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## Student Athlete Concussions: The Often Overlooked Legal and Ethical Minefield

David E. Missirian

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# Student Athlete Concussions: The Often Overlooked Legal and Ethical Minefield

By David E. Missirian\*

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## INTRODUCTION

This article will examine the legal liability of public and private colleges and universities for long and short term injuries (mental and physical) due to concussions sustained by student athletes while participating in university-sanctioned sports. It will review, among other cases, the recent NCAA lawsuit brought by former Eastern Illinois football player Adrian Arrington and its proposed 70 million dollar settlement. The article will also look to the doctrines

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\* David Missirian is a Senior Lecturer at Bentley University. The author is grateful for the assistance of Katie Dunn.

of *in loco parentis*, negligence, and the duty of care owed to an invitee to discover if there are any applicable insights for a university environment. The article will further discuss diverging policies among colleges regarding their perceived obligations to students, along with the ethical implications of those policies, regardless of potential legal liability. Finally, the article will conclude with a policy recommendation to best meet a college or university's legal obligations, along with meeting their needs to manage constrained resources.

#### LEGAL LIABILITY FOR UNIVERSITIES: A CHANGING DYNAMIC

In order to understand current university policies regarding their obligations to keep students safe, we must examine how the law's view of those requirements has changed over time. It is also important to consider whether a student-athlete is in a unique position that may in some respects differ from a university's duties to a student who is not participating in a university-sponsored event.

##### *In Loco Parentis: The early 1900s and how the doctrine initially applied*

The doctrine of *in loco parentis* is a common law doctrine that means "in the place of a parent," or "charged with a parent's rights, responsibilities and duties."<sup>1</sup> Based in English common law, "*in loco parentis* originally governed the legal rights and obligations of tutors and private schools."<sup>2</sup> As the Supreme Court recently stated in *Morse v. Frederick*:

As early as 1837, state courts applied the *in loco parentis* principle to public schools, reasoning that teachers – serving as "substitutes" for parents – had a duty to "to command obedience, to control stubbornness, to quicken diligence, and to reform bad habits" in order for children to become "useful and virtuous members of society."<sup>3</sup>

It is important to note that under *in loco parentis*, the breadth of a parent's responsibility, i.e. to "train up the children"<sup>4</sup> is the same responsibility assigned to the teacher. The scope of these responsibilities demonstrates a full shift of the burden to mold and shape the child into a useful member of society; it goes without saying that this cannot be accomplished if the child's welfare is not protected. The teacher was thought to be a guardian of the student, a counselor, a smith who tempered the student's metal. By transforming the student from a collection of unfocused and undisciplined thoughts and emotions into a focused and disciplined individual, the student could become a useful and valued member of society. The University, by and through their teachers, similarly take their charges and transform them into useful and productive members of society and

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1. *In loco parentis*, BLACK'S LAW DICTIONARY (5th ed. 1979).

2. *Morse v. Frederick*, 551 U.S. 393, 413 (2007) (citing 1 W. Blackstone, Commentaries on the Laws of England 441 (1765)).

3. *Morse v. Frederick*, 551 U.S. at 414 (quoting *State v. Pendergrass*, 19 N.C. 365, 365–66 (1837)).

4. *Id.*

humanity.

In the early 20<sup>th</sup> century, the concept of *in loco parentis* expanded from boarding schools to colleges after the case of *Gott v. Berea College*.<sup>5</sup>

College authorities stand in loco parentis concerning the physical and moral welfare and mental training of the pupils, and we are unable to see why, to that end, they may not make any rule or regulation for the government or betterment of their pupils that a parent could for the same purpose. Whether the rules or regulations are wise or their aims worthy is a matter left solely to the discretion of the authorities or parents, as the case may be, and, in the exercise of that discretion, the courts are not disposed to interfere, unless the rules and aims are unlawful or against public policy.<sup>6</sup>

Here, the court in *Gott* directly equated the college's power with that of the parent. Today, it is unclear how far these powers extend under the guise of physical and moral child welfare. Nonetheless, in 1913 the purview of what constituted something beneficial for a child's welfare was quite broad. In discussing the extent of a college's ability to create rules that affected a child in their charge, the court in *Gott* quoted *People v. Wheaton College*, a case from 1866:

But whether the rule be judicious or not, it violates neither good morals nor the law of the land, and is therefore clearly within the power of the college authorities to make and enforce. A discretionary power has been given them to regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family.<sup>7</sup>

The *Wheaton* case litigated a college's ability to regulate the type of organizations that a student could belong to. In this instance, the student joined a secret society called the Good Templars, which violated the college's rules. The *Gott* court, by quoting *Wheaton* in such detail, did not specify what part of the case they felt was significant. From this, one might conclude that *Gott* felt that the entire scope mentioned was relevant; that a college may create any rules, "so long as their rules violate neither divine nor human law."<sup>8</sup> In *Wheaton*, one of those rights is to control with whom a student may associate. Much in the same way that a parent might forbid a child from associating with someone they deem to be a bad influence, here the court ruled that apparently a school has that ability as well.

*Gott* also alluded to the court's inability to interfere with a parent's right to

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

6. *Gott v. Berea Coll.*, 156 Ky. 376 (1913).

7. *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186, 187 (1866).

8. *Gott*, 156 Ky. 376.

discipline his or her child.<sup>9</sup>Ten years later, the Supreme Court of Florida (in a case involving student discipline which resulted in expulsion), said:

As to mental training, moral and *physical discipline*, and welfare of the pupils, college authorities stand *in loco parentis* and in their discretion may make any regulation for their government which a parent could make for the same purpose, and so long as such regulations do not violate divine or human law, courts have no more authority to interfere than they have to control the domestic discipline of a father in his family.<sup>10</sup>

These cases demonstrate a growing relationship between parents and their child's school; the deeper connection further increased a school's obligation to protect the child. Taken to its fullest interpretation, "the doctrine of *in loco parentis* permits colleges to devise, implement and administer student discipline and to foster the physical and moral welfare of students."<sup>11</sup> The obligation to protect a student in its charge later extended to universities who were charitable in nature. In 1941, the Tenth Circuit Court of Appeals held a not-for-profit university liable for a student's injuries resulting from a chemistry experiment after the instructor had left the class momentarily. The court ruled that the Supreme Court of Utah had "definitively and conclusively. . .repudiated the doctrine of immunity generally accorded charitable institutions" given that the tort was "against a paid patient, or in this instance, a student."<sup>12</sup>

The court seemed comfortable adopting the position that colleges and universities could serve as surrogate parents while students were under their care. Yet, moving from the late 40's to the early 60's, there was a curious development. First, there was an explosion in the number of students attending colleges and universities; from 1947 to 1960, enrollment increased by over three hundred percent.<sup>13</sup> In the following decade, that number again increased by almost 100 percent.<sup>14</sup>

#### *The 1960s: Dissatisfaction with in loco parentis grows*

Partly due to this enrollment boom, in addition to the emphasis on civil rights and personal freedoms, the latter half of the twentieth century took a different look at the *in loco parentis* doctrine. A recent article in U.S. News & World Report, commemorating the 50-year anniversary of the sixties, references a key insight into the shift. It quotes Democratic pollster Geogg Garin, born in 1953, who said: "it was much different in the Sixties compared to what it meant

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9. *Id.*

10. John B. Stetson Univ. v. Hunt, 88 Fla. 510, 516 (1924) (emphasis added).

11. Stamatakos, *supra* note 6, at 474.

12. Brigham Young Univ. v. Lillywhite, 118 F.2d. 836, 842 (10th Cir. 1941)

13. U.S. CENSUS BUREAU, CURRENT POPULATION SURVEY (2013), [http://www.census.gov/hhes/school/data/cps/historical/FigureA-6\\_2013.pdf](http://www.census.gov/hhes/school/data/cps/historical/FigureA-6_2013.pdf).

