition at ¶ 24-28, Brown (No. 1:01/CIV-4086) (detailing NFL knowledge).
73. Plaintiff's Petition at ¶ 29, Brown (No. 1:01/CIV-4086) (describing NFL duty to supervise).
74. Plaintiff's Petition at ¶ 30-31, Brown (No. 1:01/CIV-4086) (describing NFL safety duties).
75. Plaintiff's Petition at ¶ 32-33, Brown (No. 1:01/CIV-4086) (describing NFL duty to train and supervise).
76. Plaintiff's Petition at ¶ 45, Brown (No. 1:01/CIV-4086) (alleging breach of duty to train).
77. Plaintiff's Petition at ¶ 31, Brown (No. 1:01/CIV-4086) (contending breach of duty to ensure safety).
79. It may be argued that the plaintiff volitionally chose not to name the referee as a defendant because (1) the National Football League is the deep pocket, (2) such an action would be duplicative since the National Football League is the employer of the referee and is responsible for indemnifying its agents, or (3) the chosen strategy avoids the possibility of a subtle perception of animosity between game officials and players which may be created by an NFL player directly suing an
Instead, he pursues the NFL for negligently training its officials.\(^8\) Strategically, Brown avoids an allegation of vicarious liability. Under New York law:

[W]here an employee is acting within the scope of his or her employment, thereby rendering the employer liable for any damages caused by the employee's negligence under a theory of respondeat superior, no claim may proceed against the employer for negligent hiring or retention (citing Eifert v. Bush, 238 N.E.2d 759 (N.Y. 1967)). This is because if the employee was not negligent, there is no basis for imposing liability on the employer, and if the employee was negligent, the employer must pay the judgment regardless of the reasonableness of the hiring or retention or the adequacy of the training.\(^8\)

The Ohio Supreme Court, in *Hanson v. Kynast*,\(^8\) discusses the requisite elements of a "cause of action . . . when an individual participant in a sporting event is injured by another participant."\(^8\) In *Hanson*, Kynast and Hanson were opponents in a lacrosse game.\(^8\) Kynast "body checked from behind" and taunted an opponent named Allen.\(^8\) Allen's teammate, Hanson, flung Kynast to the floor after bear hugging Kynast.\(^8\) In retaliation, Kynast slammed Hanson to the floor. Hanson was seriously injured and sued Kynast. In that context, the court determined the appropriate standard of conduct between players. In particular, the Ohio Supreme Court stated that "a cause of action does exist in such a situation, NFL referee. The more likely result is discussed *infra* note 81 and accompanying text.

\(^8\) Karoon v. N.Y. City Transit Auth., 659 N.Y.S.2d 27, 29 (1997) (granting summary judgment dismissing actions based negligent hiring, retention, and training since recovery was sought on respondeat-superior theory); *see* Liddell v. Slocum-Dickson Med. Group, P.C., 710 N.Y.S.2d 278, 278 (2000) (holding "[b]ecause [employee] was acting within the scope of her employment when plaintiff was injured, Slocum-Dickson is liable for any damages caused be [employee's] alleged negligence under the doctrine of respondeat superior, and no claim may proceed against the employee for negligent hiring or supervision") .


\(^8\) Id.

\(^8\) *See id.* at 327-28. Lacrosse is a "game . . . in which two 10-member teams attempt to send a small ball into each other's netted goal, each player being equipped with a crosse or stick at the end of which is a netted pocket for catching, carrying, or throwing the ball." *Random House Unabridged Dictionary* (2d ed., 1995). The court in *Hanson* described the contest as "a spirited body-contact sport." *Hanson*, 526 N.E.2d at 329.

\(^8\) *See Hanson*, 526 N.E.2d at 327-28.

