

Testimony for HB 5113

Good Afternoon Representative Urban, Senator Bartolomeo, Representative Betts and Senator Linares and the distinguished members of the Children's Committee. For the record, I am Pippa Bell Ader, from Westport, CT, and the Parents Concussion Coalition. I am here to testify in support of:

AN ACT CONCERNING YOUTH ATHLETICS AND CONCUSSIONS.

To begin with, I would like to give a brief review of how we got here, starting with Zachary Lystedt.

In 2006 Zachary was a Washington State middle school football player who hit his head during a football game. He was evaluated by his coach and returned to the field. Toward the end of the game he hit his head again, came off the field, complained of a massive headache, and collapsed. He subsequently underwent multiple brain surgeries and is now permanently disabled. His parents sued the school system because it was NOT FOLLOWING CURRENT STANDARDS OF CARE, and won over \$14 million. But they didn't stop there.

Zachary and his parents made it their mission to prevent further injuries like his, and in 2009 the Zachary Lystedt Concussion Law was passed in Washington State. This consisted of 3 components, 2 of which CT follows. By 2010 CT was the 3rd state in the nation to pass its own concussion law, and requires education for interscholastic coaches and remove and return to play guidelines. The 3rd component of the Lystedt Law is missing from CT's law: athlete and parent concussion education, and a signed informed consent before the athlete can participate in an athletic activity. CT is one of the few states in the nation that does NOT include athlete and parent education and informed consent.

This is the third attempt to update the CT law. At this time all 50 states have concussion laws, and over a third include Youth Athletic Activities and non-public schools.

So how did I get involved in this? My son, Nicho, sustained a concussion while playing touch football at recess, at age 10, back in 2007. This was the Stone Age, in light of what we now understand about concussions and sub-concussive blows. Nicho spent a lot of time in the nurse's office with concussion symptoms after his injury. Initially we didn't know he should be resting, and then, when we did know, we got some resistance. 4 months after

his concussion, Nicho, an above-average student, tested with an IQ of 75 and had significant cognitive and processing deficits, some of which he still has.

I believe that had we, the parents and athlete, been better educated through, say the youth soccer league, Nicho would have been put on immediate bedrest and would have healed faster and better. Even a simple information sheet about concussions would have been helpful. But Youth Sports are not currently covered by the law, leaving our most vulnerable at risk.

But the story does not stop there. Last year, while representing his high school in wrestling, Nicho sustained another concussion. He was thrown around a lot, in an attempt to avoid being pinned, but he never hit his head.

It is now known that children who have sustained one concussion are more susceptible to additional concussions. We think Nicho may have sustained a concussion from a series of sub-concussive blows. The good news is that this time we immediately confined him to rest, and within 2 weeks he was back at school, on a modified educational program. When things are done right, the outcome is usually good.

Please consider seriously the need to provide ALL young athletes, and their parents, coaches and referees with the knowledge to recognize a concussion, and manage it correctly. Even better, the Parents Concussion Coalition requests that all collision and contact sports be reviewed annually, and that best practices be implemented with a goal to decrease exposure to brain injuries. Including such a provision in the bill would further protect young athletes from unnecessary brain injury.

With regards the Youth Athletic Activity component of the bill, it was the intention of the Parents Concussion Coalition to have Youth coaches complete a briefer concussion education training, not the 3 hour training that the Interscholastic coaches complete. We believe that the bill is worded in a non-prescriptive way, and allows the authorized entities to develop OR APPROVE an initial training course, such as the online CDC coach training program. The same goes for Youth Referees. As for Youth athletes and parents, the bill stipulates that they receive a written statement which must be signed by a parent. We feel all of these requirements are reasonable and beneficial to the health of Connecticut's children.

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To Committee On Children,

Please find the legal cases that are associated with Youth Concussions in CT, as per Kerri McGowan Lowrey, JD, MPH, Deputy Director, The Network for Public Health Law - Eastern Region. Please contact Ms. Lowrey directly if you have any questions about this data.

