

# Evaluating a “Concussion Clause”: Why the NFL’s Assumption of Risk Defense Fares No Better As Time Goes On

*Ramsey W. Fisher\**

## ABSTRACT

*This Article explores the future of National Football League (NFL) concussion litigation. Currently, hundreds of retired NFL players who previously brought negligence claims against the NFL are seeking compensation under a settlement agreement reached in 2012. With many retired players exempting themselves from the 2012 agreement and current players learning more about the long-term risks of football, the potential for future negligence lawsuits against the NFL is still ripe. In any such suit, a key issue will be the NFLs’ assumption of risk defense. The allure of the defense is intuitive—when one chooses to play professional football for a living, he assumes the risk of injuries associated with the game. Further, as information about concussions and chronic traumatic encephalopathy (CTE) continues to saturate the public dialogue, players will become more informed about the risks of CTE, strengthening the NFL’s potential assumption of risk defense.*

*This Article challenges that intuition through a hypothetical scenario: Were the NFL to ask its players to sign a “Concussion Clause” waiver, much like the waivers skiers are required to sign before getting on a ski lift, would the waiver be enforceable? If not, then why should any assumption of risk defense be successful? To wrestle with this hypothetical scenario, this Article first evaluates tort law doctrine on assumption of risk, laying out the background of express and implied assumption of risk defenses and their historical applications in football.*

*In applying the assumption of risk doctrine to a hypothetical Concussion Clause, this Article reaches a peculiar result. While a Concussion Clause would likely violate public policy and, therefore, be*

---

\* Judicial Law Clerk, the Honorable David C. Godbey, United States District Court for the Northern District of Texas.

*unenforceable under current doctrine, the NFL could still prevail using an implied assumption of risk defense. This is largely because tort doctrine places tremendous weight on the distinction between inherent and extraneous risks. While the former can be assumed implicitly and avoid triggering scrutiny on public policy grounds, the latter can only be assumed through an explicit waiver that is consistent with public policy. So long as concussions and CTE are characterized as inherent risks to football, an implied assumption of risk defense could theoretically be upheld, even if an express waiver for the same risks would violate public policy. This Article concludes by challenging this outcome on both doctrinal and policy grounds, and recommends that courts recognize public policy objections to the implied assumption of risk defense.*

### TABLE OF CONTENTS

I.	INTRODUCTION.....	653
II.	EVALUATION OF THE ASSUMPTION OF RISK DEFENSE.....	658
	A. <i>Assumption of Risk Background</i> .....	658
	1. Primary Implied Assumption of Risk.....	658
	2. Secondary Implied Assumption of Risk.....	659
	3. Express Assumption of Risk.....	660
	B. <i>Historical Application of Assumption of Risk in Football</i> ....	661
III.	EVALUATING A CONCUSSION CLAUSE.....	663
	A. <i>Requirements for Enforceability</i> .....	664
	B. <i>Requirements Applied to the Concussion Clause</i> .....	668
	1. Professional Football as a Matter of Great Public Importance.....	668
	2. Disparities in Bargaining Power.....	669
	C. <i>The Fate of the Concussion Clause: Likely Invalid Under         the Tunkl Test</i> .....	674
IV.	RETHINKING THE DISTINCTION BETWEEN IMPLIED AND EXPRESS ASSUMPTION OF RISK.....	675
	A. <i>Ambiguity Between “Inherent” and “Extraneous”</i> .....	675
	1. Judicial Incompetency.....	676
	2. Rules of the Game as Dividing Principles.....	677
	3. Players Cannot Fairly Be Said to Have Knowingly Assumed Inherent Risks.....	680
	B. <i>Failing to Incorporate a Public Policy Analysis Is         Inconsistent with the Principles of Tort Law</i> .....	682
	C. <i>Failing to Incorporate a Public Policy Analysis Is         Inconsistent with the Restatement and the Functions of         Tort Law</i> .....	685
	D. <i>Positive Recommendation</i> .....	686

V.	CONCLUSION .....	687
----	------------------	-----

## I. INTRODUCTION

“It’s bad for football.”<sup>1</sup> This was the blunt summary offered by analyst Jon Gruden after a particularly brutal Monday night football matchup between the Pittsburgh Steelers and Cincinnati Bengals in late 2017.<sup>2</sup> The game showcased the dark side to a sport that has captivated the United States for nearly a century. Every play seemed to result in injury. Players were critically injured on the field; some after suffering questionable blows delivered after the whistle.<sup>3</sup> Two players had to be stretchered off the field due to their injuries.<sup>4</sup> One player even had to undergo immediate spinal stabilization surgery to avoid permanent paralysis.<sup>5</sup>

The game was, as Hall of Fame quarterback Troy Aikman described, “hard to watch.”<sup>6</sup> And in the days following the matchup, it reinvigorated a conversation that has crept into countless US living rooms: is football too dangerous and should measures be taken to make it safer?

Players began to participate in the national dialogue almost immediately.<sup>7</sup> In an interview shortly after the game, Pittsburgh’s Mike Mitchell made it very clear that for him, football is a matter of informed choice.<sup>8</sup> “Safer” football, for Mitchell, would no longer be true football:

Just hand us all some flags. Hand us all some flags, and we’ll go out there and try to grab the flags off. Because we’re not playing football[.] . . . This is not damn football.

---

1. Jason Owens, *Jon Gruden Leads Wave of Criticism over Violence in Steelers-Bengals MNF Game*, YAHOO SPORTS (Dec. 5, 2017, 12:05 AM), <https://sports.yahoo.com/jon-gruden-leads-wave-criticism-violence-steelers-bengals-mnf-game-060535067.html> [https://perma.cc/N2FK-U398].

2. *See id.*

3. *See id.*; Bryan Armen Graham, *Steelers-Bengals Brutality a Reminder Life-Altering Violence Is at NFL’s Core*, GUARDIAN (Dec. 5, 2017, 2:03 PM), <https://www.theguardian.com/sport/blog/2017/dec/05/steelers-bengals-game-violence-ryan-shazier-nfl> [https://perma.cc/N9JR-44XB].

4. *See* Graham, *supra* note 3.

5. *See* Mark W. McFarland, *Ryan Shazier – From Paralysis to Standing – A Cause for Celebration!*, ORTHOPAEDIC & SPINE CTR. (Feb. 2, 2018), <https://www.osc-ortho.com/blog/ryan-shazier-paralysis-standing-cause-celebration/> [https://perma.cc/J53G-VWMK].

6. Troy Aikman (@TroyAikman), TWITTER (Dec. 4, 2017, 8:41 PM), <https://twitter.com/TroyAikman/status/937904747427893250> [https://perma.cc/W2ZZ-CTL5].

7. *See* Brett Williams, *American Football Won’t Last Much Longer, Because It’s Killing Itself*, MASHABLE (Dec. 10, 2017), <https://mashable.com/2017/12/10/football-is-killing-itself/#bLY5CL99MPqd> [https://perma.cc/3TPN-S6J4].

8. *See* Jeremy Fowler, *Steelers Safety Mike Mitchell Rips Officiating: ‘Just Hand Us All Some Flags’*, ESPN (Dec. 6, 2017), [http://www.espn.com/nfl/story/\\_id/21693373/pittsburgh-steelers-safety-mike-mitchell-upset-stance-hard-hits-nfl](http://www.espn.com/nfl/story/_id/21693373/pittsburgh-steelers-safety-mike-mitchell-upset-stance-hard-hits-nfl) [https://perma.cc/MH8V-5KKE].

When I was six years old watching Charles Woodson, Rod Woodson, Sean Taylor, the hitters, Jack Tatum. That's football. This ain't football. You have to know the risk when you sign up. . . . It's football. It's no different than UFC fighting. This a combat, contact sport. There's gonna be injuries. That's just what it is. But if you don't want to get injured, don't come out here.<sup>9</sup>

Mitchell is not the first to make the point,<sup>10</sup> and every indication suggests that he will not be the last.<sup>11</sup> In a 2010 ESPN poll of three hundred prep football players, 45 percent replied “Yes” when asked if a “good chance” of playing in the National Football League (NFL) was worth a “decent chance” of permanent brain damage.<sup>12</sup> Counterintuitively, in a survey of three hundred twenty prospective senior high school players two years later—after more information had been released about concussions—that percentage increased to nearly 54 percent.<sup>13</sup>

Retired players, however, seem to view the situation differently. Since 2011, former players have filed over two hundred complaints against the NFL regarding its duties to protect players from the chronic risks created by concussive and subconcussive head injuries.<sup>14</sup> The suits raise five major claims: negligence, negligent misrepresentation, fraud, fraudulent concealment, and conspiracy.<sup>15</sup> The most common claim by far, however, is ordinary negligence based on a breach of the duty to take reasonable precautions for players' safety.<sup>16</sup> These cases against the NFL were consolidated in 2012 as multidistrict litigation in the United States District Court for the Eastern District of Pennsylvania.<sup>17</sup> The parties eventually reached a settlement that Judge Brody of the Eastern District of Pennsylvania approved and the United States Court of Appeals for the Third Circuit on appeal affirmed.<sup>18</sup>

---

9. *Id.*

10. Quarterback Jay Cutler and Wide Receiver Brian Hartline have both made similar points. See Robert Klemko, *You Can't Please Everybody*, SPORTS ILLUSTRATED (Oct. 25, 2013), <https://www.si.com/2013/10/25/players-react-concussion-rules> [<https://perma.cc/DVX8-SHEJ>].

11. See, e.g., Sam Alipour et al., *NFL Confidential*, ESPN THE MAGAZINE, Sept. 3, 2012, at 93.

12. *Id.*

13. *Id.*

14. See *In re Nat'l Football League Players' Concussion Injury Litig.* (In re *Nat'l Football League I*), 301 F.R.D. 191, 195 (E.D. Pa. 2014), *aff'd*, 821 F.3d 410 (3d Cir. 2016).

15. See Plaintiff's Amended Master Administrative Long-Form Complaint at 2, 3, In re *Nat'l Football League I*, 301 F.R.D. 191 (No. 2:12-md-02323-AB); J. Brad Reich, *When "Getting Your Bell Rung" May Lead to "Ringling the Bell": Potential Compensation for NFL Player Concussion-Related Injuries*, 12 VA. SPORTS & ENT. L.J. 198, 200 (2013).

16. See Reich, *supra* note 15, at 205.

17. See *In re Nat'l Football League I*, 301 F.R.D. at 195.

18. The settlement allows compensation to the estate of players who died of CTE, if confirmed in autopsy. It does not, however, allow for compensation to players diagnosed with CTE during their lifetime. See *id.*; *In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410, 423–24, 448 (3d Cir. 2016).

As a result, whether the NFL has actually breached its duty of care to protect players from the risks of traumatic brain injuries has yet to be fully litigated.<sup>19</sup> There remains, however, significant potential for such a case to be brought to trial. In addition to the several hundred players who opted out of the settlement, specifically to reserve their right to sue the NFL at a later date, the agreement notably omitted CTE diagnosed in living patients as a qualified condition.<sup>20</sup> This omission bars retired players participating in the settlement from seeking compensation to pay for CTE specific treatment. Initially, this omission made some degree of sense. After all, because science could not yet detect with certainty that someone had CTE until that person died, why pay for treatment for a disease one cannot prove the player has?<sup>21</sup>

But times have changed. In addition to a study finding that 99 percent of studied former NFL players’ brains had CTE,<sup>22</sup> researchers now know it is in fact possible to diagnose CTE in living patients.<sup>23</sup> With this new information, there is good reason to suspect that current and retired players are living with CTE, and it is now possible for any one of those players to be diagnosed during their lifetime.<sup>24</sup> By failing to acknowledge CTE as a qualified condition, the settlement now seems ill-equipped to fulfill its fundamental purpose of compensating retired players for health problems associated with their football careers.

---

19. One question raised with respect to this litigation is whether players can turn to workers’ compensation for relief. *See, e.g.*, Thomas Reiter & Lucas Tanglen, *Concussions and Coverage: Insurance for Claims Alleging Long-Term Brain Injuries, Including CTE*, 34 ENT. & SPORTS L. 3, 16 (2016). These statutes, after all, are the usual form of compensation for employees injured on the job. *See id.* The problem, however, is that workers’ compensation statutes—at least for the time being—typically either preempt or exclude recovery for CTE. *See* CHRISTOPHER DEUBERT, I. GLENN COHEN & HOLLY FERNANDEZ LYNCH, PROTECTING AND PROMOTING THE HEALTH OF NFL PLAYERS: LEGAL AND ETHICAL ANALYSIS AND RECOMMENDATIONS 212, 257–64 (2016); 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, 214 (2005). Researchers have recommended advocacy to change these statutes but for the time being, the courts remain the proper venue for NFL players seeking compensation for their injuries. *See* Mitten, *supra*, at 213.

