

My research paper, “Concussions and Youth Sports – Lawsuits: Too Little Too Late”, supervised by Professor Richard Janda, is based on my personal experiences as a youth student-athlete.

From 2013 to 2016 (ages 14 to 17), I suffered four concussions as a youth soccer player, the permanent consequences of which I continue to live with daily, including a reading speed twice as slow as the average person, severe difficulty concentrating, persistent nausea and sensitivity to light, and the constant fear of suffering another concussion. I chose to write about this topic because for a very long time I only blamed myself for returning to the game prematurely and for continuing to play inherently rough contact sports in general. It was not until completing the Extra-Contractual Obligations course in my first year of law school that I realized that perhaps I was not the only individual responsible for my injuries. As I learned in Professor Van Praagh’s first year tort law class, the consequences of one’s actions can be analogized to the ripples that occur when one throws a rock into a pond; they are not limited to the principal actor. Instead, when a child or youth suffers a concussion, given the lower threshold associated with the notion of “the reasonable child”, one must take even more care to consider the implication of other parties relevant to the harm. This includes parents, coaches, sports organizations, and medical staff. Did any of these parties owe the child a duty of care? And if so, did they breach this duty?

My paper explores the reality that lawsuits as a *reactive* mechanism are insufficient, since, by then, the harm has already manifested and is irreparable. It goes on to suggest that we must use the law as a *proactive* tool to enact legislation, like Rowan’s law in Ontario, to minimize the risk youth suffering concussions and second-impact syndrome.

In conducting my research, I was by no means surprised about the complexities in succeeding with a concussion-based negligence claim, especially given the nature of the issue: youth as plaintiffs and the invisible disposition of brain injuries. To illustrate not only the complexity of raising a negligence claim in this context, but also the severity of concussions in sports, I drew parallels between the topic of my paper and NHL, NFL, and CFL concussion lawsuits; none of which have had decisions pronounced by the courts.

Conversely, when conducting a comparative approach between the Canadian and American approaches to proactively regulating concussions in youth sports, I was surprised to find out just how behind the Canadian legal landscape is in this regard in comparison to the United States. In the United States, all 50 states and the District of Columbia have successfully passed proactive laws to address and minimize the risk of brain injuries in youth sports, the most notable of which is Lysdt’s law. In Canada, Ontario’s Rowan’s law is the only comparable effort made by legislators to address the issue. The disparity speaks for itself; more work needs to be done by legislators, who have been repeatedly called on by the public, parents of youth athletes in specific, to do so. While Rowan’s law is a step in the right direction, in weighing the principles of negligence law, the reality of concussions, and the false assumption that human beings will act rationally in all instances, it becomes clear that legislation like Rowan’s law is not a fool proof plan. In the last section of my paper, I make three suggestions on how to make Rowan’s law more comprehensive,

based on my personal experiences. The most pertinent of which is the need for an enforcement mechanism. As it stands, the natural consequences of concussions for youth athletes have been the only “deterrent” factors encouraging coaches, parents, and medical professionals to abide by Rowan’s Law. Let my experiences and those of thousands of youth and professional athletes alike be a reminder that it is, in fact, a mistake to assume that parties will be deterred from returning athletes to sport prematurely solely based on their knowledge of the natural consequences of concussions.

Ultimately, the comparative nature of this paper makes it clear that using the law proactively to minimize the risk of concussions in youth sports, as done in the United States, is clearly an attainable and necessary initiative that Canadian legislators ought to take more seriously.

## **i. SOURCES**

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### **JURISPRUDENCE**

#### ***Agar v Canning*, [1965] MJ No 24.**

This case highlights the Court’s recognition that athletes accept a certain risk of accidental harm in the context of their sport.

#### ***Anns v Merton London Borough Council* (1977), [1978] AC 728 (UK HL).**

This case establishes the broad test for determining the existence of a duty of care, relating to the tort of negligence.