14. *Id.*

to be growing up in the Fifties.” Garin pointed “to the movement for women’s rights, civil rights for blacks, an increase in tolerance for differences and diversity, and technological breakthroughs among the most important trends of the decade”; he noted that “the sky literally became the limit in terms of what was possible technologically”<sup>15</sup> The article also notes an “unprecedented” rise in affluence for most Americans, coupled with “a rising sense of social conscience based on the idea that millions of people of color and other disadvantaged groups were being left behind.”<sup>16</sup>

Tom Hayden, an activist of the time, expressed some of the feelings of his student colleagues: “We are the people of this generation bred in at least modest comfort, housed now in universities, looking uncomfortably to the world we inherit.”<sup>17</sup> In the sixties, it seemed that students no longer wanted to be shepherded, molded, or shaped by their educational administrations, as the early courts envisioned. They questioned those who were in charge and demanded to be set free from societal norms; they also gave “visible signs of opposition to traditional society” through their “highly distinctive dress” and overall rejection of their prior generation’s attitudes.

Freedom comes at a cost, however, and that cost took some unusual turns as it applied to universities’ control over students. In 1968, students at the University of Colorado participated in a protest where they blocked access to numerous facilities; consequently, they were expelled. Interestingly enough, in discussing the facts surrounding the rights possessed by the University and those possessed by the students, the appeals court said: “the appeals court held that *in loco parentis* is “no longer a tenable doctrine in a university community,” at least in part because of a “trend to reject the authority of university officials” off campus.”<sup>18</sup>

A year earlier, in 1967, students at the University of California were also expelled for participating in a protest. Although the court again upheld the institution’s suspensions, it pointed out several of the changes occurring at universities. First, it acknowledged that students do have a right to free speech and that universities cannot in an unbridled fashion curtail that speech: “unquestionably, the achievement of the University’s educational goals would preclude regulations unduly restricting the freedom of students to express themselves.”<sup>19</sup> Then, however, the court clarified what restrictions on speech it would allow:

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

16. *Id.*

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

18. *Buttny v. Smiley*, 281 F. Supp. 280, 286 (D. Colo. 1968).

19. *Goldberg v. Regents of Univ. of Cal.*, 248 Cal.App.2d 867, 879 (1967).

Ultimately, while the “function of the University is to impart learning and to advance the boundaries of knowledge,” the institution also has an “administrative responsibility to “control and regulate” any behavior of its students which “impede[s], obstructs, or threaten[s] the achievements of its educational goals”; therefore, it has the “power to formulate and enforce rules of student conduct that are appropriate and necessary to the maintenance of order and propriety.”<sup>20</sup>

Thus these students, who at an earlier point in history were legally relegated to unquestionably follow the rules as set down by educational institutions in the same way that they were obligated to follow the rules set down by their parents, were now granted constitutional protections in a very real and tangible way. Students were given their independence. As time progressed, these rights continued to broaden. In its 1967 decision *Goldberg v. University of California*, the California Court of Appeals stated that the “better approach. . .recognizes that state universities should no longer stand *in loco parentis* in relation to their students.”<sup>21</sup>

In 1968, a year and a half after the *Goldberg* decision, the Federal District Court in *Soglin v. Kauffman* further solidified the idea that student constitutional rights trumped *in loco parentis*. The *Soglin* case involved students who were expelled from their university without a hearing or expressly knowing the charges for which they were being kicked out. The court acknowledged that while historically, university authorities were given wide latitude in disciplinary and “judicial” proceedings, the relationship between students and universities had now changed; the court articulated that the “facts of life” have “undermined” concepts like *in loco parentis*, which could no longer be “invoked” to provide “virtually limitless disciplinary discretion.”<sup>22</sup>

The court in *Soglin* also stated that the university’s actions could not take place without consideration of the Bill of Rights, and in this case, its decisions were vague and overbroad. The court’s position again reinforced a student’s rights to constitutional protections normally reserved for those outside of the university realm, directly contradicting the blanket authority of *in loco parentis*.<sup>23</sup> As the courts further recognized that students were individuals entitled to constitutional rights, they no longer treated them as children who needed to be protected or molded by their surroundings.

#### *Universities are Educators Not Baby Sitters*

The 1979 Federal Appeals Court case of *Bradshaw v. Rawlings* highlights the courts position after the decline of *in loco parentis*.<sup>24</sup> The incident occurred

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20. *Id.* at 879.

21. *Id.* at 876 (citing *Dixon v. Alabama State Bd. of Ed.*, 294 F.2d 150 (5th Cir. 1961).

22. *Soglin v. Kauffman*, 295 F. Supp. 978, 988 (W.D.Wis. 1968).

23. *Id.* at 989.

24. *Bradshaw v. Rawlings*, 612 F.2d 135 (3d Cir. 1979).

in 1975, while Delaware Valley College student Donald Bradshaw was attending a school sponsored off campus sophomore event. Donald, an 18-year old, was returning to the college when he was severely injured in an automobile accident and became a quadriplegic. The driver also attended the party, was underage, and intoxicated. The College provided the beer that the driver consumed at the event.

In reviewing the College's liability for the passenger's injuries, the court used a strict negligence analysis and dismissed the doctrine of in loco parentis in its entirety. The Bradshaw Court highlighted that the relationship between the student and the university or school has changed, noting that "the modern American college is not an insurer of the safety of its students."<sup>25</sup>

There was a time when college administrators and faculties assumed a role In loco Parentis. Students were committed to their charge because the students were considered minors. A special relationship was created between college and student that imposed a duty on the college to exercise control over student conduct and, reciprocally, gave the students certain rights of protection by the college. The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights.<sup>26</sup>

The Bradshaw Court highlighted that the relationship between the student and the university or school has changed. Further, the Court pointed out that university students themselves demanded more rights during the sixties and seventies and as a result of that demand the courts gave them those rights. With these rights came responsibility, and the harsh realities of negligence law.

The Appeals Court in Bradshaw stated: "[A] negligence claim must fail if based on circumstances for which the law imposes no duty of care on the defendant. Negligence in the air, so to speak, will not do. As Professor Prosser has emphasized, the statement that there is or is not a duty begs the essential question, which is whether the plaintiff's interests are entitled to legal protection against the defendant's conduct."<sup>27</sup>

Here, the Court focused their negligence analysis on the relationship between the student and the College:

Certainly, the plaintiff in this case possessed an important interest in remaining free from bodily injury, and thus the law protects his right to recover compensation from those who negligently cause him injury. The college, on the other hand, has an interest in the nature of its relationship with its **adult students**, as well as an interest in avoiding responsibilities that it is incapable of performing.<sup>28</sup>

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25. *Id.* at 138.