\(^8\) *See id.* at 328.
but only for an intentional tort, i.e., an intentionally inflicted injury not arising out of the ongoing conduct of the sport itself, as herein."\(^{87}\)

In *Marchetti v. Kalish*,\(^{88}\) the Ohio Supreme Court clarified that the player-to-player standard is "recklessness" or "intentional conduct." In *Marchetti*, children twelve and thirteen years of age were playing "kick the can."\(^{89}\) One of the players signaled for play to stop, but the defendant "continued to run toward [the plaintiff], colliding with her and kicking the ball out from under her foot . . . [Plaintiff] fell to the ground, and her right foot was broken in two places."\(^{90}\) The defendant tried to differentiate between *Marchetti* and *Hanson*.\(^{91}\) It was argued that because *Marchetti* involved children rather than adults, the court should apply an ordinary-negligence standard rather than the higher recklessness standard.\(^{92}\) The Ohio Supreme Court was unmoved.

Whether the activity is organized, unorganized, supervised or unsupervised is immaterial to the standard of liability [citations omitted]. To hold otherwise would open the floodgates to a myriad of lawsuits involving the backyard games of children. Furthermore, . . . [we do] not differentiate between adults’ and children’s recreational and sports activities. Rather, the courts appl[y] the same standard of liability to children’s sports activities as to those of adults.\(^{93}\)

It is uncertain whether a court would be so egalitarian when formalizing the duty of a professional sports official to a player. In formulating the recklessness standard to be applied between players in sporting events, the court did not want to foster litigation by setting a standard so low that ordinary aggressive acts common to the particular sport would be ground for suit. Instead, the court desired to "strike a balance between encouraging vigorous and free participation . . . while ensuring the safety of the players."\(^{94}\) The court concluded that "a player's reckless disregard for the safety of

\(^{87}\) *Id.* at 329.
\(^{89}\) See *id.* at 699.
\(^{90}\) See *id.* at 700.
\(^{91}\) See *id.* at 699. See generally *Hanson* v. Kynast, 526 N.E.2d 327 (Ohio Ct. App. 1987).
\(^{92}\) See *Marchetti*, 559 N.E.2d at 701-02.
\(^{93}\) *Id.* at 702.
\(^{94}\) *Id.* at 703.
his fellow participants cannot be tolerated. If a plaintiff pleads and proves such recklessness, he may seek relief for injuries incurred in an athletic competition. 95 Recklessness has been a judicial sieve to separate egregious from overly-spirited athleticism. Ordinarily, unlike the players, officials are not engaged by design, in bodily contact with the players let alone the absence of an intent to injure. Thus, unless the officials are intervening in a scrap between or among players, direct or indirect physical contact with players is inadvertent. 96 However, it is common for officials to contact or be incidentally contacted by players, equipment or items common to the sport. Occasionally, a player may even intentionally contact the officials. 97 The officials’ clear duty is to regulate the conduct of the players so as to enhance fairness and the players’ safety. In the context of player-on-player aggressive sportsmanship, the courts have rightfully sought a balance between conduct which is outside acceptable sports customs and the negative effect on competition that judicial intervention may have on an athletic contest. 98

The relationship between official and player significantly differs from player-to-player relationships. Imposing a standard less than recklessness or intentional misconduct on a sports official would discourage officials from joining the officiating ranks as well as chill and curtail the spontaneity required to officiate a sports contest. Such a result is particularly true at the professional football level. In professional sports, officials must indicate fouls with authority and without hesitation. Often, authoritative demeanor is demonstrated by the accuracy, quickness, force, and trajectory of a thrown flag. For major fouls, the game requires that the flag be thrown to or at particular spots because penalty yardage is assessed

95. Id. (quoting Ross v. Clouser, 637 S.W.2d 11 (Mo. 1982)).

96. Football officials commonly break up chicken fights between players. In fact, the NFL wants these minor skirmishes disassembled without calling a foul. The official does not physically touch the body or uniform of a player in “indirect” physical contact, but a bean bag or flag contacts the player after being thrown or dropped by an official.

97. Football rules consider this unsportsmanlike conduct and require the offending players immediate ejection and disqualification from continued participation in the contest. After Orlando Brown was contacted by the official’s flag, he, with two hands, violently pushed Referee Triplette to the ground. Immediately, he was disqualified. Subsequently, the NFL fined Orlando Brown and suspended him indefinitely without pay. No action was taken against Triplette.