#### ***Blondeau v Peterborough* (1998), 72 O.T.C. 81 (GD).**

This case concerns a 12-year-old figure skater who was injured after her skating coaches and the Community Centre failed to discharge their duties to ensure that the surface of the ice was reasonably safe for their athletes to skate on.

#### ***Childs v Desormeaux* 2006 SCC 18.**

In this case, the SCC held that the host of a party does not owe a duty of care to a person injured by a guest who consumed alcohol. The case outlines the procedure, based on a proximity analysis, for the courts to determine whether a duty of care can and should be established between parties.

#### ***Cooper v Hobart*, [2001] 3 SCR 537 (SCC).**

This case redefines the *Anns Test* for determining the existence of a duty of care, relating to the tort of negligence.

***Crocker v Sundance Northwest Resorts Ltd.*, [1988] 1 S.C.R. 1186.**

This case highlights that, despite the common law being generally reluctant to impose positive obligations on individuals, it will impose a duty of care where there are certain recognized proximate relationships, including parent-child, teacher-student, etc.

***Donoghue v Stevenson* [1932] UKHL 100.**

This case is, essentially, the foundation of negligence law, as it establishes the general principles relating to the notion of duty of care.

***Dunn v University of Ottawa*, [1995] OJ No 2865 (OCJ Gen Div).**

In this case, the Court recognized that by participating in a game of university-level football, Dunn, the plaintiff, had consented to a certain degree of violence and risk. However, the Court highlighted that an athlete's consent is limited only to the degree of violence and risk that is reasonably expected within the circumstances.

***Hughes v Lord Advocate*, [1963] AC 837.**

In this case, the Court recognized that as long as the defendant can foresee, in general, the possibility for a certain type of injury to occur, proximate cause will be established.

***Hussack v Chilliwack School District No. 33*, 2011 BCCA 258.**

In this case, the plaintiff was a grade 7 student who was injured while playing field hockey during a physical education class at school. Hussack was hit in the face by another student's stick, which progressively led to the development of a mental disorder accompanied by physical problems. Given Hussack's lack of knowledge about the rules and play of field hockey, the gym teacher was found to have failed to discharge his duty to instruct the students on how to play the sport. Consequently, the teacher ought to have foreseen that lack of instruction could reasonably lead to a student being hit in the face by the stick of another.

***Levita v Crew*, 2015 ONSC 5316.**

In this case, Levita, the plaintiff, argued that Crew, the defendant, engaged in negligently rough behaviour when the latter body checked the former into the boards and fractured his tibia. Despite having signed a waiver absolving the league of liability, Levita pursued both the defendant and the league in negligence suits. The Court found that Levita had accepted the risk that he might suffer an injury in the regular course of a hockey game, and that the waiver was a complete defence for the league.

***Marconato et al. v Franklin*, [1974] BC SC.**

This case reiterates that the thin skull rule, whereby regardless of the plaintiff's dispositions, if the defendant ought to have reasonably foreseen the probability of a certain type of injury occurring, he will be held liable in negligence.

***McHale v Watson*, 1966, 115 CLR 199.**

This case concerns a 12-year-old girl who threw a sharpened metal rod at a piece of wood and injured another young girl after the metal rod ricocheted and hit the latter in the eye, causing permanent blindness. This case is important as it establishes that the adult standard of care should not be used to assess what is reasonably expected of a child.

***Robitaille v Vancouver Hockey Club Limited*, 1981 CanLII 532 (BC CA).**

This case is the leading authority addressing the duty of care owed by professional sports organizations toward its players. It established that a professional sports team is under a duty to exercise reasonable care to ensure that its players do not suffer undue or unnecessary risk of injury. This duty extends to the actions of the team's employees, including coaches, physicians, and athletic trainers.

