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Rhode Island and Sports Law

Adam Epstein
Central Michigan University

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INTRODUCTION

The purpose of this Article is to offer an overview on how Rhode Island, the smallest U.S. state geographically,[1] has had a moderate influence in sports law. The Article will serve as a solid resource for the academic, practitioner, student and others interested in sports law generally and its relationship to Rhode Island. While the depth of sports law material from the state relative to others is not is overwhelming, Rhode Island jurisprudence in this field has been compelling and influential well beyond its borders with its prominent gender discrimination cases involving the Equal Protection Clause of the U.S. Constitution and Title IX, the 1970s gender-equity law.

After an exploration of a few sports-related tort cases, the Article will delve into the several decades-old state and federal cases involving whether a boy may participate on a high school girls' field hockey team, whether a boy could participate on a girls' volleyball team, and whether a girl could play Little League Baseball. Of course, the Article will also examine the well-known Title IX saga involving Brown University's unsuccessful attempt to eliminate several sports in the 1990s that led to a decades-long settlement.

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* Professor, Department of Finance and Law, Central Michigan University, Mount Pleasant, Michigan. The material in this article was utilized in an online presentation "Rhode Island and Sports Law" presented to the Mid-Atlantic Academy of Legal Studies in Business (MAALSB) on March 19, 2021. Special thank you to all attendees.

1. *See Fun Facts & Trivia*, RI.GOV, https://www.ri.gov/facts/trivia.php [https://perma.cc/EUG5-6VJC].

Finally, the Article will provide a short summary of other sports law topics relevant to the state. It will conclude with a brief encounter in other state sport-related statutes involving sports officials, the adoption of the Uniform Athlete Agents Act, the 2018 authorization of sports wagering in Rhode Island, the School and Youth Programs Concussion Act (SYPCA), and others. Perspectives on how Rhode Island decisions fit into an overall U.S. sports law perspective are scattered throughout and provided for context.

I. SPORTS TORTS

A. *Participation Cases*

In the 2000 decision, *Kiley v. Patterson*,[2] Lori Kiley, playing second base, sued for injuries to her knee after colliding with Steven Patterson during a coed, recreational softball game.[3] The Supreme Court of Rhode Island held that the duty of care owed by the athletic event participants to each other during a sport activity is not measured by ordinary negligence.[4] Instead, for a participant-plaintiff to prevail, the party must prove willfulness or recklessness on the part of the other participant.[5] According to the Rhode Island Supreme Court, the trial court (Superior Court) did not actually determine if Patterson's slide was merely negligent or if he acted in *reckless disregard* of injuring Kiley when he slid into her.[6] Put differently, there remained an issue as to whether Patterson executed a "take-out slide" in violation of the rules of baseball and softball.[7] The Supreme Court remanded the case for a trial accordingly to make this determination.[8]

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2. Kiley v. Patterson, 763 A.2d 583 (R.I. 2000).

3. *Id*. at 584 ("Presumably, he sought to break up a possible double play and force out at second base. In throwing himself into a slide, however, Patterson raised at least one of his feet high enough off the ground to cause it to collide with Kiley's knee as he slid into second base.").

4. *Id*. at 585 (citing Stanley L. Grazis, Annotation*, Liability of Participant in Team Athletic Competition for Injury to or Death of Another Participant*, 55 A.L.R. 5th 529, 537 (1998).

5. *Kiley*, 763 A.2d at 585.

6. *See id*. at 587.

7. *See id*. at 584.

8. *Id*. at 587.

While *Kiley* has had minimal legal impact outside of Rhode Island,[9] this decision is in-line with most other states by applying the "reckless disregard" standard as the appropriate standard in these types of recreational and sporting cases involving injuries between participants themselves.[10] This standard is well-established and traces its roots to the classic Illinois soccer case *Nabozny v. Barnhill*,[11] in which a soccer goalkeeper was kicked in the head after catching the ball inside the penalty zone. That court held the defendant had a duty to refrain from conduct proscribed by safety rules and could be liable for deliberate, willful or reckless disregard for safety of others.[12] A minority of courts, however, use a negligence standard rather than the reckless disregard standard as in *Kiley*.[13]

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9. Of the 19 citing decisions as offered by a Lexis Advance® search, only five references were from other states, including: Connecticut, Iowa, Maryland, and Maine (last conducted Oct. 28, 2021).

10. *See, e.g.,* Erica K. Rosenthal, *Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play*, 72 FORDHAM L. REV. 2631, 2647-2648 (2004) ("Most courts hold that a defendant's conduct must be at least reckless before the plaintiff can recover for his injuries. Thus, even if negligence is proven, no liability will attach."); *see also* RESTATEMENT (THIRD) OF TORTS, *Liability for Physical and Emotional Harm*, § 2 (AM. L. INST. 2010) (referencing the decision and others, "Comment b. Significance. Cases recognizing a recklessness standard of liability for harm caused during recreational and sporting activities include Knight v. Jewett, 834 P.2d 696 (Cal. 1992) (coed touch football); Jaworski v. Kiernan, 696 A.2d 332 (Conn. 1997) (coed soccer); Hoke v. Cullinan, 914 S.W.2d 335 (Ky. 1995) (tennis); Gray v. Giroux, 730 N.E.2d 338 (Mass. App. Ct. 2000) (golf); Ritchie—Gamester v. City of Berkley, 597 N.W.2d 517 (Mich. 1999) (ice skating at ice arena); Ross v. Clouser, 637 S.W.2d 11 (Mo. 1982) (slow-pitch soft-ball); Dotzler v. Tuttle, 449 N.W.2d 774 (Neb. 1990) (pickup basketball); Schick v. Ferolito, 767 A.2d 962 (N.J. 2001) (golf); Marchetti v. Kalish, 559 N.E.2d 699 (Ohio 1990) (game of "kick the can"); Kiley v. Patterson, 763 A.2d 583 (R.I. 2000) (coed soft-ball); Monk v. Phillips, 983 S.W.2d 323 (Tex. App. 1998) (golf).").

11. *See* Nabozny v. Barnhill, 334 N.E.2d 258, 260-61 (Ill. App. Ct. 1975). The *Kiley* decision cites *Nabozny* at 586.

12. For a Rhode Island soccer case in which a high school soccer player was seriously injured by a water drain that was partially covered by grass and just out of bounds from the field itself, *see* Morales v. Town of Johnston, 895 A.2d 721, 731 (R.I. 2006) (holding "that Johnston owed the plaintiff a special duty of care to protect her from a dangerous condition on the athletic field. We are satisfied that a jury, based on this record, reasonably could find Johnston liable for negligently allowing a dangerous condition on its premises and negligently failing to warn plaintiff of this danger.").

13. *See* Rosenthal, *supra* note 10, at 2653 (citing LaVine v. Clear Creek Skiing Corp., 557 F.2d 730, 735 (10th Cir. 1977); Babych v. McRae, 567 A.2d

Rhode Island has addressed negligence issues involving athletic participants in other cases as well. For example, in the 1975 decision *Salk v. Alpine Ski Shop, Inc.*,[14] the Rhode Island Supreme Court denied a plaintiff-skier's appeal of a Superior Court's directed verdict against the seller and manufacturer of ski bindings.[15] The defendant installed and adjusted the ski bindings according to plaintiff's height, weight, and skiing ability.[16] Though the equipment worked properly on four separate occasions, the fifth resulted in the plaintiff breaking his leg after falling, attributing the harm to the bindings which should have released but failed to do so.[17]

Unfortunately for plaintiff Burton Salk, the Rhode Island Supreme Court held in favor of the directed verdict for the defendants because it agreed that Salk failed to demonstrate that the bindings were adjusted improperly, that he met the requisite speed for the bindings to release, or that the failure to release caused the injury itself.[18] The Court opined that Salk failed to produce evidence accordingly, and that his inference of the harm resulting from the failure of the bindings to release "becomes mere conjecture and speculation."[19] Thus, the Court affirmed that the trial court judge did not err in granting the motion for a directed verdict.[20]

1269, 1270 (Conn. Super. Ct. 1989); Duke's GMC, Inc. v. Erskine, 447 N.E.2d 1118, 1124 (Ind. Ct. App. 1983); Auckenthaler v. Grundmeyer, 877 P.2d 1039, 1043-44 (Nev. 1994); Lestina v. W. Bend Mut. Ins. Co., 501 N.W.2d 28, 33 (Wis. 1993)).