26. *Id.*

27. *Id.*

28. *Id.* (emphasis added).



It is of particular note that the court categorized the students as “adult students” rather than simply students.<sup>29</sup> The inclusion of the word “adult” carries with it certain connotative implications and gives us some insight into why the court ruled as it did.

The dictionary defines an adult as: “A person who by virtue of attaining a certain age, generally eighteen, is regarded in the eyes of the law as being able to manage their own affairs.”<sup>30</sup>

It is the idea that an eighteen-year-old adult student has sufficient maturity to be able to manage their own affairs that I believe is at the heart of the Bradshaw court’s decision. The court sees the prior cases involving the rights of students as being their claim of right, their claim of independence.

[T]oday students vigorously claim the right to define and regulate their own lives. Especially have they demanded and received satisfaction of their interest in self-assertion in both physical and mental activities, and have vindicated what may be called the interest in freedom of the individual will.<sup>31</sup>

As a result of this newfound independence, the court in Bradshaw found no legal duty on the part of the College to protect the adult student from the acts of a third party, i.e. the fellow student who was driving the car, absent a special relationship. The Court, quoting the Restatement Second of Torts, said:

There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless

(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person’s conduct, or

(b) a special relation exists between the actor and the other which gives to the other a right to protection.<sup>32</sup>

The possibility of there being a special relationship between the students and the College was for two principal reasons. First, the court stated that the student movement of the 1960’s aimed to forsake such special relationships. “The campus revolutions of the late sixties and early seventies were a direct attack by the students on rigid controls by the colleges and were an all-pervasive affirmative demand for more student rights.”<sup>33</sup> And second, given this demand for autonomy by students, and its accompanying responsibility, the court was loth to remove it.

Thus with the adult students acquisition of their new found freedoms came the added responsibility for student’s own actions as adults. No longer would they be protected in the way they had been in the past. No longer would they be

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29. *Id.*

30. *Adult*, THE FREE DICTIONARY BY FARLEX, <http://legal-dictionary.thefreedictionary.com/adult> (last visited Aug. 2, 2016).

31. Bradshaw, 612 F.2d at 140.

32. *Id.*

33. *Id.*

thought of as youths in need of protection.

In 1986 a student at the University of Utah was injured when she fell at a University sponsored field trip. Dana Beach, a twenty-year-old student at the University of Utah, enrolled in a freshman-level field biology class during the spring quarter of 1979. The class taught by a tenured professor, Orlando Cuellar, required students to attend three one-day field trips and three weekend field trips.<sup>34</sup> During the trip, Beach and other students attended a lamb roast at a local farmer's ranch where she had one mixed drink and 3-4 homebrewed glasses of beer.<sup>35</sup> She was then driven back to the campsite in the university van driven by Professor Cuellar where she had a shot of whiskey.<sup>36</sup> Upon returning to her tent, she became disoriented and ultimately fell into a ravine suffering extensive injuries resulting in her becoming a quadriplegic.<sup>37</sup>

Here, as in *Bradshaw*, we have a school-sponsored event, where alcohol was involved and a serious resultant injury was sustained, causing a student to become a quadriplegic. Yet unlike *Bradshaw*, the injury was not caused by a third party and rather may have been self-inflicted or at least made more likely by the student's inebriated condition.

Beach contended that the University and/or Professor Cuellar had an affirmative duty to protect her.<sup>38</sup> But the court disagreed, citing a 1962 Utah case which stated: "Ordinarily, a party does not have an affirmative duty to care for another. Absent unusual circumstances which justify imposing such an affirmative responsibility, 'one has no duty to look after the safety of another who has become voluntarily intoxicated and thus limited his ability to protect himself.'"<sup>39</sup> Thus, the court held that no affirmative duty exists because the student placed herself in harms way, through becoming intoxicated. The Court followed the maxim of "you've made your own bed, now you must lie in it," a commonly used expression said to people who are complaining about problems that they have brought on themselves.<sup>40</sup>

The court also considered whether a special relationship capable of giving rise to to an affirmative duty. Two possibilities they examined were where a person assumed the duty and the other being where there was a mutual dependence by virtue of the relationship.

The Court, citing again the Restatement of Torts, said, "[t]he law imposes upon one party an affirmative duty to act only when certain special relationships exist between the parties. These relationships generally arise when one assumes

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34. Beach v. University of Utah, 726 P.2d 413, 414 (1986).

35. *Id.*

36. *Id.*

37. *Id.* at 415.

38. *Id.*

39. *Id.* (citing *Benally v. Robinson*, 376 P.2d 388, 390 (1962)).

40. *You've made your bed, now lie in it*, DICTIONARY.COM, <http://dictionary.reference.com/browse/you've+made+your+bed,+now+lie+in+it> (last visited Aug. 2, 2016).

responsibility for another's safety or deprives another of his or her normal opportunities for self-protection."<sup>41</sup> The Court stated that a special relationship may exist between "common carriers and passengers, employers and employees, owners and invitees, and parents and children."<sup>42</sup>

The special relationships the Court notes all share some resemblance with the facts from *Beach*. The faculty member was there presumably to supervise the class field trip. He gave Ms. Beach a ride back to camp from an event where drinking was clearly going on and he allowed her to drink a shot of whiskey in the van. Is there not some moral if not legal obligation here? Did his care of her end when she stepped from the van? The Court seems to say yes it did.

Colleges and universities are educational institutions, not custodial. Their purpose is to educate in a manner, which will assist the graduate to perform well in the civic, community, family, and professional positions he or she may undertake in the future. It would be unrealistic to impose upon an institution of higher education the additional role of custodian over its **adult students** and to charge it with responsibility for preventing students from illegally consuming alcohol and, should they do so, with responsibility for assuring their safety and the safety of others.<sup>43</sup>

Therefore, in the Court's mind there is a clear distinction between educating the student to be able to perform well in civic, social and professional arenas and having a custodial role of the students. This suggests that the *Beach* Court did not believe the schools educational responsibility included stopping someone from harming themselves outside the classroom. Yet I wonder if the court has taken a too narrow view of the word educating? Given the amount of time an educator interacts with students is not part of their duty to educate students about the consequences of risky behavior?

Unfortunately for Ms. Beach, the court viewed that level of educational instruction as akin to babysitting, "a task beyond the resources of any school" and "inconsistent with the nature of the relationship between the student and institution." Such close oversight is "inconsistent" with the student-college relationship because "it would produce a repressive and inhospitable environment, largely inconsistent with the objectives of a modern college education."<sup>44</sup>

How is protecting a person from harm considered a repressive and inhospitable act? If one were voluntarily stepping into traffic because of inattentiveness or a lack of knowledge of the consequence would they feel someone to be hostile and repressive if they saved them from serious injury? I think not.

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41. *Beach*, 726 P.2d at 415 (1986).

42. *Id.* (citations omitted).

43. *Id.* at 419 (emphasis added).

44. *Id.* at 419.