20. *See* Michael McCann, *Will New CTE Findings Doom the NFL Concussion Settlement?*, SPORTS ILLUSTRATED (Aug. 15, 2017), <https://www.si.com/nfl/2017/08/15/new-cte-study-effect-nfl-concussion-settlement> [<https://perma.cc/F6R6-RQV7>].

21. *See id.*

22. *See* Jesse Mez et al., *Clinicopathological Evaluation of Chronic Traumatic Encephalopathy in Players of American Football*, 318 J. AM. MED. ASS’N 360, 360–70 (2017).

23. *See* Bennet Omalu et al., *Postmortem Autopsy—Confirmation of Antemortem [F-18] FDDNP-PET Scans in a Football Player with Chronic Traumatic Encephalopathy*, 82 NEUROSURGERY 237, 237–46 (2017).

24. *See id.*

Future negligence actions, therefore, remain a looming threat over the NFL.<sup>25</sup> A particularly interesting aspect of any potential future suit is whether the NFL could raise a viable assumption of risk defense. That is, could the organization essentially mimic Mike Mitchell's sentiments in an effort to avoid liability, arguing that players "have to know the risks when [they] sign up," and if they do not want to get injured, then they should not play?<sup>26</sup>

Defenses based on plaintiffs' assumption of risk take two forms: express and implied. Express assumption of risk applies when plaintiffs have explicitly waived all potential tort claims against the defendant.<sup>27</sup> The viability of this defense largely depends on whether the waiver is consistent with public policy.<sup>28</sup> Implied assumption of risk, however, applies when there is no explicit waiver and protects the defendant only from liability for injuries resulting from inherent risks in the activity.<sup>29</sup> Although neither form of the defense has been litigated with respect to the risk of concussions and CTE in professional football, the prospect of future litigation in this area makes for an intriguing thought experiment. Namely, which version of the defense—if either—should provide a persuasive defense for the NFL?

For potential suits in the near future, the implied assumption of risk defense seems weak. Now-retired players did not know the risks of traumatic brain injuries when they decided to play decades ago.<sup>30</sup> The essence of their negligence claim is that the league either knew or should have known about these risks and accordingly should have done more to ensure that players made a truly informed choice when they decided to play professional football.<sup>31</sup>

As time goes on, however, the information asymmetries between the league and its players will diminish. The link between CTE and professional football has garnered an increasing amount of scholarly<sup>32</sup>

---

25. Several commentators have attempted to predict how courts will react to such an action. See, e.g., David S. Cerra, *Unringing the Bell: Former Players Sue NFL and Helmet Manufacturers over Concussion Risks in Maxwell v. NFL*, 16 MICH. ST. U.J. MED. & L. 265, 282–84 (2012); John Guccione, *Moving Past a "Pocket Change" Settlement: The Threat of Preemption and How the Loss of Chance Doctrine Can Help NFL Concussion Plaintiffs Prove Causation*, 22 J.L. & POL'Y 909, 944 (2014); Joseph M. Hanna, *Concussions May Prove to Be a Major Headache for the NFL: Players' Class Action Suit Places a Bounty on the League*, N.Y. ST. B.J., Oct. 2012, at 10, 14; Reich, *supra* note 15, at 200; Ashley J. Adams, Note, *Intercollegiate Concussions: What the NCAA Can Do to Ease the Pain from an Inevitable Headache*, 87 TEMP. L. REV. 193, 218–19 (2014).

26. Fowler, *supra* note 8.

27. See RESTATEMENT (SECOND) OF TORTS § 496B (AM. LAW INST. 1979).

28. See *id.*

29. See § 496C. For a detailed examination of both express and implied assumption of risk defenses, see *infra* Part II.

30. See Reich, *supra* note 15, at 200.

31. See *id.*

32. See, e.g., Omalu et al., *supra* note 23, at 237–46.

and popular attention.<sup>33</sup> Thus, the players of today and tomorrow theoretically should be fully aware of the risks, irrespective of what action the league takes. Further, as incoming players and the public grow more informed, judges and juries may be more inclined to find that these players have knowingly assumed the risk of CTE as a risk of playing. It indeed seems that the league’s implied assumption of risk defense only grows stronger with time.

This Article challenges this logic<sup>34</sup> by wrestling with a hypothetical scenario: Were the NFL to ask its players to sign a “Concussion Clause” waiver, would an express assumption of risk defense be upheld? In that hypothetical world, the information asymmetries that existed in the past would be fully resolved. But would that waiver be legally enforceable? And if that express waiver would *not* be upheld, why should tort law allow players to assume the same risks impliedly through their conduct?

To answer these questions, this Article proceeds in three parts. Part II evaluates tort law doctrine on assumption of risk, detailing the background of express and implied assumption of risk defenses and their historical application in football. Part III addresses the above Concussion Clause hypothetical, concluding that any waiver exculpating the NFL for concussion injuries would likely violate public policy and would thus be legally unenforceable. The puzzle, however, lies in the fact that the NFL could still advance a potentially viable implied assumption of risk defense despite such a waiver being unenforceable for violating public policy.

This seemingly contradictory outcome is largely due to the tremendous weight tort doctrine places on the distinction between inherent and extraneous risks. While the former can be assumed impliedly and without triggering scrutiny on public policy grounds, the latter can only be assumed through an explicit waiver consistent with public policy. As long as concussions and CTE are characterized as inherent risks of football, courts could theoretically uphold an implied

---

33. See, e.g., Alipour et al., *supra* note 11, at 93; Williams, *supra* note 7.

34. While this Article is not the first to approach the viability of the NFL’s assumption of risk defense going forward, it is the first to evaluate the concept of a Concussion Clause. See *infra* Part III. Some scholars have turned to the science of concussions to argue that, even if the players knew and understood the risks of traumatic brain injuries when they decided to play, they can never be said to have made an informed choice to return to the field after suffering a concussion. See, e.g., Tracey B. Carter, *From Youth Sports to Collegiate Athletics to Professional Leagues: Is There Really “Informed Consent” by Athletes Regarding Sports-Related Concussions?*, 84 UMKC L. REV. 331, 351–53 (2015); Heather MacGillivray, *Where Is the Awareness in Concussion Awareness: Can Concussed Players Really Assume the Risk in a Concussed State?*, 21 JEFFREY S. MOORAD SPORTS L.J. 529, 555–57 (2014). This Article, confronts the NFL’s defense with a more wholesale approach. It steps away from the nuances of informed choice and instead argues that the league’s defense should fail for being inconsistent with the principles of tort law.

assumption of risk defense even if an express waiver for the same risks would violate public policy. Part IV challenges this outcome on three grounds, arguing that courts should recognize public policy objections to the implied assumption of risk defense. First, the line between inherent and extraneous risks is murky and full of complications, making it an unusable legal standard. Second, only using a policy backstop for express assumption of risk is inconsistent with the basic principle in tort law of using policy to inform duty determinations. Lastly, and perhaps most importantly, failing to recognize public policy objections to implied assumption of risk is inconsistent with the Restatement and both the compensation and deterrence goals of tort law. Part V briefly concludes and offers some recommendations.

## II. EVALUATION OF THE ASSUMPTION OF RISK DEFENSE

### A. *Assumption of Risk Background*

When Judge Cardozo first articulated the assumption of risk defense, he envisioned it as a fairly simple concept. As he summarized assumption of risk, “the timorous may stay at home.”<sup>35</sup> Since 1929, however, the defense has evolved into a much more nuanced, multidimensional aspect of tort law. Today, it takes three main forms: primary implied assumption of risk, secondary implied assumption of risk, and express assumption of risk.

#### 1. Primary Implied Assumption of Risk

The first and most prominent form of the assumption of risk defense is primary implied assumption of risk. In this version of the defense, the plaintiff voluntarily enters into a risky activity and, therefore, has relieved the defendant of a duty to protect him from the risks inherent in that activity.<sup>36</sup> Under primary implied assumption of risk, liability attaches only “where the defendant intentionally injures or engages in reckless, willful or wanton misconduct beyond the scope ordinarily contemplated for the activity.”<sup>37</sup> Determining the ordinary scope of an activity is a question reserved for judges and has proven to be quite the legal challenge.<sup>38</sup>

---

35. *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929).

36. RESTATEMENT (SECOND) OF TORTS § 496A cmt. (c)(2) (AM. LAW INST. 1979).

37. Alexander J. Drago, *Assumption of Risk in the Arena, on the Field and in the Mosh Pit: What Protection Does It Afford?*, 13 ENT. & SPORTS LAW. 3, 4 (1995).

38. *See id.* at 6–7.



A classic example of this puzzle is the New York case, *Turcotte v. Fell*.<sup>39</sup> A professional jockey, Ronald Turcotte, was injured in a race when his horse clipped the heels of another horse.<sup>40</sup> Turcotte sued the jockey riding the other horse, the owner of that jockey's horse, and the owner-operator of the racetrack.<sup>41</sup> The defendants responded with an assumption of risk defense.<sup>42</sup> As the court saw it, the defendants' only duty was to make the conditions as safe as they appear to be. That is, the defendants need not have protected Turcotte against "the perfectly obvious" risks associated with competitive horse racing.<sup>43</sup> Because the risk at issue was "known, apparent or reasonably foreseeable," the defendants had satisfied their duty.<sup>44</sup>

Had the defendant failed to keep the track in reasonable condition or concealed another danger, Turcotte's case may have succeeded. But the court concluded that the risk of horses colliding was inherent to the sport and patently obvious to an experienced rider like Turcotte.<sup>45</sup> Though dated, the example highlights the intuitive point Cardozo playfully articulated: If someone knowingly opts into a risky activity, he accepts the consequences.<sup>46</sup> The only duty of the defendant is to protect against risks *beyond* those inherent to the activity.

## 2. Secondary Implied Assumption of Risk

Unlike primary implied assumption of risk, the defendant in *secondary* implied assumption of risk cases argues that the plaintiff was "aware of [the] risk created by the negligence of the defendant, [and] proceed[ed] or continue[d] voluntarily to encounter it."<sup>47</sup> The key difference between primary and secondary implied assumption of risk is what the plaintiff knew going into the activity. In primary implied assumption of risk, the plaintiff is said to have known of and consented to the risks inherent to a dangerous activity.<sup>48</sup> In secondary implied assumption of risk, the plaintiff is assumed to have known of and consented to a particular risk caused by the defendant's negligence.<sup>49</sup>

---

39. See *Turcotte v. Fell*, 502 N.E.2d 964, 966 (N.Y. 1986).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 968.

44. *Id.*

45. In an interesting parallel to the NFL's assumption of risk defense, the court found it particularly relevant that Turcotte was a professional, noting that "a professional athlete is more aware of the dangers of the activity, and presumably more willing to accept them in exchange for a salary, than is an amateur." *Id.* at 969.

46. See *id.* at 968.

47. RESTATEMENT (SECOND) OF TORTS § 496A cmt. (c) (AM. L.INST. 1979).

48. See Drago, *supra* note 37, at 4.

49. See *id.* at 5.

As it relates to CTE litigation, primary assumption of risk is far more important. Secondary assumption of risk does not operate as a complete defense, “but has been merged with contributory negligence under comparative fault laws.”<sup>50</sup> Under this defense, the NFL would argue that while it may have been negligent, so too were the players for deciding to play. A jury would have to balance the faults and reasonableness of both parties under the relevant state’s comparative fault laws.<sup>51</sup>

If the NFL’s only line of defense became secondary implied assumption of risk, in other words, the legal analysis of the case would be relatively clear. The focus would turn to how a jury should approach the factual question of fault. This is why the viability of a primary assumption of risk defense is far more puzzling. One question of law—whether or not a risk is within the “ordinary scope of an activity”—determines whether the defendant is granted a complete defense. As such, this Article focuses on the NFL’s use of a primary implied assumption of risk defense.

### 3. Express Assumption of Risk

In cases concerning express assumption of risk, the plaintiff and defendant have entered into a private agreement altering their rights and obligations under tort law.<sup>52</sup> In some ways, express assumption of risk is the explicit version of its implied counterparts. The key difference, however, is that while a plaintiff subject to primary implied assumption of risk defense can still sue for dangers beyond the ordinary scope of the activity, the plaintiff subject to an express assumption of risk defense has usually “agree[d] to accept a risk of harm arising from the defendant’s negligent or reckless conduct.”<sup>53</sup> In other words, under implied assumption of risk, defendants can still be sued if they fail to meet their duty of care relating to noninherent risks. In contrast, the defendant cannot be sued at all under express assumption of the risk. Express assumption of risk provides the defendant with far more protection. To return to the example of *Turcotte*, an implied assumption of risk defense would not bar the jockey from suing the racetrack for a risk that is extraneous to jockeying—say, if the seating area collapsed on him. But an express assumption of risk would foreclose even that claim if it were enforced.