14. Salk v. Alpine Ski Shop, Inc., 342 A.2d 622 (R.I. 1975).

15. *Id*. at 624.

16. *Id*. at 624.

17. *Id*. (offering that the complaint against Alpine and Cubco, the manufacturer, included eight counts of liability to include breaches of express and implied warranties, strict liability and negligence).

18. *Id*. at 625.

19. *Id*. (stating, "A plaintiff may not rely on conjecture or speculation to establish the essential elements of his case, and thus the trial justice did not err in directing a verdict on this count.).

20. *Id.* (authoring, "In the instant case, plaintiff did not allege that had he been warned of the inevitable dangers of skiing, he would not have skied; nor did he allege that he would have purchased other bindings and that other bindings would have prevented his injury. Quite to the contrary, the record indicates that despite his knowledge of the risks involved in the sport, plaintiff has continued to ski. Even viewing this evidence in a light most favorable to the plaintiff, we cannot find any grounds on which a jury would conclude that the alleged defect caused plaintiff's injury."). Today, Rhode Island does have a

Two other participation cases are worthy of exploration in Rhode Island sports law. In the 1983 decision in *Fiske v. MacGregor*,[21] high school football player Kelly Fiske was left a quadriplegic after unsuccessfully attempting to make a first-half, touchdown-saving tackle in a 1974 football game.[22] A year later, on September 22, 1975, Kelly filed a lawsuit, claiming in negligence, breach of implied warranty, and strict liability and that the injury was caused by the defective design of the football helmet by MacGregor Manufacturing Company.[23] The lawsuit also claimed that his injury was due to the negligent coaching and supervision by the varsity football coach of Cranston East and the Cranston School Committee."[24]

After six years of discovery and a twenty-one day trial involving thirty-six witnesses, the jury ruled in favor of the coach and committee.[25] However, the same jury found that MacGregor was liable under strict liability and breach of implied warranty attributing forty percent fault to Kelly and sixty percent fault to MacGregor.[26] This comparative fault analysis reduced the jury award of $3,500,000 by forty percent resulting in a verdict of $2,100,000 plus interest.[27] Both sides appealed the decision, but the Supreme Court of Rhode Island affirmed.[28]

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statutory framework for ski-area operators and skiers. *See* Responsibility and Liability of Ski Operators and Skiers, 41 R.I. GEN. LAWS § 8-1 to 8-4 (2019).

21. Fiske v. MacGregor, 464 A.2d 719 (R.I. 1983).

22. *See id*. at 721 (offering that after the collision, Kelly "lay motionless on the ground, suffering from a spinal cord injury that rendered him permanently quadriplegic.").

23. *Id*. Throughout the decision, the court noted that the issue of whether the design of the face mask was defective was a proper question for the jury, and expert witnesses were offered by both parties. Accordingly, the court affirmed that the denial of a motion for a new trial was correct, stating "…we are of the opinion that the demonstrations, along with the conflicting testimony of the parties' experts, presented factual issues that were correctly left for the jury to decide. The trial justice did not overlook or misconceive material evidence, nor was he otherwise clearly wrong in denying defendant's motion for a new trial." *Id*. at 724-25.

24. *Id*. at 721.

25. *Id*.

26. *Id*.

27. *Id*.

28. *Id*. at 729 ("[W]e feel that the application of comparative-negligence principles to strict liability and implied warranty achieves a fair and equitable

Cases involving sport equipment, such as football helmet cases, often result in mixed decisions.[29] As in negligence cases, the results rest on jury decisions and expert testimony as to whether a manufacturer produced a helmet that was defective either in warning, design, or the manufacturing process.[30] The *Fiske* decision, like *Kiley*, discussed *supra*, is referenced in the Restatement Third of Torts.[31]

Finally, in *Schultz v. Foster-Glocester Reg'l Sch. Dist.*,[32] the Rhode Island Supreme Court reversed summary judgment for the defendants and held that Patricia Schultz, a fourteen-year-old cheerleader from Ponaganset Middle School, could sue Foster-Glocester Regional School District after a "basket-toss" maneuver went wrong as she missed the mat and injured her elbow.[33] On December 27, 1996, the lawsuit alleged that Foster-Glocester "was negligent in failing to properly train, supervise, instruct, provide proper equipment and provide proper post-injury treatment for Patricia during and after cheerleading practice."[34]

Despite the trial court finding that no special duty was owed to the cheerleader, and, in fact, the public-duty doctrine provided immunity, the Supreme Court of Rhode Island disagreed, vacating

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result in the apportionment of damages."). As of June 18, 2019, Lexis Advance® search demonstrates fifty-four citing decisions of the case.

29. *See* Adam Epstein, *Sales and Sports Law*, 18 J. LEGAL ASPECTS OF SPORT 67, 80 (2008).

30. *Id*. (referencing the *Fiske* decision and others including Gentile v. MacGregor Mfg. Co., 493 A.2d 647 (N.J. Super. 1985); Eldridge v. Riddell, Inc., 626 So. 2d 232 (Fla. Ct. App. 1993); Bell Sports, Inc. v. Yarusso, 759 A.2d 582 (Del. 2000).

31. *See* RESTATEMENT (THIRD) OF TORTS, *Products Liability*, § 17 (2010) (cited in comments a, "For authority supporting the proposition that the majority of courts utilize comparative fault to reduce the recoveries of products liability plaintiffs, see…" and d, "Some courts take the position that classic assumption of the risk is a total bar to a products liability action.").

32. Schultz v. Foster-Glocester Reg'l Sch. Dist., 755 A.2d 153 (R.I. 2000).

33. *Id*. at 154. The Supreme Court provided, "Patricia said she went to the school nurse who, after manipulating the injured elbow, sent her back to practice. According to Patricia, she then continued to participate in practice, performing what she described as painful physical activities until she stopped and went home. Patricia, in her answers to interrogatories, stated that as a result of her fall, she suffered a 100 percent displaced radial head fracture of her right elbow."

34. *Id*. at 155.

summary judgment and remanding the case for trial.[35] The court stated:

> In the instant case, it is clear that the school district was aware of Patricia, and knew of her cheerleading exploits. Patricia was both a student at the school and a member of the cheerleading squad. Further, the squad was composed of a small group of cheerleaders that had been practicing together for months; clearly the cheerleading coach knew of, and engaged in a relationship with, Patricia. Thus, we are satisfied that Patricia's injury was sufficiently foreseeable to trigger the special-duty doctrine and ultimately liability on the part of the school district. Although there may have been some risk, there is always risk involved in cheerleading maneuvers. However, the particular maneuver in this case may well involve the doctrine of assumption of the risk. This doctrine cannot be applied in the context of summary judgment, and must be submitted to the trier of fact.[36]

In sum, Rhode Island provides just a few sports law participation cases involving claims of negligence and other legal theories. These cases do not otherwise appear to be especially unique, though the 1970s *Fiske* football helmet and face-mask decision was noteworthy for its era and length, involving various other legal claims and a large jury verdict against a prominent manufacturer despite comparative negligence principles reducing the judgment by forty percent even under the theories of breach of implied warranty and strict liability.[37] As noted by one author as a result of the *Fiske* decision, "the law was established regarding the application of

35. *Id*. at 156 (remanding "for a trial on the merits relating to the question of assumption of the risk by the minor.").

36. *Id*.