I believe the Court has allowed the idea of a legal adult to blur the concept of being an adult. The question, which needs to be answered, is what is the function of a university? If the university's function is to educate students, then in what areas are they to be schooled? Are observance of social norms and avoidance of risky behavior relegated to trial and error on the part of college students? Apparently so, as the "adults" attending Colby College, demonstrate.

In 1989, in *Albano v. Colby College*, the Court had to decide whether Colby College had a duty to aid a student athlete who sustained severe head injuries after drinking, even though the injury occurred during a school sponsored athletic trip. The Court stated that it would not "apply the *in loco parentis* doctrine to find a duty on the part of the College or the coach toward Albano in circumstances like these."<sup>45</sup> The court acknowledged that "*in loco parentis* doctrine. . . has suffered serious inroads" since the days when courts held that schools had such a duty to aid.<sup>46</sup>

The Court argued that no duty to aid should exist given the circumstances of the trip. "The fact that the coach directed the students for their safety to stay on the hotel grounds at all times and not to drink liquor to excess did not create "a relationship of dependence" that would give rise to a legal duty where none existed to start with."<sup>47</sup> The court viewed the Coach's comments that the students should stay on the hotel grounds more as friendly advice, as opposed to one, which created a legal duty on the part of the College. Additionally, the court seemed to dismiss with little fanfare, the plaintiff's contention that because it was Colby College who chose Puerto Rico as the location of the tennis instruction, that this choice in some way created a legal duty to protect the students from the potential hazards therein. "Colby's choice of Puerto Rico (where the legal drinking age was 18 rather than 21 as in Maine) as the site for tennis instruction did not thereby create a legal duty."<sup>48</sup>

The court rather bluntly ended their discussion of the College's liability on a negligence theory thusly:

The point is, Albano as an adult freely made the decision to consume alcoholic beverages and neither Colby College nor the coach forced or encouraged him to do so. I find no support in Maine law for the proposition that a Maine college or college coach has an obligation to prevent an adult student from being injured as a result of drinking excessively on a college-sponsored trip in a jurisdiction where drinking is legal. However helpful or wise it might have been for the tennis coach to have urged Albano to stop drinking on the night in question, he breached no duty in failing to do so.<sup>49</sup>

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45. *Albano v. Colby College*, 822 F. Supp. 840, 842 (1993).

46. *Id.* (citing *Bradshaw v. Rawlings*, 612 F.2d 135 (3rd Cir. 1979)).

47. *Id.* at 842 n3.

48. *Id.*

49. *Id.* at 842.

Again, the court has focused on the concept of adulthood. The achievement of adulthood gives rise to the enjoyment of many rights and privileges, such as drinking in places where it is legal to do so, engaging in potentially risky behavior, but as a result adulthood also has with it the accompanying obligations and consequences of those choices which the adult has made.

*State Sovereign Immunity: Belts and Suspenders*

With the doctrine of in loco parentis a distant memory, and with tort liability based on negligence theory mired in issues of proving a duty to act or a special relationship, institutions of higher learning had, in the late 1980's, been fairly well protected from suit.<sup>50</sup>

On the federal level, the Federal Torts Claim Act granted a statutory exception for the long-held idea of federal sovereign immunity.<sup>51</sup> The act allowed an injured party to make "claims for damages for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."<sup>52</sup>

Thus, state colleges and universities could take advantage of the doctrine of sovereign immunity, making it even more difficult for an injured student to bring an action against a state institution. It should be noted that though state sovereign immunity would preclude a litigant from bringing an action against the sovereign, the suit can be allowed if the sovereigns consent or if the state has passed legislation allowing for the cause of action.<sup>53</sup> Most jurisdictions adhere to the rule that governmental entities operating public schools are immune from tort liability for personal injuries or death occurring in connection with such operation, unless the entity has assumed liability by constitutional or legislative provisions, at least where the particular function in connection with which the injury or death occurred was governmental, as distinguished from propriety, in character.<sup>54</sup> "Pursuant to such doctrine, as a general rule, all . . . authorities in charge of or conducting . . . public institutions of higher learning, including . . . public colleges or universities . . . likewise enjoy tort immunity in the absence of a legislative enactment to the contrary."<sup>55</sup>

It should be noted that over one third of the four year universities in the country are public institutions.<sup>56</sup> And approximately 29 of the 50 states have

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50. *Bradshaw v. Rawlings*, 612 F.2d 135, 140 (3rd Cir. 1979).

51. 28 U.S.C. § 1346(b).

52. *Id.*

53. *State Sovereign Immunity*, BLACK'S LAW DICTIONARY (5<sup>TH</sup> Ed. 1979).

54. 33 A.L.R. 3d 703, §3 (1970).

55. *Id.*

56. *Number of U.S. Colleges and Universities and Degrees Awarded, 2005*, INFOPLEASE,

some type of legislation, which may allow suits against the state in tort, but these state statutes vary in their scope.<sup>57</sup>

#### THE PENDULUM BEGINS TO SHIFT

The number of attendees at colleges has increased since the sixties. With more students at colleges, so too has the potential for injury increased. Wanting freedom with its attendant consequences for self-determination and protection and having freedom apparently began to wane heavy on the children of the sixties who now had children of their own in college. To quote Spock: “After a time, you may find that having is not so pleasing a thing after all as wanting.”<sup>58</sup>

#### *But, They’re Just children.*

Despite the *Bradshaw* decision some courts began to feel that a little bit of required supervision might not be a bad thing. The courts have ruled on various factual situations where university liability has now been found. Four years after *Bradshaw* in 1983, the Massachusetts Supreme Court found Pine Manor College responsible for the rape of a freshman student who was housed on the University property, where she voluntarily chose to live in a dorm which allowed male guests to stay overnight.<sup>59</sup> Acknowledging the changing social mores that led to the decline of in loco parentis, the Court nonetheless stated that “[t]he fact that a college need not police the morals of its resident students. . . does not entitle it to abandon any effort to ensure their physical safety. Parents, students, and the general community still have a reasonable expectation, fostered in part by colleges themselves, that reasonable care will be exercised to protect resident students from foreseeable harm.”<sup>60</sup> The Court then stated that if a college assumes a duty that they are then expected to carry out that duty with reasonable care. The Court clarified that this duty only exists when “either (a) the failure to exercise due care increased the risk of harm, or (b) the harm is suffered because of the students’ reliance on the undertaking.”<sup>61</sup>

The court went on to say that by providing housing to the students the College implicitly took on the safety for its residents and that the parents and students had a reasonable basis for that reliance.<sup>62</sup>

Five years later in 1988, a court found a duty to protect after a student

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<http://www.infoplease.com/ipa/A0908742.html>.

57. *State Sovereign Immunity and Tort Liability*, NATIONAL CONFERENCE OF STATE LEGISLATURES (Sept. 10, 2010), <http://www.ncsl.org/research/transportation/state-sovereign-immunity-and-tort-liability.aspx#Table>.

58. *Star Trek, Amok Time, Quotes*, IMDB, <http://www.imdb.com/title/tt0708416/quotes>. (add date)

59. *Mullins v. Pine Manor College*, 449 N.E.2d 331, 333 (1983).

60. *Id.* at 335-36.

61. *Id.* at 336.

