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CHECK TO THE HEAD: THE TRAGIC DEATH OF NHL
ENFORCER, DEREK BOOGAARD, AND THE NHL'S
NEGLIGENCE –HOW ENFORCERS ARE TREATED
AS SECOND-CLASS EMPLOYEES

“To distill this to one sentence, you take a young man, you subject him to trauma, you give him pills for that trauma, he becomes addicted to those pills, you promise to treat him for that addiction, and you fail.”¹

I. INTRODUCTION

The popularity of professional ice hockey may not rise to the levels of other professional sports in the United States, because of the predominance of on-the-ice fighting.² Interestingly, however, Gary Bettman, the commissioner of the National Hockey League (“NHL”), is the only commissioner in major American professional

1. John Branch, *In Suit Over Death, Boogaard's Family Blames the N.H.L.*, N.Y. TIMES, May 12, 2013, at D1, [hereinafter “Branch I”], available at <http://www.nytimes.com/2013/05/13/sports/hockey/derek-boogaards-family-sues-nhl-for-wrongful-death.html> (quoting William Gibbs, attorney for Boogaard’s family in suit against National Hockey League (NHL)).

2. See Jeff Z. Klein & Stu Hackel, *A Blow to the NHL's Positive Buzz*, N.Y. TIMES (Jan. 25, 2014), http://www.nytimes.com/2014/01/26/sports/hockey/a-brawl-is-a-blow-to-the-nhls-positive-buzz-outdoors.html?_r=0 (discussing why fighting may be tainting positive buzz of NHL). Klein and Hackel discuss a game-opening brawl which broke out on January 18, 2014 between the Calgary Flames and the Vancouver Canucks and note National Football League (NFL) player Richard Sherman’s following comment about the brawl: “There was a hockey game where they didn’t even play hockey. I saw that and I was like, ‘Oh, man, and I’m the thug?’” See *id.* Richard Sherman’s comment highlights the hard-hitting, concussion riddled similarity between the professional hockey in the NHL and professional American football in the NFL, especially in light of the NFL’s recent influx of unprecedented concussion litigation—the NFL is dealing with approximately 4,336 cases of former NFL players that sustained head injuries while playing for NFL teams—which will likely have a substantial impact on the future physical nature of American Football. . See Nathan Fenno, *Fenno: Derek Boogaard Lawsuit Puts NHL on Notice*, WASHINGTON TIMES (May 13, 2013), <http://www.washingtontimes.com/news/2013/may/13/derek-boogaard-lawsuit-puts-nhl-notice/#.UuL5-FGV3yY> (discussing parallels between NFL concussion litigation and NHL’s soon-to-be head injury litigation). For hockey and the NHL, at least one commentator has speculated that the case of Derek Boogaard could be “the league’s NFL moment . . . which is not a positive thing.” See *id.* Discussing the issue of concussions in the NHL, Fenno quotes Paul Anderson, a Kansas City attorney that tracks concussion lawsuits, as stating the following: “Boogaard’s lawsuit could be a potential game-changer It could have far-reaching implications not only to Boogaard’s case in particular, but to all NHL players generally. I think this could be the first step toward the next wave of the NHL concussion litigation.” See *id.*

sports to admit to fighting as part of the sport.³ The most apparent sign of violence in the NHL is teams' reliance on enforcers—players purposefully placed on teams for their physicality and fighting ability in order to protect their teammates.⁴ In 2011, the death of three NHL enforcers, Derek Boogaard, Rick Rypien, and Wade Belak, illuminated the issue of whether to accept fighting as a part of professional hockey.⁵

Perhaps the most infamous of the three deaths is that of enforcer Derek Boogaard, a 28-year old NHL player who died in May

3. See Patrick K. Thornton, *Rewriting Hockey's Unwritten Rules: Moore v. Bettman*, 61 ME. L. REV. 205, 216 (2009) (citing *Bettman Worried About Player Safety and Injury*, ESPN NHL (Mar. 26, 2007), <http://sports.espn.go.com/nhl/news/story?id=2813743>) (stating that hockey is only major sport where sport's commissioner has condoned fighting as part of its game and discussing suit against NHL player for incident of on-ice fighting). Gary Bettman, the NHL commissioner, stated to the Canadian press that, "[He's] always taken the view that [fighting] is a part of the game based on what the game dictates. [His] view on fighting hasn't changed. [The NHL has] never taken active steps or considered eliminating fighting from the game." *Bettman Worried*, *supra* (discussing Bettman's view that although fight is part of hockey safety remains an ongoing concern). *But see* Sean Gentile, *NHL Enforcers Are Disappearing, and It Doesn't Have to Be Easy*, SPORTINGNEWS (Sep. 18, 2013), <http://www.sportingnews.com/nhl/story/2013-09-18/nhl-fight-rules-new-helmets-visor-regulations-best-fighters-steve-macintyre> (arguing that "mandatory visors for all players entering the league, plus the helmet rule—is a clear attempt by the league to cut back on fighting without banning it outright []"); Stephen Whyno, *NHL: Eliminating Fighting Wouldn't Make Game Safer, Players Say*, THESTAR.COM (Nov. 6, 2013), http://www.thestar.com/sports/hockey/2013/11/06/nhl_eliminating_fighting_wouldnt_make_game_safer_players_say.html (discussing arguments and evidence for and against banning fighting in NHL).

4. See Matthew P. Barry, Richard L. Fox & Clark Jones, *Judicial Opinion on the Criminality of Sports Violence in the United States*, 15 SETON HALL J. SPORTS & ENT. L. 1, 7, 8-14 (2005) (identifying hockey's enforcer role as an example of encouraging violence in sports); Jeff Yates & William Gillespie, *The Problem of Sports Violence and the Criminal Prosecution Solution*, 12 CORNELL J.L. & PUB. POL'Y 145, 150 (stating "some [NHL] players—called 'enforcers'—are kept on teams primarily for their fighting ability and to intimidate opponents" (citing Don Eugene-Nolan Gibson, *Violence in Professional Sports: A Proposal for Self-Regulation*, 3 COMM/ENT L.J. 425, 430 (1980))). Commentators Barry, Fox, and Jones also discuss the issue of whether violence in sports should be penalized under criminal law. *See* Barry, Fox & Jones, *supra* this note, at 8-14 (citing Debra Feldman, *Pandora's Box is Open: Criminal Prosecution Implement*, 2 VA. SPORTS & ENT. L.J. 310, 313-14 (2003)).

5. See Adrian Dater, *Spotlight on the Role of Enforcers in the NHL*, THE DENVER POST (Dec. 1, 2013, 12:01 AM) [hereinafter Dater I], http://www.denverpost.com/avalanche/ci_24630566/spotlight-role-enforcers-nhl (discussing deaths of former NHL enforcers). Rick Rypien, who played for the Vancouver Canucks, died at the age of 27. *See id.* "[Rypien] suffered from clinical depression and took leaves of absence from the team to treat it. He took his own life in his Alberta home." *Id.* Wade Belak, who played for the Colorado Avalanche, died at the age of 35. *See id.* "Belak suffered from depression. His body was found in a Toronto apartment. No official cause of death was given by police, but his death was treated as a suicide." *Id.* For a more detailed discussion of Boogaard's death, see *infra* notes 34-49 and accompanying text.

2011 from an accidental drug overdose from using alcohol with prescribed oxycodone.⁶ Throughout his NHL career, Boogaard played in a total of 277 games, participated in at least sixty-six on-ice fights, sat in the penalty box for a total of 589 penalty minutes, and only scored three goals.⁷ His frequent involvement in on-ice fighting caused him to incur severe head injuries, and, as a result, Boogaard suffered from chronic traumatic encephalopathy (“CTE”), which physicians discovered through a post-mortem brain

6. See *Family of Late NHL Player Sues League Over Drug Problem* Nelson v. NHL, 25 No. 5 WESTLAW JOURNAL ENTERTAINMENT INDUSTRY 1 (June 12, 2013) (describing Boogaard’s suit against NHL). The Associated Press reported that William Gibbs, one of the attorneys representing Boogaard’s family, as stating the following: “The NHL drafted Derek Boogaard because it wanted his massive body to fight in order to enhance ratings, earnings, and exposure.” See Andrew M. Harris, *Dead Ranger Boogaard’s Estate Sues NHL for Wrongful Death*, BLOOMBERG BUSINESS (May 13, 2013), <http://www.bloomberg.com/news/articles/2013-05-13/nhl-accused-in-suit-of-giving-boogaard-drugs-that-led-to-death> (discussing filing of suit against NHL). See also Complaint at Law at 1, Nelson v. Nat’l Hockey League, 20 F. Supp. 3d. 650 (Ill. Dist. Ct. 2014) (No. 13 C 4846), 2013 WL 1951586 [hereinafter “Complaint”] (listing all of Boogaard family’s claims against NHL). See also John Branch, *Derek Boogaard: A Brain ‘Going Bad’*, N.Y. TIMES Dec. 6, 2011, at B13, [hereinafter Branch II], similar version available at <http://www.nytimes.com/2011/12/06/sports/hockey/derek-boogaard-a-brain-going-bad.html?pagewanted=5&emc=etal> (mentioning that Hennepin County medical examiner ruled Boogaard’s death as “an accidental overdose of alcohol and oxycodone”). In an article for the New York Times covering Boogaard’s case, journalist Jeff Z. Klein noted that “Boogaard’s parents authorized researcher to examine his Brain after his death, and those researchers concluded he had a degenerative brain disease linked to repeated trauma[;]” and highlighted notable deaths of NHL “enforcers” such as former Detroit Red Wings “well-known fighter” Bob Probert, who “died of heart failure in 2010 at age 45[.]” and who, like Boogaard, “was also found to have evidence of degenerative disease, chronic traumatic encephalopathy. [hereinafter “CTE”].” Jeff Z. Klein, *Boogaard Lawsuit May Shake Up Hockey*, N.Y. TIMES, Sept. 26, 2012, <http://www.nytimes.com/2012/09/27/sports/hockey/result-of-boogaard-suit-against-nhl-union-could-exceed-outline.html> (discussing how Boogaard’s lawsuit may have impact on NHL in future). Boogaard played a total of six seasons in the NHL: five regular seasons (2005-2010) with the Minnesota Wild (“Wild”), and one regular season with the New York Rangers (“Rangers”). See *Derek Boogaard*, NHL.COM NETWORK, (last visited March 6, 2014) (listing statistics of Boogaard’s performance on Wild and Rangers).

7. See generally Complaint, *supra* note 6 (listing all of Boogaard family’s claims against NHL). See also *Boogaard Family Sues NHL for Son’s Death*, CBS CHICAGO (May 13, 2013), <http://chicago.cbslocal.com/2013/05/13/report-boogaard-family-sues-nhl-for-sons-death/> (mentioning Boogaard’s lawsuit and details of his NHL career). See also Travis Hughes, *Enforcer Role, Not Fighting Itself, The Real Problem in Hockey*, <http://www.sbnation.com/nhl/2011/12/12/2630130/hockey-fights-nhl-enforcers-goons> (Dec. 12, 2011, 12:25 EST) (indicating that Boogaard’s total fight count during his lifetime is unknown because he could have engaged in more fights as junior level and minor league player). For details regarding Boogaard’s goals, see NHL.COM NETWORK, *supra* note 6. For a detailed list of Boogaard’s fights during his career, see the following web address: <http://www.hockeyfights.com/player/1571> (last visited Sep. 13, 2014).

autopsy.⁸ To treat Boogaard's injuries, NHL team physicians had prescribed Boogaard a total of 1,021 pills during his 2008-09 season with the Minnesota Wild, and 366 pills during his 2010-11 season with the New York Rangers.⁹ Allegedly, these prescriptions led to Boogaard's opioid addiction and eventual death.¹⁰

Boogaard's estate filed a wrongful-death suit against the NHL and NHL Players' Association ("NHLPA"), claiming that the NHL and NHLPA failed to adequately prevent and treat Boogaard's addiction and abuse of opioids.¹¹ Specifically, the complaint alleged that the NHL negligently administered the league's Substance Abuse Behavioral Program ("SABH"), where Boogaard went for opioid addiction treatment before his death.¹² Moreover, the suit

8. See Complaint, *supra* note 6, at 2 (mentioning that Boogaard underwent two surgeries performed within week of each other at end of 2008-09 season). For a complete count of Boogaard's NHL injuries, see Complaint, *supra* note 6, paras. 55-58, 72. For a discussion of Boogaard's CTE diagnosis, see Complaint, *supra* note 6, paras. 26-27. For a discussion of CTE, see *infra* notes 50-53 and accompanying text.

9. See Complaint, *supra* note 6, paras. 83, 96 (mentioning total number of pills prescribed by team physicians to address Boogaard's injuries). For a complete list of the types and dosage of painkillers that physicians prescribed for Boogaard, see Complaint, *supra* note 6, at 9-12, 15, 20, 27-28, 30.

10. For a discussion of Boogaard's opioid addiction, see *infra* notes 36-49 and accompanying text.

11. See generally Complaint, *supra* note 6, paras. (outlining Boogaard's family wrongful death suit against the NHL). For a more complete discussion of all eight counts against the NHL/NHLPA, see *infra* note 12 and accompanying text. For a discussion concerning how Boogaard's case sparked a discussion of the problem with doctors prescribing alarming amounts of addictive opioids, see Maura Lerner & Mike Kaszuba, *Derek Boogaard's Death Shows How Easily Patients Can Get Addictive Pain Pills*, STAR TRIBUNE (June 17, 2013), <http://www.startribune.com/local/211700061.html>.

12. See generally Complaint, *supra* note 6. The suit alleged a total of eight counts against the NHL/NHLPA. See *id.* The first count alleged that "[a]s a proximate result of . . . [the NHL's] negligent acts or omissions, Derek Boogaard suffered personal and pecuniary injuries in the form of addiction, which caused conscious pain and suffering and a loss of normal life." See *id.* at para. 70, at 13. The second count alleged the following:

The NHL breached its duty to Derek Boogaard to keep him reasonably safe during his NHL career and to refrain from causing an addiction to controlled substances [and] [a]s a proximate result of . . . acts and omissions by the NHL, D[erek] B[oogaard] died from an accidental prescription drug overdose on May 13, 2011.