37. *See, e.g*., Brian James Mills, *Football Helmets and Products Liability*, 8 SPORTS LAW. J. 153, 167-68 (2001); *see also* Shea Sullivan, *Football Helmet Product Liability: A Survey of Cases and Call for Reform*, 3 SPORTS LAW. J. 233, 254-55 (1996); Virginia Graziani M.D. & Samuel D. Hodge Jr., *A Primer on Spinal Cord Injuries-A Medical/Legal Overview*, 31 TEMP. J. SCI. TECH. & ENVTL. L. 205, 234-35 (2012).

comparative negligence and, if applicable, the assumption of the risk defense in a products liability context."[38]

B. *Flying Objects*

For years, the issue of spectator safety at baseball games has been part of the sports law discussion.[39] In 2019, for example, the Chicago White Sox became the first Major League Baseball (MLB) team to extend protective netting from foul pole to foul pole after outcry over continuous spectator injuries at MLB ball parks.[40] In fact, more than 100 years prior in Rhode Island, the Providence Grays of the National League (1879) became the first professional team to install netting behind home plate at all.[41] Two Rhode Island-related flying object cases are worth exploring though case law related to foul balls and other objects appears to be relatively rare and old in the state.[42]

First, in *Reid v. R.I. Co.*,[43] the plaintiff:

> [O]n the second day of August, 1902, was a passenger upon one of the defendant's cars running on Weeden street in the

38. *See* Jack Mahoney, Tribute to Joseph A. Kelley, 69 RHODE ISLAND B. J. 19 (2020) ("We lost a legal giant in May of this year. Joseph A. Kelly passed at the age of 94. His elite legal career extended over 65 years. If there was a litigation hall of fame Joe would have been inducted unanimously on the first ballot.").

39. *See* Adam Epstein, *Teaching Torts with Sports*, 28 J. LEGAL STUD. EDUC. 117, 119-120 (2011); *see also* Adam Epstein, SPORTS LAW 124 (2013).

40. Katherine Acquavella, *White Sox Will Become First MLB Team to Extend Protective Netting All the Way to the Foul Poles*, CBS SPORTS (June 18, 2019), https://www.cbssports.com/mlb/news/white-sox-will-become-first-mlb-team-to-extend-protective-netting-all-the-way-to-the-foul-poles/ [https://perma.cc/MJ6V-9D3C].

41. *See* Christine Van Dusen, *Why Baseball is America's Most Dangerous Spectator Sport*, WEEK (Aug. 31, 2014), https://theweek.com/articles/444131/why-baseball-americas-most-dangerous-spectator-sport [https://perma.cc/FAG5-QPXP].

42. *Compare* James v. R.I. Auditorium, Inc., 60 R.I. 405, 199 A. 293 (1938) (woman struck by flying hockey puck while witnessing her first professional hockey game was justified in believing her seat was reasonably safe from danger), *with* Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 376 A.2d 329 (1977) (woman struck in face by hockey puck during professional game assumed as a matter of law risk of injury by flying pucks, because she had "attended numerous hockey games and was familiar with the flying-puck syndrome.").

43. Reid v. R.I. Co., 67 A.2d 328 (R.I. 1907).

> city of Pawtucket. It was necessary for this car to stop on Weeden street until a certain hour, to permit another car to pass. On this occasion, instead of stopping the car at the usual place, which was further down the street, the conductor stopped the car directly opposite the home plate of a ball field where a game of baseball was in progress, as it appears from his own evidence, that he might watch the game. Two or three minutes after the car was stopped a foul ball struck the head of the plaintiff, who was sitting in the car with her back to an open window, and injured her more or less severely. This suit is brought to recover damages for the alleged results of the blow.[44]

A jury awarded Flora Reid $2,750.00.[45] The Supreme Court of Rhode Island stated, "it was a breach of the defendant's duty to the plaintiff to stop the car unnecessarily in a place of danger, and all the evidence in the case agrees with our common knowledge that a position behind the home plate of a baseball field while a game is going on is a position of great danger.[46]

In a more contemporary case, *Hennessey v. Pyne*,[47] the issue before the Supreme Court of Rhode Island was also its first sentence in its first paragraph:

> When hitting a golf ball, does a golfer owe any duty to persons living in residences immediately adjacent to the golf course? If so, is that duty breached when the golfer unintentionally hits a ball that veers off the course, strikes a resident on her own property, and injures her? This appeal from a summary judgment requires us to tee off on these questions for the first time in Rhode Island.[48]

Eileen Hennessey lived in a condominium next to a golf course and was struck in the head from a shot by the defendant Michael G. Pyne, the assistant golf-pro at Louisquisset Golf Club, who hit from the eleventh hole tee.[49] The Superior Court judge "concluded that as a golfer engaging in a lawful and intended use of a golf course,

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44. *Id*. at 328-29.
45. *Id*. at 329.
46. *Id*. at 330.
47. Hennessey v. Pyne, 694 A.2d 691 (R.I. 1997).
48. *Id*. at 693.
49. *Id*. at 693-94.

Pyne owed no duty to Hennessey and that therefore summary judgment should enter against her on her negligence cause of action."[50] The Supreme Court heard Hennessey's appeal, affirmed the lower court's judgment related to the nuisance and assault and battery claims including her husband's loss-of-consortium claim, but reversed it relative to the negligence claim.[51] Specifically, the Court established the following rule:

> The general rule in this type of case is that the mere fact that a person is struck by a golf ball driven by a person playing the game of golf does not constitute proof of negligence on the part of the golfer who hit the ball, and that a golfer is only required to exercise reasonable care for the safety of persons reasonably within the range of danger of being struck by the ball . . . . Nonetheless, when . . . a golfer knows that residences are located within striking distance of where the golfer stands to play the ball, the risk reasonably to be perceived is such that the golfer has a duty to exercise reasonable care for the safety of those people who may be located within that range.[52]

The case was remanded to the Superior Court.[53] Interestingly, the Supreme Court referenced Mark Twain, H.L. Mencken, and humorist A.P. Herbert in the second paragraph of its decision.[54] Also of interest, all these Rhode Island cases discussed above involved female spectators who were hit by flying objects.

Indeed, the *Reid* case is now over a century old, it has rarely been cited and of those decisions all are from other Rhode Island cases. It has little impact on sports law either within or beyond the

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50. *Id*. at 694.

51. *Id*. at 694-95.

52. *Id*. at 698 (citing Ludwikoski v. Kurotsu, 875 F. Supp. 727, 731 (D. Kan. 1995)).

53. *Id*. at 701.

54. *Id*. at 693 ("Ever since Mark Twain quipped that golf was nothing more than "a good walk spoiled," the game of golf has continued to excite flamboyant commentary concerning those who ply its greensward. The famed American curmudgeon, H. L. Mencken, once chipped in that if he had his way, "no man guilty of golf would be eligible to any office of trust or profit under the United States." A different but equally difficult lie has been played by humorist A. P. Herbert, who took this shot: "the game of golf may well be included in that category of intolerable provocations which may legally excuse or mitigate behavior not otherwise excusable.").

borders of Rhode Island other than possibly to place the incident in an historical context of one of the country's first foul ball cases resulting in an injured plaintiff.[55] On the other hand, *Hennessey* has been cited by forty-seven decisions and twenty-five other sources since its publication in 1997.[56] The Restatement Third of Torts cites *Hennessey* in two places related to liability.[57] Still, the case seems to be in line with other golf ball injury cases that historically have used a reasonable care—as opposed to *recklessness*—standard for liability.[58]

II. SPORT AND GENDER DISCRIMINATION ISSUES

The issue of whether boys may play on girls' teams and vice-versa has been addressed by various states with differing results.[59] Boys have been excluded from participating in girls' field hockey in high school in Rhode Island, along with Maine and New Jersey.[60] The issue related to whether boys can play on girls' field hockey teams in Pennsylvania appears vibrant still today, and boys may

55. As of Apr.12, 2021, a Lexis Advance® search demonstrates that the case has 13 citations, all by the Rhode Island Supreme Court from 1914-1975 and has no other citing sources.