62. *Id.* at 337.

injured himself during a hazing incident.<sup>63</sup> The Court stated that “where there is direct university involvement in, and knowledge of, certain dangerous practices of its students, the university cannot abandon its residual duty of control.”<sup>64</sup>

In 2011, in *McFadyen v. Duke University*, certain Duke University lacrosse students who were accused of rape brought suit against the University alleging that the University owed them a duty of reasonable care when giving them advice regarding how they should proceed relative the rape accusations made against them.<sup>65</sup> Though the court did not find liability on the part of the University, the court did say:

[A] university may be held liable for negligence if it makes itself responsible for a students’ physical safety in a school-related activity, and if the university’s alleged negligence contributed to a physical injury to the student. However, administrators and other advisors should be free to communicate and advise students without creating potential tort liability, even if that advice turns out to be misguided or inadequate.<sup>66</sup>

More recently in 2013, though the New York Court of Appeals did not find liability on the part of Long Island University for injuries sustained by a pledge during a pledging activity, the court did state that “[a] duty, however, may be imposed upon a college where it has encouraged its students to participate in an activity and taken affirmative steps to supervise and control the activity.”<sup>67</sup>

#### *Old English Tort Law Rebuilt to Suit a New Age*

From a historical perspective the duty of care of a landowner and for our purposes a university as the landowner is based on the relationship of the landowner to the party or to the specific activities of the parties.<sup>68</sup> Under the second restatement of torts, parties are generally classified in three major categories of trespasser, licensee, and invitee, with trespasser being further subdivided into child trespassers and adult trespassers.<sup>69</sup> A trespasser is “one who intentionally and without consent or privilege enters another’s property.”<sup>70</sup> An invitee is “a person who has express or implied invitation to enter or use another’s premises, such as a business visitor or member of the public to whom the premises are held open. The occupier has a duty to inspect the premises and warn the invitee of dangerous conditions.”<sup>71</sup> A licensee is one, “who has

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63. *Furek v. Univ. of Delaware*, 594 A.2d 506, 519 (Del. 1991).

64. *Id.* at 520.

65. *McFadyen v. Duke Univ.*, 786 F.Supp.2d 887, 997 (M.D.N.C. 2011), *aff’d in part, rev’d in part, dismissed in part sub nom.* *Evans v. Chalmers*, 703 F.3d 636 (4th Cir. 2012).

66. *Id.* at 998.

67. *Pasquaretto v. Long Island Univ.*, 106 A.D.3d 794, 796 (2013).

68. RESTATEMENT (THIRD) OF TORTS § 51A (2009).

69. *Id.*

70. *Black’s Law Dictionary* (9<sup>th</sup> ed. 2009).

71. *Id.*

permission to enter or use another's premises, but only for one's own purposes and not for the occupier's benefit."<sup>72</sup>

The Restatement of Torts Second Section 333 states that as a general rule, "a land possessor does not owe a duty of reasonable care to a trespasser."<sup>73</sup> As to a child trespasser, the Restatement of Torts Second (hereinafter Restatement) has imposed on the landowner a reasonable duty of care.<sup>74</sup> As to invitees such as university students, the Restatement has imposed a reasonable duty of care, with some subtle caveats.<sup>75</sup>

A possessor of land is subject to liability to his invitees for physical harm caused to them by his failure to carry on his activities with reasonable care for their safety if, but only if, he should expect that they will not discover or realize the danger or will fail to protect themselves against it.<sup>76</sup>

Unlike the licensee, an invitee enters the premises with the implied assurance of preparation and reasonable care for his protection and safety while he is there.<sup>77</sup>

The comments to Section 341A make it clear that the obligation of the possessor, in our case the University, is therefore not limited to one of reasonable care to protect against conditions of which he does not know or have reason to know as in the case of the licensee but rather extends to protection against risks of harm for activities for which the invitee knows or has reason to know of the harm but where it may be reasonably expected that he will fail to protect himself notwithstanding such knowledge.<sup>78</sup>

Suits for student injury are causing plaintiffs to expand the scope of their creative arguments to justify recognition of the University's obligations to protect students in their care. This search has even been effective in some situations where the shield of sovereign immunity has been employed by the university. Courts sometimes use of the tort concepts of landowner invitee obligations to create a duty of care on the part of the University.

In *Glaser v. Florida Board of Regents*, a 1994 case, the District Court of Appeals used the old common law doctrine of a private landowner's obligations to protect an invitee. June Glaser while attending an educational workshop at University of Southern Florida, fell down a flight of stairs. Rather than denying her right to sue the State University based on the doctrine of sovereign immunity, the court allowed the suit to go forward holding that when a governmental body assumes the control and operation of a building, it has the same duty of care in

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72. *Id.*

73. RESTATEMENT (THIRD) OF TORTS § 51A (Am. Law Inst. 2009).

74. RESTATEMENT (SECOND) OF TORTS § 339 (Am. Law Inst. 1977):

75. *Id.* at § 341A.

76. *Id.*

77. *Id.* at § 341A cmt. a.

78. *Id.*



the maintenance of that building as does a private person.<sup>79</sup>

The court further made clear that it would find a distinction between a state university acting in its capacity as the state and a state university acting in its capacity as a private person. “When a governmental body assumes the control and operation of a building, it has the same duty of care in the maintenance of that building as does a private person.”<sup>80</sup>

#### *The Restatement of Torts Third to the Rescue?*

As time passed universities slowly began losing their long-lived protections. Even the writers of the Restatement of Torts Third in 2009 modified the obligations of landowners to make universities potentially more culpable for student injury. The writers found that despite there being a status based liability scheme followed in the Restatement of Torts Second, which had prevailed for over 45 years, numerous judicial exceptions made such segregation not consistent with modern judicial opinion.<sup>81</sup>

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

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

conduct by the land possessor that creates risks to entrants on the land;  
artificial conditions on the land that pose risk to entrants on the land;  
natural conditions on the land that pose risks to entrants on the land; and  
other risks to entrants on the land where any of the affirmative duties provided in chapter 7 is applicable.<sup>82</sup>

Section 51 comment I also recognizes the duty of the landowner to discover dangerous conditions on the land and to eliminate or ameliorate them.<sup>83</sup> Things to be considered in determining reasonable care are the foreseeability and likeliness of the harm in the foreseeability and severity of any potential harm as well as the burden required on the land possessor to eliminate or reduce the risk.<sup>84</sup> This change to the Restatement and the addition of its commentaries will lend credence to the argument made by students that based on the current restatement the artificial notion of a special relationship need not be proved. Or in the alternative if it needs be proved that activities sponsored and controlled by the university (the land owner) if indeed hazardous will place upon the university the obligation to use due care on keeping the students safe.

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79. Glaser v. Florida Bd. Of Regents, 636 So. 2d. 58, 91, (Fl. Dist. Ct. App. 1994).

80. *Id.* at 59.

81. RESTATEMENT (THIRD) OF TORTS § 51 cmt. a (Am. Law Inst. 2009).

82. *Id.* at § 51.

83. *Id.* at § 51 cmt. i.