98. Fear of civil liability stemming from negligent acts occurring in an athletic event could curtail the proper fervor with which the game should be played and discourage individual participation, yet it must be recognized that reasonable controls should exist to protect the players and the game.
Orlando Brown asserts that the flag was negligently, recklessly, or intentionally thrown, or, perhaps even improperly altered. Essentially, Orlando Brown proffers that the referee recklessly constructed and used a dangerous weapon that caused Orlando Brown's injury.

To be reckless the act must have been intended by the actor. At the same time, the actor does not intend to cause the harm which results from it. It is enough that he realized, or from the facts should have realized, that there was a strong probability that harm would result even though he may hope or expect that his conduct will prove harmless. Nevertheless, existence of probability is different from substantial certainty which is an ingredient of intent to cause the harm which results from the act.

V. NEGLIGENCE AND RESPONDENT SUPERIOR LIABILITY

In short, under the respondeat superior doctrine, an employer is responsible for the torts committed by its agents in the scope of the employment. Under the doctrine, although the principal is liable for such torts, the agent remains liable for his torts. If Referee Jeff Triplette was not negligent, then vicarious liability cannot be imposed against the NFL. For this reason, the conduct of Triplette is briefly examined in this article although Orlando Brown does not pursue this theory of liability against the NFL for sundry reasons.

It can be safely said that the legal duty of a sports official is to "exercise the care of an ordinary, prudent referee under similar circumstances." Of course, the breach of this duty could lead to a conclusion of negligence. This duty of care inversely lessens as the

99. See infra notes 138-40 and accompanying text for the significance of penalty-enforcement spots.

100. See supra notes 69-78 and accompanying text for Brown's allegations.

101. See supra note 1 discussing the suggestion that the referee's flag was negligently modified.


103. Dobbs, supra note 27, § 333, at 905.

104. "When the employer who is not personally chargeable with tort is held vicariously liable for the tort of an employee, the employer has a right of indemnity from the employee." Dobbs, supra note 27, § 333, at 905.

professional football player acquires knowledge, skill, experience, and the concomitant appreciation of the unique dangers associated with football in general and, particularly, professional football.  

One court has even questioned whether a professional athlete injured in a professional sports contest is owed a duty at all. Modern courts seem to imply that the degree of reasonable care owed a plaintiff-athlete is concomitant with the amount of risk a player legitimately assumes. In other words, the more a plaintiff-player knows, understands and appreciates the possibility that he may be injured while participating in athletic events, the amount of care owed the plaintiff by a defendant decreases. This correlation is generally true in sports. It is even more applicable in contact sports. A fortiori, the quantum of care owed a professional athlete is even lower because the professional athlete knows what he or

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Personal Liability of Sports Officials: Take the Game Into Your Own Hands, Take Them to Court, 4 SPORTS LAW. J. 213, 217-24 (1997); Lewis & Forbes, supra note 6, at 693.

106. See Turcotte v. Fell, 502 N.E.2d 964, 969-70 (N.Y. 1986) (suggesting that professional horse racing jockey’s assumption of risk was greater than his amateur counterpart); Hanson, 526 N.E.2d at 333 (holding that injured player assumed the risk of injury and defendant’s duty was “diminished”). See infra note 123 and accompanying text discussing professional athlete’s assumption of risk.

107. See Turcotte, 502 N.E.2d at 969-70 (suggesting that professional horse racing jockey’s assumption of risk was greater than his amateur counterpart).

108. See Hanson, 526 N.E.2d at 333 (suggesting that reasonably foreseeable conduct decreases liability); Turcotte, 502 N.E.2d at 967-68 (suggesting that professional horse racing jockey consented to risks).

109. Hanson, 526 N.E.2d at 333 (holding that duty diminished as risk assumption increases); Turcotte, 502 N.E.2d at 967 (suggesting that professional athletes make informed assessment of risks).