56. As of Apr. 12, 2021, Lexis Advance® search. This decision was analyzed in *1997 Survey of Rhode Island Law: Case: Tort Law*, 3 ROGER WILLIAMS U. L. REV. 563 (1998).

57. *See* RESTATEMENT (THIRD) OF TORTS, *supra* note 10, at *Liability for Physical and Emotional Harm*, §§ 3,18 (2010).

58. *See* Gregory M. Dexter, *Tort Liability for Golf Shots: Time to Reject the Recklessness Standard and Respect the Rules of Golf*, 9 DEPAUL J. SPORTS L. CONTEMP. PROBS. 1, 3-4 (2012) (expressing concern and arguing against, however, over a disturbing trend by some courts to utilize a recklessness as opposed to reasonable care standard. "Indeed, the current trend among courts is to adopt the recklessness standard-the majority rule in the context of recreational sports generally-to golf. This trend is a relatively new development: before 1990, no court required golfers to plead more than ordinary negligence to recover for injuries sustained by an errant golf ball. The negligence standard requires golfers to use ordinary, or reasonable care. At its core, this standard imposes a duty on golfers to give timely and adequate warning, customarily by yelling "fore," before hitting if another individual is within the "foreseeable zone of danger." The author continues, "The rationales for the recklessness standard-a standard that has its roots in sports where physical contact is the norm-simply do not hold up when applied to golf. Occupying an uncertain penumbra between negligence and intent, recklessness is a nebulous standard incapable of being applied consistently." *Id*.).

59. EPSTEIN, *supra* note 39, at 212-14.

60. *Id*.

indeed play on a "mixed gender" sports team as long as four criteria are met.[61] In Massachusetts, boys may play on the girls' team.[62]

Some states opine that field hockey is a contact sport and therefore boys may be excluded—at least under federal law—under the contact sports exception to Title IX.[63] Put differently, this means that schools may discriminate (i.e., exclude) between the genders in the statutorily listed sports of boxing, wrestling, rugby, ice hockey, football, basketball, and other sports the purpose or major activity of which involves bodily contact.[64]

What follows is a summary of Rhode Island cases which addressed gender-related sports law issues under state and federal law. In fact, the solid history of gender-related cases and issues involving Rhode Island decisions and courts is where the state makes its mark in sports law.

A. *Kleczek and Field Hockey*

In *Kleczek v. R.I. Interscholastic League, Inc.*,[65] Brian Kleczek (through his parents) sought a preliminary injunction based on the Equal Protection Clause of the U.S. Constitution,[66] Title IX of the Education Amendments of 1972,[67] the anti-discrimination laws of

61. *See* Ross Lippman, *Palmyra School Not Allowing Boy to Play Field Hockey*, ABC27.COM (Sept. 20, 2017), https://www.abc27.com/news/palmyra-school-not-allowing-boy-to-play-field-hockey/ [https://perma.cc/TWH3-WQ98] (offering the four criteria under the PIAA constitution and bylaws).

62. *See* Cam Smith, *The War against Boys Playing Feld Hockey is Picking up Steam in Mass.*, USA TODAY HIGH SCH. SPORTS (Nov. 16, 2018), https://usatodayhss.com/2018/the-war-against-boys-playing-field-hockey-is-organizing-in-mass [https://perma.cc/YVC8-AGDE] (writing, "Massachusetts was the first state to rule it was unconstitutional to bar a player from competing based solely on gender some three decades ago.").

63. ATHLETICS, 34 C.F.R. §106.41(b) (2019). This, then, invites a discussion or debate as to whether sports such as soccer, lacrosse, volleyball, baseball, and so on, are indeed contact sports and therefore members of the opposite gender may be excluded. At the very least, it would not be inappropriate for Congress to update the statute to include other sports such as those just aforementioned in this footnote especially since the federal statute's legislative history began in 1972).

64. *Id.*; *see also* EPSTEIN, *supra* note 39, at 212-14.

65. 768 F. Supp. 951 (D.R.I. 1991) [Kleczek I].

66. U.S. CONST. amend. XIV.

67. 20 U.S.C. § 1681.

Rhode Island,[68] and the state constitution[69] to allow him to participate on his high school girls' field hockey team because there was no boys' team.[70] Brian's parents sought a waiver, but the Rhode Island Interscholastic League (RIIL) refused to let him play on the girls' team.[71] The United States District Court for the District of Rhode Island denied the preliminary injunction, opining:

> In sum, plaintiffs have not shown that they are likely to succeed on the merits of their Title IX claim for three reasons: (1) the programs and activities of the defendants in question do not receive federal funds; (2) the overall athletic opportunities for males at South Kingstown High School have not been limited; and (3) the evidence indicates that field hockey is not a "non-contact" sport.[72]

Not to be denied, the parents then brought the action in state Superior Court, and the trial justice them an injunction, determining that a "strict scrutiny" review should be applied to gender classifications.[73] The trial justice concluded that the league had no compelling reason not to permit males to compete in female sports.[74]

However, on appeal, the Supreme Court of Rhode Island vacated the injunction and remanded the case to the Superior Court,[75] opining that even though there is state action, *intermediate scrutiny* was more appropriate in gender cases.[76] The Court provided some interesting language:

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68. 16 R.I. GEN. LAWS § 38-1.1.
69. R.I. CONST. ART. I, § 2.
70. 768 F. Supp. at 952-53.
71. *Id*. at 953.
72. *Id*. at 956.
73. Kleczek v. R.I. Interscholastic League, Inc. (*Kleczek II*), 612 A.2d 734, 735 (R.I. 1992).
74. *Id*.
75. *Id*.
76. *Id*. at 737 ("The next level of analysis is called intermediate scrutiny. It is undisputed that intermediate scrutiny is applied to gender classifications. Intermediate scrutiny requires "that classifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives" in order to be constitutional . . . classifications by gender deserve intermediate scrutiny because most, although not all, gender classifications by the state are not justified. Thus, intermediate scrutiny is applied, and classification by gender will only be upheld if the state can

> We are also of the opinion that intermediate-scrutiny is particularly appropriate for gender classifications that effect athletic opportunities for boys and girls. Because of innate physiological differences, boys and girls are not similarly situated as they enter athletic competition. Some classifications based on gender may therefore be justified. The classifications can reflect reasoned judgments rather than prejudice.[77]
>
> The tradition of having separate teams is based on a realization that "high school boys are substantially taller, heavier and stronger than their girl counterparts." . . . the classifications are based on the realization that distinguishing between boys and girls in interscholastic sports will help promote safety, increase competition within each classification, and provide more athletic opportunities for both boys and girls.[78]
>
> In the present case under the standard we adopt, it must be determined whether the league's rule that prevents boys from participating in girls' interscholastic teams serves important governmental objectives and is substantially related to those objectives. Although it will be for the trial justice to determine this issue, we would comment on what constitutes an important governmental interest. We are of the opinion that the promotion of safety and the preservation of interscholastic athletic competition for both boys and girls constitute an important governmental interest.[79]

The plaintiffs lost again.[80]

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demonstrate an important government objective." citing Craig v. Boren, 429 U.S. 190, 197 (1976)).

77. *Kleczek II* at 738.

78. *Id*. at 739 (citing Petrie v. Ill. High Sch. Ass'n, 394 N.E.2d 855, 861 (Ill. App. 1979)).

79. *Id*.

80. *See also* William Geoghegan, *Field of His Own*, THE INDEP RI. (Feb. 4, 2016), http://www.independentri.com/independents/article_706ef923-f6b7-52f8-b2e6-61bc053cc715.html [https://perma.cc/Y8MN-YEGC] (authoring that Tommy Meyer of South Kingstown, Rhode Island, started playing field hockey with his sister but cannot play on a high school team due to RIIL rules. Also, Meyer may have been the first boy to ask for a waiver in Rhode Island since Brian Kleczek).