See *id.* paras. 97, 99, at 19. See also *id.* para. 98 (alleging eight acts or omissions by NHL that constituted breaches of NHL's duty to Boogaard). The third count claimed that "[t]he NHL, individually, and by an through its agents in the SABH Program, breached its duty to D[erek] B[oogaard]" through certain acts and omissions and that these "acts and omissions caused, or contributed to cause, D[erek] B[oogaard]'s death as a result of accidental drug overdose on May 13, 2011." See *id.* paras. 147, 148, at 28. See also *id.* para. 147 (alleging eight acts or omissions by NHL and its agents). The fourth count claimed the NHL breached, through its agents, "its assumed duty to curb, cure, and monitor Boogaard's drug addiction

alleged that the NHLPA's 2005 Collective Bargaining Agreement ("CBA") "does not address the NHL's duties or responsibilities to keep its [e]nforcers[] safe does not address procedures for administering controlled substances to its players[;]" and "does not address NHL's duties . . . monitor [players'] general health."¹³

Players' suits, similar to Boogaard's, alleging team physician medical malpractice and negligence are barred because of federal preemption, physician tort liability immunity, and state worker

causing pain and suffering and loss of a normal life." The fifth count claimed the NHL was negligent "in monitoring Boogaard for brain trauma during Boogaard's NHL playing career caus[ing] CTE and pain and suffering and loss of a normal life." The sixth count claimed the "NHL's negligence in monitoring Boogaard for brain trauma during Boogaard's NHL playing career caused CTE and wrongful death." The seventh count claimed the "NHL's negligence in using toradol during Boogaard's career caused CTE and pain and suffering and the loss of a normal life." The eighth count claimed the "NHL's negligence in using toradol during Boogaard's career caused CTE and wrongful death." *Id.* paras. 4, 8, 13, 18, 23, 25, 27, 29. For information regarding toradol and its side effects, see MEDICINET.COM, <http://www.drugs.com/toradol.html> (last visited Mar. 7, 2014) (discussing toradol as anti-inflammatory drug used to treat moderate to severe pain). For more information on the NHLPA, see NHLPA, *Inside NHLPA*, NATIONAL HOCKEY LEAGUE PLAYERS' ASS'N, <http://www.nhlpa.com/inside-nhlpa> (last visited Jan. 12, 2015) [hereinafter "NHLPA"] (providing general information about purpose of NHLPA). The website states the following: "[T]he NHLPA is the union for professional hockey players in the National Hockey League (NHL). Created in 1967, the union negotiates and enforces fair terms and conditions of employment for NHL players." *See id.* The complaint alleged that Boogaard's tort claims arose under Illinois law, but under 29 U.S.C. Section 1441 (1980), the NHL removed the case asserting that federal jurisdiction is present under 28 U.S.C. §1331 (1980). *See generally* Nelson v. National Hockey League, 2014 WL 656793, at *1 (N.D. Ill. Feb. 2, 2014) (holding Boogaard's tort claims were preempted under federal law). Boogaard's response was to remand the case to state court by arguing that claims were not completely preempted by Section 301 of LMRA. *See id.*

13. *See* Complaint, *supra* note 6, paras. 30, 32-33, at 5 (addressing claims against NHL/NHLPA for content in CBA). For purposes of this Comment, the NHL's 2005 Collective Bargaining Agreement will be distinguished from the NHL's 2012 Collective Bargaining Agreement. *See generally* COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION, NHL (Jul. 22, 2005) [hereinafter "2005 CBA"], available at <http://www.nhl.com/cba/2005-CBA.pdf>; *see also* COLLECTIVE BARGAINING AGREEMENT BETWEEN NATIONAL HOCKEY LEAGUE AND NATIONAL HOCKEY LEAGUE PLAYERS' ASSOCIATION (Feb. 15, 2013) [hereinafter "2012 CBA"], available at http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf. If CBA is mentioned without the year, it means that both the 2005 CBA and 2012 CBA are identical on the particular issue. "Collective bargaining agreements" in other contexts to discuss those types of agreements generally apart from a specific NHL CBA. Because Boogaard died in May 2011, suit was subject to the 2005 CBA, which expired in Sept. 15, 2011. *See generally* Complaint, *supra* note 6 (filing complaint and trial pleading on May 10, 2013); 2005 CBA, NHL (Jul. 22, 2005), available at <http://www.nhl.com/cba/2005-CBA.pdf>; 2012 CBA, NHL (Feb. 15, 2013), available at http://www.nhl.com/nhl/en/v3/ext/CBA2012/NHL_NHLPA_2013_CBA.pdf. In discussing Boogaard's suit, "Boogaard" designates Boogaard's estate and family filing suit.

compensation laws that exempt recovery from “co-employees.”¹⁴ These barriers create an atmosphere where professional hockey team physicians may fail to provide appropriate medical care without fear of serious repercussions.¹⁵ Considering professional hockey’s inherent violence and the recent deaths of three enforcers in 2011, the NHL and NHLPA should include safeguards in the CBA to protect the health of NHL players.¹⁶ Furthermore, players that have tort claims against their treating physicians should have a remedy under workers’ compensation laws.¹⁷

Part II lays the foundation of the role of enforcers in the NHL and the particulars of Boogaard’s case.¹⁸ Part III provides the legal and medical standards required of team physicians, and analyzes whether Boogaard’s physicians met those standards.¹⁹ Part IV analyzes possible remedies available and concludes that those remedies are inadequate.²⁰ Part V analyzes Boogaard’s case and argues that the NHL should medically treat its players in the future.²¹

14. See Mitten, *infra* note 83, at 214 (discussing co-employee doctrine). For a discussion of the inadequacy of remedies available to professional athletes, see *infra* notes 134-167 and accompanying text. For a discussion of federal preemption, see Nelson, 20 F. Supp. 3d. 650 (Ill. Dist. Ct. Feb. 20, 2014), *supra* note 12, and accompanying text.

15. For a discussion of the inadequacy of remedies available to professional athletes, see *infra* notes 134-167 and accompanying text.

16. See Dater I, *supra* note 5 (mentioning deaths of three NHL enforcers in 2011). See also Klein & Hackel, *supra* note 2 (discussing whether violence in hockey is tainting its image); see also Allan Muir, *Horrifying Injury to George Parros Won’t Affect the Fighting Debate*, SPORTS ILLUSTRATED, Oct. 2, 2013, available at <http://nhl.si.com/2013/10/02/horrifying-injury-to-george-parros-wont-affect-the-fighting-debate/> (discussing brawl between Montreal enforcer, George Parros, and Toronto “tough guy” Colton Orr). For a list of current injuries in the NHL, not all of which resulted from fighting, see *NHL Injuries*, ESPN, <http://espn.go.com/nhl/injuries> (last visited March 6, 2014).

17. For a discussion of why players should have tort claims against their treating physicians, see *infra* notes 168-175 and accompanying text.

18. For a discussion of general information regarding the role of enforcers and violence in the NHL and in Boogaard’s case, see *infra* notes 22-81 and accompanying text.

19. For a discussion regarding physician’s duty and standard of care and Boogaard’s negligence claim, see *infra* notes 82-133 and accompanying text.

20. For a discussion regarding of the potential yet inadequate remedies available for Boogaard, see *infra* notes 134-192 and accompanying text.

21. For a discussion of how remedies available to NHL players are applicable and the implications of the inadequate remedies, see *infra* notes 168-203 and accompanying text.

II. BACKGROUND: BOOGAARD'S CASE AGAINST THE NHL AND WHAT THE NHL SHOULD HAVE KNOWN

A. The Violent Culture of the NHL and the Role of Enforcers

Unsurprisingly, hockey is known as “the most violent of all team sports[.]”²² Professional hockey stands at the forefront of the ongoing debate of violence in professional sports because the NHL remains the “only major league in which violence is, if not quite institutionalized, nevertheless, actively encouraged.”²³ Fighting and foul play seem to be encouraged because penalties for doing so do not have a strong deterrent effect.²⁴ The NHL may sustain vio-

22. See Jeff Yates & William Gillespie, *supra* note 4, at 150, 152-60 (describing hockey as having reputation as most violent team sport and discussing potential criminal prosecution applied to athlete's conduct). Yates and Gillespie note that “[f]ormer [NHL] president Clarence Campbell “has openly admitted that players are under pressure to fight.” See *id.* at 150 (footnote omitted) (citing William Hechter, *The Criminal Law and Violence in Sports*, 19 CRIM. L.Q. 425, at 428 (1976-77)). Further, Yates and Gillespie highlight the following comment of sports attorney and agent Bob Woolf about fighting in hockey:

The premium the NHL puts on fighting was reestablished every time I talked to a team on behalf of a draft choice. Invariably, the interview would get around to how well my client could fight To my endless amazement, the clubs—if they got the impression that the boy wasn't tough enough—frequently offered to enroll him in boxing classes.

Id. at 150 (alteration in original) (footnote omitted) (citing BOB WOOLF, *BEHIND CLOSED DOORS*, 146-47 (1976)).

23. See J.C.H. Jones & Kenneth G. Stewart, *Hit Somebody: Hockey Violence, Economics, the Law, and the Twist and McSorley Decisions*, 12 SETON HALL J. SPORT L. 165, at 167 (2002) (citations omitted) (discussing inherent violent nature built into professional hockey); Ken Campbell, *NHL's Violent Culture Encourages Reckless Play*, THE HOCKEY NEWS (Mar. 4, 2013, 14:05 EST), <http://www.thehockeynews.com/articles/50376-NHLs-violent-culture-encourages-reckless-play.html> (discussing implications of cheap shots in hockey). Campbell, the senior writer for The Hockey News, discusses how enforcers doling out hard hits in hockey have a “prominent place” in the NHL and advances that “the NHL is enveloped in such a culture of violence that it actually encourages [hard hitting] players [such as enforcers] . . . to exist.” See *id.* For a discussion of the history of violence in the NHL, see Jeff Z. Klein, *Hockey's History, Woven with Violence*, N.Y. TIMES (Dec. 11, 2011), <http://www.nytimes.com/2011/12/11/sports/hockey/hockeys-history-woven-with-violence.html?pagewanted=all> (reporting Adam Gopnik's, a writer for The New Yorker, theory that “violence [in hockey started] as an outgrowth of organized hockey's origins in late-19th-century Montreal, where ethnic groups formed rival clubs that gave the game the ‘archaic tang,’ . . . ‘of my gang here versus your gang there.’”). For a further discussion of why violence is prevalent in the NHL, see generally John Branch, *Derek Boogaard: A Boy Learns to Brawl*, N.Y. TIMES, Dec. 3, 2011, at SP1 [hereinafter “Branch III”] (noting “[e]fforts to ban fighting in the N.H.L. have long been stymied, in part by the popularity and tradition of it in the junior and minor leagues”). Branch mentions that Boogaard grew up with the violence mentality for hockey when he “stepped into this culture” at sixteen years of age. See *id.*

24. See *NHL Safer With Fighting, Players Say*, CBC SPORTS-THE CANADIAN PRESS (Nov. 6, 2013), <http://www.cbc.ca/sports/hockey/nhl/nhl-safer-with-fighting-players-say-1.2416907> (arguing whether fighting should be eliminated or whether

lence because of its commercial value.²⁵ Additionally, violence is a part of the NHL's history within the nature of the game.²⁶ The NHL rules penalize "aggressor" players that commit one-sided acts of fighting not in compliance with the league rules.²⁷ However, on-

safety regulations should just be heightened). The Canadian Press highlights that in leagues outside of the United States, namely "European leagues and tournaments regulated by the International Ice Hockey Federation, like the Olympics, fighting is punishable by ejection along with imposing a five-minute major penalty." See *id.* Further, The Canadian Press notes that "the NHL has taken steps" to improve players' safety such as instituting "[t]he instigator rule . . . to punish players who clearly initiate fights, [and] leaving the bench to join an altercation carries an automatic 10-game suspension and so-called 'staged' fights are becoming less popular." See *id.* See also NHL OFFICIAL RULES 2014-2015, Rule 46.14, NHL (2014-2015) [hereinafter "NHL OFFICIAL RULES"] available at <http://www.nhl.com/ice/page.htm?id=26336> ("A major penalty shall be imposed on any player who fights."). "For the first major penalty in any one game, the offender . . . shall be ruled off the ice for five minutes[.]" See *id.* § 4, Rule 20.1. For physical penalties generally see *id.* § 6, Rule 46.

25. See *Three Reasons Why Hockey Fights Are Allowed*, HOCKEY ROUNDTABLE (May 6, 2013), <http://hockeyroundtable.com/three-reasons-why-hockey-fights-are-allowed/> (discussing why hockey fights provide entertainment value). See also Adam Gopnik, *Hockey Without Rules*, THE NEW YORKER (Apr. 20, 2012), <http://www.newyorker.com/online/blogs/sportingscene/2012/04/hockey-violence-blackhawks.html> (noting that violence in hockey has entertainment value); Patrick Hruby, Jake Simpson & Hampton Stevens, *As Hockey Gets More Violent, More People Are Watching: Coincidence?*, THE ATLANTIC (Apr. 20, 2012, 9:05 A.M.), <http://www.theatlantic.com/entertainment/archive/2012/04/as-hockey-gets-more-violent-more-people-are-watching-coincidence/256130/> (noting that hockey fans as well as players generally like violence and fighting); Greg Wyshynski, *Once Again, NHL Players Voice Overwhelming Opposition to Fighting Ban*, YAHOO! SPORTS (Feb. 20, 2012, 12:55 PM), <http://sports.yahoo.com/blogs/nhl-puck-daddy/once-again-nhl-players-voice-overwhelming-opposition-fighting-175557533.html> (noting that "98 percent of 318 players surveyed in the NHLPA/CBC poll[]" were against banning fighting); Branch II, *supra* note 6, at B13 (discussing NHL's reluctance to ban on-ice fighting). Branch quotes NHL Commissioner Gary Bettman as stating the following proposition: "If you polled our fans, probably more would say they think it's a part of the game and should be retained[.]" See *id.*

26. See Gopnik, *supra* note 25 (noting that violence in hockey stems from tradition: "this is the way we play our game, it's part of our culture, [and] it's intrinsic to its enjoyment"). See also Scott Burnside, *NHL to Discuss Ban on Goalie Fights*, ESPN (Nov. 11, 2013, 4:07 PM), http://espn.go.com/nhl/story/_/id/9961982/nhl-general-managers-discuss-ban-goaltender-fights-gary-bettman-says (discussing NHL commissioner's position on hockey's tradition of fighting). Burnside reports that when asked whether fighting has a place in professional hockey, Gary Bettman, the NHL commissioner, gave the following response: "Fighting has been part of the game . . . I think fighting acts as a thermostat to keep other things [orderly]. I'd rather them be punching each other than swinging the sticks at each other." See *id.* (second alteration in original).

27. See NHL OFFICIAL RULES, *supra* note 24, § 6, RULE 46.2 (defining aggressor player as "the player who continues to throw punches in an attempt to inflict punishment on his opponent who is in a defenseless position or who is an unwilling combatant"); *id.* §§ 6-9 (outlining types of penalties and types of fouls). The NHL's Rule 46 generally outlines the rules for fighting. See *id.* § 4.

the-ice fistfights, that seem like boxing matches, in which more than one player engages, are in a league of their own.²⁸

Players who engaged in these on-the-ice fistfights are known as enforcers because they purposely intimidate opponents through brute force.²⁹ While the role of enforcers can be valuable to teams for multiple reasons, the case of Boogaard's role has raised questions to the necessity of enforcers to enhance an NHL team's performance.³⁰ Particularly, the benefit of an enforcer on a team unlikely outweighs the potential physical costs and consequences of

28. See Jamie Fitzpatrick, *History of Hockey Fights*, <http://proicehockey.about.com/od/rules/a/History-Of-Hockey-Fights.htm> (last visited Sep. 14, 2014) (mentioning that fighting in hockey has occurred since hockey rules were established). Fitzpatrick acknowledges that the NHL imposes "penalties [on] players who attack with their sticks, or those who go after an unwilling or unaware opponent." See *id.* However, "a fistfight between two willing combatants has long been accepted as a 'natural' part of hockey and a tactic for motivating team mates and intimidating opponents." See *id.* For annual NHL fight statistics since 2001, generally see *NHL Fight Stats*, HOCKEYFIGHTS.COM, <http://www.hockeyfights.com/stats/> (last visited Jan. 15, 2015). See also Branch II, *supra* note 6 (discussing NHL's consideration of increasing penalty for on-ice fighting and quoting Commissioner Bettman as stating "there doesn't seem to be overwhelming appetite or desire to [increase the penalty]").