111. See Hanson, 526 N.E.2d at 333 (emphasizing that less duty owed in contact sports).
she\textsuperscript{112} is getting into and, arguably, forfeits some of his or her common-law protection in lieu of salary.\textsuperscript{113} Consequently, one can approach the defendant's liability as having no duty or a "diminished" duty, or the plaintiff having assumed the risk of injury.

Whether a professional athlete should be held . . . to have consented to the act or omission of a coparticipant which caused his injury involves consideration of a variety of factors including but not limited to: the ultimate purpose of the game and the method or methods of winning it; the relationship of defendant's conduct to the game's ultimate purpose, especially his conduct with respect to rules and customs whose purpose is to enhance the safety of the participants; and the equipment or animals involved in the playing of the game. The question of whether the consent was an informed one includes consideration of the participant's knowledge and experience in the activity generally. Manifestly a professional athlete is more aware of the dangers of the activity, and presumably more willing to accept them in exchange for a salary, than is an amateur.\textsuperscript{114}

Many cases and commentaries involve a player suing another player for injuries inflicted by his or her opponent during a contest.\textsuperscript{115} Considerably fewer cases involve an official injured during a game or a player injuring an official.\textsuperscript{116} Some authority suggests a sports official may be liable for failing to affirmatively act.\textsuperscript{117} The author finds no cases imposing liability on a sports official where an official or an instrumentality (e.g., a weighted penalty marker) under the direct control of a sports official is alleged to have di-

\textsuperscript{112} Presently, there are no female professional football participants. However, the author's arguments apply to other professional sports in which female athletes do participate.

\textsuperscript{113} See \textit{Turcotte}, 502 N.E.2d at 969-70 (suggesting that professional horse racing jockey's assumption of risk was greater than his amateur counterpart).

\textsuperscript{114} \textit{Id.} at 969.

\textsuperscript{115} See \textit{supra} note 3 and \textit{infra} note 127 and accompanying text discussing player actions against other players.

\textsuperscript{116} \textit{See}, e.g., \textit{Dillard v. Little League Baseball, Inc.}, 390 N.Y.S.2d 735, 736 (App. 1977) (deciding case where umpire in little league baseball game sues for injury when struck in groin by baseball).

\textsuperscript{117} \textit{See}, e.g., \textit{Carabba v. Anacortes Sch. Dist. No. 103}, 435 P.2d 936, 946-48 (Wash. 1967) (referee sued for allowing illegal hold in wrestling match which caused high school athlete's injury).
rectly caused a player’s injury.\textsuperscript{118} In the absence of intentional con-
duct, courts must practically weigh the quantity of care demanded
of a referee against those risks society reasonably expects a profes-
sional football player to assume, particularly because thrown pen-
alty flags are a natural incidence of the game.

VI. Orlando Brown’s Assumption of the Risk of Injury

[O]ne assumes only those risks which are reasonably fore-
seeable . . . . Thus, a player consents as a matter of law to
assume the risk of injuries resulting from reasonably fore-
seeable conduct by other players. Such reasonable fore-
seeability is determined by the rules and regulations of the
particular game, and the customs and practices generally
accepted as part of the game.\textsuperscript{119}

Persons participating in sports traditionally assume the risk of
injuries attendant to the game.\textsuperscript{120} These risks include injuries re-
sulting from acts in violation of the particular sport’s rules.\textsuperscript{121} In


the modern view, game officials are not always exempt from liability.\textsuperscript{122} Likewise, case law supports the proposition that players do not always assume the risks involved in the game.\textsuperscript{123}

Courts have been reluctant to hold a participant liable for ordinary negligence which resulted in another participant’s injury.\textsuperscript{124} Traditional courts applied the defensive doctrine of assumption of risk to completely bar an injured plaintiff from recovering any damages when the plaintiff reasonably understood and appreciated the dangers inherent in the game.\textsuperscript{125} The assumption of risk doctrine in sports cases began to weaken in situations involving a participant’s intention to injure another participant.\textsuperscript{126} Modern courts are somewhat unwilling to blindly apply the assumption of risk defense when a participant acts recklessly or intentionally.\textsuperscript{127} The

\textsuperscript{122} See, e.g., Carabba, 435 P.2d at 958 (applying reasonableness standard to wrestling official’s conduct in absolving individual from negligence).