84. *Id.*

## UNIVERSITY INVOLVEMENT IN THEIR OWN POTENTIAL DEMISE

Student participation in intercollegiate sports has long been an integral part of University life. “The first intercollegiate football contest was played on November 6th, 1869, between Rutgers University and Princeton University”<sup>85</sup> By the beginning of the 20<sup>th</sup> century 250 colleges were participating in the sport.<sup>86</sup> The early years of college football were marked by such brutality in their play, that Columbia University, the third college to adopt the sport, threatened to ban football entirely unless changes were made.<sup>87</sup> “In 1905 the game was so dangerous, regularly killing participants, that President Roosevelt demanded that Universities make the game safer.”<sup>88</sup> Public outcry against the game’s brutality led to the creation of the NCAA in 1910, which added a rule-making component.<sup>89</sup>

*Today’s College Football is not your Grandfather’s Football*

In 1960 there were approximately 113 NCAA football teams.<sup>90</sup> Today there are over 657 NCAA colleges and universities that offer football, and over 891 colleges and universities offer some sort of football scholarship.<sup>91</sup><sup>92</sup> Of those 891 colleges and universities, there are over 90,136 college students participating in the sport, between varsity, junior varsity and practice squads.<sup>93</sup> The number of participants is staggering.

So too are the number of injuries which occur. The NCAA has stated that the annual average number of concussions suffered between the 15 NCAA sports was 3,753.<sup>94</sup> It also has stated that “[f]ootball had the highest number of reported concussions suffered, despite the high number women’s ice hockey had the highest injury rate per participant.<sup>95</sup> This translates into collegiate football players suffering over 1,876 reported concussions.

The numbers suggest that approximately 5.4 concussions are suffered per

85. Robert M. Orus, *Introduction: A Brief History of College Football*, COLLEGEFOOTBALLPOLL.COM, [http://www.collegefootballpoll.com/history\\_of\\_college\\_football.html](http://www.collegefootballpoll.com/history_of_college_football.html).

86. *Id.*

87. *Id.*

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

89. *Id.*

90. *1960 NCAA Division IA Football Power Ratings*, JIM AND SHERRI HOWELL’S HOME PAGE, <http://www.jhowell.net/cf/cf1960.htm> (last visited Aug. 5, 2016).

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

92. *College Football & Scholarship Opportunities*, SCHOLARSHIPSTATS.COM, <http://www.scholarshipstats.com/football.html> (last visited Aug. 5, 2016).

93. *Id.*

94. *Id.*

95. *Id.*

school per year. Given that many schools have multiple varsity sports teams, (UCLA, for example, has 22 varsity teams)<sup>96</sup> having a little over 5.4 concussions per year overall seems rather amazing. That numeric curiosity may be explained by the choice of wording specifically used in the report. In the NCAA report, regarding injuries suffered by college athletes or concussions suffered by those athletes over the span of their investigation the word “reported” was used 20 times in the context of the figures assembled.<sup>97</sup> Why did the NCAA make this distinction between concussions and reported concussions? Is it not apparent that they can only tabulate numbers of concussions that which has been reported to them? Why the need for the modifier? I suggest that the language choice is to be able to eliminate from the report those students who may have suffered a concussion but who failed to report the event, thus artificially minimizing the number of students who may have suffered concussive impact.

*Football, Soccer, Lacrosse. It’s Only a Game, What’s the Harm?*

Most people’s perception of college sports and the resulting impact of play are expressed thusly: College sports are just a game. It’s not like they are playing professionally. College sports are just clean fun. You’re bound to get a little banged up, but isn’t that just the nature of the game?

A recent study by Harvard University and Boston University regarding concussion injuries stated:

Despite years of education and growing public awareness about head injuries, college football players report having six suspected concussions and 21 so-called “dings” for every diagnosed concussion, with offensive linemen being the least forthcoming to trainers and team personnel.<sup>98</sup>

The upshot of this is that at a minimum there rather than 5.4 concussions university-wide for all sports, and 2.6 concussions occurring university-wide for football during the school year, at least as to football the number is closer to 16 concussions per year. This calculation of 16 is itself deceptive because it does not consider the potential concussions suffered which were simply reported as a “ding.”

The report issued by Harvard University and Boston University broke down statistical analysis by position and found that offensive linemen reported significantly higher numbers of post-impact symptoms than other positions.<sup>99</sup>

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96. UCLA Registrar, *UCLA General Catalog*, <http://catalog.registrar.ucla.edu/uclacatalog2015-16-5k.htm>.

97. *Id.*

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

99. Christine M. Baugh, MPH, et al., *Frequency of head impact related outcomes by position in NCAA Division I collegiate football players*, ESPN 2, <http://espn.go.com/pdf/2014/1002/Baugh-1-Unreported-OLine.pdf>.

These symptoms, which were reported as dings, included dizziness, headaches, and seeing stars.<sup>100</sup> Despite these symptoms, student athletes would continue participating in the physical activities.<sup>101</sup>

The number of concussions suffered may be much higher than we anticipate. The potential long term effects on students who suffer undiagnosed concussions are severe. “An undiagnosed concussion is problematic because athletes who sustain additional brain trauma while recovering from a previous injury are at risk of more severe neurologic consequences.”<sup>102</sup> While not immediately reporting injuries may seem unreasonably dangerous, there are multiple reasons why an athlete might choose not to report a suffered concussion.<sup>103</sup> It is this failure to report injury on the part of the athlete coupled with the difficulty of assessing and recognizing multiple sub-concussive blows which adds to the severity of the problem

*The Science, the Myth and the Risk*

Given the number of sports being participated in and the large percentage of student athletes who may be suffering concussions the initial question is what is a concussion and is it really something to be afraid of?

A concussion is the shaking of the brain inside the skull that changes the alertness of the injured person. That change can be relatively mild. (She is slightly dazed.) It can be profound. (She falls unconscious). Both fall within the definition.<sup>104</sup>

Symptoms of a concussion fall into four major categories somatic, (headaches, nausea, vomiting, dizzy spells), emotional, (sadness to the point of depression even suicide, nervousness, irritability), sleep disturbances, (sleeping more or less than usual or trouble falling asleep), cognitive, (difficulty concentrating, troubles with memory feeling mentally slow or as if they are in a fog that will not lift).<sup>105</sup> “Rest is the hallmark of concussion therapy. The best we can do for the patient is to shut things down physically and cognitively.”<sup>106</sup>

Today, neurologists who specialize in brain trauma recognize the potential for injury to the brain caused by concussions. One such specialist is Dr. Robert Cantu, who is the chief of neurology at Emerson Hospital in Massachusetts. Dr. Cantu has authored over 357 scientific publications, including 28 books on neurology and sports medicine.<sup>107</sup> According to Dr. Cantu, most concussions resolve in seven to ten days and athletes return to their normal activities in two

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100. *Id.*

101. *Id.*

102. *Id.* at 4.

103. *Id.* at 5.

104. ROBERT CANTU, M.D. & MARK HYMAN, CONCUSSIONS AND OUR KIDS 2 (2013).

105. *Id.* at 8.

106. *Id.* at 10.