29. See Jones & Stewart, *supra* note 23 (discussing role of enforcers in NHL and their apparent value). Boogaard's suit described him as an enforcer for the Wild and Rangers because "[he] engage[d] in fist-fights with players from the opposing team, on the ice, during a game." See Complaint, *supra* note 6, at 1-2. See generally Michael McCarthy, *The Fight Game: NHL's Rules of Engagement*, USA TODAY, Apr. 5, 2007, http://usatoday30.usatoday.com/sports/hockey/nhl/2007-04-04-fighting_N.htm (discussing role of Colton Orr, NHL player on New York Rangers, as "enforcer" that brutally knocked out Todd Fedoruk of Philadelphia Flyers during first twenty seconds of game as retribution for Fedoruk's hits on Rangers' captain Jaromir Jagr during previous game between Flyers and Rangers). Interestingly, Fedoruk commented that "Orr had to send a message . . . [he] did the right thing . . . [h]e had to let his teammates know they would be protected and safe, that they wouldn't get run by [the Flyers]." See *id.* For a more thorough discussion of examples of enforcers in the NHL see Rob Flis, *10 of the Highest-Paid NHL Enforcers for 2013*, THE RICHEST (Nov. 11, 2013), <http://www.therichest.com/sports/hockey-sports/top-10-highest-paid-nhl-enforcers-for-2013/>.

30. See Adam Gretz, *The Enforcer Fallacy: Hockey's Fighting Specialists Don't Protect Anyone*, <http://regressing.deads핀.com/the-enforcer-fallacy-hockeys-fighting-specialists-don-1442618145> (Oct. 11, 2013, 14:00 EST) (opining that NHL's problem is not with fighting but rather with teams' employment of enforcers "whose only tangible skill is their ability to punch another player in the face"). Gretz highlights the career of Pittsburgh Penguin Steve MacIntyre, an enforcer, that "[i]n [ninety-one] career games at the NHL level he has recorded four points (two goals, two assists) and tallied 175 penalty minutes . . . [o]nly [twenty-one] times has he played more than five minutes in a single game[.]" See *id.* For a discussion of how Boogaard's death may impact the role of enforcers, see Branch II, *supra* note 6 (discussing implications of Boogaard's death along with Rick Rypien and Wade Belak, whose combined deaths "provided a backdrop for further debate about the role of fighting and the toll on enforcers[]").

acting as an enforcer.³¹ Although findings show that enforcers face an increased risk of injury, the NHL seems hesitant to ban fighting or simply increase the penalty for fighting.³²

B. An Enforcer's Dilemma: The Case of Derek Boogaard

In a game on December 9, 2010, when Boogaard played for the Rangers, he engaged in an on-ice fight and suffered a concussion; it was the last game he would ever play.³³ Boogaard, an enforcer throughout his entire NHL career, was prescribed opioids for his ensuing pain, which led to Boogaard abusing opioids and to his

31. See Dater I, *supra* note 5 (discussing deaths of three enforcers in 2011); Muir, *supra* note 16 (discussing George Parros, an enforcer, and concussion he sustained in fighting). See also Adrian Dater, *Former Avalanche Enforcer Scott Parker Battling Effects of Concussions*, THE DENVER POST (Dec. 1, 2013) [hereinafter Dater II], http://www.denverpost.com/avalanche/ci_24631033/former-avs-enforcer-scott-parker-battling-effects-concussions (detailing daily struggles of Scott Parker, retired NHL enforcer that played for Colorado Avalanche, who sustained multiple concussions). Dater reports that Parker “estimates he participated in around 400 fights, absorbed at least 4,000 punches to the head and face, and suffered 20-25 concussions[.]” See *id.* Although Parker has been retired from the NHL for nearly six years, he “frequently is debilitated by seizures[.] . . . wear[s] sunglasses most of the time” to prevent light-induced, incapacitating headaches, and “[w]hen [he] looks down, he cannot ‘track’ objects. Otherwise, he gets dizzy and nauseous.” See *id.* Nonetheless, the importance of fighting and enforcers in hockey is a hotly debated subject. See Elizabeth Merrill, *Derek Boogaard Felt the Pain, Too*, ESPN OUTSIDETHELINES (May 29, 2011, 6:10 PM), <http://sports.espn.go.com/espn/otl/news/story?id=6598296> (quoting sports author Ross Bernstein as stating following about role of enforcers in hockey: “you’re not going to win [without enforcers] . . . [like] a kicker in football . . . [y]ou might not think they’re athletes, but you can’t win without him”). Merrill notes that Bernstein “believes that enforcers are integral, even though rule changes in the NHL in recent years have diminished their place in the game.” See *id.* Speaking on Boogaard, Merrill notes Bernstein as stating the following: “Derek was a specialist. Just his presence was enough to keep teams honest. They know that if they mess with [Marian] Gaborik, then Boog[aard’s] coming off the bench.” See *id.* (first alteration in original). Marian Gaborik was a former NHL player for the Rangers from 2009-2012 and during the 2012-2013 season. See *Marian Gaborik Stats*, ESPN NHL, http://espn.go.com/nhl/player/stats/_/id/290/marian-gaborik (last visited Sep. 14, 2014).

32. See Branch II, *supra* note 6 (discussing that NHL commissioner has not come out in support of increasing penalty time for fighting based on commissioner’s view of lack of support from fans and players). See also Dater II, *supra* note 31 (noting NHL has implemented rules that discourage fighting, but NHL has not banned fighting outright). Dater discusses the NHL rules “requiring any player who enters the league now to wear a protective visor and eliminating fights in the final five minutes [of the game].” See *id.* In the future, the NHL might ban fighting between goalies. See Burnside, *supra* note 26 (discussing future meeting among league’s general managers to determine whether new rule prohibiting goalies from fighting should be implemented). According to Burnside, this new rule came about because of a fight between Ray Emery, a goalie for the Philadelphia Flyers, and Braden Holtby, a goalie for the Washington Capitals. See *id.*

33. See Complaint, *supra* note 6, paras. 16-17 (discussing last game that Boogaard played).

accidental, fatal overdose of oxycodone and alcohol in his apartment.³⁴ Boogaard's case pointedly brings attention to two potential issues that enforcers have faced and could face in the future due to the high rate at which they sustain physical injuries: opioid addiction and CTE.³⁵

1. *Boogaard's Dark Road to Opioid Addiction*³⁶

Boogaard's first experience with opioids as a professional hockey player came on October 16, 2008, when NHL team physicians first prescribed him 432 pain pills of Hydrocodone for a tooth fracture sustained in an on-ice fight.³⁷ Next, from April 14, 2009 to April 30, 2009, Boogaard received 150 pills of Oxycodone and/or Percocet and forty pills of Hydrocodone after undergoing nasal surgery and right shoulder surgery.³⁸ After this, Boogaard allegedly

34. See *supra* notes 6-7 (discussing general information of Boogaard's case and Boogaard's NHL career); Complaint, *supra* note 6, at 2 (alleging Boogaard "was provided copious amounts of prescription pain medications, sleeping pills, and painkiller injections by NHL team's physicians, dentists, trainers, and staff[]").

35. For a general discussion of opioid addiction see *infra* notes 36-49 and accompanying text. For a discussion of CTE, see *infra* notes 50-53 and accompanying text.

36. For a discussion regarding opioids and their addictive effects, see *Treating Opiate Addiction, Part I: Detoxification and Maintenance*, HARVARD MEDICAL SCHOOL, http://www.health.harvard.edu/newsweek/Treating_opiate_addiction_Detoxification_and_maintenance.htm (last visited Sep. 14, 2014) ("Opiates are outranked only by alcohol as humanity's oldest, most widespread, and most persistent drug problem[.]"). Opiates are mainly used when over-the-counter drugs for pain prove ineffective. See *id.* Essentially, "opioid drugs work by binding to opioid receptors in the brain, spinal cord, and other areas of the body [and] reduce the sending of pain messages to the brain and reduce feelings of pain." See *id.* Some common opioid prescription drugs include the following: codeine, fentanyl, hydrocodone, hydromorphone, meperidine, methadone, morphine, and oxycodone. See *Opioid (Narcotic) Pain Medications*, WEBMD, <http://www.webmd.com/pain-management/guide/narcotic-pain-medications> (last visited Sep. 14, 2014) (describing opiates generally, side effects, and how to discuss using opiates with one's physician).

37. See Complaint, *supra* note 6, para. 55 (listing in chart corresponding quantities and dosage of Hydrocodone or Vicodin and prescribing physician).

38. See Complaint, *supra* note 6, paras. 57, 58, 61 (charting corresponding dates drugs were dispensed, quantities, and dosage of oxycodone or hydrocodone, and prescribing physicians). See *id.* para. 91 (describing Boogaard "often ingesting up to 10 [pain pills] per day"). See also DRUG ENFORCEMENT ADMINISTRATION (DEA), CONTROLLED SUBSTANCES, U.S. DEP'T OF JUSTICE (Feb. 2, 2015), available at http://www.deadiversion.usdoj.gov/schedules/orangebook/c_cs_alpha.pdf (listing Oxycodone as Schedule II controlled substance). For information regarding how drugs, substances, and certain chemicals are classified, see DRUG ENFORCEMENT ADMINISTRATION (DEA), DRUG SCHEDULES, U.S. DEP'T OF JUSTICE (Feb. 2, 2015), available at <http://www.justice.gov/dea/druginfo/ds.shtml>. Drugs, substances, and chemicals are classified according to their respective abuse rates, which is a determinative factor. See *id.* According to the DEA, Schedule II drugs such as oxycodone "are defined as drugs with a high potential for abuse, less abuse

became addicted to opioids, began abusing pain medications and sleeping pills, and was placed in SABH in September 2009.³⁹ Upon discharge from the SABH program, Boogaard participated in an NHL-mandated “Aftercare Program” in which he “was to refrain from all opioid and Ambien drug use and submit to random drug testing.”⁴⁰ During Boogaard’s 2009-2010 season with the Minnesota Wild, his drug tests were negative.⁴¹

Despite Boogaard’s father notifying NHL officials that Boogaard had relapsed, and Boogaard’s conversation with the Rangers about his addiction prior to signing, physicians prescribed Boogaard an additional 366 prescription pain medications and other controlled substances during the 2010-11 season.⁴² From January 2011 to March 2011, Boogaard’s urine tested positive for Oxymorphone, Hydromorphone, and Hydrocode in six urine tests,

potential than Schedule I drugs, with use potentially leading to severe psychological or physical dependence. These drugs are also considered dangerous.” See DRUG ENFORCEMENT ADMINISTRATION (DEA), DEFINITION OF CONTROLLED SUBSTANCES, U.S. DEP’T OF JUSTICE <http://www.deadiversion.usdoj.gov/schedules/> (last visited Sep. 14, 2014) (defining drug classifications). Schedule I drugs, substances, or chemicals have “no currently accepted medical use and a high potential for abuse.” See *id.*

39. See Complaint, *supra* note 6, paras. 64, 66 (discussing Boogaard’s mandated placement into SABH program signaled that NHL knew of Boogaard’s addiction to prescription pain medications). “Addiction . . . is characterized by one or more of the following behaviors: [1] poor control over drug use[,] [2] compulsive drug use[,] [3] continued use of a drug despite physical, mental and/or social harm[,] [and 4] [a] craving for the drug.” See Karen Richards, *Opioids: Addiction vs. Dependence*, <http://www.healthcentral.com/chronic-pain/coping-27488-5.html> (last visited Mar. 7, 2014). Richards advances that certain of the following behaviors may suggest that a person’s physical dependence on an opioid has turned into addiction: “[1] Taking medications more frequently or at higher dosages than prescribed. [2] Ingesting drugs in ways other than directed such as crushing, snorting or injecting. [3] Frequent reports of lost or stolen prescriptions. [4] Doctor shopping. [5] Using multiple pharmacies.” See *id.*

40. See Complaint, *supra* note 6, paras. 64-65 (“On [Sept.] 23, 2009, as part of the SABH program, Boogaard was checked into ‘The Canyon’ rehabilitation facility in California for in-patient treatment of his developed opioid and sleeping pill addiction.”). See *id.* para. 63 (stating Boogaard “purchased and was provided Oxycodone off-market from multiple sources”). See also Branch II, *supra* note 6, at 4 (discussing testimony from Boogaard’s best friend in New York, Devin Wilson, who stated that Boogaard “usually on Sunday evenings . . . met a man in a parking lot [in Long Island] . . . and bought Ziploc bags full of painkillers”).

41. See Complaint, *supra* note 6, para. 115, at 23 (stating Boogaard’s tests were negative when he played for Wild).

42. See Complaint, *supra* note 6, paras. 116, 118, 120, at 23 (listing in chart quantities of Hydrocodone, Zolpidem, and Ambien prescriptions given to Boogaard during the 2010-11 season with the Rangers). According to Boogaard’s father, although Boogaard had been in a rehab program since September 2009, Boogaard’s father would find prescription pill bottles in Boogaard’s bathroom prescribed by Rangers’ physicians. See Branch II, *supra* note 6.

but neither the team nor the league suspended him.⁴³ After the sixth positive urine test, the SABH program placed Boogaard into *Stage One* intervention.⁴⁴ On April 4, 2011, during a team practice, “he could not stay up on his skates, fell numerous times, and was kicked out of practice.”⁴⁵

The next day, he was admitted into the Authentic Recovery Center (“ARC”) in California for opioid dependence.⁴⁶ While receiving treatment at ARC, Boogaard resisted treatment and showed indifference in therapy sessions; he “view[ed the] treatment episode as something he must do to comply with NHL.”⁴⁷ A day before his death on May 12, 2011, even though Boogaard was generally non-compliant with the ARC’s treatment protocol, he was released to attend his sister’s college graduation.⁴⁸ He overdosed on pain medications and was found dead on May 13, 2011.⁴⁹

43. See Complaint, *supra* note 6, paras. 122-127, at 24-25 (listing dates Boogaard’s urine tested positive for pain medications). According to the chart, during the urine tests, Boogaard was only prescribed Ambien CR and Zolpidem ER, which are not pain medications but medications for sleep problems. See Complaint, *supra* note 6, at 15 (listing Zolpidem ER and Ambien CR prescribed starting from Dec. 24, 2010 until April 8, 2011).

44. See Complaint, *supra* note 6, para. 128, at 25-26. For a discussion of SABH program, see *infra* notes 71-76 and accompanying text.

45. See *id.* para. 129, at 26 (discussing Boogaard’s alleged impairment at practice).

46. See *id.* para. 130, at 26 (discussing admittance into SABH program).

47. See *id.* para. 131, at 26 (internal quotation marks omitted) (discussing Boogaard’s lack of participation in SABH program).

48. See *id.* para. 140, at 27 (discussing physicians releasing Boogaard from SABH program).

49. See *id.* paras. 141-142, at 27 (discussing details of Boogaard’s death). A “[p]ost-mortem toxicology [report] revealed that [] Boogaard had a blood alcohol count of .180 gm/dL and a blood opioid quantification of .14mg/L of Oxycodone.” See Complaint, *supra* note 6, para. 143, at 27. Boogaard’s death not only raised awareness of issues concerning enforcers but also of a rising problem of opioid related deaths in the United States:

In 2010, the most recent year with complete statistics, drug overdose deaths killed more people than auto accidents in the U.S. [m]ore than 16,000 of these deaths were from opioid relapses and overdoses, compared to just over 4,000 in 1999. The U.S. Centers for Disease Control and Prevention in Atlanta, which monitors health trends, classifies opioid addiction as an ‘epidemic’ that, together with heroin (another opioid), has killed 125,000 Americans in the last decade.

Lester Munson, *Enforcer’s Family vs. the NHL*, ESPN (May 15, 2013), http://espn.go.com/espn/otl/story/_/id/9275330/looking-answers-derek-boogaard-death (discussing Boogaard’s case against NHL generally).