\textsuperscript{123} Players do not assume the risk of intentionally harmful conduct. “[I]t is highly questionable whether a professional football player consents or submits to injuries caused by conduct not within the rules . . . .” See Hackbart, 601 F.2d at 520 (deciding that infliction of intentional blow in football game is not subject to restraint of law).

\textsuperscript{124} See infra note 127 and accompanying text discussing the adoption of recklessness standard by a majority of courts.

\textsuperscript{125} See Hackbart v. Cincinnati Bengals, Inc., 435 F. Supp. 352, 356 (D. Colo. 1977), rev’d, 601 F.2d 516 (10th Cir. 1979). Judge Matsch opined that “the level of violence and the frequency of emotional outbursts in NFL football games are such that [the plaintiff] Dale Hackbart must have recognized and accepted the risk that he would be injured by such an act as that committed by the defendant . . . . The plaintiff must be held to have assumed the risk of such an occurrence. Therefore, even if the defendant breached a duty which he owed to the plaintiff, there can be no recovery because of assumption of risk.” Id. at 537. But see Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993) (holding ordinary negligence sufficient to establish cause of action for injuries sustained in contact sports contest).

\textsuperscript{126} See Hackbart, 601 F.2d at 526.

\textsuperscript{127} See, e.g., Hackbart, 601 F.2d at 526; Kuehner v. Green, 436 So. 2d 78, 80-81 (Fla. 1983) (deciding that in karate game, participants expressly consented to contact); Oswald v. Township High Sch. Dist., 406 N.E.2d 157, 158 (Ill. App. Ct. 1980) (dismissing petition which lacked allegation of intentional misconduct where plaintiff negligently kicked in gym class by fellow student); Nabozny v. Barnhill, 334 N.E.2d 258, 261 (Ill. App. Ct. 1975) (adopting recklessness standard in tort action for injuries sustained in soccer match); Gauvin v. Clark, 537 N.E.2d 94, 95 (Mass. 1989) (deciding willful or reckless conduct required to impose liability on defendant athletic participant); Ross v. Clouser, 637 S.W.2d 11, 13-14 (Mo. 1982) (“cause of action for personal injury incurred during athletic competition must be predicated on recklessness, not mere negligence”). Niemczyk v. Burleson, 538 S.W.2d 737, 740 (Mo. 1976) (dismissing petition where plaintiff softball player failed to allege that injury was intentionally inflicted); Dotzler v. Tuttle, 449 N.W.2d 774, 783 (Neb. 1990) (deciding recklessness standard diminishes need for players to seek retaliation); Kabella v. Bouschelle, 679 P.2d 290, 294 (N.M. Ct. App. 1983) (applying a recklessness standard where plaintiff was injured in informal tackle football contest); O’Neill v. Daniels, 523 N.Y.S.2d 264, 265 (App. Div. 1987) (deciding plaintiff softball player cannot consent to reckless or intentional acts); Marchetti v. Kalish, 559 N.E.2d 699, 703-04 (Ohio 1990) (adopting recklessness
doctrine of comparative negligence further complicates the situation by requiring that damage awards be apportioned according to the negligence of the litigants.\textsuperscript{128} Courts have ruled that the complete-bar provisions of the assumption of risk doctrine were incompatible with the more humanitarian comparative negligence mandate.\textsuperscript{129}

Where intentional or reckless conduct is not involved, courts should give more weight to an assumption of the risk defense than in player-on-player situations.\textsuperscript{130} The courts should also apply the diminished duty of care doctrine between players and officials. The \textit{Hanson} court said:

The quid pro quo of an "assumed greater risk" is a diminished duty. Thus, participants in bodily contact games such as basketball (and lacrosse) owe a lesser duty to each other than do golfers and others involved in non-physical contact sports. Injuries resulting from violent physical contact are reasonably foreseeable in sports such as lacrosse and football. However, injuries which result from conduct on the playing field which are not reasonably foreseeable are of a different nature. The focus is on [the] reasonable foreseeability of the conduct, not on the particular injury. Naturally, this foreseeability is dependent upon such factors as the nature of the sport involved, the rules and regulations which govern the sport, the customs and practices which are generally accepted and

\begin{itemize}
\item standard in informal kick-the-can game); Hanson v. Kynast, 526 N.E.2d 327, 327 (Ohio 1987) ("[D]uty not to commit an intentional tort against another remains intact, even in the heat of battle in a spirited body-contact sport such as lacrosse.");
\item Bangert v. Shaffner, 848 S.W.2d 353, 354-55 (Tex. Ct. App. 1993) (deciding recklessness standard not applicable to parasailing); Connell v. Payne, 814 S.W.2d 486, 488-89 (Tex. App. 1991) (holding injured polo player must prove that defendant opponent acted "recklessly" or "intentionally" to recover for injuries sustained in polo contest).
\item 128. "Under comparative negligence statutes or doctrines, negligence is measured in terms of percentage, and any damages allowed shall be diminished in proportion to amount of negligence attributable to the person for whose injury, damage or death recovery is sought." \textsc{Black's Law Dictionary} (6th ed. 1991).
\item 129. \textit{See}, \textit{e.g.}, Segoviano v. Hous. Auth., 191 Cal. Rptr. 578, 579 (Ct. App. 1983) (holding that reasonable implied risk assumption defense is applicable only where plaintiff acts unreasonably); Turcotte v. Fell, 502 N.E.2d 964, 967 (N.Y. 1986) ("With the enactment of the comparative negligence statute, assumption of risk is no longer an absolute defense."). Of course, in this case, comparative negligence is not an issue since the defendant does not allege that Orlando Brown was negligent.
\item 130. \textit{See supra} notes 124-29 and accompanying text for discussion of assumption of risk in player-on-player scenarios.
\end{itemize}
which have evolved with the development of the sport, and the facts and circumstances of the particular case. Another factor is whether or not the sport is played professionally.\textsuperscript{131}

Players do not assume the risk of wanton near-criminal acts of violence in an arena,\textsuperscript{132} but it is reasonably foreseeable that a player will be struck by a weighted penalty marker during a football contest. In \textit{Dillard}, an umpire was hit in the groin while umpiring a game. The New York appellate court held:

\begin{quote}
\textbf{[G]enerally, the participants in an athletic event are held to have assumed the risks of injury normally associated with the sport. Players, coaches, managers, referees and others who, in one way or another, voluntarily participate must accept the risks to which their roles expose them. Of course, this is not to say that actionable negligence can never be committed on a playing field. Considering the skill of the players, the rules and nature of the particular game, and risks which normally attend it, a participant's conduct may amount to such careless disregard for the safety of others as to create risks not fairly assumed. But it is nevertheless true that what the scorekeeper may record as an “error” is not the equivalent, in law, of negligence.}\textsuperscript{133}
\end{quote}

\ldots As respects voluntary participation in a sport, the doctrine of assumption of risk applies to any facet of the activity inherent in it and to any open and obvious condition of the place where it is carried on \ldots and imports a knowledge and awareness of the particular hazard that caused the injury.\textsuperscript{134}

Awareness of the general scope of the risk combined with the skill and experience of the actor in question are primary factors influencing the determination whether the assumption of risk doctrine will be applied.\textsuperscript{135}

\textsuperscript{131} See \textit{Hanson}, 526 N.E.2d at 333.

\textsuperscript{132} See \textit{Hackbart v. Cincinnati Bengals, Inc.}, 601 F.2d 516, 520-21 (10th Cir. 1979).


