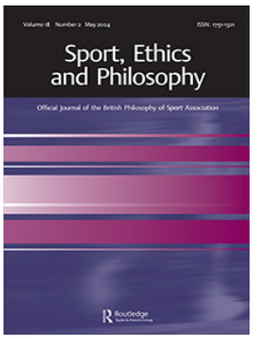

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Litigation and liability in concussion research and collaboration

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ABSTRACT

This paper explores, first, the common law principles of personal injury litigation explored through court decisions relating to sports injuries in (primarily) England and Wales and, second, the statutory schemes relating to concussion liability and young players in the United States. It explores the difficulties of using those strategies as a means of establishing liability for injuries arising from sports-related concussion (SRC) and explains why they are of such limited utility. While proposed class actions over historically acquired injuries or individual litigation over recent catastrophic injury may have some merit, and while future amendments to the US laws might remove some of their inherent flaws, the difficulties in establishing liability for personal injury will always be exacerbated by the specific characteristics of SRC and the legal, factual and evidential issues that arise. For those reasons, the paper considers the potential benefits of other means of concussion prevention and mitigation, including no-fault compensation and mandatory insurance, the more widespread use of effective, nuanced concussion protocols, and inter-disciplinary research that engages with doctrinal legal research.

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Introduction

Through analysis of the relevant legal frameworks, this paper considers the difficulties of using the civil law to seek redress for personal injuries (Partington 2021, 2022) that arise from sports-related concussion (SRC). While litigation can encourage behavioural change among individuals and organisations (Johnson 2023), cure breaches of the law (Steel 2023), and impose costs burdens as well as, potentially, punitive sanctions on those deemed legally responsible (Goudkamp 2021), the nature of SRC does not easily lend itself to a successful personal injury action. The same applies to the statutory schemes that exist in the US. For the reasons explained below, neither has much to offer as a means of preventing the harm from occurring or mitigating loss or damage arising from it.

We illustrate our core argument by critiquing those two distinct legal approaches. First, through discussion of the common law principles of personal injury litigation and by reference to court decisions relating to sports injuries in

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(primarily) England and Wales, we show how the various aspects that plaintiffs must establish to succeed in personal injury cases are especially challenging in respect of SRC. Second, by reference to the statutory schemes relating to concussion liability in the US, we illustrate the flaws in frameworks that were ostensibly designed to both protect youth participants from injury and to mitigate the consequences.

Discussion

The common law approach to sports injuries

At the risk of over-simplification, common law jurisdictions are those where the judiciary plays a very particular role in the development and application of the law. This is achieved not by interpreting and applying the provisions of a Constitution or of legislation to the case at hand but, in areas not covered by statute, through applying legal principles developed through earlier court decisions. The courts that hear the cases apply earlier decisions reached by courts of superior standing—the appellate courts, up to and including that country's Supreme Court. This means the decisions that first instance courts apply may have been reached many years or decades previously; but if the legal and factual circumstances of those earlier cases are sufficiently analogous, the doctrine of precedent obliges the court to apply the law established in those earlier cases (Duxbury 2008, with respect to England and Wales, and in the US context; Schulz 2022). Courts in common law jurisdictions, especially in smaller jurisdictions, where analogous local cases might be few or non-existent, might look at analogous cases arising in other common law countries, so while this paper draws primarily upon cases from England and Wales, the reach of the 'common law approach' is much wider.

Czernuszka v Watts (2023) shows how personal injury litigation potentially offers a financial solution of sorts to an individual sporting tragedy that has already occurred, and this is important because a finding of negligence does allow an injured party to recoup the costs of (for example) lost earnings, medical expenses or specialist equipment, and to be financially compensated for non-financial loss such as pain and suffering, loss of faculties and amenities, and loss of expectation of life (Russell 2021). Litigation can establish liability of employers for the negligent acts of their workers (Brown 2023) or determine which side's insurers bear the loss because many cases are not disputes between the named parties but the insurance companies. But in cases where parties are uninsured (*Condon v. Basi* 1985), or the employer is not vicariously liable (Barclays Bank v Various Claimants 2020), or where insurers manage to avoid liability on the policy's terms (*Brown v. Fisk* 2021), the financial implications for individuals can be devastating.

Reaching the stage where liability is established and damages are to be assessed is a daunting task at common law. Successful personal injury litigation involves, first, proving to the jurisdiction's civil standard of proof that a duty of care was owed and was breached. If those are established, then, consideration turns to the concepts of causation and remoteness and whether any defences are available. That process will determine whether the claimant (sometimes called the 'plaintiff' or the 'pursuer') has successfully established that the defendant (or the 'defender') is legally liable for the

injuries sustained. Only at that stage does the court turn its attention to how much the loss or damage is 'worth' in financial terms.

If the courts were faced with a negligence action arising from SRC, the claimant's first task would, therefore, be to establish that the defendant owed a duty of care to them. In that regard, Donohue v Stevenson (1932) remains the key precedent. Lord Atkin, laying down what became known as the 'neighbour principle', said that people owe a duty of care to those who are so closely and directly affected by their acts or omissions that they should have them in mind when they carry out the act or omission in question. In *Donoghue*, a duty of care was owed by a drinks manufacturer to people who purchased their products, whomever and wherever they might be. In the sports context, this means that players, coaches, officials, spectators, and other participants owe a duty of care to one another just as assuredly as a coach driver owes a duty of care to passengers on the way to a game, or a referee owes a duty of care to the players.