107. Robert Cantu, MA, MD, FACS, FACSM,  
<http://www.bu.edu/cte/about/leadership/robert-cantu-m-d/>.

weeks.<sup>108</sup> Unfortunately, 20 percent of concussions are post-concussion syndrome cases.<sup>109</sup> These are cases where the injury can last at least one month and can persist, with the patient experiencing unusually intense symptoms.<sup>110</sup> According to Dr. Cantu, rest is the only effective therapy for concussive trauma and as a result athletes should stop playing sports completely until they are symptom free.<sup>111</sup>

The difficulty of having the athlete voluntarily choose to remove themselves from play and rest is that the athletes want to continue to play for fear of being replaced. This desire to keep playing can be so strong that some athletes lie about their symptomology in the hopes of returning to play.

T.J. Cooney a former football player for Catholic University suggested the following reason for his desire to continue playing despite possible injury: He was raised to believe that football players were tough, nearly indestructible.<sup>112</sup> There were injuries which could not be played through but those were few and they did not happen to tough guys.<sup>113</sup> He thought for nearly his entire playing career that extreme headaches were part of the game.<sup>114</sup>

As a result of T.J.'s mindset during his sophomore year he suffered a concussion during practice which left him with a severe headache. He then suffered two more concussion nine days later during the first half of a game.<sup>115</sup> He chose not to inform his coach of the difficulties he was having and then during the second half of the game he collapsed falling flat on his face.<sup>116</sup> It took eight months for him to recover from his injuries, though not completely.<sup>117</sup>

There are also numerous myths regarding concussions, including the following that Dr. Cantu notes in his book:

“You can’t have a concussion without being hit on the head.”<sup>118</sup> The fact is that many concussions occur not as the result of a blow to the head but rather as a result of the head experiencing rotational forces which impact the brain inside the skull or via acceleration forces which whip the head around bruising the brain inside the skull.<sup>119</sup>

“To have a concussion you need to be knocked unconscious.”<sup>120</sup> 95% of athletes who suffered concussions are not knocked unconscious.<sup>121</sup>

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108. Cantu, *supra* at 71.

109. *Id.*

110. *Id.* at 72.

111. *Id.*

112. *Id.* at 132.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 105.

119. *Id.* at 106.

120. *Id.*

121. *Id.*

“Helmets prevent most concussions.”<sup>122</sup> While it is true that a well-padded and constructed helmet, when worn properly, can diffuse a direct hit to the helmet and may dramatically reduce the chances of bleeding of the brain and skull fractures, it does not adequately protect against center hits to the helmet nor does it protect against slams to the body which cause the head to whip from one side to another.<sup>123</sup> These violent motions of acceleration and sudden deceleration cause the brain to shake within the skull, potentially causing concussive damage to the brain.<sup>124</sup>

These myths, coupled with athletes’ desires not to leave the game can exacerbate the fact that spotting the occurrence of a concussive or sub-concussive blow is already difficult. In a 2010 study of hockey players from ages 16 to 21, researchers found that the occurrence of concussions was seven times that as observed by coaches, reported by athletes or caught by physician observers.<sup>125</sup> Additionally the researchers were told by some of the players that they were told by their coaches to continue to play even when advised by their medical professionals to take time off.<sup>126</sup>

I suggest here that these myths and misconceptions give rise to a coaching culture where either the coach does not believe that there is a significant risk to an athlete due to concussive injury, or the coach feels that injury is part of the game and that if you cannot handle the risk as he or she did when they played then you do not deserve to play the game or lastly and most disturbingly that the coach does not care about the risk to the athlete. Regardless of the motivating reason, sending players back into the field of play based on medical or ideological fallacy is wrong.

As to the risk being suffered by students who return to play prematurely after suffering concussive or sub-concussive blows, we do know that total brain trauma (concussive and sub-concussive blows are a risk factor in developing CTE, (Chronic Traumatic Encephalopathy)<sup>127</sup> How many blows cumulatively may cause CTE is currently unknown.<sup>128</sup> CTE is a progressive degenerative brain disease found in people exposed over many years to brain trauma, including concussive and many years of sub-concussive blows.<sup>129</sup> CTE can cause victims to lose brain functions such as memory, impulse control, and can result in a decline in their general ability to think and reason.<sup>130</sup>

From the perspective of the college athlete this extreme condition may not

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122. *Id.* at 107.

123. *Id.*

124. *Id.*

125. *Id.* at 15.

126. *Id.* at 15-16.

127. *Id.* at 12-13.

128. *Id.* at 13.

129. *Id.* at 90.

130. *Id.* at 92.

manifest itself for many years.<sup>131</sup> CTE is not a disease that affects only the aging professional athlete. Its victims can be younger and sometimes much younger.<sup>132</sup>

Nathan Stiles is an example of a young athlete plagued by CTE. He was a high school senior who was both a running back and a linebacker. Nathan died during a game after he intercepted a pass and was tackled.<sup>133</sup> During the game, he told his coach his head really hurt. He was taken out of the game. Upon collapsing, he was taken to the hospital where he later died as the result of a cerebral re-bleed from a concussive impact earlier in the season which had not healed fully.<sup>134</sup> An autopsy showed that Nathan had suffered from early stages of CTE.<sup>135</sup>

At the present time CTE can only be diagnosed after death by postmortem neuropathological analysis. Right now there is no known way to use MRI, CT, or other brain imaging methods to diagnose CTE.<sup>136</sup>

The net result of this behavior of Universities, coaches and athletes, is that the student athlete may be incurring life-altering injuries during their participation in collegiate sports which do not fully manifest themselves for many years, when proving the causality of the injury is difficult if not impossible.

Using presently available technology, CTE can only be diagnosed after the death of the individual.<sup>137</sup> So how would a person know that their decline in brain function was attributable to injuries suffered as a result of previous play? Additionally, if proof of the player's decline is gradual, at what point could one say that they are eligible for reparation? Given the current structure of the settlement it would seem that what the NCAA's agreement would do is potentially relieve them from liability while at the same time allowing universities and colleges to bear the future risk of suit.

#### COLLEGES AND UNIVERSITIES ARE CURRENTLY FOOTING THE BILL BUT AT WHAT COST IN THE LONG RUN?

Most colleges and Universities offer athletics as part of their college curriculum. They advertise the wide and varied sports to entice students to attend, despite the fact that most of these programs do not make a profit.<sup>138</sup> I suspect that most colleges and universities are utilizing what is called a lost leader strategy, where, "a product or service (in this case a sports program) is

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131. *Id.* at 90.

132. *Id.* at 96.

133. *Id.* at 97.

134. *Id.*

135. *Id.* at 98.

136. *Frequently Asked Questions*, BOSTON UNIVERSITY CTE CENTER, <http://www.bu.edu/cte/about/frequently-asked-questions/> (last visited Aug. 5, 2016).

137. *Frequently Asked Questions*, *supra* note 144.