\textsuperscript{135} \textit{Id.}
The risk of being struck by a baseball in the groin while umpiring is reasonably foreseeable... Plaintiff, an active participant as an umpire and, for some time, coach and instructor in Little League Baseball, assumed the risk inherent in playing a game with youthful and inexperienced participants without a protective cup.¹³⁶

The likelihood of being contacted by a penalty flag in a football game is nearly as certain as being contacted by a baseball in a baseball game. Referees routinely throw flags in football games at spots of fouls, and not at players.¹³⁷ A fortiori, the probability of contact with a penalty marker is greater for offensive linemen than other players. Linemen are more likely to be flagged for blocking infractions and false starts.¹³⁸ By rule, a flag is thrown, the whistle blown and play is immediately discontinued upon the occurrence of a "false start." Customarily, the flags are thrown in the direction and toward the location of the infraction. Typically, upon hearing the referee's whistle, players spontaneously react by rising out of their stances and pointing at their opponents to suggest that he was induced to commit an infraction,¹³⁹ or turn around to ascertain the referee's call. These infractions are commonly enforced from the spot of the foul or from the line of scrimmage. The flag, therefore, literally marks the spot. Inevitably, the offender will be at, on, or near that spot at which and when the marker is thrown. Therefore, it is expected that a player may come in contact with a thrown flag.

In addition to alleging that the referee negligently threw the penalty marker, Orlando Brown alleges that "defendant [NFL], breached and violated its duty to ensure that penalty flags not be dangerously, improperly and unsafely weighted by referees, [specifically Jeff Triplette] in violation of NFL rules, regulations, and guidelines."¹⁴⁰ A professional football player should know from ex-

¹³⁶. Id. at 738.
¹³⁷. Orlando Brown alleges that "defendant [NFL], breached and violated its duty... to ensure that the referee refrain from throwing a penalty flag directly at a player when calling an infraction." Plaintiff's Petition at ¶ 46, Brown v. NFL (S.D.N.Y. 2001) (No. 1:01/CIV-4086).
¹³⁸. "From the start of the neutral zone until the snap, no offensive player, if he assumed a set position, shall charge or move in such a way as to simulate the start of a play." Rule 7, Art. 3, Section 4, 2001 Official Playing Rules of the National Football League.
¹³⁹. Under the playing rules of the NFL, it is a foul for a defensive player to enter the neutral zone and cause a spontaneous reaction from his opponent. This is called a "neutral zone infraction." Either the offensive player committed a false start, or was "drawn off" by his opponent. Players are contentious that one or the other occurred.
¹⁴⁰. Plaintiff's Petition at ¶¶ 50-51, Brown (No. 1:01/CIV-4086).
perience that flags are weighted. Referees throw flags for considerable distances in order to land the flags on the spot of infractions; otherwise, the flags without added weight would have no trajectory, would not land on or acceptably near the relevant spot and would not remain on the spot. It is unfortunate that Orlando Brown suffered an eye injury from a thrown weighted penalty flag, but "[t]he focus is on the reasonable foreseeability of the [defendant’s] conduct, and not on the particular injury." 141

Given the purpose for weight in the penalty markers, it is reasonably foreseeable that a penalty marker may be weighted with small ball bearings ("BB’s"). 142 It is also foreseeable that penalty flags will be thrown for rule infractions by football players in general and especially offensive lineman. The vast majority of them will harmlessly hit the ground on or near the spot of the infraction. One may reasonably expect, therefore, that some of these markers will make contact with players. In this respect, this lawsuit is frivolous.

VII. CONCLUSION

Orlando Brown’s best option was to pursue a workers’ compensation claim against the Cleveland Browns, his immediate employer, at the time of his injury. 143 Brown did not and should not seek workers’ compensation benefits from the NFL. 144 The National Football League was not his employer. 145 Brown circumvents the linchpin of the case - the referee’s malfeasance. 146 If Triplette is not negligent, Brown’s action is a nonsuit. 147 Brown alleges that the NFL failed to properly train its officials. 148 Therefore, he de-