In Shone v British Bobsleigh Ltd (2018), the duty of care was breached by a team manager who allowed a novice rider to choose whether to continue in a sled that was not properly set up for her. Shone had said she felt unsafe after the first run, and the team manager said it 'is your decision' whether to do a second run—a decision that should have been taken away from her given 'the obvious reality that the athletes were being assessed by (the manager) and others for potential Olympic skills' (para 61). The employer had, thus, 'breached its duty to the claimant by allowing a frightened novice to go down the run when (to the manager's knowledge) she could not brace with either hands or feet and felt unsafe to slide' (para 68). In Fenton v Thruxton (2008), the occupier of a racetrack and a safety inspector had similarly breached their duties of care to a spectator who was injured when a motorcycle crashed. The inspector had not thought about spectator safety, only rider safety, and the occupier's reliance on what the inspector said was a breach of the duty, too. His conduct in not getting a proper assessment of the risk to spectators materially contributed to the spectator's harm.

The previous cases are examples of a *duty* of care being established, and that duty had been breached because the required *standard* of care had not been met. That is to say, the person owing the duty had not behaved at the level the law demanded. Hall v Brooklands Auto Racing Club (1932) remains relevant in establishing what that standard actually is: it concerned the concept of the 'reasonable man' (sic), which is a problematic but useful tool that involves putting a hypothetical reasonable person in the position of the defendant and asking whether their behaviour fell short of what they would have expected a reasonable person to do in that situation. The answer to that question will depend on the circumstances of the case, the judges' view of the evidence, and their perception of the credibility of the witnesses.

Having established that there was a duty of care and that the duty was breached because the standard of care was not met, the party who breached the duty potentially becomes liable if the claimant can establish causation. Put another way, if the claimant can show a link between the breach of the duty and the injury, loss, or damage sustained. Establishing causation turns on an apparently simple question: on the balance of probability, did the breach of the duty cause the loss to the plaintiff? In Clarke v Kerwin (2008), the defendant owned land where an all-terrain motorcycle event was held. The claimant, a rider, did not attend a safety briefing the defendant organised; he went at twice the recommended maximum speed and crashed when he tried to overtake on a bend. No

other vehicles were involved. He said the landowner should have done more to enforce the speed limit and should have made the safety briefing compulsory. He lost because the duty of care, which the landowner undoubtedly owed to him, had not been breached, but in any event, the cause of the accident was the speed he was riding his motorcycle and his ill-conceived overtaking strategy, compounded by his failure to engage with the safety protocols.

Where there is more than one potential cause, such as a multi-vehicle pile-up in which the defendant might have been only one of several potentially responsible persons, it is not necessary to show the defendant was the only person responsible. It is enough to show that the defendant materially contributed to the plaintiff's injury. One of the UK's most significant sports personal injury cases, Smoldon v Whitworth (1997), is not entirely on-point but helps illustrate the issue: here, a rugby referee had breached his duty of care by allowing scrums to repeatedly collapse during an under-19s game, leading to a catastrophic spinal injury. A claim against the referee had succeeded and was upheld on appeal. The rules on scrums, and their modifications over time, were designed to reduce the risk of such collapses, but achieving that relied on referees being aware of the rules and applying them properly. At first instance, the judge had held an opposition player not liable, but the referee's failure was not the same as the player's fleeting stupidity or a momentary lapse of judgment. The scrum had collapsed on previous occasions, and the referee had not applied the rules or taken other steps which might have prevented a reoccurrence.

At this stage, defendants might argue that the existence and breach of a duty of care, and the concomitant loss, still do not render them liable because causation has not been established. Causation is a question of fact, dependent on the circumstances of the case, and as a defence, it succeeds if the evidence is insufficient for the court to reasonably draw an inference that it was more likely than not that the loss had been caused by the breach of duty (see the Scottish case of *McDonald v. Indigo Sun Retail* 2022). Defendants might also try to argue that the loss was too remote from their act of negligence. Any negligent act can have far-reaching consequences, but the courts have to make decisions about whether those consequences for the claimant are too far removed from the negligence for it to be reasonable to hold the defendant liable.

In Wall v British Canoe Union (2015), the widow of a canoeist who had drowned sued the sport's governing body, which had published a book that said the stretch of water he drowned on could be safely navigated. The British Canoe Union (BCU) had not organised an event where he died, and unlike the bobsleigh driver in *Shone*, the canoeist had not been under the BCU's control or supervision at the time. The deceased had merely read a guidebook the BCU had published ten years previously. The court said it would not be fair, just, or reasonable to impose a duty of care on BCU in those circumstances; but even if there had been a duty of care, which was breached by the BCU, it could convincingly argue that publishing a (perhaps ill-researched) book ten years previously was too remote from the injury sustained.

Finally, there are certain defences which as a matter of law can either limit the defendant's liability or remove it altogether. Two defences are potentially relevant in the concussion context.