***Smith v Horizon Aero Sports Ltd*, [1981] BCJ No 1861 (BCSC).**

This case highlights that when determining the liability of a sports organization, the courts must consider their efforts in fulfilling (but not limited to) the following: , training players, baseline concussion testing, concussion detection protocols, return to play protocols, etc.

***The Wagon Mound (No1); Overseas Tankship (UK) Ltd. v. Morts Dock & Engineering Co* [1961] AC 388 (PC) [*Wagon Mound No1*].**

This case created the remoteness rule for causation in the context of negligence law. The Privy Council held that an individual can only be held liable for loss that was reasonably foreseeable.

***Thomas et al. v. Board of Education of Hamilton et al.*, (1994) 85 O.A.C. 161 (CA).**

In this case, the plaintiff, Thomas, brought an action against the defendant after he was rendered quadriplegic during a football game between schools. The Court absolved the defendants of liability on the basis that they could not have reasonably foreseen the plaintiff's particular susceptibility to injury given the lack of public awareness of the "swan neck theory".

**GOVERNMENT DOCUMENTS**

**House of Commons, *Tackling the Problem Head-On: Sports-Related Concussions In Canada*, 42-1, (June 2019).**

In 2018, the House of Commons Standing Committee on Health established the Subcommittee on Sports-Related Concussions in Canada to study concussions in sport. The Subcommittee heard testimonies about efforts to increase concussion awareness and training across Canada, protocols implemented by sports organizations, evolving research on concussions, and inconsistent access to concussion care across Canada. The Subcommittee went on to make 13 recommendations to alleviate these concerns.

**SECONDARY MATERIALS**

**(a) Sources that provide statistics about concussions in Canada.**

Brain Injury Canada, “Statistics on brain injury”, online: *Brain Injury Canada* < [www.braininjurycanada.ca/en/statistics-brain-injury](http://www.braininjurycanada.ca/en/statistics-brain-injury) >.

Government of Canada, “Sport and Recreation-related Concussions and Other Traumatic Brain Injuries Among Canada's Children and Youth” (11 October 2018), online: *Government of Canada* <[www.health-infobase.canada.ca/datalab/head-injury-interactive.html](http://www.health-infobase.canada.ca/datalab/head-injury-interactive.html)>.

"Sport and Recreation-related Concussions and Other Traumatic Brain Injuries Among Canada's Children and Youth," Government of Canada, 2018.

**(b) Sources that define concussions.**

Brain Trust Canada, “Traumatic Brain Injury”, online: *Brain Trust Canada* <[www.braintrustcanada.com/resources/brain-injury-information/](http://www.braintrustcanada.com/resources/brain-injury-information/)>.

Concussion Legacy Foundation, “Subconcussive Impacts”, online: *Concussion Legacy Foundation* <[www.concussionfoundation.org/cte-resources/subconcussive-impacts](http://www.concussionfoundation.org/cte-resources/subconcussive-impacts)>.

**(c) Sources that compare Canadian and American approaches to regulating concussions.**

Brandon Seltenrich, “A Polar Comparison of Concussion Legislation in the United States and Canada”, (2 September 2019), online: *HeadsupCAN* <[www.headsupcan.ca/blog/2019/9/2/a-polar-comparison-of-concussion-legislation-in-the-united-states-and-canada](http://www.headsupcan.ca/blog/2019/9/2/a-polar-comparison-of-concussion-legislation-in-the-united-states-and-canada)>.

Jim Tomnlinson, Adrian Nicolini, and Stefanie Vescio, “Concussions and Injuries in Canadian and American Contact Sports: A Legal Perspective”, (29 March 2011), online: *McCague Borlack LLP* <[www.mccagueborlack.com/uploads/articles/102/concussions\\_contact\\_sports.pdf](http://www.mccagueborlack.com/uploads/articles/102/concussions_contact_sports.pdf)>.