142. A BB or ball bearing is “standard size of lead shot that measures 0.18 inch in diameter.” RANDOM HOUSE UNABRIDGED DICTIONARY (2d ed. 1993). A gunsmith informed the author that 300 BB’s weigh 4 ounces (minus the box in which they come). Therefore, a single lead ball bearing shot weighs 0.01 ounce. Such conduct is not alleged. See supra note 1 and accompanying text for discussion of referee’s alleged modification of penalty marker.
143. At the time of this writing, the Ohio Workers’ Compensation Board indicated that Orlando Brown had not filed a claim against the Cleveland Browns.
144. At the time of this writing, the Ohio Workers’ Compensation Board indicated that Orlando Brown had not filed a claim against the NFL.
145. See supra notes 40-44, 78-90 and accompanying text for discussion of the NFL as Orlando Brown’s employer.
146. See supra notes 105-06 and accompanying text for discussion of a referee’s duty of care to players.
147. See supra notes 79-81 and accompanying text for discussion of the incompatibility of the doctrines involving respondeat superior and negligent training.
148. See supra notes 69-78 and accompanying text for discussion of Brown’s allegations against the NFL.
duces that the NFL was the primary responsible party for his injury. Brown strongly implies the negligence of the game’s referee, Jeff Triplette. Understandably, he declines, however, to join Triplette as a party-litigant. This joinder would be superfluous because (1) it is doubtful Brown could establish Triplette’s negligence, and (2) Brown assumed the risk of (a) being injured by a thrown penalty flag and (b) being injured by the errant actions of officials whether or not trained by the NFL.

The NFL and the game officials, whom it employs, are not insurers of player safety. In fact, the players are in the best position to determine whether they should participate, discontinue or condition their playing, or make the appropriate modifications in their conduct to best protect themselves. The incidence of being injured by a referee’s flag is quite infrequent. An ordinary and prudent professional football official would not have reasonably foreseen its occurrence. It would be properly characterized as remote. Therefore, the referees owed no duty of care to Brown. Further, no legal duty arises on behalf of the NFL to train or supervise its officials to prevent the remote possibility of player injury which may result from contact with a thrown penalty marker. A fortiori, Brown assumes the risk of such a common and integral occurrence.

Another ubiquitous ground exists concerning injured professional players’ actions. It is in the best interest of the sporting public that sports officials are immune from this type of suit so long as

149. See supra notes 69-78 and accompanying text for discussion of Brown’s allegations against the NFL.
150. See supra notes 69-79, 105-18 and accompanying text for a discussion insinuating the referee’s negligence.
151. See supra notes 52-58, 79-81 and accompanying text for discussion on the mutually exclusive nature of the relevant tort claims.
152. See supra notes 107-09 and accompanying text for relevant discussion.
153. See supra notes 108-42 and accompanying text for assumption of risk by athletes. For example, the professional football players of the “Baltimore Ravens refused to play the Philadelphia Eagles on the shoddy turf at Veterans Stadium” in a pre-season professional football game scheduled for August 30, 2001. Ultimately, the game was never rescheduled. George, T., Players Take Back Their Bodies, N.Y. Times, Aug. 15, 2001, at D1.
154. See supra notes 108-42 and accompanying text on professional players’ assumption of risk.
155. See supra notes 103-13 and accompanying text on referees’ duty of care towards players.
156. “The risk reasonably to be perceived defines the duty to be obeyed.” Pal-sgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) (intimating in this oft-cited famous case that railroad company owed no duty to plaintiff whose injuries incurred on company property were not reasonably foreseeable).
they are performing their duties in good faith with due diligence. 157 The case law implies liability on sports officials for gross negligence or intentional conduct by players. 158 In fact, in the cases in which the courts have indicated the possibility of liability, the relevant conduct has been violent or near-barbaric under the circumstances. 159 Legislatures may consider statutorily exempting sports officials from liability unless their conduct is specifically intended to harm. 160 Conduct which is germane to the administration of the game should not be subject to liability. There was no requirement that Triplette or other officials of the NFL use any particular type of penalty flag. Nor would it have mattered. The Director of Officials gratuitously recommended that popcorn be used by the officials. 161 Just like athletic competition should not be chilled, the game's administration nor the fellows who make that administration a reality should not be impaired by threat of liability.

157. See infra notes 103-13 and accompanying notes respecting referees' duty of care towards players.
158. See supra note 118.
160. See Lewis & Forbes, supra note 6, at 701-02.
161. See supra note 1 discussing the penalty marker involved in Brown's injury.