First, contributory negligence arises when the injured person is partly or wholly at fault for their own plight. This allows the court to reduce damages by whatever percentage it

thinks is fair. In the Scottish case of Phee v Gordon (2013), a golfer injured another with a wayward shot. He was overconfident in his ability, shouted 'fore' in the time-honoured manner when the shot went wrong, but the injured party (a novice player) had not ducked, and the defender argued that the pursuer had been contributorily negligent. The court disagreed because the injured party had only a split second to make sense of, and react to, what was, for him, an unexpected event. Contrary to golfing lore, as opposed to golfing law, shouting 'fore' does not allow players to escape liability for a negligently hit shot. Importantly, in sports contexts, an injured party's failure to perceive and quickly respond to unexpected risks created by others is not contributory negligence if those risks come to pass.

Second, there is the much-vaunted Latin maxim of *volenti non fit injuria* ('no harm is done to the willing person'). In the sports context, that means, for example, that players are deemed to accept the risks that are ordinarily associated with the game. The principle should not be overstated, and it does not mean that one automatically accepts all risks of injury arising once the game starts. If event organisers or venue controllers had failed to take reasonable safety measures (Wattleworth v Goodwood Road Racing Co Ltd 2004), or if the person who caused the injury went beyond the rules or the rather nebulous concept of a sport's 'playing culture' (Caldwell v Maguire 2001; James and McArdle 2005), then *volenti* does not apply because one cannot consent to risks that one cannot reasonably be expected to be aware of. Similarly, if the injury was sustained while playing within the rules, then the duty of care has not been breached, and by definition, the person responsible has not been negligent. Deliberate or reckless foul tackles do not attract the defence of *volenti* because one cannot consent to the unknown; unfortunate accidents arising in the ordinary course of the game are not negligent acts, so one cannot claim in respect of them anyway.

Applying the principles to the problem of SRC

Unless the court has made an error of law, it is very hard to succeed in an appeal on the basis of the court's findings of fact on the issues outlined above, and if one considers those principles and the particular factual circumstances of SRC, then, the challenges become evident. This is the case with typically later-life conditions like dementia or chronic traumatic encephalopathy (CTE a degenerative brain condition particularly associated with people who sustained repeated traumatic brain impacts [Iverson 2023]) as well as the more immediate consequences of a catastrophic injury or second impact syndrome (Bey and Ostick 2009). In principle, a coach allowing somebody to return to play immediately after they have been knocked out would have probably breached their duty of care, whereas a referee failing to spot a seemingly innocuous blow to the head because she was keeping up with play. In that case, the damage would have to manifest very shortly after the supposedly negligent act. This follows the principle of causation discussed above: the longer the gap between the incident and the injury, the harder it is to show the incident caused the injury even where the duty of care had been breached.

Causation is also a significant challenge for those seeking to establish liability for those later-life conditions that were potentially caused by one-off or cumulative incidents that occurred while playing or training years or perhaps decades ago (Iverson 2023). While the statistical evidence of a link between those cumulative incidents and later-life conditions

is irrefutable, establishing liability in the case of a specific defendant is a Herculean task. At the elite level pitch-side analysis, concussion substitutes and return-to-play protocols are increasingly common and afford better provision for detection; but further down the pyramid, concussive injuries are especially challenging to detect and respond to, and that, in turn, gives rise to the same challenges as later-life conditions—specifically, in proving that the duty of care was breached and that causation was present. Fast-moving contact or collision sports rarely give rise to *Smoldon*-type scenarios where a referee has time to identify, pause, and consider the appropriate response to, for example, a scrum repeatedly collapsing (such as sending off the player(s) responsible or abandoning the game if necessary). And it also becomes possible to argue that the chain of causation was broken and a new intervening act, such as a wholly innocent tackle or an incident that happened after the game, casts sufficient doubt on the cause of the injury being negligence on the defendant's part. Faced with those challenges, it is unsurprising that no SRC cases have been brought by, or on behalf of, an individual litigant.

The potential of class actions

But confronting those challenges will also be central to the various concussion class actions that are currently contemplated in football (BBC Sport 2024), rugby union (Kilgallon 2024), Australian Rules football (Anderson 2023b), and potentially other collision and contact sports as an alternative to an individual bringing a case. The class actions concern the long-term consequences of harm inflicted years, or perhaps decades, previously. In the Australian Rules context, for instance, the class action will likely include consideration of clubs' and/or their doctors' duty of care in relation to concussion management; but even if a duty of care can be established, any assessment of its breach will be hindered by the lack of contemporaneous medical records, alongside the critical issue of establishing a chain of causation between the accumulated head injuries suffered by the player and what the player is now suffering neurologically (Anderson 2023a). Those are incredibly difficult hurdles to overcome.

The hurdles will be compounded because *volenti* becomes a 'live' issue in the context of historically acquired injuries and contributory negligence will similarly be significant. Limitation periods—the time between the harm and the date by which the legal proceedings must commence—are also important because the collective knowledge of the long-term chronic effects of those historic injuries is so recent. That potentially defeats the argument that a jurisdiction's limitation periods for bringing claims in respect of harm inflicted decades ago have long passed, but it is by no means a certainty. Other uncertainties concern identifying those who might foreseeably be liable in negligence—is it clubs, the league, a doctor (and if it is a doctor, what was their employment status at the material time), or other players? As a matter of law, what were the accepted standards of care at that time, as opposed to the accepted standards today? What exactly was the duty that was allegedly breached at the time (was there a duty to monitor, a duty to warn, or a duty to mitigate)? What was the position with regard to health and safety law, employer liability, and workplace insurance in a 'workplace' where acquired brain injury seems to be one of the most prevalent harms arising? And what evidence is available, given there is not likely to be extensive written employment or medical records from the 1980s and the 1990s? All these are important questions to ask, bearing in mind both the innate

challenges of bringing personal injury claims and the particular challenges arising from SRC.