Steven Reinber, “More Evidence Contact Sports Can Affect the Brain”, (22 August 2017), online: *WebMD* <[www.webmd.com/brain/news/20170822/more-evidence-contact-sports-can-affect-the-brain#:~:text=The%20brain%20scans%20showed%20that,brain](http://www.webmd.com/brain/news/20170822/more-evidence-contact-sports-can-affect-the-brain#:~:text=The%20brain%20scans%20showed%20that,brain)>.

**(d) Sources that explore sports-related negligence law in Canada.**

Dolden Wallace Folick LLP, “A Guide for Amateur Sports Organizations and their Insurers”, (1 September 2012), online (blog): *Dolden Wallace Folick LLP* <[www.dolden.com/sport-liability-law](http://www.dolden.com/sport-liability-law)>.

John Barnes, *Sports and the Law in Canada*, 3d ed. (Markham: Butterworths Canada Ltd., 1996).

Kavivarman Sivasothy, Josh Hanet, “Liability for Sports Organizations in the Diagnosis and Treatment of Concussions”, (18 December 2018), online (blog): *Gowling* <[www.gowlingwlg.com/en/insights-resources/articles/2018/sports-organizations-liability-in-concussions](http://www.gowlingwlg.com/en/insights-resources/articles/2018/sports-organizations-liability-in-concussions)>.

Mark James, *Sports Law*, (Great Britain: Palgrave Macmillan, 2010).

Sport Law, “Violence in Sport: Policy Considerations for the Amateur Sport Organization” (10 August 2002), online (Blog): *Sport Law*: <[www.sportlaw.ca/violence-in-sport-policy-considerations-for-the-amateur-sport-organization/](http://www.sportlaw.ca/violence-in-sport-policy-considerations-for-the-amateur-sport-organization/)>.

**(e) Sources that support the policy arguments for regulating concussions in youth sports.**

Dave Korzinski, “New federal concussion guidelines are a step forward but what will impact be without enforcement?”, online (blog): *Angus Reid Institute* <<https://angusreid.org/federal-concussion-guidelines-parachute/>>.

Hobart A. Burch, *The Why's of Social Policy: Perspective on Policy Preferences*, (NY : Praeger, 1991).

McCradden MD, Cusimano MD. Staying true to Rowan's Law: how changing sport culture can realize the goal of the legislation. *Can J Public Health*. 2019 Apr;110(2):165-168.

McCrorry et al., Consensus statement on concussion in sport—the 5th international conference on concussion in sport held in Berlin, October 2016 (2017).

**(f) Sources that explore concussions specifically in the context of youth sports.**

Jim Tomlinson, Robert McGlashan, Kati Aubin, David Edwards and Sarah Berhane, “Kids May Be Kids, But Adults Oversee: The Liability of Adult Supervisors for Child Injuries”, online: *McCague Borlack LLP* <<https://mccagueborlack.com/uploads/articles/149/liability-child-injuries.pdf?1382629874>>.

Marie-France Wilson, “Young athletes at risk: Preventing and managing consequences of sports concussions in young athletes and the related legal issues” (2010-2011) 21 Marq. Sports L. Rev. 241.

Phoebe Anne Amberg, “Protecting Kids’ Melons: Potential Liability and Enforcement Issues with Youth Concussion Laws” (2012) 23:1 Marq. Sports L. Rev. 171 (2012).

**(g) Sources that explore concussion litigation in professional sports.**

Darena Muça, “Liability for Brain Injuries in Sports” (24 March 2020), online (blog): *McGill Journal of Law and Health* <[www.mjlh.mcgill.ca/2020/03/24/liability-for-brain-injuries-in-sports/](http://www.mjlh.mcgill.ca/2020/03/24/liability-for-brain-injuries-in-sports/)>.

Jon Heshka, “CFL, Concussions, and a \$200 Million Court Case”, (3 September 2015), online (blog): *Law Now* <[www.lawnow.org/the-cfl-concussions-and-a-200-million-court-case/](http://www.lawnow.org/the-cfl-concussions-and-a-200-million-court-case/)>.