---

50. *Id.*

51. *See id.*

52. *See* David Horton, *Extreme Sports and Assumption of Risk: A Blueprint*, 38 U.S.F. L. REV. 599, 616 (2004).

53. RESTATEMENT (SECOND) OF TORTS § 496B (AM. LAW INST. 1979).

With added protection, however, comes added scrutiny. Exculpatory waivers must meet two requirements to be enforced. First, the waiver must clearly and unequivocally express the parties’ intent to release the defendant from liability for his negligent acts.<sup>54</sup> Specifically, courts have found that a release “must appear plainly and precisely apparent that the limitation of liability extends to negligence or other fault of the party attempting to shed his ordinary responsibility.”<sup>55</sup>

Second, and more often the subject of litigation, the waiver must not violate public policy.<sup>56</sup> While states have slightly different approaches to this question, the majority of jurisdictions evaluate waivers on six grounds: (1) whether the activity is usually regulated, (2) whether the activity is of great importance to the public, (3) whether the activity is open to the public, (4) whether there is unequal bargaining power between the parties, (5) whether the waiver can be construed as a contract of adhesion, and (6) whether the plaintiff is under the defendant’s control.<sup>57</sup> These factors, and the other tests employed by states for evaluating waivers on public policy grounds, are explored in greater detail below.

### *B. Historical Application of Assumption of Risk in Football*

While the most recent NFL concussion litigation was settled before trial, courts have tackled assumption of risk defenses with respect to both professional and amateur football.<sup>58</sup> In these cases, distinguishing between risks that are inherent and extraneous to the game has been a particularly challenging task for courts. This preliminary question of law has an enormous impact on the case. If the judge ultimately decides a risk is inherent, much like in *Turcotte*, the defendant’s implied assumption of risk defense is viable.<sup>59</sup> If, however,

---

54. See *Paralift, Inc. v. Superior Court of San Diego Cty.*, 29 Cal. Rptr. 2d 177, 181 (Ct. App. 1993); *Jones v. Dressel*, 623 P.2d 370, 374 (Colo. 1981); *Gross v. Sweet*, 400 N.E.2d 306, 309 (N.Y. 1979); Alexander J. Drago, *Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 583, 585–86 (2002).

55. *Gross*, 400 N.E.2d at 309 (internal quotation marks omitted) (citing *Howard v. Handler Bros. & Winell, Inc.*, 107 N.Y.S.2d 749, 751 (N.Y. App. Div. 1951), *aff’d*, 303 N.E.2d 990 (N.Y. 1952)).

56. See Drago, *supra* note 54, at 588.

57. See *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 445–46 (Cal. 1963).

58. See, e.g., *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 519 (10th Cir. 1979); *Rutter v. Ne. Beaver Cty. School Dist.*, 437 A.2d 1198, 1202 (Pa. 1981); *Claims in NFL Concussion Settlement Hit \$500 Million in Less Than 2 Years*, CBS NEWS (July 30, 2018, 7:10 PM), <https://www.cbsnews.com/news/nfl-concussion-claims-hit-500-million-less-than-2-years/> [<https://perma.cc/JB97-LJM9>].

59. See, e.g., *Turcotte v. Fell*, 502 N.E.2d 964, 969 (N.Y. 1986).

the judge decides the risk is extraneous, implied assumption of risk does not apply.<sup>60</sup>

The seminal case in the professional football realm is *Hackbart v. Cincinnati Bengals, Inc.*<sup>61</sup> The case concerned an incident during a regular season game in which the Bengals' player Charles Clark intentionally "stepped forward and struck a blow with his right forearm to the back of the kneeling plaintiff's head and neck."<sup>62</sup> The plaintiff suffered injuries from the blow that eventually forced him to retire.<sup>63</sup>

The issue in the case was whether the NFL could be held liable for the injury because it was "inflicted by the intentional striking of a blow" or if it was protected by assumption of risk.<sup>64</sup> The trial court ruled in the NFL's favor.<sup>65</sup> As the trial judge saw it, "Hackbart had to recognize that he accepted the risk that he would be injured by such an act."<sup>66</sup>

On appeal, however, the United States Court of Appeals for the Tenth Circuit, took a different approach. The panel emphasized that the rules of football specifically prohibit these kinds of intentional blows.<sup>67</sup> As a result, the court concluded that the trial court wrongfully "determined that as a matter of social policy the game was so violent and unlawful that valid lines could not be drawn."<sup>68</sup> They found instead that the lines were perfectly clear as articulated by the rules of the game.<sup>69</sup> Since these rules prohibited intentional hits, the "plaintiff was entitled to have the case tried on an assessment of his rights and whether they had been violated."<sup>70</sup> The court accordingly remanded the

---

60. See, e.g., *Rutter*, 437 A.2d at 1208.

61. See *Hackbart*, 601 F.2d.

62. *Id.* at 519. A similar incident took place during the 2017–2018 NFL season in a game between the New England Patriots and Buffalo Bills. Tight end Rob Gronkowski, after the play, charged into the back of the Cornerback Tre'Davious White's head and neck. Gronkowski was suspended for one game. No litigation has been filed. See Kaleel Weatherly, *Rob Gronkowski Suspended 1 Game for Late Hit on Bills' Tre'Davious White*, SB NATION (Dec. 5, 2017, 5:25 PM), <https://www.sbnation.com/2017/12/4/16733394/rob-gronkowski-suspended-patriots-bills-tredavious-white-hit> [https://perma.cc/MS2G-H4HQ].

63. See *Hackbart*, 601 F.2d at 519; *High Court Upholds Injury Suit in N.F.L.*, N.Y. TIMES (Oct. 30, 1979), <https://www.nytimes.com/1979/10/30/archives/high-court-upholds-injury-suit-in-nfl-hackbart-retired-after-injury.html> [https://perma.cc/SET5-632E].

64. *Hackbart*, 601 F.2d at 518.

65. *Id.* at 519.

66. *Id.*

67. See *id.* at 521.

68. *Id.* at 526.

69. *Id.* at 521.

70. *Id.* at 526.

case for a new trial, but Hackbart subsequently opted to settle his claims.<sup>71</sup>

*Hackbart* can be read as limiting the reach of implied assumption of risk. The court effectively concluded that the NFL rules that the players knew when they put on their helmets defined what was inherent to, or within the ordinary scope of, football in 1979. The rules of the game are the boundary lines for what is inherent under *Hackbart*.

Courts handling cases involving amateur football have reached similar conclusions. In *Rutter v. Northeastern Beaver County School District*, a school district raised an assumption of risk defense against a high school football player suing for injuries he sustained during a preseason training drill where he was required to play without protective equipment.<sup>72</sup> The court emphasized whether playing without protective equipment presented risks that were inherent to football. While the court noted that “[o]ne possibility [was] that he assumed the risk of *all* injuries related to training for and playing football,” they ultimately decided that he only assumed the risk of “injuries related to training for and playing football while under the direction of coaches who furnished watchful supervision and protective equipment when needed.”<sup>73</sup> As a result, implied assumption of risk did not protect the defendant.<sup>74</sup>

Thus, when presented with the issue of injuries relating to football, courts have consistently narrowed the applicability of implied assumption of risk defenses. Furthermore, no court has yet interpreted the applicability of an *express* assumption of risk defense to football-related head injuries. The question of how much risk a football player legally assumes when he decides to play is, therefore, ripe for exploration.

### III. EVALUATING A CONCUSSION CLAUSE

Were the NFL to defend a negligence suit in court today based on a concussion injury, asserting an implied assumption of risk defense would likely prove futile. After all, players currently suing the league were very much unaware of the risks of concussions, CTE, and traumatic brain injuries when they first picked up a helmet decades ago.<sup>75</sup>

---

71. See *Hackbart in Settlement with Bengals on Injury*, N.Y. TIMES (July 5, 1981), <https://www.nytimes.com/1981/07/05/sports/hackbart-in-settlement-with-bengals-on-injury.html> [<https://perma.cc/69XZ-CLSE>].

72. *Rutter v. Ne. Beaver Cty. Sch. Dist.*, 437 A.2d 1198, 1200 (Pa. 1981).

73. *Id.* at 1207–08 (emphasis added).

74. See *id.* at 1209.

75. See, e.g., Omalu et al., *supra* note 23, at 244.

As time goes on, however, this argument loses its potency. With the link between CTE and football drawing increased attention, the information asymmetry that existed in years past is closing. Thus, the league's implied assumption of risk defense grows stronger with time. In a future negligence suit, an implied assumption of risk defense may be persuasive and, curiously, it may fare better than its express assumption of risk counterpart.

This section evaluates whether this counterintuitive outcome should be the case by taking the logic of full disclosure to the extreme. Imagine the NFL had its players sign a completely comprehensive exculpatory waiver before putting on a helmet—a Concussion Clause. In that world, where the information asymmetries are entirely cured, is the assumption of risk defense stronger? That is, would the NFL be able to rely on an express assumption of risk defense? And if not, why would players be allowed to assume risks impliedly that they are barred from assuming by contract?

#### A. Requirements for Enforceability

As noted above, there are two requirements for an express assumption of risk to be enforceable. First, the waiver's scope must be clearly defined.<sup>76</sup> For the purposes of the hypothetical Concussion Clause, assume that this requirement is satisfied and that the NFL's waiver unambiguously explains that the player waives any rights to sue for concussion-related injuries, regardless of whether those injuries resulted from the inherent aspects of the game *or* the defendant's negligence.<sup>77</sup>

The second requirement is that the waiver be consistent with public policy.<sup>78</sup> There is no single way to answer this question, as the issue is largely a creature of state law. The most common approach, however, is to refer to the six factors laid out in *Tunkl v. Regents of the University of California*.<sup>79</sup> *Tunkl* involved an exculpatory waiver a California hospital required patients to sign before admission.<sup>80</sup> When the plaintiff brought a negligence suit against the hospital, the hospital pointed to the waiver as its defense.<sup>81</sup>

---

76. See Drago, *supra* note 37, at 3.

77. See *id.* at 3. Interestingly, some scholars have expressed doubt as to whether such a waiver could actually be so comprehensive. See *id.* at 4. But for the purposes of this hypothetical, the Author assumes that this first requirement has been met.

78. See Drago, *supra* note 54, at 588.

79. See *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 444 (Cal. 1963).

80. *Id.* at 442.

81. *Id.* at 442.

The California Supreme Court ultimately found the waiver unenforceable because it “affect[ed] the public interest.”<sup>82</sup> The court reached its conclusion by evaluating the waiver in light of six public policy factors:

(1) that “[i]t concerns a business of a type generally thought suitable for public regulation”;

(2) that “[t]he party seeking exculpation is engaged in performing a service of great public importance, which is often a matter of practical necessity for some members of the public”;

(3) that “[t]he party holds himself out as willing to perform the service for any member of the public who seeks it, or at least for any member coming within certain established standards”;

(4) that there is a “decisive advantage of bargaining strength against any member of the public”;

(5) that the waiver represents a contract of adhesion, and allows for “no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence”; and

(6) that the transaction places the “person or property of the purchaser under the control of the seller.”<sup>83</sup>

An often-criticized aspect of the *Tunkl* holding, however, is that the court gave little guidance on how courts should weigh these factors.<sup>84</sup> While the court noted that the “agreement need only fulfill some of the [above] characteristics,” it failed to provide any further guidance on how to actually execute the public policy analysis.<sup>85</sup>

Still, the cases applying *Tunkl* reveal some important patterns. For one thing, when the matter involves public agencies or common carriers impacting a large portion of the public, courts tend to find all six factors present.<sup>86</sup> In *Wagenblast v. Odessa School District*, for example, the Washington Supreme Court invalidated a school district’s

---

82. *Id.* at 447.

83. *Id.* at 445–46.

84. *See, e.g., Negligence—Exculpatory Clauses—School Districts Cannot Contract Out of Negligence Liability in Interscholastic Athletics—Wagenblast v. Odessa School District*, 110 *Wash. 2d* 845, 758 P.2d 968 (1988), 102 HARV. L. REV. 729, 735 (1989) [hereinafter *Harvard Law Review Association*].

85. *Tunkl*, 383 P.2d at 447.