2. *Chronic Traumatic Encephalopathy: Post-Mortem Brain Analysis is Bad News for Enforcers*

CTE is a “progressive degenerative” brain disease found in those “with a history of repetitive brain trauma[,]” including athletes, and it can only be diagnosed post-mortem by analyzing brain tissue.⁵⁰ CTE is believed to be caused by such repetitive brain trauma, “including symptomatic concussions as well as asymptomatic subconcussive hits to the head[,] [which] trigger[] progressive degeneration of the brain tissue, including build-up of an abnormal protein called tau.”⁵¹ Progression of CTE “can begin months, years, or even decades after the last concussion or end of active athletic involvement.”⁵² Some of the symptoms associated with CTE include: “memory loss, confusion, impaired judgment, paranoia, impulse control problems, aggression, depression, and, eventually, progressive dementia.”⁵³

Physicians from the Boston University School of Medicine, Center for the Study of Traumatic Encephalopathy [“BUCTE

50. See SPORTS LEGACY INSTITUTE, CHRONIC TRAUMATIC ENCEPHALOPATHY, <http://www.sportslegacy.org/research/cte/> (last visited Mar. 7, 2014) (discussing general information about CTE, its history, and progression). “The VA CSTE Brain Bank contains more brains diagnosed with CTE than have ever been reported in the world combined.” Boston University School of Medicine, Center for the Study of Traumatic Encephalopathy, *Boston University Researchers Reports NHL Player Derek Boogaard Had Evidence of Early Chronic Traumatic Encephalopathy*, BU CTE CENTER (Dec. 6, 2011), [hereinafter “BUCTE”], <http://www.bu.edu/cte/news/press-releases/december-6-2011/> (discussing scientific findings and conclusions that can be drawn from examining Boogaard’s brain tissue). The CTE Center “was established in 1996 as one of 29 centers in the US funded by the National Institutes of Health to advance research on Alzheimer’s disease and related conditions . . . the CTE Center conducts high-impact, innovative research on Chronic Traumatic Encephalopathy and other long-term consequences of repetitive brain trauma in athletes and military personnel.” See BUCTE, *About*, <http://www.bu.edu/cte/about/> (last visited Mar. 7, 2014).

51. See BUCTE, *What is CTE?*, <http://www.bu.edu/cte/about/what-is-cte/> (last visited Feb. 23, 2015) [hereinafter “*What is CTE?*”] (discussing CTE and its progression). Boxers exhibited the first signs of being affected by CTE since the 1920s, as CTE occurs when there is “repetitive brain trauma including symptomatic concussions as well as asymptomatic subconcussive hits to the head.” See *id.*

52. See *What is CTE?*, *supra* note 51. Even though boxers were the first to exhibit signs of CTE, recently published scientific reports have confirmed CTE “in retired professional football players and other athletes who have a history of repetitive brain trauma.” See *id.* Recently, CTE can even be diagnosed in living people. See William Weinbaum & Steve Delsohn, *Dorsett, Others Show Signs of CTE*, ESPN (Nov. 7, 2013), http://espn.go.com/espn/otl/story/_/id/9931754/former-nfl-stars-tony-dorsett-leonard-marshall-joe-delameilleure-show-indicators-cte-resulting-football-concussions (discussing signs of CTE diagnosis of NFL Pro Football Hall of Famers Tony Dorsett, Joe DeLamielleure, and former NFL All-Pro Leonard Marshall through brain scans and clinical evaluations).

53. See *What is CTE?*, *supra* note 51 (discussing progression of CTE and symptoms).

Center”] examined Boogaard’s brain tissue and found that he suffered from Stage II CTE because of the repeated blows to the head during his NHL career.⁵⁴ As examined, “the severity of his brain changes was more advanced than most other athletes of similar age with CTE examined by Dr. McKee.”⁵⁵ According to the examination, for the two years leading up to Boogaard’s death, he not only “dealt with drug addiction” but also “exhibited abnormal behaviors, including emotional instability and problems with impulse control, along with short-term memory problems and disorientation[.]”⁵⁶ These behaviors could have served as red flags, and Boogaard’s complaint alleged that the NHL should have known that he, as an enforcer, was more susceptible to injuries and “brain damage due to concussive and subconcussive brain trauma,” and that he “had an increased risk of developing addiction to prescription pain medications.”⁵⁷

“The association between Boogaard’s brain pathology and [the] . . . behavioral changes and memory problems he experienced in his last two years, is unclear[.]” because it is generally “unknown whether substance abuse is caused by the impulse control problems associated with CTE[.]”⁵⁸ However, in a statement regarding Boogaard’s CTE diagnosis, Dr. Robert Cantu, the BUCTE Co-Director, stated that “based on the small sample of enforcers we have studied, it is possible that frequently engaging in fistfights as a hockey player may put one at increased risk for this

54. See Complaint, *supra* note 6, para. 26, at 23. Dr. Ann McKee, a “professor of neurology and pathology at Boston University School of Medicine, and the director of the CTE brain bank” located in Virginia, diagnosed Boogaard with mild CTE. See BUCTE, *supra* note 50. Playing for the New York Rangers in 2010, Boogaard’s fitness coming out of rehab was questionable and “[t]eam officials expressed concern about [Boogaard’s] effectiveness on the ice, even his safety in a fight[.]” See Branch II, *supra* note 6. In November 2010, Boogaard “beat[] Philadelphia’s Jody Shelley” and also “pounded Edmonton’s Steve MacIntyre[.]” but the bout left Boogaard sidelined for a game with a “broke[n] nose and most likely . . . a concussion.” See *id.* Further, on December 9, 2010, Ottawa enforcer, Matt Carkner, “cracked Boogaard’s face with a right hand[;]” in response, Boogaard, uncharacteristically, “turned his head away and held on to Carkner . . . [and] did not throw another punch.” See Branch II, *supra* note 6 (highlighting at least three videos showing Boogaard fighting and discussing how Boogaard’s “family and friends noticed an indifference in his fighting”).

55. See BUCTE, *supra* note 50 (discussing possible scientific findings and conclusions drawn from examining Boogaard’s brain tissue).

56. See *id.* (discussing CTE symptoms that could have led to Boogaard’s death).

57. Complaint, *supra* note 6, paras. 48-50, at 7 (discussing Boogaard’s status as enforcer for the NHL).

58. BUCTE, *supra* note 50 (discussing potential possibility of causal relationship between Boogaard’s opioid addiction and his early onset of CTE).

degenerative brain disease.”⁵⁹ Furthermore, “even if [CTE] was not directly affecting Boogaard’s quality of life and overall functioning before he died, it is possible it could have in the future.”⁶⁰

C. 2005 and 2012 NHL Collective Bargaining Agreement and the SABH Program

The NHLPA, on behalf of the NHL players, bargains with team owners to establish a binding contract, known as a CBA, between the parties.⁶¹ The CBA “sets the terms and conditions of employment of all professional hockey players playing in the NHL as well as the respective rights of the NHL Clubs,” and remains in effect for just under ten years.⁶² The 2012 CBA, which replaced the 2005 CBA, was ratified on January 12, 2013.⁶³ Generally, CBAs give teams the exclusive right to “designate the doctors and hospitals responsible for furnishing medical treatment” for their players.⁶⁴ Both CBAs address a performance enhancing substance program, but fail to incorporate a program that addresses the use of opioids or other addictive substances.⁶⁵ Instead, the CBAs state that the SABH program will continue to handle any substance abuse, behavioral, or domestic issues.⁶⁶

59. *See id.* (discussing enforcers have heightened risk of head injuries because they often fight).

60. *See id.* (discussing whether Boogaard’s symptoms of CTE would have showed up later in his life prior to his death).

61. *See* Nick DiCello, *No Pain, No Gain, No Compensation: Exploiting Professional Athletes through Substandard Medical Care Administered by Team Physicians*, 49 CLEV. ST. L. REV. 507, 522 (2001) (citations omitted) (discussing team physicians’ duty of care, standard of care, and claims that can be brought against team physicians alleging medical malpractice).

62. *See Collective Bargaining Agreement*, NHLPA, <http://www.nhlpa.com/inside-nhlpa/collective-bargaining-agreement> (last visited Jan. 15, 2015) (containing information regarding NHLPA and CBA).

63. *See id.* (discussing 2012 CBA). For purposes of this Comment, the 2012 CBA is only mentioned to highlight that there was no change in the SABH program’s terms from the 2005 CBA and this Comment focuses on the 2005 CBA because Boogaard’s suit brought in May 2013 was under the 2005 CBA. *See* Complaint, *supra* note 6, paras. 28-33.

64. Teresa Herbert, *Are Player Injuries Adequately Compensated*, 7 SPORTS L.J. 243, 247 (2000) (discussing collective bargaining agreements and workers’ compensation laws).

65. *See* 2005 CBA, *supra* note 13, art. 47, at 133-35 (outlining NHL’s performance enhancing drugs program); 2012 CBA, *supra* note 13, art. 47, at 188-94 (same).

66. *See* 2012 CBA, *supra* note 13, art. 47.4(a); 2005 CBA, *supra* note 13, art. 47.3. A committee of NHLPA members and NHL representatives took on the responsibility of “establish[ing] an education program on the dangers of performance-enhancing substances[.]” but the committee left the responsibility of handling “substance abuse and behavioral and domestic issues involving players requiring employee assistance” to the SABH program. *See NHL, NHLPA Team Up*

Although the CBA does not list opioids as a banned substance, the 2012 CBA states, “the joint committee will agree on a Prohibited Substances List [which] will include performance-enhancing substances on the list maintained by the World Anti-Doping Agency”⁶⁷ The World Anti-Doping Agency (“WADA”) prohibits the use of narcotics including Oxycodone and Hydromorphone, but NHL physicians continue to prescribe these narcotics to players like Boogaard.⁶⁸ In accordance with the performance enhancing substances program, the NHL imposes penalties on players that test positive for using performance-enhancing substances.⁶⁹ While the NHL could also add narcotics to the prohibited substance list, nothing indicates that it will.⁷⁰

According to Boogaard’s complaint, the SABH program follows a “defined regimen[.]”⁷¹ Any player that enters the SABH pro-

Against Performance-Enhancing Substances, NHL (July 22, 2005), http://www.nhl.com/nhlhq/cba/drug_testing072205.html (discussing performance enhancing substances program).

67. See Press Release, NHL, NHL, NHLPA Team Up Against Performance-Enhancing Substances, NHL (July 22, 2005) (on file with author) (discussing terms of new NHL CBA). See also NHLPA, *supra* note 12, at Art. 47. For more information regarding the WDA, see *About WADA*, available at <http://www.wada-ama.org/en/About-WADA/> (last visited Mar. 7, 2014).

68. For a complete list of WADA prohibited substances, see THE WORLD ANTI-DOPING CODE, THE 2014 PROHIBITED LIST, available at <https://wada-main-prod.s3.amazonaws.com/resources/files/WADA-Revised-2014-Prohibited-List-EN.pdf> (last visited Mar. 7, 2014). See *supra* note 38 (listing opioids Boogaard received from team physicians).

69. See 2012 CBA, *supra* note 13 at Article 47.7 in 2012 CBA and Article 47.7 in 2012 CBA. The penalties for using performance enhancing substances are as follows: “1) for the first positive test, a suspension of twenty NHL Games without pay, and mandatory referral to the SABH Program for evaluation and possible treatment, 2) for the second positive test, a suspension of sixty NHL games without pay, and mandatory referral to the SABH Program for evaluation and possible treatment, and 3) for the third positive test, a ‘permanent’ suspension,” although the player has an opportunity to “reapply for discretionary reinstatement after a minimum period of two years.” “The policy [i.e., SABH program’s policy] is by far the most lenient, player-friendly drug policy of all the major sports leagues.” See Robert F. Moore, *The Interaction Between the Americans with Disabilities Act and Drug and Alcohol Addiction*, 16 SPORTS LAW. J. 231, 243 (2009) (analyzing drug abuse policies of major leagues such as NFL, NBA, MLB, and NHL) (citations omitted).

70. See 2012 CBA, *supra* note 13, at 506 (discussing addendum agreement for “illegal” stimulants and amphetamines, such as cocaine, and “stimulants/amphetamines” that require “licensed physician[’s]” prescription to be added to Prohibited Substances List).

71. See Complaint, *supra* note 6, para. 111 (outlining guidelines for players entering SABH program). A player in the SABH program “is placed in Stage One of four defined stages for substance abuse.” See *id.* “A Stage One player continues to receive his full NHL salary, with no penalties, so long as he fully complies with the treatment and follow-up care prescribed.” See *id.*

A player that violates the Stage One treatment or follow-up care program is placed in Stage Two. A player in Stage Two is suspended without pay

gram “receive[s] a comprehensive medical and psychological evaluation by one of the Program Doctors.”⁷² Though not the case with Boogaard, players are allowed to check themselves into the SABH program.⁷³ The SABH program has procedures for treating and penalizing players that do not comply with treatment, however, it “has been a somewhat invisible entity.”⁷⁴ After the deaths of Rypien and Boogaard, Commissioner Gary Bettman stated that he expected the league to review the SABH program and possibly make some changes.⁷⁵ Further, even NHLPA union executive Mathieu Schneider called the SABH program “very strong[,]” but recognized that the NHLPA must work to improve the program.⁷⁶

According to Boogaard’s complaint, the 2005 CBA does not address the following issues: the NHL’s duty to its players in administering controlled substances; NHL procedure for administering controlled substances to its players; the NHL’s duty to its players pursuant to the SABH program; or the NHL’s duty to its players to

during active treatment and is eligible for reinstatement upon recommendation of the Program Doctors. A player that violates Stage Two treatment or follow-up care program is placed in Stage Three. A player in Stage Three is suspended without pay for a minimum of six (6) calendar months and is eligible for reinstatement upon recommendation of the Program Doctors. A player that violates Stage Three treatment or follow-up care program is placed in Stage Four. A player in Stage Four is suspended without pay for a minimum of one (1) season. Reinstatement is at the discretion of the NHL.

Id. (internal tabulation omitted) (outlining program requirements and expectations).

72. *See id.* (discussing medical procedures of SABH program physicians).

73. *See NHLPA, Tootoo Enters Substance Abuse/Behavioural Health Program* (Dec. 27, 2010), <http://www.nhlpa.com/news/tootoo-enters-substance-abusebehavioural-health-program> (discussing Nashville Predators, Jordin Tootoo “voluntarily enter[ing] in-patient care as part of the [SABH program]”). While in the SABH program, Tootoo will “receive his full salary and benefits and will have no penalty imposed, provided he complies with his prescribed treatment and follow-up care program.” *See id.*

74. *See* Colin Bruckel, *CBA SABH: Program*, THE HOSERS (Sept. 1, 2011), <http://www.thehosers.com/2011/09/cba-sabh-program.html> (last visited Mar. 7, 2014) (recognizing that despite SABH’s privacy concerns with releasing information about its program, structure of program can still be divulged because it does not infringe on anyone’s personal privacy).

75. *See NHL to Look at Program in Light of Deaths*, ESPN, Aug. 17, 2011, [hereinafter “*NHL to Look at Program*”] http://espn.go.com/nhl/story/_/id/6871384/gary-bettman-says-nhl-union-evaluate-behavioral-program (mentioning Rypien and Boogaard both spent time in SABH program before their deaths). For details regarding Rypien’s death, see Dater I, *supra* note 5, and accompanying text.