B. *Gomes and Volleyball*

The 1992 *Kleczek* decision cited another earlier federal case from the 1970s in *Gomes v. R.I. Interscholastic League*,[81] in which the District Court held that league actions constituted *state action* within the purview of 42 U.S.C.S. § 1983.[82] Donald M. Gomes, a volleyball player on an all-male volleyball team at his high school in Pennsylvania, was excluded from competition when he transferred to Rogers High School in Newport, Rhode Island for his senior year.[83] Gomes, similar to Kleczek, sought an injunction to play on the girls' team (in this case volleyball) since the school offered no separate male team.[84] Rogers High School allowed Gomes to join and practice with the team but did not use him in RIIL competition.[85]

The District Court ruled in Gomes's favor, but the First Circuit Court of Appeals vacated the decision.[86] Indeed, the District Court rendered its decision on May 1 to accommodate Gomes, but the First Circuit was persuaded to stay the implementation of the order as it could disrupt the remainder of the season.[87] The next month, on June 8, the Court of Appeals heard arguments but the season was already done and Gomes was about to graduate from the high

81. Gomes v. R.I. Interscholastic League (*Gomes I*), 469 F. Supp. 659, 661 (D.R.I. 1979), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

82. *Id*. at 661 (claiming violations of Title IX and the Fourteenth Amendment as well).

83. *Id*. at 660-61.

84. *See id*. at 661. The court noted that Donald had played on an all-boys volleyball team in Harrisburg, Pennsylvania, before transferring, that the RIIL did not provide volleyball competition for males and would disqualify any team that did. Technically, though some Rhode Island high schools fielded all-male volleyball teams, they only played outside the jurisdiction of RIIL, and Rogers High was not one of those schools. *Id*.

85. *See id*. at 661.

86. Gomes v. RI Interscholastic League (*Gomes II*), 604 F.2d 733, 736 (1st Cir. 1979).

87. *Id*. at 735.

school.[88] The case was dismissed as moot, and the final decision was rendered on August 31, 1979.[89]

C. *Fortin and Little League Baseball*

In *Fortin v. Darlington Little League, Inc.*,[90] ten-year-old Allison "Pookie" Fortin was denied the opportunity to try out for Little League baseball because of her gender. The District Court ruled that with the public playing fields that there was a sufficient claim of state action under the Fourteenth Amendment and 42 U.S.C. § 1983,[91] but nonetheless it concluded that baseball was a contact sport and therefore it could exclude her from competing.[92]

The First Circuit Court of Appeals reversed and ruled for Fortin.[93] The appellate court held that the district court's finding that injury would undoubtedly occur owing to the physical differences between girls and boys was unsupported and did not constitute a convincing factual rationale for the sex-based classification that went beyond "archaic and overbroad generalizations" about the different roles of men and women.[94]

> It seems likely that as girls and boys mature, greater physical differences affecting athletic ability exist. But the evidence is essentially uncontroverted that the years 8-12 are those during which girls come close to matching boys in size

88. *See id*. at 736.

89. *Id.* The court noted that Gomes only sued on behalf of himself and not as a class (action) representative. The court also acknowledged the speed to which it reached its jurisdiction, stating:

> The Interscholastic League's 1979 volleyball season was scheduled from March 27 until approximately May 24. Gomes filed his complaint around March 28 and filed an amended complaint on April 2. The district court held a hearing on Gomes' request for a preliminary injunction on April 4, issued its opinion on May 1, and entered its order on May 3. We stayed implementation of that order pending appeal and set argument on the merits for the earliest date practicable. *Id.* at 735 n. 4.

90. *Fortin* I 376 F. Supp. 473, 474 (D.R.I. 1974), *rev'd* 514 F.2d 344 (1st Cir. 1975).

91. *Fortin I* at 478.

92. *Id*. at 479. ("This Court takes judicial notice that baseball is a contact sport and that at times such contacts are violent."). *Id.*

93. Fortin v. Darlington Little League, Inc. (*Fortin* II), 514 F.2d 344, 344 (1st Cir. 1975).

94. *Id*. at 348 (citing Schlesinger v. Ballard, 419 U.S. 498 (1975)).

> and physical potential. The other reasons cited by Darlington, the alleged preferences of coaches and players, the sense of what is or is not fit for girls to do, and the like, seem to us inadequate reasons to deny Pookie an opportunity to play on equal terms. These fall more under the heading of those "archaic and overbroad generalizations" rejected by the Supreme Court.[95]

The Court of Appeals reversed and ordered that Fortin was allowed to play so long as Darlington Little League continued to use City of Pawtucket parks and fields.[96]

The *Kleczek* decision has had an impact far outside of Rhode Island and in fact it was cited in the first footnote of the 2001 U.S. Supreme Court decision in *Brentwood Acad. v. Tenn. Secondary Sch. Ath. Ass'n*,[97] among a host of other state court decisions that have held that state high school athletic associations may be considered *state actors*.[98] More recently, the Eighth Circuit Court of Appeals cited *Kleczek* as authority to reverse an order of the U.S. District Court for the District of Minnesota and remand the case back to that court to issue a preliminary injunction in favor of the high school boys who wanted to participate on girls competitive

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95. *Id*. at 351.

96. *Id*. (Note that neither the District Court not the Court of Appeals mentioned Title IX in either decision and that law did not go into effect until 1975. Prior to passage of Title IX, cases were argued under alleged violations of the Equal Protection Clause.).

97. Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n, 531 U.S. 288, 294 n.1 (2001) ("A number of other courts have held statewide athletic associations to be state actors. Griffin High School v. Illinois High School Assn., 822 F.2d 671, 674 (CA7 1987); Clark v. Arizona Interscholastic Assn., 695 F.2d 1126, 1128 (CA9 1982), cert. denied, 464 U.S. 818, 78 L. Ed. 2d 90, 104 S. Ct. 79 (1983); In re United States ex rel. Missouri State High School Activities Assn., 682 F.2d 147, 151 (CA8 1982); Louisiana High School Athletic Assn. v. St. Augustine High School, 396 F.2d 224, 227-228 (CA5 1968); Oklahoma High School Athletic Assn. v. Bray, 321 F.2d 269, 272-273 (CA10 1963); Indiana High School Athletic Assn. v. Carlberg, 694 N.E.2d 222, 229 (Ind. 1997); Mississippi High Sch. Activities Ass'n v. Coleman, 631 So. 2d 768, 774-775 (Miss. 1994); Kleczek v. Rhode Island Interscholastic League, Inc., 612 A.2d 734, 736 (R. I. 1992); see also Moreland v. Western Penn. Interscholastic Athletic League, 572 F.2d 121, 125 (CA3 1978) (state action conceded).").

98. *Id*.

dance teams despite resistance from the Minnesota State High School League.[99]

The *Gomes* decision, cited in fact by *Kleczek*, has had its share of citations as well and from many more states and federal circuits.[100] Still, the merits of the decision appear to hold little precedential value given that Gomes had already graduated, and the case was dismissed as moot.[101] Nonetheless it remains one of the earliest sports law cases to challenge, under the Equal Protection Clause of the Fourteenth Amendment and Title IX, the notion that boys may be prohibited from participating on girls' teams at the interscholastic level for a non-contact sport. The *Fortin* decision has been cited by ten federal circuits and five states in addition to Rhode Island state courts.[102] However, even decades after the three decisions of *Klezcek*, *Gomes*, and *Fortin*, all appear to be a substantial part of the current academic[103] and legal discussion

99. D.M. v. Minn. State High Sch. League, 917 F.3d 994, 1003 (8th Cir. 2019) ("Here, the League does not explain how allowing boys to dance on their schools' competitive dance teams would be unsafe or how it would deprive girls of opportunities to compete. Moreover, Kleczek was decided under the Rhode Island constitution, not the U.S. Constitution. *Id*. at 736. We find the League's asserted other justifications for prohibiting boys from participating on high school competitive dance teams unpersuasive." The boys sought an injunction "under 42 U.S.C. § 1983. The boys alleged that the league violated their rights under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution and under Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-88 (Title IX)." *Id*. at 998.