86. *See, e.g., Gavin W. v. YMCA of Metro. L.A.*, 131 Cal. Rptr. 2d 168, 178 (Ct. App. 2003) (holding that services that affect the public interest—like childcare—cannot contract away their duty to exercise ordinary care); *Okura v. U.S. Cycling Fed’n*, 231 Cal. Rptr. 429, 431–32 (Ct. App. 1986) (reaching a similar conclusion with respect to a cycling organization); *Covenant Health & Rehab. of Picayune, LP v. Estate of Moulds ex rel. Braddock*, 14 So. 3d 695, 703 (Miss. 2009) (reaching a similar conclusion with respect to nursing homes); *Sw. Public Serv. Co. v. Artesia Alfalfa Growers’ Ass’n*, 353 P.2d 62, 71 (N.M. 1960) (reaching a similar conclusion with respect to a public utility company).

requirement that parents release schools from negligence liability before their children could participate in school athletics.<sup>87</sup> The *Wagenblast* court placed significant weight on the fact that, since the schools were a part of the public education system, these waivers impacted a large number of students.<sup>88</sup> In light of this, the court promptly found that all six *Tunkl* factors pointed against enforcing the waiver: interscholastic sports and public schools were already “extensively regulated”; they were certainly a “matter of [great] public importance” and “open to all students who meet certain skills and eligibility standards”; there was a stark disparity in bargaining power, as there was no equivalent to interscholastic competition and the school districts gave no option to pay for protection from negligence; and the students were under the complete control of the school’s coaches.<sup>89</sup>

The same type of analysis guided the *Tunkl* court. There, the seminal fact was that the waiver was drawn up by a public hospital.<sup>90</sup> Accordingly, the court found that this was a type of business typically regulated, that the business was important to and open to the public, and that there was a disparity in bargaining power because patients were not in a position to leave and go to another hospital.<sup>91</sup>

This trend is not surprising. After all, if the defendant is a public agency, the first set of factors—common regulation, public importance, and public availability—are by definition met. In addition, because public agencies, by their nature, are not driven by competition, there will likely be some disparity in bargaining power between the plaintiff and defendant.

When the entity attempting to enforce the waiver is nonpublic, however, courts are more divided. Some courts have refused to apply the public policy exception at all in such cases.<sup>92</sup> In *Marshall v. Blue Springs Corporation*, for example, an Indiana state court found that a liability waiver used by a scuba instruction company was not inconsistent with public policy because the plaintiff chose to take the lessons solely for “his own personal enjoyment” and “was under no compulsion by an outside force to do so.”<sup>93</sup>

Still, other courts have extended the doctrine to purely recreational activities when there are stark disparities in bargaining

---

87. *Wagenblast v. Odessa Sch. Dist.* No. 105-157-166J, 758 P.2d 968, 970 (Wash. 1988).

88. *Id.* at 973.

89. *Id.* at 972–73.

90. *Tunkl*, 383 P.2d at 447.

91. *Id.*

92. *See, e.g., Marshall v. Blue Springs Corp.*, 641 N.E.2d 92, 95 (Ind. Ct. App. 1994).

93. *Id.* at 95–96; *see also Espinoza v. Ark. Valley Adventures, LLC*, 809 F.3d 1150, 1157 (10th Cir. 2016) (holding a release was enforceable against a guest of a rafting company who died rafting largely because the service was not a matter of “practical necessity”).



power.<sup>94</sup> The key case is *Hanks v. Powder Ridge Restaurant Corporation*.<sup>95</sup> After consulting the *Tunkl* factors, the Connecticut Supreme Court found that a snow tubing company’s waiver was inconsistent with public policy largely because (1) the defendant provided the services to the general public, suggesting the activity was reasonably safe; (2) the plaintiff came directly under the defendant’s control; and (3) there was an inherent disparity in bargaining power between the two parties, resulting in a contract of adhesion.<sup>96</sup> It did not matter that the activity was purely voluntary and recreational.<sup>97</sup> The court found there was still a “public policy interest of promoting vigorous participation in such activities,” and there can still be a “disparity of bargaining power in the context of voluntary or elective activities.”<sup>98</sup> Courts throughout the country have followed *Hanks* and struck down waivers in cases involving nonpublic entities when there is a stark disparity in bargaining power.<sup>99</sup> Thus, it seems that the jurisdictions that impose *Tunkl* tend to boil the analysis down into two basic questions: (1) whether the defendant is a public entity and (2) whether there is a disparity in bargaining power.

Interestingly, states that do not use *Tunkl* also tend to focus on these basic questions. Idaho, for instance, “limits the ban on exculpatory clauses to situations in which ‘one party is at an obvious disadvantage in bargaining power or a public duty is involved.’”<sup>100</sup> Kansas, on the other hand, focuses on the public nature of the entity by asking whether the waiver injures “the interests of the public or contravenes some established interest of society, violates some public statute, or tends to interfere with the public welfare or safety.”<sup>101</sup>

In sum, there is no single way to go about answering the public policy question. At root, it is a state law question, and states have developed different ways of handling it. That being said, examining the various tests states have established, it seems there are two overarching concerns guiding the analysis: (1) whether the entity is

---

94. See, e.g., *Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 746 (Conn. 2005).

95. *Id.*

96. *Id.* at 745–46.

97. Compare *id.* at 746, with *Espinoza*, 809 F.3d at 1157, and *Marshall*, 641 N.E.2d at 95–96.

98. *Hanks*, 885 A.2d at 746.

99. See, e.g., *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27, 30 (Or. 2014) (invalidating a snowboarding release after finding it to be a contract of adhesion); *Reardon v. Windswept Farm, LLC*, 905 A.2d 1156, 1157 (Conn. 2006) (extending *Hanks* to horseback riding); *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098, 1113 (N.M. 2003) (invalidating a resort’s horse riding release after finding it to be a contract of adhesion); *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 796 (Vt. 1995) (invalidating a ski resort’s release after finding it to be a contract of adhesion).

100. *Harvard Law Review Association, supra* note 84, at 732 (quoting *Rawlings v. Layne & Bowler Pump Co.*, 465 P.2d 107, 111 (Idaho 1970)).

101. *Hunter v. Am. Rentals, Inc.*, 371 P.2d 131, 133–34 (Kan. 1962).

engaged in activity important to the public and (2) whether there is a stark disparity in bargaining power. The following Section applies these questions to the hypothetical Concussion Clause.

### *B. Requirements Applied to the Concussion Clause*

This Section describes how the two most salient *Tunkl* factors—public importance and disparities in bargaining power—may apply to potential NFL litigation. Section III.C draws on these conclusions to consider the likely fate of the Concussion Clause in court.

#### 1. Professional Football as a Matter of Great Public Importance

The court in *Wagenblast* held that interscholastic sports are integral to the public interest because of how closely they are intertwined with the educational system, emphasizing how “some students undoubtedly remain in school and maintain their academic standing only because they can participate in these programs.”<sup>102</sup> Interscholastic sports, in other words, served the important public function of furthering education and bettering the lives of youth.<sup>103</sup>

Similar reasoning characterizes professional football as a matter of great public importance by being a tool for social mobility. At the 2010 NFL draft, Dez Bryant was drafted fourth overall.<sup>104</sup> After his name was called, the cameras immediately turned to the hordes of friends and family surrounding him in his Texas home.<sup>105</sup> They were sobbing, jumping, and cheering.<sup>106</sup> Dez Bryant—a man who grew up with a lock on his refrigerator and routinely knocked on neighbors doors begging for food stamps—was going to the NFL.<sup>107</sup> It was a dream come true because for Bryant, like countless other NFL players, getting drafted was “the way out” of poverty.<sup>108</sup>

Professional football is inextricably intertwined with race and socioeconomic status. A recent study by the International Review for Sociology and Sport suggests that while black NFL draftees come from

102. *Wagenblast v. Odessa Sch. Dist.* No. 105-157-166J, 758 P.2d 968, 972 (Wash. 1988).

103. *See id.*

104. *See* JMan2015, *Dallas Cowboys Draft 2010: Dez Bryant*, YOUTUBE (Apr. 22, 2010), <https://www.youtube.com/watch?v=jM4CQSS1qVM> [<https://perma.cc/J77Y-HH3Q>].

105. *See id.*

106. *See id.*

107. *See* Paul Solotaroff, *Dez Bryant: The Survivor*, ROLLING STONE (Aug. 27, 2015, 2:00 PM), <https://www.rollingstone.com/culture/culture-sports/dez-bryant-the-survivor-47956/> [<https://perma.cc/UG2N-QKAK>].

108. Bryan Mealer, *The Way Out*, N.Y. TIMES (Feb. 2, 2013), <https://www.nytimes.com/2013/02/03/opinion/sunday/football-as-a-way-out-of-poverty.html> [<https://perma.cc/Q8LG-3KCN>].

more disadvantaged hometowns than black non-drafted athletes, white draftees come from communities that are less socioeconomically disadvantaged than white non-drafted athletes.<sup>109</sup> The study theorized that this discrepancy is due, in part, because unlike their white counterparts, black men from poor communities see football as the most promising path for upward mobility.<sup>110</sup> Indeed, in communities like Palm Beach County, Florida, “[f]ootball is salvation itself, a fleeting window of escape from a place where prison or early death are real and likely outcomes.”<sup>111</sup>

In some ways, then, professional football is the extension of the public policy function noted by the court in *Wagenblast*. It keeps children in school, motivates them to take the next step to attend college, and is viewed in many communities as the key tool for social mobility. There is, thus, some basis for characterizing professional football as a matter of great public importance.

## 2. Disparities in Bargaining Power

Even if professional football cannot be considered a matter of great public importance, a Concussion Clause may still violate public policy if one can show a stark disparity in bargaining power.<sup>112</sup> Examining the ins and outs of the NFL’s procedures, it becomes clear that a tremendous disparity in bargaining power exists between the players and the league both in contract negotiations and the league’s capacity to control the rules and conditions of play. This section will consider each asymmetry in turn.

Unlike contracts in other professional sports leagues, football contracts are seldom guaranteed.<sup>113</sup> Consider the case of Donovan McNabb. In November 2010, he signed a five-year contract extension with the Washington Redskins worth \$78 million, with incentives that could have increased the payout to \$88 million.<sup>114</sup> But after the 2010

---

109. See Rachel Allison, Adriene Davis & Raymond Barranco, *A Comparison of Hometown Socioeconomics and Demographics for Black and White Elite Football Players in the US*, 53 INT’L REV. FOR SOC. SPORT 615, 618 (2018).

110. See *id.*

111. Mealer, *supra* note 108.

112. See *Bagley v. Mt. Bachelor, Inc.*, 340 P.3d 27, 30 (Or. 2014); *Reardon v. Windswept Farm, LLC*, 905 A.2d 1156, 1157 (Conn. 2006); *Hanks v. Powder Ridge Rest. Corp.*, 885 A.2d 734, 746 (Conn. 2005); *Berlangieri v. Running Elk Corp.*, 76 P.3d 1098, 1113 (N.M. 2003); *Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 796 (Vt. 1995).

113. See Dom Cosentino, *Why Only the NFL Doesn’t Guarantee Contracts*, DEADSPIN (Aug. 1, 2017, 11:38 AM), <https://deadspin.com/why-only-the-nfl-doesnt-guarantee-contracts-1797020799> [<https://perma.cc/Q9UA-RDD9>]. Major League Baseball (MLB) and the National Hockey League (NHL) both guarantee salaries completely. So too do the vast majority of contracts in the National Basketball Association (NBA). See *id.*

114. See *id.*

season, McNabb was traded to the Minnesota Vikings and later cut from the team entirely.<sup>115</sup> As a result, McNabb did not receive a penny of the remaining \$70 million after the 2010 season; that money simply “evaporated into that NFL netherworld of nonguaranteed money.”<sup>116</sup> McNabb’s story is not unique. The dominant structure of contracts in the NFL is to offer high numbers over a period of time without guarantees. This structure is used mainly so that if the player gets injured or needs to be cut, the team and the league do not lose too much in the process.<sup>117</sup> Football players get injured more often than players in the MLB, NBA, or NHL by a large margin.<sup>118</sup> Their careers are also far shorter, averaging just around three years.<sup>119</sup> If *any* player were in need of a contract with a guaranteed payout, it would seem to be the professional football player. Yet, the going standard in the league is to offer minimal guarantees.<sup>120</sup>

Other examples of the uneven bargaining power include the risky “injury split” contract, in which players agree to slash their salaries if they end up on the injured reserve,<sup>121</sup> as well as the rising use of per-game bonuses that require players to be on the active (noninjured) roster each week to get their maximum salary.<sup>122</sup>

While some superstars may wield enough leverage to negotiate more favorable contracts,<sup>123</sup> the majority of NFL players—the “middle

115. See *id.*

116. See Brett Martel & Arnie Stapleton, *Will NFL Contracts Ever Fully Guarantee? Players Can Only Hope*, USA TODAY (Sept. 16, 2017, 3:44 AM), <https://www.usatoday.com/story/sports/nfl/2017/09/16/will-nfl-contracts-ever-fully-guarantee-players-can-hope/105676754/> [<https://perma.cc/9TAK-TWVH>]. McNabb received \$8 million under the deal. See *id.*

117. See Cosentino, *supra* note 113. Darren W. Dummit, Note, *Why the NFL May Not be Free after Claret, and Why Professional Sports May be Free from Antitrust Law*, 8 VAND. J. ENT. & TECH. L. 149, 152 (2005). Other rules established by the league and in the Collective Bargaining Arrangement pose further disincentives for guarantees. For example, the “fully funded rule” mandates that any full guaranteed salary be placed into escrow at the time of signing, requiring the owners to part with the money right away. *Id.*

118. See *id.*; DEUBERT, COHEN & LYNCH, *supra* note 19, at 1 (mean number of injuries suffered per game in the NFL is approximately 4.9 times higher than the sum of MLB, NHL, and NBA leagues).