76. *See NHL to Look at Program*, *supra* note 75 (quoting Mathieu Schneider as stating the following about Rypien’s death: “Maybe it would have been better had Rick been able to lean on some teammates and guys there for support. . . . But those type of things have always been kind of taboo. You just don’t talk about it.”).

monitor their general health.⁷⁷ Unfortunately, Boogaard's claims against the NHL and NHLPA relating to the 2005 CBA and SABH are federally preempted under the Labor Management Relations Act ("LMRA").⁷⁸ Courts often interpret CBA provisions broadly; therefore, if the players' claims are "remotely related" to the league's CBA, the claims are preempted.⁷⁹ Boogaard's abuse of opioids did not trigger the imposition of penalties pursuant to the CBA, which could imply that the NHL does not consider opioid abuse to be as serious of a problem as the use of performance enhancing drugs.⁸⁰ The question stands whether the NHL CBA

77. See Complaint, *supra* note 6, paras. 29-35 (discussing Boogaard's claims against SABH program under 2005 CBA).

78. See *Nelson v. NHL*, 2014 WL 656793, (N.D. Ill. Feb 2, 2014) (denying Boogaard's motion to remand case to state court because third and fourth counts of Boogaard's claims were completely preempted under § 301 of Labor Management Relations Act (LMRA)). "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . or between any such labor organization, may be brought in any district court of the United States . . ." See 29 U.S.C.A. § 185(a). See also *National Labor Relations Act*, NAT'L LABOR RELATIONS BOARD, <http://www.nlr.gov/resources/national-labor-relations-act> (last visited Mar 7, 2014). Under the LMRA, the NHL and NHLPA, which are considered labor organizations, can bring their case in federal court because federal courts have jurisdiction over the labor disputes. *Id.* The NHL argued that the suit must be dismissed because the CBA (collective bargaining agreement) and federal labor law preempt the claims of Boogaard. See Travis Yost, *The NHL/SABH Miserably Failed Derek Boogaard*, EKLUND'S HOCKEY, LLC (July 30, 2013, 2:48 PM) <http://www.hockeybuzz.com/blog/Travis-Yost/How-Did-the-NHL-and-SABH-Fail-Derek-Boogaard/134/53114>. Boogaard's lawyers, however, could respond in asserting that "the 2005 CBA does not address the NHL's duties to its players to monitor their general health." See Paul D. Anderson, *NHL Concussion Litigation –The Boogaard Family Strikes First*, (May 13, 2013) <http://nflconcussionlitigation.com/?p=1446>. In other words, a judge should not be required to interpret the provisions of the CBA. See *id.* See *Smith v. Houston Oilers*, 87 F.3d 717 (5th Cir. 1996) (holding that players' state tort law claims against professional team were preempted by federal labor laws, which required that arbitration resolution measures be exhausted before commencing civil suit). The court held that the suit's dispute should be dealt with under the CBA. See *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172 (N.D.N.Y. 1990) (holding that former NFL player's claims against professional team were preempted under federal labor law because they were substantially related to NFL's CBA). In some instances, team physicians are partial owners of sports franchises. See Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians vs. Athlete Patients*, 50 ST. LOUIS U. L.J. 185, 192-203 (2005) (discussing issue of conflict of interest where partial owners are also team physicians). For example, "Arthur Pappas, who served as both part owner and team physician for the Boston Red Sox[,] was subject "to player and public criticism that he was compromising his athletes' best interests for the short-term benefit of the team." See *id.*, at 193-94 (discussing Pappas' role as both team owner and physician).

79. See *Herbert*, *supra* note 64, at 252-54 (noting that "[w]ithout legal responsibility, teams have great latitude to abuse their players.").

80. See Complaint, *supra* note 6, at paras. 171-78, at 33-35 (describing multiple instances where Boogaard tested positive for opioids but was not suspended).

should have procedures that address the health of its players and potential remedies for players incurring injuries.⁸¹

III. MEDICAL MALPRACTICE AND HOW PROFESSIONAL ATHLETES ARE GIVEN THE SHORT END OF THE STICK

A. Relationship Among Teams, Team Physicians, and Team Players

Team physicians have an employer-employee relationship with their respective teams.⁸² Typically, the team selects its own physicians who usually specialize in internal medicine or orthopedic surgery.⁸³ Although the definition of a team physician is unclear, the team is involved in paying the physician's salary.⁸⁴ Because the team is the employer, the team has the power to hire, fire, and pay the physician to treat its players.⁸⁵ Therefore, the physician's rela-

81. For a discussion of potential remedies for injured NHL players, see *infra* notes 168-192 and accompanying text.

82. See Calandrillo, *supra* note 78, at 190 (discussing the employer-employee relationship between team physicians and athletes, as well as the legal implications). Commentator John Branch reported in the New York Times that after Boogaard's case, the SABH program's co-directors, Dr. Lewis and Dr. Shaw, referred all questions to the NHL and it provided the following written statement:

Under the auspices of the NHL/NHLPA Substance Abuse and Behavioral Health Program, an NHL player receives individualized — and confidential — medical treatment, care and counseling. Based on what we know, Derek Boogaard at all times received medical treatment, care and counseling that was deemed appropriate for the specifics of his situation.

John Branch, *In Hockey Enforcer's Descent, a Flood of Prescription Drugs*, N.Y. Times, June 4, 2012, at A1 [hereinafter Branch IV], available at <http://www.nytimes.com/2012/06/04/sports/hockey/in-hockey-enforcers-descent-a-flood-of-prescription-drugs.html?pagewanted=all>.

83. See Matthew J. Mitten, *Team Physicians as Co-Employees: A Prescription That Deprives Professional Athletes of an Adequate Remedy for Sports Medicine Malpractice*, 50 ST. LOUIS U. L.J. 211, 211 (2005) (citing Steve P. Calandrillo, *Sports Medicine Conflicts: Team Physicians vs. Athlete Patients*, 50 ST. LOUIS U. L.J., 190-91 (2005)). For a discussion of sports physicians according to the American Medical Association ("AMA"), see sources cited *infra* note 87 and accompanying text.

84. See Scott Polsky, Comment, *Winning Medicine: Professional Sports Team Doctors' Conflict of Interest*, 14 J. CONTEMP. HEALTH L. & POL'Y 503, 507 (acknowledging that definition of team physician is not precise but defining team physician as "physician who undertakes to render medical services to athletic participants and whose services are either arranged for or paid for at least in part by the institution or entity other than the patient, the patient's family, or some surrogate" (internal quotation marks omitted) (citing Joseph H. King Jr., *The Duty and Standard of Care for Team Physicians*, 18 Hous. L. Rev. 657, 658 (1981)). For a discussion of requirements of team physicians, qualifications, and responsibilities, see Information Statement: *Team Physician Definition, Qualifications, and Responsibilities: Consensus Statement* AAOS, <http://www.aaos.org/about/papers/advistmt/1021.asp> (last updated June 2013).

85. See Calandrillo, *supra* note 78, at 191 (discussing team's control over employee physicians).

tionship with the team may conflict with the physician's relationship with the athletes, as the physician is not an employee of the individual athlete, but the team.⁸⁶ Recognizing this conflicting relationship, the American Medical Association ("AMA") "requires that any contractual relationship entered into by physicians with teams be free from lay interference in medical matters, and that a doctor's primary responsibility [is] to [the] patient."⁸⁷ Furthermore, physicians are bound by the Hippocratic Oath, which holds physicians' treatment of patients to the highest standard of care.⁸⁸

Under the AMA's Code of Ethics, team physicians cannot let financial interests interfere with their level of medical care, which can be especially difficult given the tension between a team's salary payment and the players' health.⁸⁹ Additionally, team physicians are often placed in a difficult position when it comes to administering medical care to players, with the possibility of either fame or notoriety, depending on how well the treatment goes.⁹⁰ Further,

86. See *id.* at 191 (discussing conflict of interest between physician and athlete). See also Anthony A. Romeo, *Team Physicians Must Balance Conflict of Interest*, HEALIO (July 2013), <http://www.healio.com/orthopedics/sports-medicine/news/print/orthopedics-today/%7B6731ea9a-fe9a-4edc-8f62-b2da1c29bab7%7D/team-physicians-must-balance-conflict-of-interest> (noting physicians, in taking Hippocratic oath, swear to make patient priority-without conflict). When their patients play professionally, "doctors often will encounter severe pressures from their employers, the patients, and from their own self-interests to compromise their medical ethics." See Polsky, *supra* note 84, at 503. Team physicians are often placed in tough positions because the physicians do not want to be too conservative in their treatment if it means that the player will not get better, as the physician could get fired for underperforming. See *id.* (discussing team physicians' concerns). See also Mitten, *supra* note 83, at 211 (discussing that team physicians commonly give "discounted medical care [to the team's] players").

87. See Calandrillo, *supra* note 78, at 191 (discussing employer-employee relationship between team physician and athlete). According to the AMA "the interests of the patient . . . should be paramount in the practice of medicine." See Polsky, *supra* note 84, at 505 (citations omitted) (footnote omitted). AMA's Code of Ethics mandates that physicians put their patient's interests first and foremost, and "health care providers are bound not to let any other interest interfere with that of the patient in being cured." See Calandrillo, *supra* note 78, at 188-89 (citations omitted) (footnotes omitted) (internal quotation marks omitted).

88. See Peter Tyson, *The Hippocratic Oath Today*, PBS NOVA (Mar. 27, 2001), <http://www.pbs.org/wgbh/nova/body/hippocratic-oath-today.html> (discussing the history of the Hippocratic Oath and listing old and new versions of oath).

89. See AMA Code of Medical Ethics § 8.03 (1994), available at <http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics/opinion803.page> (prohibiting physicians from placing their own financial interests above health of their patients). If a conflict arises between the physician's financial interests and the player's interests, the physician still must put the player first. See Calandrillo, *supra* note 78, at 189 (citing AMA Code of Medical Ethics § 8.03).

90. See Polsky, *supra* note 84, at 524-25 (noting difficult positions physicians may be put in because of public attention). In addressing team physicians' conflicts of interests, Polsky states the following:

the prestige of being a physician for a professional sports team can cause physician groups to compete with each other.⁹¹ In contrast to a physician's duty to place players' health above all, players continuously feel pressure to outperform the competition— an area in which both successes and failures affect their fame and economic status—and also must face influence from peers, pride, and the love of the game.⁹² Likewise, athletes feel pressure to play through illness, injury, and pain, despite the health risks.⁹³

1. *Medical Malpractice Suits*

Players primarily have sued team physicians for negligence, alleging malpractice.⁹⁴ Players base medical malpractice claims “on a team physician's failure to discover an abnormality during a physical examination, improper medical clearance, improper medical care, or failure to disclose the nature and extent of an injury.”⁹⁵ Decisions are usually made on a case-by-case basis, depending on

It is not easy to make clear judgments, however, when an employer is telling the doctor, an employee, to get the players ready to play as quickly as possible, the player is telling the doctor to get him back into play as quickly as possible, and the media and the fans want the player to play as quickly as possible.

Id. at 505.

91. See Calandrillo, *supra* note 78, at 188 (discussing how prestige and power of professional sport's team physicians can cause competition).

92. See Polsky, *supra* note 84, at 504 (citations omitted) (discussing athletes' pressures of performing); Michelle Hill, *Athletes Performing Under Pressure*, SPORTS BUSINESS, <http://www.sportsnetworker.com/2010/06/02/athletes-performing-under-pressure/> (last visited Mar. 14, 2014) (discussing how athletes' fear of failure and pressure can affect athletes psychologically).

93. See Calandrillo, *supra* note 78, at 189 (discussing how athletes may want to disregard their health to play). Playing through pain can pose long-term psychiatric risks, such as emotional distress and posttraumatic stress disorder (PTSD). See generally Samantha O'Connell & Theo C. Manschreck, *Playing Through the Pain: Psychiatric Risks Among Athletes*, 11 CURRENT PSYCHIATRY, 16, 16 (July 2012), available at http://www.currentpsychiatry.com/fileadmin/cp_archive/pdf/1107/1107CP_OCConnell.pdf.

94. See Nick DiCello, Note, *No Pain, No Gain, No Compensation: Exploiting Professional Athletes Through Substandard Medical Care Administered by Team Physicians*, 49 CLEV. ST. L. REV. 507, 518 (2001) (discussing team physicians and players' suits alleging medical malpractice against physicians). Courts generally give deference to a physician's medical opinion. See Mitten, *supra* note 83, at 212-13 (“[I]t will be the rare case regarding participation in athletics where a court may substitute its judgment for that of the . . . team physicians.” (second alteration in original) (citing *Knapp v. Nw. Univ.*, 101 F.3d 473, 485 (7th Cir. 1996))).

95. See DiCello, *supra* note 94, at 518-19 (discussing athletes' suits against physicians). See also Steven M. Kane & Richard A. White, *Medical Malpractice and the Sports Medicine Clinician*, NCBI (Nov. 7, 2008), <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2628504/> (discussing history of patients' suits against sports physicians alleging medical malpractice and duties of team physician).

whether the doctor's alleged conduct deviated from the reasonable standard of care "according to common law tort principles."⁹⁶

For sports tort actions, players most commonly claim negligence: that the defendant breached his or her duty of care.⁹⁷ To succeed in a negligence claim, the plaintiff must prove that the defendant did something that an "ordinary, prudent person would not have done under similar circumstances," or that the defendant "failed to do something that an ordinary, prudent person would have done in similar circumstances."⁹⁸ In negligence claims, the plaintiff has the burden to prove that the defendant negligently "act[ed] or omitted [to act]" and that the act or omission "was the proximate cause of the plaintiff's injury or a cause which proximately contributed to it."⁹⁹ Furthermore, the plaintiff must show four elements: an established duty of care, a breach of that established duty, a proximate cause or a causal connection between the act or omission and the plaintiff's injury, and damages or injury that resulted from the breach.¹⁰⁰

2. *Duty of Care of Sports Physicians*¹⁰¹

Under tort law, an actor must conduct himself in a manner aware of the fact that he risks liability should he breach a legal duty to another person.¹⁰² The CBA outlines most medical care owed to

96. See DiCello, *supra* note 94, at 519 (indicating procedure for determining whether physician committed medical malpractice). For a discussion regarding a suit by an NFL player against a team physician, see generally Brent Schrottenboer, *Chargers Doctor Found Liable in Medical Malpractice Suit*, USA TODAY SPORTS, <http://usatoday30.usatoday.com/sports/football/nfl/chargers/story/2012-07-27/doctor-malpractice-suit/56545172/1> (last updated July 28, 2012).

97. See Walter T. Champion, Jr., *FUNDAMENTALS OF SPORTS LAW* § 4:1 SPORTS MEDICINE, GENERALLY, Westlaw (2013) (discussing potential claims athletes have against physicians).

98. See *id.* (discussing reasonable person standard in negligence suits).

99. See *id.* (describing plaintiff's burden of proof).

100. See *id.* (discussing elements of negligence claim).

101. The American Board of Medical Specialties does not recognize sports medicine as a specialization; "the American Osteopathic Association does have a certification board for sports medicine." See Matthew J. Mitten, *Emerging Legal Issues in Sports Medicine: A Synthesis, Summary, and Analysis*, 76 ST. JOHN'S L. REV. 5, 10 (2002) [hereinafter Mitten II]. However, sports medicine has grown as a field. See DiCello, *supra* note 94, at 513 ("The Professional Team Physicians Organization, of whom over eighty percent are professional team physicians, provides descriptions of injuries and their prevention online." (citing Kenneth Shouler, *After the Fall*, CIGAR AFICIONADO 85 (2001))).