Perhaps the best line of argument in class actions would be for plaintiffs to use a 'material contribution in the risk of a known harm' approach, which in the UK has been used successfully in mesothelioma-related cases (Bevan 2011; Sienkiewicz v Greif UK Ltd 2011). This potentially attaches liability to international federations for not imposing global standards, on national associations for either not following the global standards or not imposing their own, or for not enforcing any standards on the clubs—and the clubs for not following any standards that did exist. Put another way, the argument is that a sport's entire ecosystem knew the risks of brain injury from SRC. By not taking appropriate action, some or all of them materially contributed to the risk; but applying the mesothelioma caselaw to SRC class actions would be hard reconcile with the 'incremental approach' to liability discussed below, and attaching liability to international federations is especially challenging (Agar v Hyde 2000; James 2021; Wattleworth v Goodwood Road Racing Co Ltd 2004).

Maybe a more realistic aim is to perceive class action as strategic litigation (Ramsden and Gledhill 2019) rather than a quest for compensation. Perhaps it will hasten a meeting of stakeholders' minds and promote moves towards either no-fault compensation schemes (Tugcu 2022) or compulsory insurance for sports participants (Connell 2019). As an aside, the potential for coroners' inquests to similarly act as a catalyst for public health reforms and for improving workplace environments (Freckleton 2023)—or, at the very least, as a means of raising awareness—should also be noted. They merit more publicity than they receive.

Furthermore, a fundamental principle of the common law system and the doctrine of precedent is that the courts should be wary of making links between earlier cases and the one at hand in a way that is tantamount to making new laws rather than applying existing principles. Myriad decisions of the higher courts are authority for that proposition, but the starting point is the Court of Appeal in White v Chief Constable of South Yorkshire Police (1999). This case concerned the police authority's duty of care to an officer who suffered psychiatric injury on the day of the Hillsborough disaster. In that case, Lord Hoffmann noted (502) that tort law is not concerned with providing 'a comprehensive system of … restitution or compensation' but rather with establishing a framework of 'cautious pragmatism' which can be used to help answer questions of whether a duty was owed and, if so, with whether it had been breached. That pragmatism, he argued, is especially important in new or novel situations that do not easily fit into existing case law. SRC fits that situation, and the principle of 'cautious pragmatism' means it will not fit comfortably within the existing categories of established sports injury negligence.

Watson v British Boxing Board of Control (2001) is also important here. It remains a key case for exploring potential liability for sporting injuries (Didulica 2019), and on a first reading it would seem to be a sufficiently close analogy for the purpose of at least contemplating SRC litigation. But to argue that imposing liability for SRC would no longer be 'new or novel' because it happened in *Watson* would not reflect either the circumstances of the case or the very particular role of the defendant in the sport's governance structures. *Watson* was very different from

most personal injury scenarios and is heavily fact-specific, and it demands proper consideration.

The implications of Watson

Briefly, in September 1991, boxer Michael Watson collapsed at the end of a 15-round bout against Chris Eubank at a football ground in North London. He had been knocked down in the 11th round but had apparently recovered and had been allowed to continue. After he collapsed, he received medical attention at the ring-side, but that attention did not involve resuscitation. He was not resuscitated until thirty minutes after the fight's end after he had been transferred to a local hospital. Thereafter, he was moved to another hospital where he underwent brain surgery, but by then, he had suffered permanent damage. Watson claimed that the British Boxing Board of Control had been under a duty of care to ensure that all reasonable steps were taken to provide immediate and effective medical attention and treatment, and he argued that the Board had breached that duty by not providing resuscitation treatment at ring-side. At first instance, the High Court found in his favour (*Watson* 1999). The Board appealed, contending that:

(1) it held no duty of care to Watson;
(2) if it did hold a duty, the duty had not been breached; and
(3) if it did hold a duty, and if the duty had been breached, its breach did not cause Watson's injuries.

In the Court of Appeal, Lord Philips MR, like Lord Hoffman in *White*, emphasised that the law of negligence should be developed 'incrementally and by analogy with established categories, rather than by a massive expansion of a *prima facie* duty of care' (Watson 2001, 1142). The unique features of this case, especially the nature of the injury sustained and the fact that the organisation responsible for the negligent act was a regulator whose sole remit was safety, meant there were no previous judgments with which a realistic analogy could be drawn. Rather, it demanded close consideration of the case's own distinctive features, and then the application of established legal principles to them.

Having undertaken this exercise, the Court of Appeal upheld the High Court's ruling while acknowledging that doing so 'broke new ground in the law of negligence'. It noted there were two 'distinctive features' of the case which justified breaking it. First, while 'many sports involve a risk of physical injury to the participants, boxing is the only sport where this is the object of the exercise … it could not have survived as a legal sport without strict regulation, one aim of which is to limit the injuries inflicted in the ring. That regulation has been provided by the Board' (1143).