100. Though the *Kleczek* decision was cited by the U.S. Supreme Court, it remains somewhat insular in that it has only been cited by 1st Circuit and Rhode Island decisions. *Gomes*, on the other hand, has been cited 23 times among nine federal circuits and four states other than Rhode Island as of a Lexis Advance® search as of Nov. 7, 2021.

101. Gomes v. R.I. Interscholastic League (*Gomes I*), 469 F. Supp. 659, 659 (D.R.I. 1979), *vacated as moot*, 604 F.2d 733 (1st Cir. 1979).

102. As reflected by a Lexis Advance® search (last conducted Nov. 7, 2021).

103. See Ray D. Hacke, *"Girls will be Boys, and Boys will be Girls": The Emergence of the Transgender Athlete and a Defensive Game Plan for High Schools that want to Keep their Playing Fields Level-For Athletes of Both Genders*, 18 TEX. REV. ENT. & SPORTS L. 131 (2018) (referencing *Kleczek* and *Gomes*); *see also* Michael J. Lenzi, *Comments: The Trans Athlete Dilemma: A Constitutional Analysis of High School Transgender Student-Athlete Policies*, 67 AM. U.L. REV. 841 (2018); *see also* Scott Skinner-Thompson & Ilona M. Turner, Title IX's Protections for Transgender Student Athletes, 28 WIS. J.L. GENDER & SOC'Y 271, 278-79 (stating, "Courts have also recognized that fears regarding males joining the sport in overwhelming numbers and denying females athletic opportunities are overblown and do not justify the exclusion of

related to the judicial and legislative battles being waged nationwide related to transgender athlete participation at the interscholastic level and whether high school athletes who transition to the other gender may then compete with that gender.[104] The RIIL policy focuses on gender identity as opposed to gender at birth,[105] and the Rhode Island is considered an inclusive state, one of the states in the country that does not require transgender high school athletes to take hormones or undergo sex reassignment surgery in order to participate on the team that fits their gender identity.[106] This transgender participation issue also exists as a contemporary

male participants." The article then explores the *Gomes* decision). For earlier articles that discuss or cite all three cases, *see* Suzanne Sangree, *Title IX and the Contact Sports Exemption: Gender Stereotypes in a Civil Rights Statute*, 32 CONN. L. REV. 381 (2000) (arguing that Title IX's contact sports exception violates equal protection); *see also* Rebecca A. Kiselewich, *Note: In Defense of the 2006 Title IX Regulations for Single-Sex Public Education: How Separate Can Be Equal*, 49 B.C. L. REV. 217 (2008) (suggesting that the single-sex programs promoted under the regulations at that time might be able to withstand judicial scrutiny.).

104. *See* Dan Cancian, *Transgender Athletes are Banned from Sports in These States*, NEWSWEEK (Mar. 12, 2021), https://www.newsweek.com/transgender-athletes-banned-sports-these-us-states-1575659 [https://perma.cc/RMC5-MQ98].

105. *See* Chris Mosier, *High School Policies*, TRANSATHLETE.COM, https://www.transathlete.com/k-12 [https://perma.cc/8UV4-W28G] (last visited Apr. 13, 2021) (providing a state-by-state update and analysis of interscholastic policies and authoring, "The Rhode Island Interscholastic League (RIIL) policy says, 'The RIIL recognizes the value of participation in interscholastic sports for all member school student athletes. The RIIL is committed to providing all student-athletes with equal opportunities to participate in RIIL athletic programs consistent with their gender identity. This policy addresses eligibility determinations for students who have a gender identity that is different from the gender listed on their official birth certificates.'" A link is also provided in order to download the RIIL policy, *RIIL Rules and Regulations–Article 3, § 3: GENDER IDENTITY* (2019-2020), https://13248aea-16f8-fc0a-cf26-a9339dd2a3f0.filesusr.com/ugd/2bc3fc_b3b30dbf9a594d03a5a36814034bdbb5.pdf [https://perma.cc/8A5C-7MDF] (last visited Apr. 13, 2021).

106. *See* Martha Bebinger, *Policies for Transgender High School Athletes Vary from State to State*, WBUR.ORG (May 9, 2016), https://www.wbur.org/commonhealth/2016/05/09/transgender-athletes [https://perma.cc/LQ6Q-4SUP] (authoring that while RIIL rules for transgender males are inclusive relative to other states and that "they can play on any team they chose, according to their ability. But transgender girls, male to female, must request an eligibility hearing and be cleared by a panel before they can play on a girls' team.").

concern or issue not just at the interscholastic level but also at the intercollegiate and Olympic levels of competition.[107]

D. *Cohen v. Brown University*[108]

In 1991, Brown University's decision to end four sports—women's volleyball, women's gymnastics, men's golf, and men's water polo—resulted in one of the most lengthy, important, and influential cases in Title IX history.[109] Brown University said the teams could still compete as club sports, but it was not going to provide university funding anymore.[110] At that time, Brown's student body was comprised of 52% male and 48% female students, though 63 percent of its student-athletes were male.[111] Amy Cohen, a member of the gymnastics team, sued Brown University for its elimination decision.[112]

The District Court issued a preliminary injunction ordering Brown to reinstate the gymnastics and volleyball programs to

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107. *See* Jason Scott, *NCAA 'Unequivocally Supports' Trans Participation*, ATHLETIC BUS. (Apr. 2021), https://www.athleticbusiness.com/governing-bodies/ncaa-unequivocally-supports-trans-participation.html [https://perma.cc/PNR5-RYPW] (quoting the NCAA's position that it is in line with the International Olympic Committee (IOC) and U.S. Olympic and Paralympic Committee (USOPC) policies and that it has a "long-standing policy that provides a more inclusive path for transgender participation in college sports." Scott stated earlier, "The NCAA statement comes as states such as Arkansas, Mississippi and Tennessee have passed legislation aimed at blocking transgender girls from participating in girls' sports, amid other limitations. Similar bills are under consideration in dozens of states.").

108. Cohen v. Brown Univ., 809 F. Supp. 978 (D.R.I. 1992) (*Cohen I*); Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) (*Cohen II*); Cohen v. Brown Univ., 879 F. Supp. 185 (D.R.I. 1995); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997) (all *Cohen III*).

109. *Cohen II*, at 892 (referring to the case as a "watershed case" and yet recognizing that "Brown will never be confused with Notre Dame or the more muscular members of the Big Ten." *Id*. at 891-92); *see also* EPSTEIN, *supra* note 39, at 216.

110. *Cohen II,* at 892.

111. *Id*.

112. *Id*.; *see also* Brown Univ., *Title IX Lawsuit Initiated*, https://www.brown.edu/about/history/timeline/title-ix-lawsuit-initiated [https://perma.cc/7F8U-FKAU] (last visited June 20, 2019) (offering, "In April 1992, Gymnastics co-captain Amy Cohen, Class of 1992, and twelve other Brown female student-athletes brought suit against the University for violation of the 1972 Title IX legislation that stipulated that there be no gender-based discrimination in any federally funded educational activity.").

varsity status pending the resolution of the Title IX claim.[113] The First Circuit Court of Appeals affirmed the preliminary injunction.[114] Characterizing compliance with Title IX as "battleground,"[115] the appellate court recognized that the legal battle centered on the third prong of the 1979 Policy Interpretation of Title IX: whether it can be demonstrated that the interests and abilities of the members of the underrepresented sex have been fully and effectively accommodated,[116] and Brown failed that test.[117] After years of litigation, the case was ultimately appealed to the U.S. Supreme Court which did not grant certiorari.[118]

This impactful case was in the courts for years though ultimately it settled out of court.[119] Brown University was required to

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113. *Cohen II*, at 892 (referencing the District Court decision in *Cohen I*).