119. See Rob Arthur, *The Shrinking Shelf Life of NFL Players*, WALL ST. J. (Feb. 29, 2016, 12:42 AM), <https://www.wsj.com/articles/the-shrinking-shelf-life-of-nfl-players-1456694959> [<https://perma.cc/X4SX-DMS2>].

120. See Cosentino, *supra* note 113. While there has been some improvement in this area, recent studies suggest that “just 44 percent of what was actually contracted was in the form of a guarantee.” See *id.*

121. For example, Donald Brown’s \$965,000 deal with New England in 2016 plummeted to a prorated \$453,000 if he got injured. See Kevin Clark, *How NFL Lost Their Leverage*, RINGER (Mar. 16, 2017, 8:30 AM), <https://www.theringer.com/2017/3/16/16077530/nfl-free-agency-players-losing-leverage-864759d6cbdb> [<https://perma.cc/T2VP-RUD5>].

122. This mechanism costed players around \$20 million in 2016 alone. See *id.*

123. On March 13, 2018, for example, quarterback Kirk Cousins made history by signing the league’s first fully guaranteed, three-year, \$84 million contract. See Vincent Frank, *NFL Free*

class” of sorts—face take-it-or-leave-it deals. Just as “coaches crib schemes from others, copycat front offices mimic the contract negotiations occurring elsewhere.”<sup>124</sup> The result is that the average player is faced with almost identical deals wherever they “shop,” and, in effect, are presented with contracts of adhesion. They cannot bargain for more protection in the form of guarantees or leverage their way out of most structural clauses teams use to limit their compensation. Instead, they settle and sign deals “well below what’s warranted.”<sup>125</sup> As former NFL player and current insurer of NFL contracts, Nick Greisen, describes, “They are a monopoly . . . you’ve only got so many teams and thousands of players: It’s a supply and demand problem that goes on, and the teams have all the power.”<sup>126</sup>

This imbalance of power can also be seen in the league’s ability to control the rules and conditions of play. Perhaps even more so than the student players in *Wagenblast* and the recreational snow tubers in *Hanks*, NFL players are subject to the unrelenting control of the league. One example of this is the league’s concussion and safety protocol.<sup>127</sup> While the National Football League Players’ Association (NFLPA) and NFL worked together to come up with the standards, enforcement powers rest solely with the league.<sup>128</sup>

As the 2017 season put on full display, however, whether the NFL actually enforces the protocol is seldom guaranteed. In 2017 alone, there were four high profile incidents in which players involved in harsh, head-to-head tackles clearly displayed symptoms of a concussion and yet were allowed to return to play in the same game in clear

---

*Agency: Minnesota Vikings to Sign Kirk Cousins to Fully Guaranteed Contract*, FORBES (Mar. 13, 2018, 12:22 PM), <https://www.forbes.com/sites/vincentfrank/2018/03/13/nfl-free-agency-minnesota-vikings-to-sign-kirk-cousins-to-fully-guaranteed-contract/#38b868a51777> [https://perma.cc/58RT-BKEF].

Outside of that deal, however, it is rare for even superstars to receive fully guaranteed deals. Quarterback Tom Brady’s most recent two-year \$41 million contract with New England is one of the few including guarantees, and only \$28 million of it is guaranteed. See *Tom Brady*, SPOTRAC, <http://www.spotrac.com/nfl/new-england-patriots/tom-brady-4619/> [https://perma.cc/2TCL-Q99Y] (last visited Feb. 2, 2019). After being cut from Seattle, cornerback Richard Sherman—perhaps the best cornerback of this generation—accepted a three-year, \$27.15 million contract with San Francisco that only included \$7 million guaranteed. See *Richard Sherman*, SPOTRAC, <http://www.spotrac.com/nfl/san-francisco-49ers/richard-sherman-7873/cash-earnings/> [https://perma.cc/M6PN-TRJ3] (last visited Feb. 2, 2019).

124. Clark, *supra* note 121.

125. *Id.*

126. *Id.*

127. See generally NAT’L FOOTBALL LEAGUE, SIDELINE CONCUSSION ASSESSMENT TOOL (2014), <https://static.nfl.com/static/content/public/photo/2014/02/20/ap2000000327062.pdf> [https://perma.cc/C6F9-SP46].

128. See Eric L. Einhorn, Note, *Between the Hash Marks: The Absolute Power the NFL’s Collective Bargaining Agreement Grants Its Commissioner*, 82 BROOK. L. REV. 393, 402, 415 (2016).

violation of the protocol.<sup>129</sup> In only one of those instances was a team subjected to discipline.<sup>130</sup> And, of course, those are only the concussions that are actually reported.<sup>131</sup> While self-reported concussions increased by 9 percent in the 2017 season,<sup>132</sup> the culture in the NFL was still, as quarterback Drew Brees described, “just get back in there, you’re fine, don’t worry about it.”<sup>133</sup> And given the prevalent contract structures in the NFL, that attitude is not surprising. After all, facing things like injury splits and per-game bonuses, players have a very strong short-term incentive to stay in the game at all costs.

All that is to say, once players sign their contracts, the league is the party that sets and enforces the rules, including rules for concussion safety. Furthermore, in the event a player fails to follow those rules, he has no functional power or process to protect his interests, as the Commissioner of the league dominates every aspect of disciplinary proceedings. Under article 46 of the NFL’s Collective Bargaining Agreement (CBA), the Commissioner not only has the power to

---

129. Quarterback Matt Moore returned to the game one play after suffering a helmet-to-helmet hit that left him seemingly dazed on the ground. See Luke Kerr-Dineen, *This Disgusting Cheap Shot Is Everything That’s Wrong with the NFL*, USA TODAY (Jan. 8, 2017, 2:37 PM), <http://ftw.usatoday.com/2017/01/bud-dupree-matt-moore-hit-pittsburgh-steelers-miami-dolphins-video-suspend> [<https://perma.cc/LZ2Y-RFGQ>]. Quarterback Jacoby Brissett returned to play without missing any time after a hit that left him on the ground holding his head. See Adam Kilgore, *After a Bad Week, the NFL’s Concussion Protocol Comes Under Scrutiny Once Again*, WASH. POST (Nov. 16, 2017), [https://www.washingtonpost.com/news/sports/wp/2017/11/16/after-a-bad-week-the-nfls-concussion-protocol-comes-under-scrutiny-once-again/?utm\\_term=.fbfae7a5e3ec](https://www.washingtonpost.com/news/sports/wp/2017/11/16/after-a-bad-week-the-nfls-concussion-protocol-comes-under-scrutiny-once-again/?utm_term=.fbfae7a5e3ec) [<https://perma.cc/5Z45-CX78>]. Quarterback Russell Wilson returned to play without being screened after suffering a collision to the jaw that left him visibly confused. See Brady Henderson, *Russell Wilson Needed to Have Jaw Realigned After Getting Hit by Karlos Dansby*, ESPN (Nov. 17, 2017), [http://www.espn.com/nfl/story/\\_id/21449776/seattle-seahawks-quarterback-russell-wilson-needed-jaw-realigned-hit-arizona-cardinals-karlos-dansby](http://www.espn.com/nfl/story/_id/21449776/seattle-seahawks-quarterback-russell-wilson-needed-jaw-realigned-hit-arizona-cardinals-karlos-dansby) [<https://perma.cc/RR6R-T4JM>]; Mark Maske, *Seattle Seahawks Fined \$100,000 for Violating NFL Concussion Protocol with Russell Wilson*, WASH. POST (Dec. 21, 2017), [https://www.washingtonpost.com/news/sports/wp/2017/12/21/seattle-seahawks-fined-100000-for-bypassing-concussion-test-on-russell-wilson/?utm\\_term=.ebed68691022](https://www.washingtonpost.com/news/sports/wp/2017/12/21/seattle-seahawks-fined-100000-for-bypassing-concussion-test-on-russell-wilson/?utm_term=.ebed68691022) [<https://perma.cc/BY6N-SR57>]. In perhaps most disturbing incident of all, quarterback Tom Savage was allowed to return to play after enduring a sack that sent him into an immediate impact seizure. See Ken Belson & Victor Mather, *Tom Savage’s Return Raises Concussion Protocol Concerns*, N.Y. TIMES (Dec. 11, 2017), <https://www.nytimes.com/2017/12/11/sports/football/tom-savage-houston-texans-concussion.html> [<https://perma.cc/H925-WAAB>].

130. The Seattle Seahawks were fined for allowing Russell Wilson to return to play. See Maske, *supra* note 129.

131. The NFL recently released a report that there were 291 reported concussions in the 2017 season, a six-year high and up 16.4 percent from 2016. See *2017 Injury Data*, NFL: PLAY SMART PLAY SAFE (Jan. 26, 2018), <https://www.playsmartplaysafe.com/newsroom/reports/2017-injury-data/> [<https://perma.cc/D6LP-CC7H>].

132. See Mark Maske, *Concussions Suffered by NFL Players Up This Season; Injury Rate Higher for Thursday Games*, WASH. POST (Jan. 26, 2018), [https://www.washingtonpost.com/news/sports/wp/2018/01/26/concussions-suffered-by-nfl-players-up-this-season-injury-rate-higher-for-thursday-games/?utm\\_term=.d442ed6da9aa](https://www.washingtonpost.com/news/sports/wp/2018/01/26/concussions-suffered-by-nfl-players-up-this-season-injury-rate-higher-for-thursday-games/?utm_term=.d442ed6da9aa) [<https://perma.cc/F6BZ-U367>].

133. Kilgore, *supra* note 129.

discipline players for conduct that is “detrimental to the integrity of . . . the game of professional football” but also to appoint himself or a person of his choosing to arbitrate the player’s appeal of those decisions.<sup>134</sup>

One problem with this arrangement, however, is that it puts the Commissioner in an inherently biased position—he has to be impartial while also working for the owners.<sup>135</sup> That is, “if [the Commissioner] upholds his own disciplinary decision, the NFLPA will challenge his impartiality since he works for the owners, but if he strikes down or lowers his punishment, he ‘would undermine his own competency as Commissioner’ and would run the risk of being fired by the owners.”<sup>136</sup>

The CBAs of the NHL, MLB and NBA are not written this way; the NFL’s stands alone.<sup>137</sup> Legally, it sets up numerous due process concerns for players.<sup>138</sup> Practically, it means that players are subject to the complete—and ultimately unfettered—discretion of the league when it comes to the rules of the game. They therefore cannot fairly be cast as equal parties free to bargain to protect themselves and promote their interests. Rather, after committing themselves to careers in football, they have to play by the league’s rules—accepting contracts and procedures that work to their disadvantage.<sup>139</sup>

---

134. NAT’L FOOTBALL LEAGUE & NAT’L FOOTBALL LEAGUE PLAYERS ASS’N, COLLECTIVE BARGAINING AGREEMENT 1, 204–06 (2011) [hereinafter NFL COLLECTIVE BARGAINING AGREEMENT], <https://nflabor.files.wordpress.com/2010/01/collective-bargaining-agreement-2011-2020.pdf> [<https://perma.cc/6FAN-FHW7>]. In recent years, Commissioner Roger Goodell has taken advantage of Article 46. *See* Einhorn, *supra* note 130, at 415. In the infamous “Deflategate” scandal involving Tom Brady and the New England Patriots, Goodell appointed himself as arbitrator, and in running back Adrian Peterson’s disciplinary dispute, he appointed a close associate as arbitrator. *See id.* at 414–17.

135. *See* Einhorn, *supra* note 128, at 415.