Second, 'the physical safety of boxers has always been a prime concern of the Board' (1144). This was evident from the fact that BBBC rules sought to ensure a boxer was not permitted to fight unless he was fit. The rules sought to restrict the physical injuries that might be inflicted, and they sought to ensure the provision of appropriate medical attention in the event of injury. The Board's rules required the event promoter to ensure two approved doctors were at ring-side; that each boxer was medically examined immediately after a bout; that there was a stretcher near the ring; and that there was

a dedicated medical treatment room close to the boxers' changing rooms. All those facilities had been provided. The problem was that the rules did not go far enough to accommodate the risks that might reasonably have been expected to arise.

In the context of SRC litigation, it is important not to lose sight of those two distinctive features because they are not likely to arise in cases that seem superficially similar to *Watson*. And even the presence of those two 'distinctive features' did not mean that liability would inevitably follow. This is because of the 'cautious pragmatism' of which Lord Hoffmann spoke in *White* and because of the House of Lords' decision in Caparo Industries v Dickman (1990). Here, Lord Bridge had noted that 'the situation should be one in which the court considers it fair, just and reasonable that the law should impose a duty of a given scope upon the one party for the benefit of the other' (617). Bearing that in mind, Watson belonged to a class of people that was in the Board's contemplation, and it had complete control over an activity where the risk of injury was 'inherent'. Further, its assumption of responsibility for medical matters had relieved the promoter of a parallel responsibility, and if Watson had no remedy against the Board he probably had no remedy at all. 'All these matters lead (us) to conclude that the judge was right to find that the Board was under a duty of care to Mr Watson', said Lord Phillips (*Watson* (1999), at 1163).

But Lord Phillips also emphasised that 'it does not follow (this) decision is the thin end of the wedge' (1163). Watson won because all the peculiar circumstances of this sport's unique regulatory system, and the circumstances which resulted in his injury, were held to weigh in his favour, but it provides little encouragement for those who would argue that its facts and circumstances are analogous to the situations in which a concussive injury might lead to litigation. The nature and functions of the BBBC is what made *Watson* unique, and it was liable because of the failures in how it discharged the roles it had taken upon itself. If the judge at first instance had decided against Watson on the facts, the Court of Appeal would not have overturned it.

US concussion statutes: an overview

In contrast to reliance on the common law or other statutes of general application, the US has chosen to address SRC among young athletes primarily through a dedicated statutory framework, primarily as a response to SRC among high school football players (Kim et al. 2017). This does not mean common law redress is no longer available (Maselli v Reg'l Sch Dist No 10 2020; Randall v Michigan High Sch Athletic Assn 2020), but it is the case that every state has legislation that applies only in respect of SRC in young players (Potteiger et al. 2018; Waltersdorff 2023). However, proper analysis reveals that there is, at best, a patchwork of protections, and most state laws insulate potential defendants from liability rather than providing redress.

Washington state passed the first US SRC law, known as the Lystedt law, in July 2009, and this provided the model that other states have followed. It contained three essential components: mandatory education of athletes and parents, removal from play at the time of suspected head injury, and return to play only with written permission of a licensed, SRC-trained healthcare provider after a minimum of 24 hours from the injury occurring. The first wave of SRC legislation led to rapid, nationwide adoption of these public health policies, and by 2014, all 50 states and the District of Columbia had legislation derived

from the Lystedt law framework (DeMartini 2021; Kim et al. 2017; Lowrey, Morain, and Baugh 2016; Zynda et al. 2020). However, the protections and requirements in these state laws were sometimes markedly different from the Lystedt Law and many states' subsequent amendments have introduced further distinctions (Waltersdorff 2023). For example, 37% of the mandates apply only to students enrolled in public schools, while 33% include public, private, and youth sports organizations as well as public schools (Potteiger et al. 2018).

It is at least the case that all states' laws include removal from play provisions and require medical clearance before return to play. Most states also require an athlete's parent or guardian to complete and sign an information sheet or informed consent form before the student can do so (Waltersdorff 2023). However, it is notable that the statutes vary in the type of sport activities covered, the definition of youth sport programs, the designated party for removal of athletes, and medical clearance steps required for athletes to return to play (DeMartini 2021; Kim et al. 2017). Not all statutes require coaches and other supervising individuals to participate in SRC training (Waltersdorff 2023), while only five states explicitly require evaluation of the efficacy of coach education or information requirements (Rivara et al. 2014). Few states require the school district to notify guardians when their child is removed from play due to an SRC or have state-mandated return-to-learn policies (Waltersdorff 2023).

Since their initial passing, at least 22 states have amended their laws to (1) expand coverage (e.g. to include younger grades or recreational sports leagues), (2) tighten or clarify existing requirements, or (3) enhance efforts to prevent SRC and improve early detection (DeMartini 2021; Lowrey, Morain, and Baugh 2016; Shen 2018). For example, in 2021, New Jersey passed legislation requiring its State Department of Education to review and revise the current model policy to ensure return-to-play protocols conformed with the Centers for Disease Control and Prevention's (CDC) six-step return-to-play progression (New Jersey Department of Education 2023). Delaware and Nevada provide other recent examples. Delaware enacted an amendment in 2023 that required the creation and maintenance of an SRC management section on its website and to provide the guidelines necessary for each non-scholastic youth athletic organizations to develop their own policies and procedures for producing an SRC information sheet for coaches, officials, athletes, and athletes' parents or guardians advising of the signs and symptoms of SRC (Del Gen Assemb152 2023). In Nevada, the legislature required interscholastic and youth sports organizations to revise their SRC policies at least every five years and compile and post educational information on their websites (Nev S 2023). Many states have expanded, or are seeking to expand, their SRC legislation by implementing brain injury awareness days or months (Waltersdorff 2023).