102. See RESTATEMENT (SECOND) OF TORTS § 4 (2013) (describing legal definition of duty under tort law).

professional players.¹⁰³ The CBAs establish teams' duty of reasonable care to "ensure the safety, fitness, and health of their players."¹⁰⁴

3. *Standard of Care Once a Duty of Care is Established*

Once the duty of care has been established, the plaintiff must establish the standard by which that duty is fulfilled.¹⁰⁵ The appropriate standard of care for a physician is not what is commonly done, but what a reasonable person would have done in similar circumstances.¹⁰⁶ In the context of professional sports, a team doctor "should perform with the level of knowledge, skill and care that is expected of a reasonably competent medical practitioner under similar circumstances, taking into account reasonable limits that have been placed on the scope of the physician's undertaking."¹⁰⁷ Typically, the standard of care is connected to a doctor's specialty;

103. See DiCello, *supra* note 94, at 517 (discussing contractual nature of collective bargaining agreement and its terms to protect players' health). See generally NHLPA, *supra* note 12 (citing NHL collective bargaining agreement).

104. See DiCello, *supra* note 94, at 517 (discussing importance of collective bargaining in determining physician's standard of care). See generally 2012 CBA, *supra* note 13.

105. See Justin P. Caldarone, *Professional Team Doctors: Money, Prestige, and Ethical Dilemmas*, 9 SPORTS LAW J. 131, 138 (2002) (discussing legal standard of a physician's duty of care, conflicts of interest, and affirmative defenses available to physicians).

106. See Mitten II, *supra* note 101, at 12, 23., 12 nn.11 & 23 ("explaining that a physician who renders medical treatment has a duty to do so in a non-negligent manner consistent with 'good and accepted standards of medical care'" (citing *Classen v. Izquierdo*, 520 N.Y.S. 2d 999, 1002 (N.Y. App. Div. 1987))).

107. See Caldarone, *supra* note 105, at 138 (internal quotation marks omitted) (quoting Joseph H. King Jr., *The Duty and Standard of Care for Team Physicians*, 18 HOUS. L. REV. 657, 692 (1981)). See also *Classen v. Izquierdo*, 520 N.Y.S. 2d 999, 1002 (N.Y. App. Div. 1987) (reasoning that physicians should treat an athlete "in accordance with good and accepted standards of medical care[]"). According to appellate courts, to set the appropriate standard of care and establish a physician's medical malpractice liability, the athlete must use expert testimony. See *Gardner v. Holifield*, 639 So. 2d 652, 656-57 (Fla. Dist. Ct. App. 1994) (reasoning that expert testimony regarding physician's medical malpractice was dispositive in precluding summary judgment); *Toppel v. Redondo* 617 N.E.2d 403, 404 (Ill. App. Ct. 1993) (implying that expert testimony can be used and is relevant to prove a physician's medical malpractice); *Mikkelson v. Haslam*, 764 P.2d 1384, 1386 (Utah Ct. App. 1988) (using plaintiff's current physician's comments regarding defendant physician's care of plaintiff). But see *Rosenweig v. State*, 171 N.Y.S.2d 912, 914 (N.Y. App. Div. 1958) (holding state not liable for examining doctor's error), *aff'd*, 158 N.E.2d 229 (N.Y. 1959). Even federal courts adopt the requirement for expert testimony to prove medical malpractice liability. See *Zimbauer v. Milwaukee Orthopedic Grp., Ltd.*, 920 F. Supp. 959, 965-66 (E.D. Wis. 1996) (holding that professional baseball player's suit against treating physician is dismissed because of lack of expert testimony); *Gardner*, 639 So. 2d at 655, 657 (allowing medical expert affidavits to raise factual issues for the jury as to whether physician committed medical malpractice); *Dailey v. Winston*, 1986 WL 12063 *5 (Tenn. Ct. App. Oct. 28, 1986)

“[f]or example, an orthopedic surgeon should held to the standard of an orthopedist providing sports medicine care.”¹⁰⁸ Team physicians should dispense drugs in accordance with the player’s best health interests.¹⁰⁹ For example, team physicians should exercise caution to ensure that a prescription drug is treating the underlying injury, not simply masking or aggravating its pain.¹¹⁰ Furthermore, according to the Controlled Substances Act, a physician may only prescribe a controlled substance for a “legitimate medical purpose.”¹¹¹

B. Were NHL Physicians Negligent in Boogaard’s Case?

To recover for medical malpractice, a plaintiff must establish the following elements: (1) the physician owed the player a duty; (2) the physician breached that duty; (3) damages existed; and (4) there is legal causation between the physician’s care and the player’s damages.¹¹² Because of the doctor-patient relationship, the physician will almost always owe a duty of care to the patient.¹¹³ Generally, a patient can establish a duty of care in two ways: (1) “through a general duty created pursuant to the third-party beneficiary theory[,]” or (2) “under tort theory, where a duty is imposed

(indicating that expert testimony necessitated jury resolution of whether physician committed medical malpractice).

108. See Mitten II, *supra* note 101, at 10 (discussing how to compare physician’s standard of care to what standard of care should be).

109. See *id.* at 20 (stating that team physician may be found negligent for dispensing any controlled drugs in illegal or careless manner).

110. See *id.* (citing James J. Thornton, *Playing in Pain: When Should an Athlete Stop?*, *The Physician & Sports Medicine*, Sept. 1990, at 138, 140). See also Branch IV, *supra* note 82 (quoting “Dr. Jane Ballantyne, a professor of anesthesiology and pain medicine at the University of Washington”). Dr. Ballantyne stated that team physicians tend to overtreat because they often want to help the team players’ return to competition. See *id.* She also stated that “because the famous athletes have access to virtually any doctor they want, they often receive whatever treatment they want.” See *id.*

111. See David H. Sohn, *Can I Have a Refill on My Percocet*, AAOS (Sept. 2012), <http://www.aaos.org/news/aaosnow/sep12/managing6.asp> (discussing safeguards for prescribing opioids and what constitutes “legitimate medical purpose”).

112. See Michael Landis, Note, *The Team Physician: An Analysis of the Causes of Action, Conflicts, Defenses and Improvements*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 139, 140 (2003) (noting elements that athlete must prove to have successful medical malpractice claim against physician). Under tort law, the word damages “denote[s] a sum of money awarded to a person injured by the tort of another.” See RESTATEMENT (SECOND) OF TORTS §12A (2013). Furthermore, causation “denote[s] the fact that the causal sequence by which the actor’s tortious conduct has resulted in an invasion of some legally protected interest of another is such that the law holds the actor responsible for such harm unless there is some defense to liability.” See *id.* § 9.

113. See Polsky, *supra* note 84, at 509 (discussing the duty of care physicians owe to patients).

on anyone who begins to perform services for another's benefit."¹¹⁴ The duty of care under tort theory does not depend on a contractual obligation between the player and physician or on compensation for the physician's treatment.¹¹⁵

Boogaard has a legitimate negligence claim against the SABH program's physicians.¹¹⁶ First, a duty exists because of the doctor-patient relationship established upon the physicians' treatment of Boogaard.¹¹⁷ Second, a court must determine whether Boogaard's prescribing physicians performed to the level expected of a reasonably competent physician under similar circumstances.¹¹⁸ The court determines the reasonableness of the physicians' conduct through whether Boogaard's course of treatment was in his best interest.¹¹⁹

In Boogaard's case, a strong argument exists that prescribing Boogaard copious amounts of pills with the information that the player had an addiction, or that he could develop one, constitutes negligent physician conduct, and is unreasonable compared to the standard of care expected of a physician licensed to prescribe opioids.¹²⁰ Additionally, no legitimate medical purpose existed for prescribing opioids to Boogaard.¹²¹ Further, the SABH physicians'

114. See Caldaroni, *supra* note 105, at 136-37 (discussing theories of tort liability).

115. See *id.* at 137 (discussing physicians' duty of care and noting that duty of care "exists regardless of who pays or even whether the doctor will or expects to be paid at all" (citing Joseph H. King Jr., *The Duty and Standard of Care for Team Physicians*, 18 HOUS. L. REV. 657, 665 (1981)). See generally Complaint, *supra* note 6 (alleging SABH program's negligence).

116. See generally Complaint, *supra* note 6 (discussing Boogaard's treatment at SABH program).

117. See *id.* For a discussion of physician-patient relationship, see *supra* notes 82-111 and accompanying text.

118. For a discussion of the reasonable standard of care requirement, see *supra* notes 105-108 and accompanying text.

119. For a discussion of physician standard of care, see *supra* notes 82-100 and accompanying text.

120. For a discussion of the amounts of prescription pills that physicians prescribed to Boogaard, see Complaint *supra* note 6, para. 5. According to the Controlled Substances Act, the number of times a prescription may be refilled ranges from zero to five refills. See U.S. Department of Justice, *Controlled Substances Listed in Schedules III, IV, and V*, http://www.deadiversion.usdoj.gov/21cfr/cfr/1306/1306_22.htm (last visited Mar. 14, 2014). The only way to obtain controlled substances legally is through a physician's prescription. See *id.*

121. See Sohn, *supra* note 111 (discussing what "legitimate medical purposes" legally entails). See also, David B. Brushwood, *Defining "Legitimate Medical Purpose"*, 62 AM. J. HEALTH-SYST PHARM 306, 306-308 (2005) (discussing Ninth Circuit court's decision in *Oregon v. Ashcroft*, 368 F.3d 1118 (9th Cir. 2004) which held that authority to define "legitimate medical purpose under federal Drug Enforcement Administration (DEA) regulations . . . rests with state governments" (internal quotation marks omitted) (citations omitted) (footnotes omitted)). For a federal stat-

negligence caused Boogaard's injuries in two ways: (1) the constant prescriptions led to his addiction and (2) his participation in the SABH program did not help to cure his addiction.¹²² Finally, Boogaard's addiction and death constitute the damages he incurred from the physicians opioid prescriptions.¹²³ Therefore, the SABH physicians negligently breached their duty of care when treating Boogaard.¹²⁴

Players have sued the NHL claiming negligence in treating head-related injuries previously, showing that, unfortunately, Boogaard is not alone.¹²⁵ In fact, ten former NHL players filed suit against the NHL "alleging that it concealed evidence of severe brain damage risks posed by repeated concussions, failed to protect players from on-ice head trauma, implemented rules that increased risk, and delayed implementing a concussion management program."¹²⁶ The lawsuit grew to include at least 200 former players.¹²⁷ The players alleged that the NHL assumed a duty to care for their head injuries when the NHL instituted its concussion program in 1997.¹²⁸ The players alleged that the league did not implement a timely concussion management program after conducting a study, did not ban fighting or body-checking, and employed enforcers.¹²⁹

utory reference, see 21 C.F.R. § 1306.04 ("A prescription for a controlled substance to be effective must be issued for a legitimate medical purpose by an individual practitioner acting in the usual course of his professional practice.")

122. See generally Complaint, *supra* note 6 (alleging physician's negligence caused Boogaard's addiction).

123. See generally *id.* (discussing reason for bringing claim).

124. *Id.* Taking into account the amounts of opioids that SABH program physicians prescribed to Boogaard, Boogaard's violations of the SABH program without punishment, and Boogaard's urine six positive urine tests indicating opioid abuse before he was placed into the SABH program for the second time. See Complaint *supra* note 6, at Counts I-III.

125. See Chris Stevenson, *NHL Being Sued by 10 Former Players Over Concussions*, Nov. 25, 2013, <http://www.torontosun.com/2013/11/25/nhl-being-sued-by-10-former-players-over-concussions> (discussing NHL players' suit).

126. Steven M. Sellers, *Ex-players Sue NHL for Improper Concussion Management*, JUSTICE.ORG (Dec. 19, 2013), <http://www.justice.org/cps/rde/xchg/justice/h.s.xsl/22457.htm> (discussing NHL players' suit). According to the Complaint, "from 1997 to 2008, an average of seventy-six players per year suffered a concussion on the ice. For the 2011-2012 season, 90 players suffered a concussion on the ice at a loss of 1,779 man games." See Sean McIndoe *Everything You Need to Know About the NHL Concussion Lawsuit*, GRANTLAND (Nov. 27, 2013), <http://grantland.com/features/the-nhl-concussion-lawsuit/> (stating that "the league knew (or should have known) about the dangers posed by concussion and failed to do enough to reduce the risk of head injuries and educate players about the issue").

127. See Sellers, *supra* note 126 (discussing how NHL players' suit is growing in plaintiffs).

128. See *id.* (mentioning that "the league recorded baseline brain testing for all players and collected injury data for each season from 1979 to 2004").

129. See *id.* (discussing NHL players' claims against NHL).

The concussion study discussed the number of reported concussions from 1997 to 2004, but did not discuss the effects of those concussions on the players' long-term health.¹³⁰ Moreover, the league had access to data regarding players' concussion susceptibility, yet, the complaint alleged that the NHL actually took steps that increased the risk of concussions, like installing rigid glass around the ice rink.¹³¹ These steps, combined with the NHL's apparent negligence in addressing concussion incidents, compose the plaintiffs' main argument that the NHL neglected its duty of care.¹³² However, although Boogaard and the other NHL players have filed suits, they will likely see limited recovery.¹³³

IV. THE INADEQUACY OF AVAILABLE REMEDIES

NHL players are employees of the NHL under the CBA.¹³⁴ As employees, NHL players could be entitled to workers' compensation if their injuries occurred within the scope of employment.¹³⁵ If the physician's improper medical treatment of the player caused the original injury, or aggravated an existing injury, then workers' compensation laws should cover the player.¹³⁶ Theoretically, players can sue teams under both workers' compensation and tort

130. *See id.* (discussing NHL players' claims against NHL for failing to disclose potential brain injuries).

131. *See id.* (discussing safety measures NHL could adopt to make game safer). These steps included "a change from flexible glass boards to rigid ones, despite 'immediate complaints from players that the rigid glass was like hitting a brick wall.'" *See id.*

132. *See id.* (summarizing plaintiffs' claims against NHL). The plaintiffs' claim that the NHL failed to acknowledge the "growing body of scientific evidence and its compelling conclusion that hockey players who sustain repetitive concussive events, sub concussive events and/or brain injuries are at a significantly greater risk for chronic neurocognitive illness and disabilities both during their hockey careers and later in life." *See id.*

133. For a discussion of remedies available to injured NFL players, see *infra* notes 148-181 and accompanying text.

134. "The NHL recognizes the NHLPA as the exclusive bargaining representative of all present and future Players employed as such in the League by the Clubs . . ." 2012 CBA, *supra* note 13, art. 2. *See also* Bryant v. Fox, 515 N.E.2d 775, 779 (Ill. App. Ct. 1987) (holding professional football players are "employees rather than independent contractors").

135. *See* Mitten, *supra* note 83, at 213 (discussing treatment of professional players as employees and implications for players' medical malpractice claims against team's physician).

136. *See id.* at 213 (citing ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 22.04[1][b] (2005); BENJAMIN T. BOSCOLO & GERALD HERZ, *PROFESSIONAL ATHLETES AND THE LAW OF WORKERS' COMPENSATION RIGHTS AND REMEDIES*, in 3 *LAW OF PROFESSIONAL AND AMATEUR SPORTS* § 17:3 (Gary A. Uberstine et al. eds., 2004)). Aggravated injuries are covered because they occurred within the scope of the players' employment. *See id.*

law.¹³⁷ However, these remedies are inadequate, disincentivize physicians from providing proper treatment, and usually bar player recovery for medical malpractice.¹³⁸ Furthermore, teams have complete control over the players' health, which causes more difficulty for athletes to recover under workers' compensation laws.¹³⁹

A. Limited Opportunity for Recovery Under Workers' Compensation Laws

Workers' compensation laws allow employees to recover for any disability or death incurred from injuries or diseases acquired on the job.¹⁴⁰ Even though most occupational employees are protected under workers' compensation laws, some jurisdictions do not adequately protect athletes under workers' compensation laws even though they are considered team employees.¹⁴¹ Under federal workers' compensation laws, professional sports teams are bound to workers' compensation laws.¹⁴² States' workers' compensation laws

137. For a discussion of workers' compensation claims and tort law claims, see *infra* notes 140-167 and accompanying text.