136. *Id.* at 414 (citing *Nat’l Football League Mgmt. Council v. Nat’l Football League Players Ass’n*, 125 F. Supp. 3d 449, 474 (S.D.N.Y. 2015)).

137. *Id.* at 402–13.

138. *See* Sally Jenkins, *DeflateGate’s Real Issue: Due Process*, WASH. POST (July 30, 2015), [https://www.washingtonpost.com/sports/the-nfls-basic-due-process-is-the-real-issue-in-the-deflategate-controversy/2015/07/30/ebda3b02-3666-11e5-9d0f-7865a67390ee\\_story.html?utm\\_term=.7a1c139c639d](https://www.washingtonpost.com/sports/the-nfls-basic-due-process-is-the-real-issue-in-the-deflategate-controversy/2015/07/30/ebda3b02-3666-11e5-9d0f-7865a67390ee_story.html?utm_term=.7a1c139c639d) [<https://perma.cc/37A7-Y2PQ>]; Greg Kanaan, *The NFL Has a Serious Due Process Problem, and Why Due Process Is Important to Everyone*, LEGAL ARTIST (Aug. 3, 2015), <http://www.thelegalartist.com/blog/the-nfl-has-a-serious-due-process-problem-and-why-due-process-is-important-to-everyone> [<https://perma.cc/4DA3-LYJ4>].

139. *See* NFL COLLECTIVE BARGAINING AGREEMENT, *supra* note 136, at xiv. It should be noted that while the NFL does have a Player’s Association to advocate on behalf of the athletes, it actually agreed to the CBA as it is currently written. *See id.*; Kevin Seifert, *DeMaurice Smith: NFLPA Will Approach 2021 Talks like ‘War’*, ESPN (Feb 2, 2018), [http://www.espn.com/nfl/story/\\_/id/22291292/demaurice-smith-nflpa-approach-2021-cba-talks-war](http://www.espn.com/nfl/story/_/id/22291292/demaurice-smith-nflpa-approach-2021-cba-talks-war) [<https://perma.cc/43AR-FL9B>]. The CBA is set to expire in 2021. *See* Seifert, *supra*. The Association may attempt to change these rules during negotiations for the next CBA, but they cannot do much to change the rules as they currently stand. *See id.* Thus, the existence of the Players’ Association does little to improve the current bargaining positions of players. *See id.*

*C. The Fate of the Concussion Clause: Likely Invalid Under the Tunkl Test*

Any exculpatory waiver established by the NFL would pose significant public policy issues. First, there is a colorable argument that professional football is a matter of great public importance that merits regulation.<sup>140</sup> Even if it is not, however, the disparities in bargaining power—both in contract negotiations and in the enforcement of league policies—are quite stark: the majority of players are faced with take-it-or-leave-it deals; the league has shown a pattern of failing to enforce policies designed by the NFLPA to keep players safe; and the current CBA is designed to minimize players' voice in challenging the league's decisions.

Were the NFL to require its players to sign a Concussion Clause, it may be deemed unenforceable, at least in some states.<sup>141</sup> Again, the public policy analysis is a creature of state law.<sup>142</sup> After weighing the various factors, courts in certain jurisdictions may very well find that such a waiver does not violate public policy. That fact does not defeat the analysis above. The point is that prevalent law in multiple jurisdictions suggests that a hypothetical express assumption of risk defense would fail.

This creates a peculiar puzzle. While the NFL would likely lose on an express assumption of risks defense, if a judge were to rule that the risk of concussions from ordinary play is indeed "inherent" to the game, the NFL could still win on *implied* assumption of risk. The latter does not have a public policy backstop, as courts interpreting implied assumption of risk claims do not conduct a public policy analysis. So long as the NFL could characterize concussion risks as inherent to the sport, implied assumption of risk would theoretically protect the league, even when an express waiver would be inconsistent with public policy.

Theoretically, there is no doctrinal problem with this outcome because the two defenses concern different risks. As discussed above, implied assumption of risk only covers risks that are inherent to the sport. It does not relieve the defendant of its duty to protect against *extraneous* or noninherent risks resulting from negligence. Express assumption of risk, on the other hand, crosses this line. It is a complete defense that relieves the defendant of any duty of care, outside of those relating to intentional torts or gross negligence.<sup>143</sup> As a result, the law

---

140. See *supra* Section III.B.1 and accompanying notes.

141. See *supra* Part II.A.

142. See *supra* Part II.A.

143. See RESTATEMENT (SECOND) OF TORTS § 496B (AM. LAW INST. 1979).



imposes a public policy test for a defendant seeking to defend himself on express assumption of risk grounds.

Theory aside, however, it seems unsettling and incongruous to hold that the NFL could lose on express assumption of risk yet win on implied. The next section evaluates whether this dichotomy is defensible as a matter of doctrine and of the functional goals of the tort system, arguing that the distinction between express and implied assumption of risk is not as clear as the doctrine appears to suggest.

#### IV. RETHINKING THE DISTINCTION BETWEEN IMPLIED AND EXPRESS ASSUMPTION OF RISK

There are three central problems with the doctrinal distinction between express and implied assumption of risk. The first is that the line between what risks are inherent and extraneous to an activity is ambiguous. Second, not using a public policy backstop with implied assumption of risk is inconsistent with the principle of tort law to consider policy when making duty decisions. Finally, the distinction is inconsistent with the Restatement and undermines the deterrence and compensatory functions of tort law.

Given these deficiencies, this Article recommends that courts infuse public policy into the implied assumption of risk analysis and that future plaintiffs—in the NFL and elsewhere—lean on the Restatement’s guidance to persuade courts to do so.

##### *A. Ambiguity Between “Inherent” and “Extraneous”*

When Cardozo decided *Murphy v. Steeplechase Amusement Co.* in 1929, the distinction between the implied and express assumption of risk defenses made sense.<sup>144</sup> Cardozo found that the plaintiff assumed the obvious risk of falling on a spinning fair ride called The Flopper, since the plaintiff had watched the ride send the bodies of participants “tumbling” before climbing aboard.<sup>145</sup> However, Cardozo found the plaintiff could not have assumed the risk that operator negligence would subject him to extraneous, or non-inherent, risks.<sup>146</sup> Cardozo explicitly noted that the court’s calculus would have been quite different had the plaintiff proceeded under a theory of defective equipment.<sup>147</sup>

Since 1929, however, drawing the line between inherent and extraneous risks has proven problematic for courts. Specifically, there

---

144. See *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929).

145. *Id.*

146. *Id.*

147. *Id.* at 175.

seem to be three major problems in the realm of athletic risks. First, because judges lack expertise in deciding what is “inherent” to a sport, inconsistent and unpredictable results mark case law. Second, using the rules of a game as dividing principles is problematic for a number of reasons. The rules themselves may be suspect and controlled by one party, and the rules are subject to wholly opposite interpretations. Third, because participants as a group cannot reliably know what risks are “extraneous”—as opposed to intrinsic—to the nature of an activity, such as football, it is not fair to say they knowingly assumed only inherent risks.

### 1. Judicial Incompetency

To begin, the classification of risks as inherent or extraneous is a question of law reserved for judges.<sup>148</sup> In practice, judges tend to rely on gut intuition when making this classification. This, of course, is problematic, as judges often have no expertise in the activity itself.

*Knight v. Jewett* is perhaps the most illustrative example.<sup>149</sup> Tasked with answering whether implied assumption of risk should bar recovery for a plaintiff injured during a recreational touch football game, the California Supreme Court held that liability only attaches to defendants when they “intentionally injure[] another player or engage[] in conduct that is so reckless as to be totally outside the range of ordinary activity involved in the sport.”<sup>150</sup> The standard ultimately led the court to engage in the nearly impossible task of determining what is “ordinary” activity in a touch football game.<sup>151</sup> Predictably, the court split, with the plurality holding for the defendant.<sup>152</sup>

Ensuing California cases followed *Knight*'s lead. In *West v. Sundown Little League of Stockton, Inc.*, for example, a California appeals court made the decision that a Little League's coach's decision to hit fly balls into the sun may have been risky, but not out of the normal scope of a baseball practice.<sup>153</sup> To contrast, in *Galliardi v.*

---

148. See *Griffin v. Haunted Hotel, Inc.*, 194 Cal. Rptr. 3d 830, 838–39. (Ct. App. 2015) (“Which risks are inherent in a given recreational activity is suitable for resolution on summary judgment. Such a determination is a legal question within the province of the courts and is reached from common knowledge. The court may also consider its ‘own or common experience with the recreational activity . . . and documentary evidence introduced by the parties on a motion for summary judgment.’” (internal citations omitted) (alteration in original)).

149. See *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992).

150. Dean Richardson, *Player Violence: An Essay on Torts and Sports*, 15 STAN. L. & POL'Y REV. 133, 156 (2004) (quoting *Knight*, 834 P.2d at 711).

151. *Knight*, 834 P.2d at 710–12.

152. *Id.*

153. *West v. Sundown Little League of Stockton, Inc.*, 116 Cal. Rptr. 2d 849, 851, 857–58 (Cal. Ct. App. 2002).

*Seahorse Riding Club*, a California appeals court overturned a trial court’s decision that a horse-riding instructor was reasonable for setting practice jumps that the court determined were dangerously high.<sup>154</sup> The *West* court recited the facts of *Gallardi*, but failed to distinguish the cases outside of noting that “[h]ere, we have no similar conduct on the part of the defendants [in each case].”<sup>155</sup> In other words, the court relied on its gut intuition to define what was “ordinary” in a baseball practice. With limited to no knowledge among judges about the inherent risks of football, baseball, horseback riding, or any other sport, inconsistent and unpredictable results are inevitable.

## 2. Rules of the Game as Dividing Principles

Perhaps then, the court should rely on bright-line rules to make the classification. Attempts to do so, however, have also proven problematic. In *Hackbart*, the court relied on the NFL’s prohibition on intentional blows to the head.<sup>156</sup> The approach of using an activity’s written rules as a guide for their decisions has some support in other courts as well.<sup>157</sup> The *Knight* dissent specifically noted that the implied assumption of risk doctrine could be more fairly applied to professional, organized sports than it could be to the backyard football game because of the “well established modes of play.”<sup>158</sup>

Using the rules of the game as dividing lines between inherent and extraneous risks is also suspect, however. Consider as an example one widely discussed aspect of professional football: allowing players to return to games after suffering a head-to-head collision.<sup>159</sup> The current concussion protocol prohibits any player exhibiting any symptom of a concussion from returning to play until he has been evaluated and cleared by an independent neurologist.<sup>160</sup>

However, using this rule on returning to play as a determinant of whether a player’s concussion-related injury was inherent to the sport or due to the league’s negligence has two major problems: the rules may be themselves suspect or biased, and the rules are subject to wholly opposite interpretations that hinge on philosophical views beyond the scope of tort law.

First, the rule itself is suspect. The NFL is far from a neutral party when it comes to concussions in football. Its business is based on

---

154. *Galardi v. Seahorse Riding Club*, 20 Cal. Rptr. 2d 270, 275 (Cal. Ct. App. 1993).

155. *West*, 116 Cal. Rptr 2d. at 858.

156. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 520–22 (10th Cir. 1979).

157. *See, e.g., Knight*, 834 P.2d at 723 (Kennard, J., dissenting).

158. *Id.*

159. *See, e.g., Kilgore, supra* note 129.

160. *See generally* NAT’L FOOTBALL LEAGUE, *supra* note 127.

viewership and, although the trend may be changing,<sup>161</sup> football fans traditionally celebrated big hits on Sunday. Until 2006, ESPN had a Monday night segment titled “Jacked Up” in which commentators ranked and celebrated the most violent hits from the weekend’s action.<sup>162</sup> In 2010, the NFL faced criticism after it began selling photos of an illegal hit that may have left receiver Mohamed Massaquoi concussed on the field.<sup>163</sup> And even today, in the midst of criticism that the game is too violent, a sizeable portion of players, fans, and even the current US president resent that football has grown “soft.”<sup>164</sup>

Thus, at least for some of its fans, hard hits still sell in the NFL. It should thus come as no surprise that the league’s concussion protocol has been widely criticized—as the NFL clearly faces conflicting interests.<sup>165</sup> But if the protocol itself is suspect, and if it may reflect negligent rule design or a bias in favor of harder hits, there is reason to question whether it should be used as a guide for a court’s thinking.