Legal implications & the US cases

Despite those recent amendments, many statutes leave few options for meaningful redress and provide limited tangible benefits to injured participants (DeMartini 2021; Harvey 2014; Shen 2018). Given those concerns, it is hard to argue that this approach is any more likely to mitigate the risks and consequences of SRC than is a reliance on the common law.

For example, some SRC statutes provide legal protection for certain parties from civil liability for ordinary negligence that causes SRC-related injuries or death, provided they acted in good faith and according to the statutory requirements, but others do not (DeMartini 2021; Kim et al. 2017). Statutes also vary in their methods of enforcement, but generally, they do not create new causes of legal action (Shen 2018). As noted in *Swank*, discussed below, there has been judicial confusion about whether the initial Lystedt Law in Washington State insulated volunteer healthcare providers and others from liability. More than half of the statutes now provide some degree of immunity to virtually anyone involved, while none of the amended statutes has extended potential liability (Athletic Business 2020). The legislation protects an ever-expanding class of people who are potentially liable. If the aim is to make sports safer or provide adequate redress where appropriate, then, again, it offers little more than the common law.

A very limited case law reinforces that point. By early 2024, thirteen cases arising in eight states had been litigated to conclusion, and, as explored below, the court outcomes have been mixed (Sharp 2021). While some courts found for the defendants (Athletic Business 2020; Lincoln Sudbury Regional High Sch Dist v W 2018; MU v Downingtown High Sch East 2015; R.B. v Enterline 2017), several claims were summarily dismissed on grounds of governmental immunity—either sovereign immunity, which grants a government entity immunity from being sued in its own courts without its consent (Immunity 2019), or public official immunity which states where the duty of a municipal officer is discretionary or judicial, they are not personally liable for negligence in the discharge of his duty (Annotation 1926& Supp 2023).

The very concept of state immunity further undermines any suggestion that the SRC statutes are designed to protect participants. Most US jurisdictions adhere to the rule that governmental entities operating public schools are immune from tort liability for personal injuries or death occurring in connection with such operations unless the entity has assumed liability by constitutional or legislative provisions. Courts have held that the organisation of school athletic teams in public schools is a governmental function. So, in the absence of a statute to the contrary, school districts, school boards, or other agencies in charge of public schools are immune, under the general tort immunity doctrine, from liability for injuries sustained by players in practice or games (Korpela 1970). In the majority of states, school officials are immune from liability for negligence in connection with all acts or omissions occurring within the scope of their employment. 'School officials' commonly include school boards, superintendents, and school principals, but some courts have held that the state's definition includes teachers and other 'certificated educational employees', too (*Kobylanski v. Chicago Bd. of Education*, 1976). Other courts have adhered to the view that the availability of the immunity defence depends on whether the function involved is ministerial or discretionary (Annotation 1985& Supp 2023).

Some cases have specifically found that a state's SRC statute provides no basis for imposing liability. For example, in 2015, a court in Iowa denied an athlete's attempt to assert a claim against his school district for failing to remove him from play, finding that the Iowa statute did not 'explicitly provide a cause of action' (K.R.S. v Bedford Comm Sch Dist 2015. Similarly, in Ingram v United States by and through Department of the Interior 2017, the court affirmed judgment for the defendant as it found no

liability under the state's SRC Act for injuries sustained by a football player at the tribal school. In Walton v Premier Soccer Club, Inc 2024, the court awarded summary judgment to the defendants, holding the plaintiffs could not use a violation of a concussion awareness statute as evidence of negligence per se. Club officials and facility employees had failed to provide certain written information as required by that statute, but there was no chain of causation between that failure and the injuries sustained.

Other cases do illustrate the potential for some protection, though. In *Goodman v. Trousdale*, 2016, where a high school cheerleader suffered an SRC while training at a private location, the Kentucky court affirmed a denial of immunity for the cheerleader coach. In Hites et al. v Pennsylvania Interscholastic Athletic Association, Inc 2017, the trial court held that the state SRC law must be considered when evaluating whether a duty should be imposed on the Pennsylvania Interscholastic Athletic Association. The court acknowledged the immunity clause but stated that the law still imposed certain responsibilities upon school entities and school employees, and it did not eliminate civil lawsuits. It concluded the SRC law was not intended to shield schools or their employees. Similarly, in Bowen v Telfair County School District 2019, the football team's coach had allowed an athlete to continue playing after he exhibited potential symptoms of SRC. The court held that the school district and the coach were entitled to immunities—but these did not extend to the negligence claim, which was based on the coach's failure to follow SRC treatment and prevention procedures.

Swank 2016 (noted above), established that the original Lystedt Law could potentially render a volunteer liable in negligence over the death of a youth football player. At a preliminary hearing, the trial judge dismissed the Swank family's claims against the coach (a volunteer) and the doctor, but said proceedings against the school could continue. On the family's appeal the Washington Court of Appeals said that the Lystedt Law did not include any 'mechanism. . . to enforce the requirements intended to address the risks of youth athlete SRC' (para 1117) and upheld the decision to dismiss. However, on further appeal, the Washington Supreme Court said that the act impliedly envisaged civil law remedies for personal injury, contrary to the lower courts' decisions, noting the legislative purpose and underlying intent of the statute. The case was remanded for further proceedings against the coach as well as the school, since there was a question of fact whether the coach acted with gross negligence or recklessness, from which a volunteer is not immune. The court agreed that there was no jurisdiction over the doctor who provided the return-to-play note because he was based in another state.