138. See Mitten, *supra* note 83, at 214 (stating "construction of co-employee doctrine under workers' compensation laws creates a disincentive to adequately protect professional athletes' health and to serve effectively as a gatekeeper").

139. See Herbert, *supra* note 64, at 276 (noting that athlete's working environments are different than a regular employee which calls for adjustments to workers' compensation laws).

140. See MARJORIE A. SHIELDS, ANNOTATION, AWARD OF WORKERS' COMPENSATION BENEFITS TO PROFESSIONAL ATHLETES, 112 A.L.R. 5th 365, (2003) (discussing workers compensation cases and state laws). For a discussion of the purposes of workers' compensation laws, see *id.* (citing AM. JUR. 2d, *Workers' Compensation* § 5). Each state has its own workers' compensation law. See *id.*

141. See Rachel Schaffer, Note, *Grabbing Them By the Balls: Legislatures, Courts, and Team Owners Bar Non-Elite Professional Athletes from Workers' Compensation*, 8 AM. U. J. GENDER SOC. POL'Y & L. 623, 624 (2000) (mentioning some teams usually bar players from workers' compensation recovery through contractual restrictions (citing ARTHUR LARSON, LARSON'S WORKERS' COMPENSATION LAW § 1, at 1-1 (1997))). See also, e.g., 29 U.S.C. § 152 (1999) (defining "employee" broadly, excluding only a select few). Florida does not protect athletes under its workers' compensation laws. See Fla. Stat. Ann. § 440.02 (1)(c)(3) (stating "employment does not include service performed by or as: professional athletes . . .").

142. See Tracy Farrell, *Determination of "Employee" Status*, in 82 AM. JUR. 2d *Workers' Compensation* § 119 (discussing workers compensation laws and what is considered an employee). Other states such as Massachusetts and Wyoming exclude professional athletes under workers' compensation laws because they are not considered employees. See Mass. Gen. Laws Ann. ch. 152 § 1(4) (West 1998); Wyo. Stat. Ann. § 27-14-102(a)(vii)(F) (Michie) (1998). Some states such as Rhode Island and Washington only exclude certain types of athletes from workers' compensation coverage. See R.I. Gen. Laws § 28-29-15 (1998) (exempting professional hockey players from workers' compensation coverage); Wash. Rev. Code Ann. § 51.12.020 (West & Supp. 1998) (excluding horse race jockeys from workers' compensation coverage).

may vary slightly, but they typically contain similar provisions.¹⁴³ Although some workers' compensation laws do not protect athletes, certain courts have recognized that workers' compensation laws do apply to professional athletes as employees of their respective teams.¹⁴⁴ Specifically, courts have recognized that professional athletes are not exempt from coverage if they incurred an injury within the scope of their employment.¹⁴⁵ Only two states, Pennsylvania and Florida, specifically address professional athletes in their workers' compensation statutes.¹⁴⁶ However, workers' compensation laws and employee opioid addiction seems to be of growing legal concern.¹⁴⁷

143. See SHIELDS, *supra* note 140 (stating that workers' compensation acts usually include "a right to compensation for all injuries incident to employment with certain exceptions, abrogation of the common-law doctrines of negligence, substitution of a simple and inexpensive scheme for securing a prompt settlement of claims, and immunity from suit for the employer although there are some well recognized exceptions to the rule of exclusivity as a remedy of workers' compensation laws, under which remedies at law may be brought by workers for injuries incurred").

144. See SHIELDS, *supra* note 140 (discussing some court's treatment of athletes under workers' compensation laws).

145. See SHIELDS, *supra* note 140 (stating that scope of players' employment is essentially their performance in games they play in). For other instances of courts' decision regarding workers' compensation laws, see *id.* (stating that "a professional athlete, who would normally be excluded from coverage under a workers' compensation statute, may be covered for injuries occurring when the athlete is engaged, at the employer's direction, in activities outside the normal scope of athlete's employment"). See also *Miles v. Montreal Baseball Club*, 379 So. 2d 1325 (Fla. Dist. Ct. App. 1980) (holding professional baseball player was covered under workers' compensation laws because injury incurred from diving accident at press party that player was required to attend constituted injury outside of his scope of employment). For more instances of statutory treatment of professional athletes under workers' compensation laws, see Stephen Cormac Carlin & Christopher M. Fairman, *Squeeze Play: Workers' Compensation and the Professional Athlete*, 2 U. MIAMI ENT. & SPORTS L. REV. 95, 104-113 (Fall 1994/Spring 1995) (stating some states do not have separate workers' compensation laws for athletes, election method, and states that set-off workers' compensation benefits).

146. See FLA. STAT. ANN. § 440.02 Definitions (West 2013) (stating definition of professional athletes); 77 PA. STAT. ANN. § 565 (discussing rules for professional athletes to be compensated).

147. See *WC Issues & Trends*, 20 No. 9 QUINLAN, WORKERS' COMP BOTTOM LINE art. 9 (2011) (stating growing problem of opioid addiction among injured workers). According to a study of prescription drug practices in 17 large states, the Workers' Compensation Research Institute (WCRI) "concluded that many doctors are not following the guidelines when prescribing narcotic painkillers to injured workers[,] which opens the door for employees to abuse opioids. See *id.* See also Michael Levin-Epstein, *Opioid Use for Chronic Pain Concerns WC Stakeholders*, 19 No. 2 QUINLAN, WORKERS' COMP BOTTOM LINE art. 4 (2010) (stating new study done by National Council on Compensation reports "prescription drug costs count for nearly one-quarter of all workers' compensation"); *id.* (stating rising costs in opioid prescriptions can have implications for workers' benefits under workers' compensation laws). This issue will not be discussed in this Comment because

To recover under workers' compensation laws, plaintiffs must prove three elements: (1) an employer-employee relationship, (2) a causal relationship between the injury and job, and (3) that the specific state's statute covers that type of employment.¹⁴⁸ The player employer-employee relationship, broadly construed, must have existed at the time of the injury.¹⁴⁹ A causal relationship exists between the injury and occupation if the injury arose out of and in the course of employment.¹⁵⁰ More specifically, the personal injury causally relates to employment "if it is caused by a risk that is closely, directly, or distinctly associated with the employment" in the course of employment.¹⁵¹ Personal injuries are usually classified as "accidental" when caused by a specific event.¹⁵²

B. Physicians Have Tort Immunity Under CBA

Players would normally allege treating physician negligence under tort law.¹⁵³ However, players are barred from tort recovery.¹⁵⁴ Under a team's CBA, physicians are employees of the teams, and as a co-employee of the players, team physicians are immune from tort liability.¹⁵⁵ Teams purposefully designate physicians as

athletes are generally not considered "employees" under workers' compensation laws. *See* FLA. STAT. ANN. § 440.02.

148. Bobbi N. Roquemore, Note, *Creating a Level Playing Field: The Case for Bringing Workers' Compensation for Professional Athletes Into a Single Federal System by Extending the Longshore Act*, 57 LOY. L. REV. 793, 804 (2011) (citations omitted) (discussing that state's workers' compensation laws inadequately protect athletes).

149. *See id.* (stating "an employee is defined as one who works for an is under the control of another for hire" (citing JAMES T. GRAY & MARTIN J. GREENBERG, SPORTS LAW PRACTICE § 12.05 (2010))).

150. *See id.* at 804-05 (discussing the second requirement for workers' compensation claim to be valid) (citation omitted).

151. *Id.* at 805 (discussing how injuries may qualify for workers' compensation coverage) (citing PETER M. LENCISIS, WORKERS' COMPENSATION: A REFERENCE AND GUIDE 62, at 36 (Quorum Books 1998)); GRAY & GREENBERG, SPORTS LAW PRACTICE § 12.05; MARGARET C. JASPER, WORKERS' COMPENSATION LAW 32 at 23 (Oxford Univ. Press 2008)).

152. *See* Roquemore, *supra* note 148, at 805 (discussing nature of personal injuries under workers' compensation laws).

153. For a discussion of potential negligence lawsuits against physicians, see *supra* notes 102-111 and accompanying text.

154. *See* Michelle L. Modery, *Injury Time-Out: Justifying Workers' Compensation Awards to Retired Athletes with Concussion-Caused Dementia*, 84 TEMP. L. REV. 247, 250 (2011) (stating employees must waive tort causes of action for injuries covered under workers' compensation laws (citing 2 MODERN WORKERS COMPENSATION § 102:1 (2011))). *See, e.g.,* Mendes v. Tin Kee Ng, 507 N.E.2d 1048, 1051 (Mass. 1987) (recognizing that employee cannot resort to tort cause of action if claim is covered by workers' compensation).

155. *See* Mitten, *supra* note 83, at 213, 217 (citing Daniels v. Seahawks, 968 P.2d 883, 885 (Wash. Ct. App. 1998) (discussing physician and player co-employee status, which exempts physicians from tort liability)). *See also* 2005 CBA and 2012

employees to ensure that their physicians are immune from tort liability if the player received improper medical care administered within the physician's scope of employment.¹⁵⁶ Physicians' scope of immunity from players' tort claims, which typically include medical malpractice alleging negligence,¹⁵⁷ extends within their scope of employment,¹⁵⁸ and, therefore, immunizing team physicians from players' tort claims gives players the "short end of the stick".¹⁵⁹

In what appears to be an intentional effort to limit physician tort liability, the NHL CBA specifically notes that physicians are employees of the NHL; they are not independent contractors.¹⁶⁰ If physicians acted as independent contractors, players *could* bring tort suits against them, which would properly balance the protection of both the physicians and the players.¹⁶¹ However, if players could bring tort suits against physicians, physicians would be protected from strict liability and automatic medical malpractice be-

CBA; 101 C.J.S. *Workers' Compensation* § 1850 (2014) (noting that if a physician and patient are employees of the same employer, "the patient may be barred by the co-employee immunity conferred by the applicable workers' compensation act from maintaining a medical malpractice action against the physician" (citation omitted)).

156. See Mitten, *supra* note 83, at 214 n.19 (stating physician immunity from players' tort claims "vary by jurisdiction, generally provides that workers' compensation benefits are the exclusive remedy available to an injured employee and prohibits a tort suit against a co-employee who caused the injury (except for intentional wrongs)" (citing *Bryant v. Fox*, 515 N.E.2d 775, 778 (Ill. App. Ct. 1987)); ARTHUR LARSON & LEX K. LARSON, *LARSON'S WORKERS' COMPENSATION LAW* § 112.02[1][b], at 112-7 to 112-10.1 (2005)).

157. See Mitten *supra* note 83, at 213-14. See generally LARSON & LARSON, *supra* note 156, § 112.02[1] [b], 112-7-112-10.1. See also *Daniels v. Seattle Seahawks*, 968 P.2d 883 (Wash. Ct. App. 1998) (holding NFL player was excluded from bringing medical malpractice claim against team's physician that treated player). The physician was considered a part-time employee, but also held his own orthopedic private practice. *Id.* at 885. The court's holding ultimately rested on finding that the physician and player were under the "same employ" (i.e. under the employment of the Seattle Seahawks). *Id.* at 887-88.

158. See Mitten *supra* note 83, at 213-14 (discussing extent of physicians tort immunity) (footnote omitted).

159. See *Stringer v. Minnesota Vikings Football Club, LLC*, 686 N.W.2d 545 (Minn. Ct. App. 2004) (recognizing that even though players and team physicians are co-employees, physicians should not be immune from tort suits brought by players), *aff'd on other grounds* 705 N.W.2d 746, 764 (Minn. 2005) (Hanson, J., dissenting) (reasoning that "the injured employee is entitled to be fully compensated for his injuries by all but the employer; the co-employee tortfeasor should not be relieved of the consequences of his wrongdoing; extending immunity to the co-employee would encourage fellow employees to neglect their duties").

160. See 2005 CBA and 2012 CBA, *supra* notes 13, 134 (discussing NHL players as employees of NHL).

161. See Mitten, *supra* note 83, at 219 (stating that "[r]emoving the unwarranted protection conferred by co-employee tort immunity would enable a professional athlete to seek full recovery for harm caused by the team physician's negligent care and treatment of his injuries"). See also *Stringer*, 686 N.W.2d 545.

cause the player would have the burden to prove liability.¹⁶² For a player to establish liability, the player would need to prove the physician deviated from reasonable, customary, or accepted sports medicine care, and that the deviation proximately caused the injury.¹⁶³ However, to avoid potential double recovery for the same claim, players must elect to recover either under a workers' compensation claim *or* tort law.¹⁶⁴

Courts seem to treat professional athletes differently from other employees under workers' compensation laws, which exacerbates the difficulty of player recovery.¹⁶⁵ As one court noted, "[P]rofessional athletes willfully hold themselves out to risk of frequent, repetitive and serious injury in exchange for lucrative compensation."¹⁶⁶ Even though professional athletes enjoy greater economic status than an average employee, players should not have to bear the economic burden of their injuries or injuries that became aggravated because of physicians' medical malpractice.¹⁶⁷

V. BOOGAARD'S CASE AND OTHERS SIMILARLY SITUATED IN THE NHL

A. Workers' Compensation Claims

The NHL addresses workers' compensation in its CBA.¹⁶⁸ However, difficult questions about recovery arise if the state in

162. See Mitten, *supra* note 83, at 219 (proposing method for players to bring tort suits against team physicians).

163. *Id.* (discussing what players need to prove in tort claim).

164. See *id.* at 220-21 (explaining that players must choose between workers compensation benefits or pursuing tort claim against team in connection with medical malpractice by team physician).

165. See *id.* at 216 (stating that "[c]ourts recognize it is not necessarily unreasonable for workers' compensation laws to be applied different to professional athletes than other employees," and disallowing professional athletes to recover under workers' compensation laws "does not deny them equal protection of the law"). See also *Rudolph v. Miami Dolphins, Ltd.*, 447 So. 2d 284, 291-92 (Fla. Dist. Ct. App. 1983) (discussing the reasons for Legislature's exclusion of players from workers' compensation benefits); *Lyons v. Workers' Comp. Appeal Bd.*, 803 A.2d 857, 861-62 (Pa. Commw. Ct. 2002) (holding 77 Pa. Stat. Ann. Tit. § 565 did not violate equal protection by limiting professional athletes to receive a partial amount of disability benefits).

166. See Mitten, *supra* note 83, at 216 (quoting *Lyons*, 803 A.2d. at 862).

167. See *id.* at 216-17 (discussing consequences of barring athletes from bringing tort claims against treating physicians).