A second problem with using the concussion protocol rule as a dividing line is that it is subject to multiple interpretations. In a concussion action, parties may rely on a rule allowing players to return to a game post-collision to argue either that concussions are so predictable that they demand a protocol (and thus they are inherent risks)<sup>166</sup> or that concussions after returning to play are due to a rules violation (and thus they are extraneous risks).<sup>167</sup>

Scholars have already made precisely these arguments. Some view concussions post return as extraneous risks that players cannot assume.<sup>168</sup> Josh Hunsucker, for instance, argues that coaches’ duty to

161. See Joe Drape, *The American Dilemma: Why Do We Still Watch Football?*, N.Y. TIMES (Feb. 2, 2018), <https://www.nytimes.com/2018/02/02/sports/football/watch-nfl-dilemma.html> [<https://perma.cc/DS8A-PN3L>].

162. Howard Bryant, *The Risky Business of Football’s Future*, ESPN (Oct. 27, 2010), <http://www.espn.com/espn/commentary/news/story?page=bryant/101027> [<https://perma.cc/ADB6-X5N5>].

163. See Gregg Rosenthal, *League Is Selling Photo of James Harrison’s Illegal Hit*, NBC SPORTS (Oct. 19, 2010, 11:12 PM), <http://profootballtalk.nbcsports.com/2010/10/19/league-is-selling-photo-of-james-harrisons-illegal-hit/> [<https://perma.cc/W4W4-S56M>].

164. See Bill Pennington, *Trump Says N.F.L. is Getting Soft. Players Hit Back*, N.Y. TIMES (Sept. 26, 2017), <https://www.nytimes.com/2017/09/26/sports/nfl-trump.html> [<https://perma.cc/6HGA-9KG6>].

165. See, e.g., DEUBERT, COHEN & LYNCH, *supra* note 19, at 11–20; Tom Schad, *Concussion Expert Has Issues with NFL’s Protocol After Jacoby Brissett Incident*, USA TODAY (Nov. 13, 2017, 4:03 PM), <https://www.usatoday.com/story/sports/nfl/colts/2017/11/13/concussion-expert-chris-nowinski-has-issues-nfl-protocol-brissett/859195001/> [<https://perma.cc/UAF5-F3J6>].

166. See Amy L. Bernstein, *Into the Red Zone: How the National Football League’s Quest to Curb Concussions and Concussion-Related Injuries Could Affect Players’ Legal Recovery*, 22 SETON HALL J. SPORTS & ENT. L. 271, 305–06 (2012).

167. See, e.g., Josh Hunsucker, *Buckle Your Chinstrap: Why Youth, High School, and College Football Should Adopt the NFL’s Concussion Management Policies and Procedures*, 45 MCGEORGE L. REV. 801, 817 (2014).

168. See, e.g., *id.*

protect players from increased risk requires them to ensure a concussed player does not return to the game.<sup>169</sup> Heather MacGillivray makes a similar argument by leaning on the science of concussions,<sup>170</sup> noting the following:

[E]ven if the athlete has exhibited symptoms and was, at one point, previously told about the risks of playing with a concussion, the potentially concussed athlete still cannot validly assume the risk because his cognitive ability and neuropsychological functioning is undeniably compromised. . . . [T]he only safeguards in place to prevent the athlete from returning to play are the medical personnel, athletic trainers, and coaches on the sidelines.<sup>171</sup>

From this perspective, the failure to properly diagnose and prevent an injured athlete’s premature return represents an elevated risk to the sport that the player could not have assumed. After all, the risk of playing football may very well be a concussion, but the risk of premature return is long-term, debilitating brain damage.<sup>172</sup>

Other commentators, such as Amy Bernstein, have taken the opposite view, using the existence of the protocol to argue that the risks of concussions and CTE are in fact inherent.<sup>173</sup> An inherent risk has been defined in tort law as one that is both “open and obvious” and unavoidable within the context of the activity.<sup>174</sup> Between a rule intended to protect players from repeat concussions after return to play and “all the new . . . information floating around . . . on the connection between concussions and degenerative neurological diseases” Bernstein argues it seems fair to characterize the risks of concussions generally as open and obvious.<sup>175</sup>

Furthermore, if players hide and understate their symptoms to continue playing—a trend that Bernstein documents convincingly<sup>176</sup>—then perhaps the risk of players incurring long-term brain injuries is, at least to some degree, unavoidable. From that perspective, so long as

---

169. *Id.*

170. MacGillivray, *supra* note 34, at 565.

171. *Id.*

172. *See id.* at 566–67.

173. *See, e.g.*, Bernstein, *supra* note 168, at 306.

174. 6 B. E. WITKIN, SUMMARY OF CALIFORNIA LAW: TORTS § 1501(c) (11th ed. 2018) (stating that “inherent risk” is defined by asking “whether the risk that led to plaintiff’s injury involved some feature or aspect of the game that is inevitable or unavoidable in the actual playing of the game.”).

175. Bernstein, *supra* note 166, at 305–06.

176. *See id.* at 306–07. Bernstein draws on the case of quarterback Jon Kitna to display the point. *Id.* In 2007, after taking a particularly harsh hit, Kitna left the game with symptoms of memory loss, severe head pain, and dizziness. *Id.* The team physician informed him he had a concussion. *Id.* At halftime, however, he claimed to be free of any pain or complications, and by the fourth quarter, “with his team losing, the team doctor cleared him to return to the field.” *Id.* Bernstein notes that “[t]he argument that players need to be protected from themselves stands on shaky grounds when a player such as Kitna can influence medical decisions” by lying or understating their symptoms. *Id.* at 307.

the players are informed of the risks, perhaps they should bear the full burden of the consequences.<sup>177</sup>

The rift between MacGillivray's and Bernstein's perspectives is rooted in questions that surpass the law. Issues of autonomy, paternalism, and players' capacity to appreciate risk lurk dominantly in the background, and this is just with respect to the rule banning potentially concussed players to return to play. The same complexity and arguments exist in relation to any rule of the game relating to concussions and traumatic brain injuries. To take another example, head-to-head hits are technically banned, but should an opposing player, or the league, bear legal liability for each violation? On one hand, the fact that there is a rule banning the illegal hits suggests the risk is open and obvious and players themselves have contended they are unavoidable.<sup>178</sup> Perhaps players should have to accept that these hits, while technically illegal, are still just part of the game. On the other hand, however, the hits are against the rules and seemingly increase the risk of the game.<sup>179</sup> The NFL is in the best position to protect players from the injuries resulting from these hits, and it has attempted to protect players by setting rules that prohibit such hits. Again, there is no easy answer, and what one decides likely depends on philosophical views that exceed tort law.

What the analysis does make clear, however, is that drawing a bright-line rule based on the rules of football is just as problematic as judicial intuition. Primarily, the defendant creates the rules.<sup>180</sup> Far from objective reflections of the true nature of football, game rules are compromises that work to advance the NFL's interests. More importantly, the rules can support wholly opposite interpretations in litigation. Both issues make the rules of play an unreliable legal standard for defining inherent versus extraneous risks.

### 3. Players Cannot Fairly Be Said to Have Knowingly Assumed Inherent Risks

There seems to be an even more fundamental flaw with using inherency as the sole test for upholding implied assumption of risk with

---

177. See *id.* at 306–07.

178. As safety Mike Mitchell noted, the speed of the game simply makes these types of collisions unavoidable at times. See Fowler, *supra* note 8 (“He’s 4.4-4.3 speed. Aim that. You go do that. You can’t. It’s just the risk of playing football. If a ball is in the air and the man jumps and a man ducks his head, how do you want me to readjust my body. You cannot do it.”).

179. See Bill Pennington, *The N.F.L. Struggles to Tackle Its Latest Problem: Tackling*, N.Y. TIMES (Sept. 6, 2018), <https://www.nytimes.com/2018/09/06/sports/nfl-week-1-tackling-rule.html> [<https://perma.cc/3XHJ-VRL8>].

180. See *2018 NFL Rulebook*, NFL: OPERATIONS, <https://operations.nfl.com/the-rules/2018-nfl-rulebook/#2018-rule-changes> [<https://perma.cc/Y9MC-4BAJ>] (last visited Feb. 2, 2019).

respect to professional football. Not only is distinguishing inherent from extraneous risks problematic for judges, but it is also incredibly difficult for players. The doctrine, however, implicitly assumes that players can and do make these distinctions before deciding to play.

Asserting that players assume the risk of all inherent risks in a game implies they know which risks are inherent and which are extraneous to the game—that is, which risks are and are not the product of the league’s negligence. The most basic definition of negligence is failing to take precautions for which the safety gains outweigh the cost.<sup>181</sup> Judges seldom ever actually take on Learned Hand’s formula, but they do ask the basic question behind it: What *could* the defendant have done to avoid the accident?<sup>182</sup>

The average NFL player is in no position to know the universe of steps the league could have taken to better protect them from traumatic brain injuries. The case at hand is far from the simple example of *The Flopper*, where operator negligence would have been easy for a layperson to conceptualize before getting on the ride. In professional football, the line is much harder to draw. Should the league stop every player who endures a head-to-head collision from returning to play? Should it inflict longer suspensions or pay cuts on players who initiate those hits? Should it bring in more doctors and technology to the sidelines? Better helmets? Softer turf? Require commentators to condemn such hits during and after games?

The answer is not obvious to anyone,<sup>183</sup> let alone the player signing an NFL contract. Yet if a player does not know what foregone precautions would have made the game less risky, per Learned Hand’s basic definition of negligence, he cannot possibly know what actions of the league constitute negligence. And if he cannot know what actions constitute negligence, it is not fair to say he knew which risks were extraneous and, therefore, which risks were inherent to the game when he signed up to play.

The line between inherent and extraneous risks is too ambiguous to be used to distinguish between implied and express assumptions of risk. Dividing “inherent” from “extraneous” is a task replete with complications, ambiguities, and sport-specific questions that make it challenging, if not impossible, for a court to do competently. Moreover, accepting players’ participation as proof of

---

181. See *T.J. Hooper v. N. Barge Corp.*, 60 F.2d 737, 739–40 (2d Cir. 1932).

182. See Gregory C. Keating, *Must the Hand Formula Not Be Named?*, 163 U. PA. L. REV. 367, 368 (2015).

183. Even concussion experts are still not entirely clear on what steps must be taken. For the most recent recommendations, see generally DEUBERT, COHEN & LYNCH, *supra* note 19.

their assumption of risk rests on unrealistic assumptions about players' knowledge.

*B. Failing to Incorporate a Public Policy Analysis Is Inconsistent with the Principles of Tort Law*

Even if inherent and extraneous risks were clearly distinguishable, there remains an even larger problem with the doctrinal distinction between express and implied assumption of risk. Recall that in order to succeed on an express assumption of risk defense, a defendant must prove that the waiver is consistent with public policy.<sup>184</sup> Failing to require the same showing on implied assumption of risk defenses is inconsistent with the well-established principle in tort law of using policy to inform duty decisions.

The doctrinal rationale for imposing greater scrutiny on express assumptions of risk through a public policy analysis is that in express assumption cases, the defendant escapes the duty to take precautions against all risks—including not only inherent but also extraneous risks.<sup>185</sup> Express assumption of risk cases absolve defendants of all duties owed, while implied assumption of risk cases are less about duty and more about the plaintiff's agreement to take on some risks voluntarily.<sup>186</sup> This logic only holds, however, if one approaches implied assumption of risk as a contract problem; that is, if one accepts the premise that the implied assumption defense is less about limiting the duty of the defendant and more about the plaintiff's subjective recognition and acceptance of the risk in an activity.

Taking a closer look at the risk assumption doctrine, however, it is clear that implied assumption of risk actually derives from limitations on *duty*, not a meeting of the minds in which plaintiffs and defendants agree to apportion risks. Some jurisdictions, such as California, have explicitly made this point.<sup>187</sup> In *Griffin v. Haunted Trail*, for example, the court stated that the plaintiff's "subjective state of mind is simply irrelevant in this context. Because primary assumption of risk focuses on the question of duty, it is *not* dependent on either the plaintiff's implied consent to, or subjective appreciation of, the potential risk."<sup>188</sup>

---

184. See *supra* Section II.A.3.

185. See Drago, *supra* note 54, at 586.

186. See RESTATEMENT (SECOND) OF TORTS § 496A cmt. (c)(2) (AM. LAW INST. 1979); Drago, *supra* note 54, at 590–91.

187. See *Griffin v. Haunted Hotel, Inc.*, 194 Cal. Rptr. 3d 830, 842 (Ct. App. 2015).

188. *Id.* The case involved a plaintiff alleging negligence against a Halloween haunted house and trail attraction after he was injured while fleeing from a chainsaw-wielding actor (albeit without the chains) in a section of the trail made to look like an exit. *Id.* at 836. The plaintiff argued



From this perspective, instead of “ask[ing] what risks a particular plaintiff subjectively knew of and chose to encounter,” the court “must evaluate the fundamental nature of the sport and the defendant’s role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk of harm.”<sup>189</sup> In other words, California approaches the implied assumption of risk as a problem of defining the scope of defendants’ duty, rather than defining the scope of risks that the plaintiff subjectively appreciates and agrees to assume.