Similarly, a youth hockey goalkeeper who was hit in the head during two separate collisions in one game sued the athletic trainer and a variety of institutional defendants for *inter alia* the trainer's failure to adhere to the Michigan SRC protection statute. The court opined that, in passing this statute, the legislature did not create, explicitly or by implication, a private statutory cause of action for violation of the statute. However, the court concluded that the statute created negligence-based duties on the part of coaches and other covered adults, and a violation of the statute can be evidence of actionable negligence. The court noted that the state legislature enacted the SRC-protection statute in order to protect youth athletes from the harmful effects of SRC (Randall v Michigan High Sch Athletic Assn 2020).

Addressing the limits of the legislation

This mix of case outcomes indicates different jurisdictional approaches to whether an SRC law should create new civil liability for coaches and school districts and, if it does, whether such liability will overcome traditional defenses such as governmental immunity discussed above. However, one US federal judicial circuit, the Ninth Circuit Court of Appeals, may be altering the landscape of sport health-and-safety policymaking (Ehrlich 2021).

Two cases, in 2018 and 2020, dealt with allegations of insufficient institutional controls by supervising athletic organizations (*Dent v National Football League* 2018; Ehrlich 2021; Mayall v USA Water Polo 2018). Both cases involved allegations that the supervising athletic organizations' failure to promulgate adequate return-to-play policies harmed athletes who were improperly allowed back into competition. In each case, the Ninth Circuit overturned district court opinions that had previously found no duty of care based on more conventional interpretations of the voluntary undertaking doctrine. Instead, the court held that each of the athletic organisations did owe a duty to act to protect its players from injuries caused by premature return-to-play. Though these cases were not brought under state SRC laws and did not involve school sports, they demonstrate a potential legal avenue that thrusts responsibility onto sports bodies. That said, the limited research on current state legislation suggests they have helped promote better SRC management policies and improved the recognition of SRC (Shen 2018).

Some studies demonstrated an increase in key stakeholders' awareness and knowledge regarding SRC, the rate of reporting, and SRC-related healthcare utilization among children, which might be attributable to the laws' existence (Covassin 2019; DeMartini 2021; Schallmo, Weiner, and Hsu 2017; Yang et al. 2017; Zynda et al. 2020). Additionally, Arakkal (2020) found a decrease in overall SRC rates during the post-law period, and states with laws specifying the category of healthcare provider for return-to-play clearance had a greater rate of decline in post-law recurrent SRC rates compared to states not specifying the category of healthcare provider. The picture is mixed, however. In Pennsylvania, researchers found school-level written SRC protocols were often missing state law components and emerging best-practice recommendations (Beidler and Welch Bacon 2022). Coaches' awareness of athletes' SRC did not vary significantly by the different modalities for SRC education received by coaches or the coach's knowledge of the state's SRC law (DeMartini 2021; Rivara et al. 2014). Diekmann (2019) discovered some evidence that SRC education can improve short-term knowledge about SRC but concluded that legislatively mandated SRC education fails to achieve public health goals.

Shen (2018) confirmed the limits of the legislation. In particular, the inability to objectively identify SRC, the lack of medical expertise available for most youth sports leagues, and the heavy reliance on volunteers suggest that it will be difficult for researchers to access the information they would need to properly evaluate current policy. Additionally, despite the similarity of youth sports SRC laws, evidence suggests there is considerable variation in their implementation. Lowrey and Morain (2014) identified challenges, including primary prevention, determining which providers are qualified to make return-to-play assessments and contents of those assessments, compliance difficulties in rural and under-served areas, and unclear responsibility for enforcement. More recently, Coxe and Sullivan (2020) found that many barriers to successful implementation

of the laws persist. The barriers to the educational component included the lack of quality SRC education, the lack of buy-in to educational requirements, and the lack of time for attendance at educational meetings. They identified additional implementation barriers to the timely removal of athletes from play, including athletes underreporting SRC symptoms, resistance from stakeholders, sport culture and 'old school' mentality, cost of and access to medical care, and lack of understanding of SRC.

In light of those limitations and the mixed evidence, Yang et al. (2021) further investigated the impact of SRC laws. They analysed SRC reporting mechanisms and considered when the law was adopted and when it was revised (if at all). They found that states with two or more law revisions and/or which were late adopters had lower recurrent SRC reporting rates. They concluded that perceived 'stronger'[1] laws may be more effective in concussion reporting and that appropriate revision may help increase SRC awareness and recognition—but that did not necessarily lead to harm reduction, and important lessons could still be learned from the trials and errors of early adopters. Although the 2023 Consensus statement on concussion in sport (Patricios, Schneider, and Dvorak 2023) did not directly address US SRC laws, it did point to Eliason et al. (2023) meta-analysis, which synthesized these findings from Arakkal (2020) and Yang et al. (2021). After concussion laws were enacted in the US, a decrease in recurrent SRC rate trends was seen across adolescent sports 2.6 years after the laws went into effect (Eliason et al. 2023, 756). The Consensus concluded that 'optimal concussion management strategies including implementing laws and protocols … are associated with a reduction in recurrent concussion rates' (699).