114. *Id.* at 907.

115. *Id*. at 897.

116. *Id*. (referencing the Department of Health, Education and Welfare's (HEW) Office of Civil Rights (OCR) policy interpretation of Title IX found published in 44 FED. REG. 71,413 (1979), and mapping "a trinitarian model under which the university must meet at least one of three benchmarks: (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.").

117. *Id*. at 899–900 (criticizing Brown repeatedly and offering, "We think that Brown's perception of the Title IX universe is myopic." *Id*. at 899).

118. In the *Cohen III* litigation [Cohen v. Brown Univ., 879 F. Supp. 185 (D.R.I. 1995); Cohen v. Brown Univ., 101 F.3d 155 (1st Cir. 1996), cert. denied, 520 U.S. 1186 (1997)], the District Court determined that Brown was out of compliance with Title IX and ordered a comprehensive compliance plan first within 120 days and then modified that order to 60 days. It then rejected the plan, entering final judgment on September 1, 1995. Then, on September 27, 1995, it denied Brown's motion for additional findings of fact and to amend the judgment. This led to an appeal. Cohen v. Brown Univ., 879 F. Supp. 185, 187, 214 (D.R.I. 1995); Cohen v. Brown Univ., 101 F.3d 155, 162 (1st Cir. 1996).

119. The settlement is also known as the "Cohen agreement."; *see also* Associated Press, *Brown to Settle Title IX Suit*, N.Y. TIMES (June 24, 1998), https://www.nytimes.com/1998/06/24/sports/brown-to-settle-title-ix-suit.html [https://perma.cc/A8A5-MEZQ]. As of Nov. 7, 2021, a Lexis Advance® search demonstrates 121 citing decisions of the *Cohen III* First Circuit Court of

keep percentage disparity within three-and-a-half percent of the total of women undergraduates.[120] The settlement, known as the *Cohen agreement*, was officially modified on December 15, 2020,[121] but only after Brown University attempted to make controversial athletic program cuts during the COVID-19 pandemic that gained national attention.[122] As a result of the latest settlement in 2020,

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Appeals decision from every federal circuit except the Tenth Circuit, and 438 other citing sources of which 293 are law reviews.

120. *Id.; see also* EPSTEIN, *supra* note 39, at 216. For a thorough discussion of the case and its litigious history, *see, e.g.*, Erin E. Buzuvis, *Survey Says…A Critical Analysis of the New Title IX Policy and a Proposal for Reform*, 91 IOWA L. REV. 821, 864–66 (2006).

121. *See* Brian E. Clark, *Final Court Approval of Brown v. Cohen Settlement Sets 2024 end to Joint Agreement*, BROWN.EDU (Dec. 15, 2020), https://www.brown.edu/news/2020-12-15/settlement [https://perma.cc/3XUB-GBKW]; *see also* Katie Mulvaney, *Judge Approves Gender-equity Settlement with Female Athletes at Brown*, PROVIDENCE J. (Dec. 15, 2020), https://www.providencejournal.com/story/news/courts/2020/12/15/judge-approves-equity-settlement-female-athletes-brown-univ/3904212001/ [https://perma.cc/X9KL-6ZSM] (authoring, "U.S. District Court Chief Judge John J. McConnell Jr. signed off on a proposed settlement reached in September between the Ivy League school and female athletes at Brown who challenged the school's move to cut sports programs this spring. Its terms, hailed by both sides, set August 2024 as the end date to a 1998 joint agreement in the landmark case Cohen v. Brown, a class action lawsuit credited with helping to even the playing field nationwide for men's and women's college sports." Mulvaney continued, "Under the settlement approved Tuesday, Brown will reinstate the varsity women's fencing and equestrian teams-two of the five teams cut-but it will be released from the 1998 agreement that university officials faulted as becoming 'a significant obstacle' to its ability to offer women's and men's teams the competitive experience they deserve.").

122. For the short history of the whirlwind of decisions and events leading up to the new 2020 settlement, *see* Katie Mulvaney, *Emails Show Brown University Wants to Kill 'Pestilential' Agreement Giving Women Equity in Sports*, PROVIDENCE J. (Aug. 27, 2020, 3:37 PM), https://www.providencejournal.com/news/20200827/emails-show-brown-university-wants-to-kill-rsquopestilentialrsquo-agreement-giving-women-equity-in-sports [https://perma.cc/LY55-R5R7]. Noteworthy, in 2020 Brown initially decided to eliminate men's track and field and cross-country teams along with nine other varsity sports. *See, e.g.*, Lincoln Shryack, *Brown Cuts Men's Track & Field/XC*, FLOTRACK.ORG (May 28, 2020), https://www.flotrack.org/articles/6748341-brown-cuts-mens-track-fieldxc [https://perma.cc/9FEN-RXRC] (offering that Brown, with a link to its "Excellence in Brown Athletics Initiative," would transition the eleven sports cut to club status beginning with the 2020-2021 school year but that also coed sailing and women's sailing were upgraded from club to varsity status. This would result in a net reduction from 38 to 29 varsity teams). However, Brown then reversed course on the men's track and field and cross-country teams just a few days later. *See* Li Goldstein, *Men's Track, Field*

today Brown University Athletics fourteen men's sports and nineteen women's sports, with sailing serving as a co-ed sport and listed under both men's and women's sports.[123]

III. STATUTORY SPORTS LAW CONSIDERATIONS

Rhode Island has several sport-related statutes.[124] For example, the criminal offenses under bribery make it a crime to corrupt or attempt to corrupt a sports participant or official with a possible punishment by a fine of not more than one thousand dollars ($1,000), or by imprisonment of not more than seven years, or both.[125] Acceptance of a sports bribe results in the same punishment.[126] In fact, the failure to report such as bribery is an offense itself.[127]

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and Cross Country Reinstated as Varsity Sports, BROWN DAILY HERALD (June 9, 2020, 8:29 PM), https://www.browndailyherald.com/2020/06/09/mens-track-field-cross-country-reinstated-varsity-sports/ [https://perma.cc/A6JU-YJJF]; *see also* Greta Anderson, *Brown University Athletic Cuts Challenged in Court*, INSIDER HIGHER ED (July 1, 2020), https://www.insidehighered.com/quicktakes/2020/07/01/brown-university-athletic-cuts-challenged-court [https://perma.cc/FV88-98QZ]; *see also* Greta Anderson, *Brown Strikes a Deal*, INSIDE HIGHER ED (Sept. 18, 2020), https://www.insidehighered.com/news/2020/09/18/brown-will-reinstate-two-womens-teams-title-ix-agreement-end [https://perma.cc/PY7R-UTN4] (reaching a settlement agreement in to end the gender equity consent agreement but in which Brown would also reinstate women's varsity teams in equestrian and fencing though women's golf, squash and skiing would not. Still, according to the settlement, Brown is required to restore more women's teams if it restores any more men's teams, also preventing any new men's teams before 2024).

123. Brown Univ. Athletics, *Sports*, https://brownbears.com/ [https://perma.cc/3Y5Z-QRBH] (last visited Apr. 13, 2021).

124. *See Organization*, R.I. INTERSCHOLASTIC LEAGUE, https://www.riil.org/page/2997 [https://perma.cc/52TL-3X36] (last visited Nov. 7, 2021) (the bylaws and rules related to state interscholastic competition at Rhode Island Interscholastic League (RIIL)). For example, students who are home schooled may participate in RIIL high school sports if five conditions are met. *Eligibility*, R.I. INTERSCHOLASTIC LEAGUE, https://www.riil.org/page/3033 [https://perma.cc/R7QC-2CM5] (last visited Nov. 7, 2021).

125. 11 R.I. GEN. LAWS § 7-9 (2020) (Corruption of sports participant or official) (referencing various sports including jai alai matches and horse or dog races).