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Begin forwarded message:

From: "Lowrey, Kerri" <klowrey@law.umaryland.edu>
Subject: RE: CT Concussion Law update
Date: January 13, 2014 3:52:30 PM EST
To: Pippa Ader <bellader@gmail.com>

Hi Pippa,

Here's what I've found:

Connecticut and the Second Circuit

I found only one case in Connecticut or the Second Circuit that deals with concussion protocols (e.g., return-to-play) and children. *Mercier v. Greenwich Academy Inc.* (2013) involves a high school basketball player who suffered a concussion during a game. She sued her coach, her school, and the opposing (host) team's school for negligence—which requires proving 4 elements: that the defendant owed plaintiff a duty of care, the duty was breached, the plaintiff was injured, and the breach was the proximal cause of the injury. The plaintiff argued that her coach was negligent in failing to have her examined/evaluated after the first strike to her head, for failing to remove her from the game after she reported concussion-like symptoms, and for failing to keep her out of the game until cleared by a licensed health care professional. It is worth noting that the court cited concern for increased litigation as a factor in its decision: "Holding coaches to a negligence standard of conduct for decisions made during athletic competitions would certainly create an influx of litigation against coaches and schools for injuries directly caused by other players." (*Mercier* at 4). It also cited an interest in encouraging continued vigorous participation in sports: "Coaches are often required to make splitsecond decisions during a game, and holding coaches liable for negligence for such decisions, including player substitution decisions, would dampen their willingness to coach aggressively and would 'unreasonably threaten to chill competitive play'." (*Mercier* at 4.) The court rests its decision on the assertion that there the duty of care owed by the schools and coach does not rise to the standard required for negligence. So, the court threw out the negligence claim, but it did not throw out the plaintiff's recklessness claims. I assume they settled out of court on that matter, since there is no record of it in Westlaw.

The decision I find most interesting in this case is the court's rejection of negligence per se. Negligence per se applies when a defendant violates a statute, creating an assumption of negligence. The plaintiff specifically raises Connecticut's concussion law in her complaint, but the court rejects the argument. Here's the pertinent part of the decision:

2. Negligence Per Se

Mercier also argues that the Westminster Defendants "had a statutory duty [under Conn. Gen.Stat. § 10-149c] to remove her from the game "as a result of her concussion like symptoms" and to keep her out of the game "until

she received written clearance from a licensed health care professional.” Am. Compl. at 7, ¶ 22(b)-(c). The court does not need to determine whether, as the Westminster Defendants argue, section 10–149c does not apply to them. These Counts, like Counts Two and Four, sound in negligence. Accordingly, for the same reasons described in Part IV.A.1, the court grants the Westminster Defendants’ Motion to Dismiss with respect to Counts Three and Five of the Amended Complaint.

The only other negligence cases in Connecticut/Second Circuit that I found involve negligence for improper maintenance of equipment and/or playing surfaces or insufficient training/safety precautions—not for return-to-play decisions. They also involve older plaintiffs (e.g., college students). For example, *Zides v. Quinnipiac University* (2006) involved a baseball player injured during batting practice because of a faulty L-screen; and *Gonzalez v. University System of New Hampshire* (2005) involved a cheerleader injured during a fall who alleged improper training for cheerleaders and coaches and lack of proper safety precautions/supervision during stunts. There is one case involving a minor who was injured by a soccer goal post, but it does not involve return-to-play protocols and the child was not playing soccer at the time (*Esposito v. City of Shelton*).

Other Jurisdictions

As far as return-to-play cases in other jurisdictions, there are only a few dealing with children:

- *Zemke v. Arreola* (Cal., 2006) finding no negligence: “But on the undisputed evidence submitted to the trial court, there are no facts that would have given the coaches any reason to suspect that Zemke had suffered a brain injury or that would have alerted them that his participation in the game should be restricted. Accordingly, there is no evidence that the defendants increased the risks to Zemke beyond those that were inherent in the football game.” (Zemke at 5.)
- *Cerny v. Cedar Bluffs Junior/Senior Public School* (Neb., 2004), which found that coaches’ conduct in evaluating the player and decision to readmit him to the game were “actions that would have been taken by reasonable state endorsed football coach under similar circumstances.” (*Cerdy* at 1.)
- *Serrell v. Connetquot Cent. School Dist. of Islip* (NY, 2005), which held that a school district was not liable for injuries.

I have to run to a meeting, but there is a great discussion of RTP case law in this article:<http://scholarship.law.marquette.edu/cgi/viewcontent.cgi?article=1500&context=sportslaw>.

I hope this helps, Pippa! Good luck with your meeting and let me know how it goes.

-Kerri

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