The evidence suggests that current US legal mandates do not help youth and school sports providers safely manage SRCs, and still less be able to prevent them (DeMartini 2021; Yeo et al. 2020; Zynda et al. 2020). Some commentators suggested improvements to the laws, including better defining SRC, expanding the scope of coverage, mandating reporting and enforcement mechanisms, providing resources for implementation, and placing greater emphasis on prevention and evaluation (DeMartini 2021; Harvey 2014; Shen 2018). Some have observed that legislation may not be the best solution for improving SRC management in young athletes and call on the involvement of players, parents, coaches, health professionals, medical organizations, and youth sport organizations to assist (Waltersdorff 2023). Others advocate change through petitioning for the same rights for all children and adolescents regardless of current state legislation and for school districts, parks and recreation departments, and youth sport organizations to create SRC policy and procedures (Potteiger et al. 2018). Legislatures could better clarify the civil liability provisions of the statutes, identifying when civil liability attaches to a failure to adhere to the statute's requirements (Waltersdorff 2023).

Conclusion

This contribution has analysed two legal frameworks relevant to the wider medical, ethical and interdisciplinary debates around SRC prevention, mitigation, and restitution that the other contributions explore. It highlights the challenges posed by both the common law and statutory provisions, and it will hopefully be a useful reference point for those exploring potential remedies in other jurisdictions.

There are strong arguments in favour of legislative frameworks that would avoid the challenges that the common law presents to SRC, but the US concussion laws have failed to mitigate those difficulties. As an alternative, statutory no-fault compensation schemes for all sports-related injuries or mandatory personal injury policies for participants are both worthy of exploration.

A recent UK Parliamentary enquiry (House of Commons 2021) considered the merits of US-style legislation as a way of making sport safer, but this paper shows that the US models did not make sport safer and were probably never intended to—they insulate people and organisations from liability. In any event, the enquiry advocated a voluntary model and recommended UK-wide concussion guidelines similar to the Scottish protocols that have existed for several years (McArdle et al. 2021; SportScotland 2018). In response, the UK government committed to introducing protocols that 'build upon the existing work undertaken across the different nations of the UK and internationally, while working collaboratively with stakeholders to develop a single set of shared guidelines' (Minister for Sport, Tourism, Heritage and Civil Society 2021, 21). In April 2023, UK-wide SRC guidelines were duly published (UK Government 2023). They commit all UK sports to an approach akin to Scotland's.

The 'protocol' approach is worthy of careful consideration by sports and governments in other countries, and it is probably easier to achieve than radical law reform which imposes direct cost burdens on participants. One should note, however, that protocols are properly concerned with SRC prevention and treatment, not with providing *post hoc* legal redress and compensation for any injuries sustained. And failing to follow protocols would not, in itself, establish liability in negligence. It might be evidence of negligence, but no more than that.

Whatever approaches are considered, there is an urgent need for research into the extent to which the perceptions of individuals (whether participants, coaches, referees, or other stakeholders) are contingent on their family circumstances, socio-economic status, perceptions of risk, current level of participation and future aspirations because those perceptions will impact on stakeholder engagement with protocols and other forms of guidance. Approaches to risk that might seem necessary or justifiable to some (a player seeking a first professional football contract, for instance, or the team manager in *Shone* looking for medal potential) may appear entirely alien to people involved in other disciplines and at other levels, or to lawyers or lawmakers who never really played at all. If the protocols are insufficiently nuanced to resonate with everybody across all sports, that might have a negative impact on compliance, engagement, and understanding—especially in respect of policies which are seen as state-imposed rather than emanating from the sport itself. Policymakers should also consider recent developments in New Jersey, Delaware, and Nevada, as noted above. Could they be usefully adapted for local needs as part of a Protocol approach?

Protocols are no panacea, but equally there is little merit in ignoring them in favour of exploring legal strategies that offer little but have the potential to scare people away from doing sport, or which discourage them from volunteering as referees or coaches for fear of being sued. Indeed, one can argue that the threat of litigation is more likely to discourage people from playing, or from continuing as referees or coaches (Fulbrook 2022), than it is to secure the outcomes desired.

Accordingly, this contribution concludes with an agenda for future socio-legal research. First, it is necessary to establish whether a particular jurisdiction's existing legal remedies offer effective redress, prevention and/or mitigation and, if not, is it realistic to advocate radical law reform in a reasonable timeframe? If the answer to both those questions is 'no', then two new questions arise: are the existing strategies for prevention and treatment fit for purpose and, if not, is it possible to envisage radically alternative possibilities that would be more effective in prevention and mitigation without needing a new legal framework. Those are daunting but significant undertakings; the ray of light is that, unlike jurisdiction-specific legal approaches, alternative strategies lend themselves to global approaches and collaborations, which can then be adapted to local circumstances.

Note

1. Yang et al. measured 'strength of law' using 13 discrete evidence-based concussion law provisions. These included seven baseline provisions related to the three key tenets of the concussion laws and six optimization provisions that reflected provisions beyond the key tenets. They assigned 1 point for the presence of a provision and 2 points for the absence of a provision, then summed the points to yield a discrete numerical strength of law score (range, 13–26), with lower scores indicating greater law strength (p. 746–747).

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