168. See 2005 CBA, *supra* note 13, art. 31.5, at 129 (stating workers' compensation policies under 2005 CBA); 2012 CBA, *supra* note 13, art. 31.5, at 172 (stating workers compensation policies under 2012 CBA). If claims arise in a state where athletes' workers' compensation claims are not required under state law, club "will either voluntarily obtain coverage under the compensation laws of that state or otherwise guarantee equivalent benefits to its players." See 2005 CBA, *supra* note 13,

which a NHL club is domiciled does not recognize workers' compensation laws for athletes.¹⁶⁹ Athletes should recover workers' compensation benefits when they are injured as a result of playing the game they are employed to play.¹⁷⁰ Further, co-employee status should not automatically bar to recovery under workers' compensation laws.¹⁷¹ Finally, the automatic barring of claims against SABH program physicians under a workers' compensation law because they are considered NHL employees serves an injustice to NHL players.¹⁷²

Boogaard satisfies the first two requirements for a successful workers' compensation claim.¹⁷³ First, the NHL players and the NHL have an employee-employer relationship, and second, Boogaard's injuries are causally related to their employment as an NHL enforcer, because of his purpose of the ice.¹⁷⁴ The third requirement, state coverage, creates a problem because most states do not

art. 31.5(a), at 129; 2012 CBA, *supra* note 13, art. 31.5(a), at 172. If a club "has not legally elected to be covered by workers' compensation laws of their state, or any state, a Player may be entitled under this Article will be determined under the Grievance procedure in Article 17 of this Agreement." 2005 CBA, *supra* note 13, art. 31.5(b), at 129; 2012 CBA, *supra* note 13, art. 31.5(b), at 172.

169. See Levin-Epstein, *supra* note 147 (discussing two states that do not recognize professional athletes as employees).

170. See generally SHIELDS, *supra* note 140 (discussing how athletes are treated under workers' compensation laws). See also Estate of Gross v. Three Rivers Inn., Inc., 706 N.E.2d 741, 741 (N.Y. 1998) (holding that professional boxers should not be barred to recover from New York's workers' compensation law); Pro-Football, Inc. v. Uhlenhake, 574 S.E.2d 288, 289 (Va. 2003) (holding that professional football players should not be barred from seeking recovery under Virginia's Worker Compensation Act because players incurred injuries from playing game they were employed to play).

171. See Mitten, *supra* note 83, at 219-21 (contending that players should be able to file tort claims against their treating physicians). But see Brocali v. Detroit Tigers, Inc. 268 S.W. 3d 90, 104-06 (Tex. App. 2008) (ruling that professional baseball players' exclusive remedy against Michigan baseball club was through the Michigan Workers' Disability Compensation Act).

172. See Landis, *supra* note 112, at 156-57 (suggesting that readjustment and uniformity of workers' compensation statutes to allow players to bring suits against team physicians could improve medical treatment and care for professional athletes).

173. See *infra* note 174 and accompanying text (contending that Boogaard's case satisfies first two elements of workers' compensation claim).

174. See 2012 CBA, *supra* note 13, art. 31.5, at 172 (stating workers' compensation policy under NHL CBA). See also sources cited, *supra* notes 29-32 and accompanying text (discussing enforcer injuries); Metropolitan Cas. Ins. Co. of N.Y. v. Huhn, 142 S.E. 121, 125-26 (Ga. 1928) (holding that baseball player was "employee" under Georgia's Workmen's Compensation Act). But see Farren v. Baltimore Ravens, Inc., 720 N.E.2d 590, 593 (Ohio Ct. App. 1998) (holding that question of whether professional football player was "employee" at time of injury under Ohio Workers' Compensation Act was genuine issue of material fact that could not be decided at summary judgment).

include professional athletes in their workers' compensation laws.¹⁷⁵

B. Tort Claims

Boogaard has a strong tort claim against the SABH program's physicians.¹⁷⁶ Physicians have commented on both the danger of high dosages of the pain pills that SABH program physicians prescribed to Boogaard and the overall negligent care of Boogaard.¹⁷⁷ Given that these opining physicians serve to establish the standard of care for the SABH physicians who treated Boogaard, the NHL doctors likely breached their duty.¹⁷⁸ According to the physicians' standard of care, the SABH program physicians knew or should have known that Boogaard had addictive tendencies.¹⁷⁹ Further, the SABH program has penalties for players who do not comply with the treatment program, but declined to enforce such penalties

175. For a further discussion of states with laws covering athletes in workers' compensation claims, see *supra* note 146 and accompanying text. For a discussion on how courts have applied workers' compensation laws to professional athletes, see *supra* notes 144-45 and accompanying text.

176. For an outline on a negligence cause of action as applied to Boogaard's case, see *supra* notes 112-124 and accompanying text.

177. See Branch IV, *supra* note 82 (noting that while several outside drug and addiction experts declined to comment on Boogaard's case, "they took note of the persistently high dosages of medications Boogaard was prescribed, and the seeming lack of a primary doctor overseeing his care[]"). Further, "Dr. Louis Baxter Sr., the executive medical director of the Professional Assistance Program of New Jersey and immediate past president of the American Society of Addiction Medicine . . . cited a three-step process for addicts: detoxification, rehabilitation and continuing care[;]" but Dr. Baxter observed that "[c]ontinuing care is probably the most important part [of the three-step process] . . . [a]nd it looks like [Boogaard] didn't have much of that." See *Id.*

178. See Landis *supra* note 112, at 140 (describing elements required to bring medical malpractice claim).

179. See generally Complaint, *supra* note 6 (averring Boogaard's physicians breached standard of care); Branch IV, *supra* note 82 (reporting that "[t]he Rangers knew about Boogaard's addiction problems," yet "he increasingly received prescriptions for drugs [they] knew he had previously abused"). Dr. Jane Ballantyne, a pain expert and Professor at the University of Washington, described that "[t]he problem with athletes is that they do get multiple injuries and therefore are given multiple courses of opiates." See *id.* Moreover, Ballantyne explained, "when injuries are frequent, it can easily turn into chronic treatment . . . and athletes are at high risk of developing addiction because of their risk-taking personalities." See *id.*

in Boogaard's case.¹⁸⁰ It was only after Boogaard's sixth positive test for opioids that the NHL sent him to the SABH program.¹⁸¹

Certainly, the NHL could raise a defense of contributory negligence by alleging Boogaard's partial responsibility for his death because he did not comply with the SABH program, and is ultimately responsible for his own health and sobriety.¹⁸² However, holding an opioid addict accountable to curb his addiction on his own accord, especially when he was continuously prescribed opioids for extensive pain, is unrealistic and unfair.¹⁸³ Such an allegation may also serve to shift the responsibility back to Boogaard's physicians to have stopped his addiction in the first place, especially when their care exacerbated his condition.¹⁸⁴

A professional hockey player, who was employed as an enforcer and given prescription pills for his injuries when the NHL knew or should have known that he had addictive tendencies, should not be partially accountable under contributory negligence.¹⁸⁵ Nor

180. See Complaint, *supra* note 6, paras. 104-07, 111 (alleging facts regarding SABH program). According to the complaint, the SABH program was created in September 1996, "separate and apart from any CBA in place at the time or subsequently entered into." *Id.* para. 104. Second, "the SABH program was granted exclusive, unsupervised control of player substance abuse issues by the NHL." See *id.* para. 105. Third, the complaint alleges that the SABH program "was created to establish a league-wide program to address substance abuse, HIV, and related health matters for NHL players." See *id.* para. 106. Fourth, Doctors David Lewis and Brian Shaw were paid by the NHL to "serve as Program Doctors for the SABH program." See *id.* para. 107.

181. See Complaint, *supra* note 6, paras. 122-28 (alleging that NHL did not enforce penalties for Boogaard's violations of substance abuse policies); 2005 CBA, *supra* note 13, art. 47.7, at 134 (stating penalties for testing positive for banned substances); 2012 CBA, *supra* note 13, art. 47.7, at 191-92 (same). Under the 2005 CBA, the first positive test for banned substances mandates suspension of the player. See 2005 CBA, *supra* note 13, art. 47.7, at 134.

182. See Branch IV, *supra* note 82 (stating that Boogaard's father requested and received medical documents from Wild and Rangers, but "it seems certain that the records received were not complete . . . many were missing pages."); Munson, *supra* note 49 (noting that NHL could respond to Boogaard's suit by blaming Boogaard for his own addiction, but Boogaard's attorneys "have some powerful ammunition" because "[t]hey will show that team physicians and dentists failed to maintain proper records of drugs they were prescribing").

183. For a discussion of Boogaard's degenerative brain disease and its impact on his ability to function and make sound decisions, see *supra* notes 54-60 and accompanying text.

184. For a discussion of Boogaard's opioid addiction, see *supra* notes 36-49 and accompanying text.

185. See Mitten II, *supra* note 101, at 31-33 (discussing athlete's contributory negligence in connection with medical malpractice claims against team physician). See also Branch IV, *supra* note 82 (discussing Dr. Louis Baxter's opinion). According to Dr. Baxter, "to see [Boogaard] have all that access to those doctors and all those prescriptions, that is mind boggling . . . He had such easy access to prescription medicines." See *id.* Additionally, Gregory J. Davis, a professor of pathology

should an athlete be held responsible for contributory negligence when the physician renders negligent medical care.¹⁸⁶ In contrast, an athlete should be held accountable for contributory negligence only when the athlete “voluntarily expos[es] one’s self to an unreasonable risk of harm.”¹⁸⁷ While Boogaard may have intentionally exposed himself to injury by being an NHL player and enforcer, he did not intentionally expose himself to negligent medical care.¹⁸⁸

C. Amending the CBA

Because courts have broadly interpreted CBAs and their contractual nature, claims that would normally fall under tort law are deemed to be subject to arbitration.¹⁸⁹ As such, courts often give deference to the CBA provisions, which exempts potential players’ tort claims against team physicians.¹⁹⁰ Courts adopting this perspective reason that because players have willingly agreed to the CBA as members of a union, they should be subject to the CBA provisions.¹⁹¹ By amending the CBA to include physicians as independent contractors, players could bring tort claims against physicians under state tort law, which would expose teams to potential vicarious liability for the physician’s malpractice.¹⁹²

and lab medicine at the University of Kentucky, saw no “smoking guns” in the list of prescriptions, but did note that “what does leap off the page is that this is a guy who is in desperate need of some help.” *See id.*

186. *See* Mitten II, *supra* note 101, at 31-33 (discussing athlete’s contributory negligence); *see also id.* at 22 (describing a court’s holding that a ringside physician was negligent where the physician refused “to stop a boxing match in which a participant received several blows to the head from which he ultimately died” (citing *Classen v. Izquierdo*, 520 N.Y.S.2d 999 (N.Y. Sup. Ct. 1987))).

187. *See id.* at 31 (stating that an athlete’s contributory negligence “involves exposing one’s self to an unreasonable risk of harm”); *id.* at 31-32 (stating that “[a]n athlete has no general duty to diagnose his own condition or to divulge information [while] the team physician has a duty to obtain a complete and accurate medical history from an athlete”); *id.* at 32 (“An athlete generally may rely upon the recommendations of the team physician or his designated consulting specialists without seeking a second medical opinion.”).

188. *See generally*, Complaint, *supra* note 6 (discussing Boogaard’s negligence claims).

189. *See* Herbert, *supra* note 64, at 255 (noting that excluding torts from arbitration could be possible remedy).

190. *See id.* (arguing that amending CBA would allow players to address tort grievances against team physicians).

191. *See id.* (noting most players probably are not aware that their tort claims against physicians can be exempted).

192. *See id.* at 256-57 (noting allowing teams to be vicariously liable for employees actions would provide incentive for health care providers to optimally treat players); *Robitaille v. Vancouver Hockey Club, Ltd.*, 124 D.L.R. (3d) 228, 228 (B.C. Ct. App. 1981) (holding team was vicariously liable for player’s injuries because employment contract was entered into by player’s company, and not player).

VI. CONCLUSION

Although the NHL CBA affords players some health protections, the league has limited and insufficient health protections for players considering the aggressive nature of professional hockey.¹⁹³ Injuries sustained, especially as enforcers, could form the basis of a massive lawsuit against the NHL similar to the recently resolved National Football League (“NFL”) Concussion lawsuit.¹⁹⁴ In fact, the NFL Concussion lawsuit has caused the NHL to begin to confront such challenges as well.¹⁹⁵

Unfortunately, NHL physicians escape responsibility for the negligent medical treatment and care of NHL enforcers under workers’ compensation laws.¹⁹⁶ Additionally, physicians enjoy tort immunity, although physician medical malpractice is a legitimate tort cause of action.¹⁹⁷ Furthermore, claims that arise under CBAs are federally preempted under LMRA.¹⁹⁸ Thus, NHL enforcers are unable to satisfactorily recover.¹⁹⁹

193. See John Redlingshafer, Note, *Tonight’s Matchup—Workers’ Compensation v. Medical Malpractice: What Should Lower-Paid, Inexperienced Athletes Receive When a Team Doctor Allegedly Aids in Ending Their Careers*, 2 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 100, 108 (2004) (listing health benefits given to NHL players under CBA).

194. See Bill Barnwell, *What You Need to Know About the NFL’s \$765 Million Concussion Settlement*, GRANTLAND (Aug. 29, 2013), <http://grantland.com/the-triangle/what-you-need-to-know-about-the-nfls-765-million-concussion-settlement/> (discussing generally NFL players’ lawsuit against NFL for injuries sustained); Steve Silver, *Could the Derek Boogaard Wrongful Death Lawsuit Deliver Knockout Blow to NHL?*, YAHOO! SPORTS: THE POST GAME (Sept. 17, 2013, 1:22 AM), <http://www.thepostgame.com/blog/daily-take/201309/nhl-concussion-lawsuit-derek-boogaard-nfl> (discussing whether Boogaard’s case can have farther implications for suits against NHL). *But see* David Campbell *NFL, NHL Concussion Cases are not the Same*, YAHOO! NEWS (Nov. 26, 2013, 7:34 PM), <http://news.yahoo.com/nfl-nhl-concussion-cases-not-same-003425068—spt.html> (comparing NFL suit to NHL suit, and discussing how NFL players’ allegations of NFL misconduct are more serious and outnumber claims NHL players have against NHL).

195. See Ken Belson and Jeff Z. Klein, *N.F.L. Concussion Case Offers Clues for Hockey Lawsuit*, N.Y. TIMES, NOV. 26, 2013, at B16, available at http://www.nytimes.com/2013/11/27/sports/hockey/nfl-concussion-case-offers-clues-for-hockey-lawsuit.html?_r=0 (discussing attorneys representing NHL players in lawsuit could take cues from NFL attorneys involved in concussion lawsuit). For a discussion on NHL players’ suits against the NHL, see *supra* notes 125-133 and accompanying text.

196. For a discussion of why athletes are exempt under workers’ compensation laws and tort, see *supra* notes 140-167 and accompanying text.

197. For a discussion of how physicians are immune from players’ tort suits, see *supra* notes 153-158 and accompanying text.

198. For a discussion of federal preemption of claims arising under collective bargaining agreements, see *supra* note 78 and accompanying text.

199. For a discussion of remedies available to athletes under workers’ compensation and tort, see *supra* notes 140-188 and accompanying text.

NHL enforcers, who are injured in the course of employment and receive negligent medical care, should recover sufficiently under workers' compensation laws.²⁰⁰ Tort immunity for team physicians under the NHL CBA creates a disincentive to administer the highest level of care since players cannot sue for negligence.²⁰¹ Enforcers, whose sole purpose is to bring brute force and physicality to their team, should be given protection for the very reason they are employed.²⁰² The presence of employer responsibility, physician medical care, and a duty of care owed to players becomes virtually non-existent when players cannot protect themselves against employer misconduct.²⁰³

*Melanie Romero**

200. For a discussion of how workers' compensation laws should provide enforcers injury coverage, see *supra* notes 168-175 and accompanying text.

201. For a discussion of how players should be able to have tort claims against physicians, see *supra* notes 176-188 and accompanying text.

202. For a discussion of enforcers, see *supra* notes 29-32 and accompanying text.

203. For a discussion of why players are not able to protect their own health from physicians' medical malpractice, see *supra* notes 148-181 and accompanying text.

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