138. David Ridpath, *Who actually funds intercollegiate athletic programs?*, FORBES (Dec. 12, 2014), <http://www.forbes.com/sites/ccap/2014/12/12/who-actually-funds-intercollegiate-athletic-programs/#33542c5e5b99>.

offered despite its lack of profitability for the sake of offering another product/service at a greater profit or to attract new customers, or in our case new students.”<sup>139</sup> It is fairly easy to quantify the costs of coaches, facilities and equipment.<sup>140</sup> According to the Washington Post, in 10 years, 48 athletic departments in college sports’ wealthiest conferences saw earnings surge by nearly \$2 billion and spent it almost as quickly as it came in. Many programs still need student fees and school money to pay their bills.<sup>141</sup>

*Hidden Costs: The Elephant in the Room*

Most of the time in business a hidden cost is defined as, an “[e]xpense not normally included in the purchase price of an equipment or machine, such as for maintenance, supplies, training, and upgrades.”<sup>142</sup> It is undeniable that colleges and universities know the cost of their sporting programs. But, do they realize the hidden cost? How many of their student athletes have suffered multiple concussions while playing sports? How many of those athletes will suffer long-term debilitating injury because of continued play after sustaining multiple concussive blows? These questions raise potential risks that add to the cost of operating an athletics program. Are universities calculating these potential health risks, as an issue of potential duty to their athletes? (Here I would suggest adding a concluding sentence or question that better hits the point that these are costs that may be implicitly incurred by the universities. Or, a cost that at least the universities should be taking in to consideration. (Ex:

These potential hidden costs will be determined by the duty that Universities in fact owe to their students and their “student athletes.” The Restatement of Torts Second has already made landowner’s responsible for activities which the landowner created but where the invitee might not be cognizant of the danger.<sup>143</sup> And as noted earlier section 51 comment I of the Restatement of Torts Third also recognizes the duty of the landowner to discover dangerous conditions on the land and to eliminate or ameliorate them.<sup>144</sup> Things to be considered in determining reasonable care are the foreseeability and likeliness of the harm in the foreseeability and severity of any potential harm as well as the burden required on the land possessor to eliminate or reduce the risk.<sup>145</sup>

Universities provide the equipment, venue and opportunity for the

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139. *Loss Leader Strategy*, INVESTOPEDIA.COM, <http://www.investopedia.com/terms/l/lossleader.asp> (last visited Aug. 5, 2016).

140. Will Hobson & Steven Rich, *Playing in the Red*, THE WASHINGTON POST (Nov. 23, 2015), <http://www.washingtonpost.com/sf/sports/wp/2015/11/23/running-up-the-bills/>.

141. *Id.*

142. *Hidden Cost*, BUSINESS DICTIONARY, <http://www.businessdictionary.com/definition/hidden-cost.html> (last visited Aug. 5, 2016).

143. RESTATEMENT (SECOND) OF TORTS § 341A cmt. a (AM. LAW INST. 1977).

144. RESTATEMENT (THIRD) OF TORTS § 51 cmt. i (AM. LAW INST. 2009).

145. *Id.*



universities' athletic programs to exist. They actively recruit players to participate in these events and programs as well as are selective on who plays in these activities. It seems almost inconceivable that the universities can deny that they have created the field on which the students participate. It is also unlikely that they can assert that they are unaware of the potential for concussive injury in their various sporting activities given the numerous available literature and given that most institutions do some basic level of concussive testing. In fact, an advertisement for ImPact a concussive testing protocol states that its product: "is used by more than 7,400 high schools, 1,000 colleges and universities"<sup>146</sup> (This statistic doesn't necessarily prove the assertion being made that "most institutions do some basic level of concussive testing." It only indicates that 1,000 schools use ImPact. I suggest providing a more specific factual example that shows MOST schools do in fact do this or not include this fact at all.)

Given the numbers of students who participate in sports to varying degrees and given the numbers of concussions and sub-concussive blows being sustained yearly by students, when will these injuries reach critical mass? Dr. Julian Bailes, one of the lead researchers of a new UCLA study, claims to have diagnosed CTE in living subjects.<sup>147</sup> If true, this could be a game changer for Universities. It will be only a matter of time for the first University suit to be brought. How much would you demand from an institution for damaging your son or daughter's brain from a foreseeable injury? Who is in the better position to know of the potential for injury the University, alleged educators, or the student? How large might the recoveries be? Well, normally the characteristics of a sympathetic victim are as follows: Was the victim permanently injured? Was the victim a child? Could a parent relate to the injury sustained?<sup>148</sup> College students with all of their lives ahead of them seem to fit all of these criteria to one degree or another.

Here I would suggest a concluding paragraph that ties back these potential liabilities mentioned to the idea of hidden cost and the overall assertion that is trying to be made in this section that the universities have a duty to their athletes.

#### CONCLUSION

What should Universities do? Well, one can either wait for the storm to hit and then rebuild or one can get out in front of the approaching storm and do all that is possible to avert any potential damage. Currently there are various modalities for protecting our athletes. While helmets do aid in protecting them

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

147. Rick Westhead, *A possible breakthrough on testing CTE*, TSN (Feb. 19, 2015), <http://www.tsn.ca/a-possible-breakthrough-on-testing-cte-1.210725>.

148. John Wilinski & Katie Czyn, *When Will Jurors Find the Plaintiff Sympathetic?*, LITIGATION INSIGHTS, <http://www.litigationinsights.com/case-strategies/jurors-find-plaintiff-sympathetic/> (last visited Aug. 5, 2016).

from skull fractures they do not prevent concussion.<sup>149</sup> Some companies have produced equipment that indicates concussive force sustained by an individual. One of these companies is Fitguard by Force Impact Technologies.<sup>150</sup> This system uses a mouth guard which transmits data to a receiver when a force is detected above a given threshold.<sup>151</sup> This is merely one product of several in existence. Given the availability of these products and the duty of the University to protect it would seem that requiring all participants in University sponsored sports be required to have at a minimum one such warning device. It could also be suggested that there be a protocol in place which utilizes the most current treatment modality for concussions whereby an independent body evaluates students for ability to resume to play if a concussion is suffered. It is foolhardy for an interested party, be it coach, athlete or otherwise to be the evaluator of a return to play policy once a concussion is sustained by a student. (Is this necessarily a true assertion of what happens? If it is, I think it should be supported w/ factual evidence that says coaches or athletes are themselves the evaluator of ability to play. Schools have athletic training departments and doctors both on behalf of the university and independent. Is this what is meant by interested party?) The sheer fact that a person might have a vested interest in the student returning to play despite having suffered a “ding” should disqualify them from making the decision. (The introduction of a new product here makes it seem like now the conclusion is that the University just needs to provide better equipment as opposed to changing their classification as “adults who can take care of themselves” to determine duty. I would suggest fleshing out the idea of the need for better equipment and protection in the analysis, or taking it out of the conclusion)

A university is a place of learning where we are tasked with educating and protecting our students? What message do we send to our students about being a responsible member of society when we allow our students to hurt themselves? Let us not hide under a veil of supposed ignorance. Let not our defensive wail be that they are adults and free to make their own choices in life. You would not let a person intentionally harm themselves if you could prevent it. Why then would you allow a student to play with an injury they are unaware of which might destroy them for life? Are we our brother’s keeper? Yes, we are.

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149. *Does a helmet protect me against a concussion?*, WEILL CORNELL CONCUSSION AND BRAIN INJURY CLINIC, <http://weillcornellconcussion.org/does-helmet-protect-me-against-concussion> (last visited Aug. 5, 2016).

150. *Id.*

151. *Id.*