Several jurisdictions take the opposite approach and frame implied assumption of risk in contract terms, placing the most importance on the “plaintiff’s implied consent to face a specific risk.”<sup>190</sup> Yet courts in these jurisdictions nonetheless import questions of duty into the analysis when they make the first step of classifying the risks themselves as inherent or extraneous. Classifying a risk as “inherent” is a question of law that must be answered *before* the court takes on the issue of manifestation of consent. But once the court classifies a risk as “inherent,” the court has inescapably limited the defendant’s duty. The classification allows—even requires—the risk to be assumed, thereby relieving the defendant from the duty to guard against it. In contrast, when the court classifies a risk as *extraneous*, defendants are duty bound to take reasonable precautions to minimize those risks. Jurisdictions framing the defense as a matter of contract have not transformed implied assumption of risk into a pure contract issue; they have simply shifted the underlying duty question to an earlier decision point: the point at which judges classify risks as inherent or not.

If implied assumption of risk is fundamentally a question of duty, it is both significant and odd that courts decide such questions without reference to public policy concerns. Elsewhere in tort law, when courts consider duty, they are required to wrestle with public policy. Specifically, in the most well-known example, *Tarasoff v.*

---

the risks were not inherent because he thought the attraction was over, but the court disagreed, holding that the risk of being afraid and falling while fleeing was inherent to the attraction and that the plaintiff’s subjective understanding of the risks and the boundaries of the attraction was irrelevant. *Id.* at 841–44; *see also* Knight v. Jewett, 834 P.2d 696, 709 (Cal. 1992) (“[C]ontrary to the implied consent approach to the doctrine of assumption of risk . . . the duty approach provides an answer which does not depend on the particular plaintiff’s subjective knowledge or appreciation of the potential risk. . . . Rather than being dependent on the knowledge or consent of the particular plaintiff, resolution of the question of the defendant’s liability in such cases turns on whether the defendant had a legal duty to avoid such conduct . . .”).

189. *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 309 (Cal. 2006).

190. *See, e.g., Horton, supra* note 52, at 615; *see also* RESTATEMENT (SECOND) OF TORTS § 496C cmt. (b) (AM. LAW INST. 1979) (noting that, in implied assumption of risk, even though the plaintiff does not expressly consent to the risk, “by voluntarily electing to proceed, with the knowledge of the risk . . . he manifests his willingness to accept it.”).

*University of California*, the California Supreme Court evaluated the foreseeability of harm, the certainty that the plaintiff would suffer injury, the link between the defendant's actions and the injury, the moral blame attributed to defendant, the protection against future harm, the extent of the burden that added protection would place on the defendant, and the availability of insurance for the plaintiff.<sup>191</sup> Since *Tarasoff*, courts have looked to these factors and a host of other policy considerations to decide duty.<sup>192</sup> In addition, as discussed above, when a defendant raises an express assumption of risk defense to limit duty, public policy is very much at play through the *Tunkl* factors or similar concerns.<sup>193</sup>

Suffice to say, duty is a policy-driven determination elsewhere in tort law. Courts rely on public policy concerns as a backstop whenever they decide to impose or withhold a duty of care. Whether or not a court characterizes implied assumption of risk as a question about the scope of defendants' duty, it is inherently making a duty determination with respect to implied assumption of risk defense. Yet in practice across US jurisdictions, courts applying implied assumption of risk doctrines do so without *any* consideration of public policy. The treatment of implied assumption of risk, therefore, is inconsistent with the basic principle in tort law of using policy to inform duty determinations. This is yet another reason courts should infuse the review of implied assumption of risk defenses with public policy analyses.

---

191. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 342 (Cal. 1976).

192. *See Estate of Mickelsen ex rel. Mickelsen v. North-Wend Foods, Inc.*, 274 P.3d 1193, 1199 (Alaska 2012) (using a three-step process to determine whether duty of care exists: "First, [the court] look[s] for duty imposed by statute. If none exists, [it] then determine[s] if the current case falls in the class of cases controlled by existing precedent. If no closely related case law exists, [it] weigh[s] the public policy considerations"); *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 582, 591 (Cal. 1997) (applying factors to impose duty to not misrepresent information that creates risk to the plaintiff); *HealthONE v. Rodriguez ex rel. Rodriguez*, 50 P.3d 879, 888 (Colo. 2002) (employing risk-utility test considering: (1) magnitude of risk; (2) relationship of parties; (3) nature of attendant risk; (4) opportunity and ability to exercise care; (5) foreseeability of harm; and (6) policy interest in proposed solution); *Lindstrom v. City of Corry*, 763 A.2d 394, 397 (Pa. 2000) ("In determining whether a duty exists, a court must weigh several discrete factors, including: (1) the relationship between the parties; (2) the social utility of actor's conduct; (3) the nature of risk imposed and foreseeability of harm incurred; (4) the consequences of imposing duty upon actor; and (5) the overall public interest in proposed solution.").

193. *See Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 444–46 (Cal. 1963); *supra* Section III.A.

*C. Failing to Incorporate a Public Policy Analysis Is Inconsistent with the Restatement and the Functions of Tort Law*

In addition to being inconsistent with the above principle of tort law, failing to evaluate implied assumption of risk claims on the basis of public policy is also inconsistent with the second Restatement of Torts and the deterrence and compensatory functions of tort law. In defining implied assumption of risk, the Restatement explicitly says that the defense “does not apply in any situation in which an express agreement to accept the risk would be invalid as contrary to public policy.”<sup>194</sup> In the illustrations, the Restatement expands on this rule by noting “where agreements between employer and employee are held ineffective to make the employee assume the risk of the employer’s negligence, it is quite logical to conclude that the acceptance of a particular risk by the conduct of the employee is equally contrary to public policy.”<sup>195</sup>

Restatements are not binding on courts, and this provision appears to be widely neglected by courts and litigants alike; it was not raised in any of the implied assumption of risk cases noted above. Commentators on concussion litigation have also overlooked the dichotomy between the two defenses, as well as this effort by the Restatement to reconcile them.

The Restatement scenario is exactly the situation the NFL concussion litigation presents. A hypothetical exculpatory waiver by the league to escape liability for concussion injuries would likely be unenforceable. Yet, it seems that the league could still invoke an implied assumption of risk defense by classifying the risks of CTE and traumatic brain injuries as inherent instead of extraneous. The Restatement’s guidance makes it clear that courts should not allow these types of defenses to succeed.<sup>196</sup>

While courts have yet to follow this advice, it nonetheless meshes with the deterrence and compensatory functions of tort law. As it stands, a defendant in the NFL’s position could avoid liability with a legal sleight of hand. Classifying the same risk—traumatic brain injuries in the case of professional football—as inherent would protect the NFL from the liability it would likely face had the risks been classified as extraneous and waived in a Concussion Clause. The current law, therefore, allows defendants like the NFL to avoid the scrutiny of a public policy analysis and therefore avoid liability all

---

194. RESTATEMENT (SECOND) OF TORTS § 496C(2) (AM. LAW INST. 1979).

195. *Id.* illus. j.

196. *See* RESTATEMENT (SECOND) OF TORTS § 496C(2).

together by winning the classification debate and characterizing certain risks as inherent to the sport of football.

This incongruence creates a host of deterrence and compensatory problems.<sup>197</sup> The wrongdoing of the defendant, after all, is not undone by the classification; the wrongdoing is that plaintiffs are assuming risks that run contrary to public policy concerns. Defendants can curtail the level of protection they provide, and plaintiffs who sue will not be compensated for the harms they endure. There are plenty of reasons, therefore, to argue that the NFL should not be able to protect itself with implied assumption of risk, if it could not do so via express assumption of risk. The following section recommends actions courts and plaintiffs should take to reconcile their application of implied and express assumption of risk doctrines.

#### *D. Positive Recommendation*

As argued above, the doctrinal distinction between the two versions of assumption of risk is deeply problematic and lacks a sound doctrinal foundation.<sup>198</sup> The difference between courts' treatment of these two defenses rests on a distinction between inherent and extraneous risks that is ambiguous, activity specific, and nearly impossible to apply competently.<sup>199</sup> Furthermore, it is inconsistent with the guidance of the Restatement, as well as the principles and functions of tort law. Courts and plaintiffs alike should therefore take action to ensure that risks that could not be assumed expressly cannot alternatively be assumed impliedly.

First, plaintiffs in professional football concussion litigation facing the league's implied assumption of risk defense should bring new doctrinal and public policy concerns into their counterarguments. In addition to focusing on information asymmetries, they should argue for courts to follow the guidance of the Restatement and point out the deficiencies in the current doctrine described above. Furthermore, players should include the relevant jurisdiction's public policy test for express assumption of risk to argue that allowing plaintiffs to *impliedly* assume the risks of concussions and traumatic brain injuries should be rejected as a matter of public policy.

Courts should also begin to implement their own procedures to follow the guidance of the Restatement. Importantly, courts need not design a new test to meet this need. The Restatement simply calls for

---

197. See KENNETH ABRAHAM, *THE FORMS AND FUNCTIONS OF TORT LAW* 14–19 (5th ed. 2017).

198. See *supra* Section IV.A.

199. See *supra* Section IV.A.

the implied assumption of risk defense to be barred “in any situation in which an express agreement to accept the risk would be invalid as contrary to public policy.”<sup>200</sup> Thus, courts merely need to afford implied assumption of risk the same public policy treatment they give to exculpatory waivers.

Under this approach, courts’ analyses of assumption of risk would not end with the classification of a risk as inherent or extraneous. Even if courts were to classify the risks of traumatic brain injuries in football as inherent, they would be required to consider the facts through the same public policy lens they utilize when evaluating express assumption of risk defenses. The above analysis reasons that such steps would likely result in courts’ rejection of implied assumption of risk defenses, but courts may differ in the outcome—if, for example, some courts do not view football as a matter of public importance. Even if courts do not reach the same result, however, subjecting implied assumption of risk claims to analysis on public policy grounds will be a welcome advancement and a correction to a puzzling and unjustified inconsistency in tort law.

## V. CONCLUSION

Ninety-nine percent of studied retired NFL players’ brains show signs of CTE.<sup>201</sup> While the NFL may have settled the issue for the time being, this problem is destined to resurface.<sup>202</sup> New plaintiffs will emerge, and it is merely a matter of time before courts must consider the merits of a concussion-based negligence claim. Assumption of risk will undoubtedly be one of the most important issues, yet the doctrine currently harbors a troubling loophole.

As it stands, the NFL likely could not be able to protect itself from negligence suits by requiring players to sign an exculpatory waiver. Such a waiver would implicate a host of public policy problems. Yet under the current doctrine, it seems the league would nonetheless be able to avoid liability under an implied assumption of risk defense

---

200. RESTATEMENT (SECOND) OF TORTS § 496C(2).

201. See Mez et al., *supra* note 22, at 362; Joe Ward, Josh Williams & Sam Manchester, *111 N.F.L. Brains. All but One Had C.T.E.*, N.Y. TIMES (July 25, 2017), <https://www.nytimes.com/interactive/2017/07/25/sports/football/nfl-cte.html> [<https://perma.cc/E93V-72FP>].

202. See Ward, Williams & Manchester, *supra* note 203. For more information on the settlement and potential for future litigation, see, e.g., Ken Belson, *Debilitated Players Accuse N.F.L. of Stalling on Settlement Payments*, N.Y. TIMES (Nov. 13, 2017), <https://www.nytimes.com/2017/11/13/sports/football/nfl-concussion-lawsuit.html> [<https://perma.cc/L33M-HW5E>].

by classifying the risks of CTE and traumatic brain injuries as inherent to the game.

As set forth in this Article, there are three major problems with this aspect of the doctrine. Primarily, an implied assumption of risk defense rests on an unusable distinction between inherent and extraneous risks. Further, while the distinction seems logical in theory, in reality the concepts are deeply ambiguous and inextricably intertwined with sport-specific questions beyond most judges' expertise. More importantly, even if courts could competently classify risks as inherent or extraneous, they would be left with a holding that is inconsistent with the functions of tort law, the Restatement, and basic policy considerations.

The impendency of CTE litigation makes clear that it is time to rethink the way common law courts apply the implied assumption of risk defense. The analysis should include policy considerations, especially in cases involving the NFL where an express waiver would be unenforceable as inconsistent with public policy. Anything less risks blurring tort doctrine, allowing defendants to skirt their duties of care, and barring deserving plaintiffs from much-needed recovery.