126. 11 R.I. GEN. LAWS § 7-10 (2020) (Acceptance of bribe by sports participant or official).

127. 11 R.I. GEN. LAWS § 7-12 (2020) (Failure to report corruption of sports participant or official) ("Any person violating the provisions of this section shall be guilty of a misdemeanor and, upon conviction, shall be punished by a fine

Professional boxers (and boxing officials) must first obtain a license from the state.[128] Though it falls under Rhode Island General Laws Title 41, *Sports, Racing and Athletics*, Chapter 5, *Boxing and Wrestling* of its General Laws, Rhode Island recognizes that contemporary professional wrestling most often is scripted and therefore it allows the state's division of gaming and athletics—at its own discretion—to waive a "professional wrestler" from the licensing requirement in the case of wrestling as a form of pre-determined entertainment."[129]

Under Rhode Island General Laws Title 5, *Businesses and Professions*, Rhode Island has adopted the Uniform Athlete Agents Act.[130] Failure to comply with that framework, when an athlete agent may contact a student athlete, could result in a misdemeanor violation.[131] Educational institutions may also sue the agent civilly for damages caused by a violation of the chapter.[132]

Rhode Island has a sports concussion statute known as the School and Youth Programs Concussion Act (SYPCA).[133] In 2014, Rhode Island amended SYPCA to direct the department of education and department of health to promulgate guidelines for teachers and teachers' aides, in conjunction with the RIIL, to complete a training course in concussions and traumatic brain injuries.[134] Coaches, volunteers and nurses who fall under the statutory

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not exceeding one thousand dollars ($1,000), or by imprisonment for not more than one year, or both.").

128. 41 R.I. GEN. LAWS § 5-7 (2020) (License required for participants and officials in professional matches).

129. 41 R.I. GEN. LAWS § 5-21 (2020) (Application of chapter to wrestling matches).

130. 5 R.I. GEN. LAWS § 74.1-2 (2020) (Definitions).

131. 5 R.I. GEN. LAWS § 74.1-15 (2020) (Criminal penalties) (referring to the permitted agent contact rules outlined in § 74.1-14).

132. 5 R.I. GEN. LAWS § 74.1-16 (2020) (Civil remedies).

133. 16 R.I. GEN. LAWS § 91-1 (2020) (School and Youth Programs Concussion Act, enacted in 2010, amended in 2014).

134. 16 R.I. GEN. LAWS § 91-3 (2020).

framework[135] must complete a training course and annual refresher courses.[136]

Finally, the State of Rhode Island has had to address sports gambling under both a regulatory scheme[137] and decades ago as a matter of criminal misconduct.[138] On November 26, 2018, Twin River Casino in Lincoln became the first casino in New England to accept bets on professional sports.[139] In 2019, the law was modified

135. *Compare* 16 R.I. GEN. LAWS § 91-2 (2020) ("For the purpose of this section, the term 'youth sports programs' means any program organized for recreational and/or athletic competition purposes by any school district or by any school participating in Rhode Island Interscholastic League Competition, and whose participants are nineteen (19) years of age or younger."), *with* 16 R.I. GEN. LAWS § 91-4 (2020) ("All other youth sports programs not specifically addressed by this statute are encouraged to follow the guidance set forth in this statute for all program participants who are age nineteen (19) and younger.").

136. 16 R.I. GEN. LAWS § 91-3(b) (2020) ("All coaches and volunteers involved in a youth sport or activity covered by this chapter must complete a training course and a refresher course annually thereafter in concussions and traumatic brain injuries. All school nurses must complete a training course and an annual refresher course in concussions and traumatic brain injuries. Teachers and teachers' aides are strongly encouraged to complete the training course in concussions and traumatic brain injuries. Training may consist of videos, classes, and any other generally accepted mode and medium of providing information.").

137. *See* 42 R.I. GEN. LAWS § 61.2-3.3 (2020) (The framework falls generally under Chapter 61, State Lottery; Chapter 61.2 Video-Lottery Games, Table Games and Sports Wagering; and then in particular Sports Wagering Regulation); *see also* 42 R.I. GEN. LAWS § 61.2-5 (2020) (Allocation of Sports-Wagering and Online Sports Wagering Revenue); *see also* Rhode Island Sports Betting, LEGAL SPORTS REPORT, https://www.legalsportsreport.com/ri/ [https://perma.cc/42SZ-KRDY] (last visited Nov. 7, 2021). Rhode Island became the eighth state to offer sports betting in 2018, months after the Supreme Court in Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S. Ct. 1461 (2018) determined the Professional and Amateur Sports Protection Act of 1992 (PASPA) was unconstitutional.

138. *See* Tim Layden, *You Bet Your Life the Stakes are High for Athletes and Other Students Who Gamble*, SI.COM (Apr. 17, 1995), https://www.si.com/vault/1995/04/17/8093410/you-bet-your-life-the-stakes-are-hight-for-athletes-and-other-students-who-gamble [https://perma.cc/JU59-G8RT] (writing, "In '92 five members of the men's basketball team at Bryant College in Smithfield, R.I., fell $54,000 in debt betting with a student bookie. Christopher Simmons, a co-captain on the Bryant basketball team, and Scott Kent, a former University of Rhode Island football player, were each sentenced to five years' probation and 100 hours of community service.").

139. *See* Jennifer McDermott, *Rhode Island Casino is 1st in New England for Sports Betting*, AP NEWS (Nov. 26, 2018),

to allow for mobile sports betting and in 2020 Rhode Island added fully mobile sports betting.[140]

CONCLUSION

This Article has demonstrated that Rhode Island has various cases and statutes related to sports law worth exploring despite its small geographic size and population. Claims of negligence by athletic participants against each other, against sports product designers and manufacturers, and those cases involving injuries suffered by spectators or bystanders due to flying objects all combine to show that Rhode Island has some gems to offer in the field of sports law.

The state clearly makes its mark, however, in the various gender discrimination cases from decades ago. These cases involved legal challenges for courts as to whether a boy may participate on a high school girls' field hockey team, whether a boy could participate on a girls' volleyball team, whether a girl could play Little League Baseball, and the iconic decisions and ultimate settlement in *Cohen v. Brown Univ.* which, at the time, was undoubtedly the most important Title IX decision of that era.

Rhode Island also has sport-related laws found in various parts of its statutes. This includes various crimes on the books related to sports bribery, a licensing requirement for those associated with professional boxing, and the adoption of the Uniform Athlete Agents Act. It also includes a contemporary training requirement for teachers and many others related to youth sport and concussions under its School and Youth Programs Concussion Act (SYPCA). A statutory framework now exists for sports gambling in which it was the eighth state to legalize such wagering activity.

Rhode Island's sports law cases are relatively few, but they are in line with mainstream decisions. Indeed, its impact has served as solid precedent within federal and state jurisdictions and as a

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https://www.apnews.com/07a8cf1b9e1c41de82276da72137595d [https://perma.cc/23E6-ZTAS].

140. *See* Adam Candee, *Don't Expect Rhode Island Sports Betting to Go Mobile Anytime Soon*, LEGAL SPORTS REPORT (Apr. 25, 2019), https://www.legalsportsreport.com/31651/rhode-island-mobile-sports-betting-launch/ [https://perma.cc/MFX3-VJV5]; *see also* Ryan Rodenberg, *United States of Sports Betting: An Updated Map of Where Every State Stands*, ESPN (Nov. 4, 2021, 11:49 PM), https://www.espn.com/chalk/story/_/id/19740480/the-united-states-sports-betting-where-all-50-states-stand-legalization [https://perma.cc/Y3UX-LT9S].

resource among academic discourse nationwide. Given Rhode Island's generous policy related to gender identity transgender participation at the interscholastic level, it would not be a surprise to see the state again at the center of discussion as other states address their own statutes or policies on gender participation accordingly.