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**EXTENDED LENGTH SESSION**

**Tort Liability Update**

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# **TORT LIABILITY UPDATE: ISSUES IN COLLEGIATE SPORT, RECREATION AND PHYSICAL ACTIVITY**

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TORT LIABILITY UPDATE  
Issues in Collegiate Sport, Recreation and Physical Activity  
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I. Supervision.

A. No Duty to Supervise. In the K-12 situation, a "duty" to supervise students who are involved in virtually any activity on the school property is inherent in the statutory duty to supervise as mandated by a state's legislature as well as in the common law nature of the "in loco parentis" relationship. However, there are many instances in the university-student relationship in which the university has no duty to supervise its adult students.

1. In Whitlock v. University of Denver, 744 P.2d 54 (Colo. 1987), a student was injured on a rather unstable trampoline which was located outside a fraternity house. The plaintiff had used the apparatus several times before without injury. The jury verdict of over \$5 million was upheld by the Colorado Court of Appeals but the Colorado Supreme Court reversed on the basis that the university owed no duty of care to the plaintiff. There was no dependence by the student upon the university and therefore, no special relationship warranting the imposition of a duty.

2. In Swanson v. Wabash College, 504 N.E.2d 327 (Ind. Ct. App. 1987), the university had no duty to supervise baseball practices which were conducted by some of the intercollegiate team players in the "off-season". The students organized the practices and knew that the coach would not be present. Although

the college allowed the students to use team equipment and gave them some money to procure baseballs, the practices were simply recreational and the students knew that they were "on their own", according to the court.

3. In Fox v. Board of Supervisors, 576 So.2d 978 (La. 1991), Louisiana State University (LSU) was held to owe no duty of care to protect plaintiff, a student at a Minnesota college who, as a member of his college's club rugby team, travelled to LSU to play in a tournament. He alleged that he was injured because of defendant university's negligence in scheduling and in failing to ascertain whether the invited teams were properly trained, coached or supervised. The Louisiana Supreme Court found no special relationship with the plaintiff sufficient to place a duty of protection or supervision upon defendant university. The defendant had not breached any duty of care as a landowner; there was no defect in the playing field. The university did not assume an obligation to scrutinize the club's activities because it allowed the club team to use university property and gave it some financial support.

4. In Gehling v. St. George's University, 705 F. Supp. 761 (E.D.N.Y. 1989), the federal district court held that the defendant university had no duty to control, monitor, or supervise a "fun run" which was organized, supervised and controlled by its medical students. In this case the plaintiff medical student, who was 75 pounds overweight, had high blood pressure and took an amphetamine before the 2.5 mile race run in

tropical conditions, collapsed and died. Although the university "sponsored" the race, the court held that it did not have "sufficient control over the event to be in a position to prevent negligence".

5. On the question of "control", the Maine Supreme Judicial Court held in Hughes v. Beta Upsilon Building Ass'n, 619 A.2d 525 (Me. 1993), that the defendant association did not have a legal duty to protect the welfare of the adult fraternity members. In Hughes, the plaintiff fraternity member became a paraplegic after diving into a field which was being used for a "mud" football game. The defendant landlord also served as fraternity advisor particularly as related to the fraternity's liquor policy. The court, in affirming summary judgment for the defendant, held that just because the association had the ability to control the activities of the fraternity did not give rise to a legal duty to protect the welfare of the adult fraternity members. Since the defendant had taken no active role in the event it had no duty to act affirmatively to protect the plaintiff from a danger it hadn't created.

B. Duty to Supervise.

1. In Brown v. Florida State Board of Regents, 513 So.2d 184 (Fla. Dist. Ct. App. 1987), a student drowned at a picnic held at a swimming facility operated by defendant university. Although a governmental unit has the discretionary authority to choose whether or not it will operate a facility, once it has decided to operate it, it assumes the common law duty

to operate the facility safely. In this case, the plaintiff stated a cause of action against defendant in the following allegations: 1) failure to have trained lifeguards on duty; 2) failure to warn of known dangerous conditions; and 3) failure to instruct in the proper operation and use of lifevests.

2. In Pitre v. Louisiana Tech University, 596 So.2d 1324 (La. Ct. App. 1991), the plaintiff student became paralyzed while sledding on a trash can lid on a hill on campus. The student hit a light post encased in concrete at the bottom of the hill. The court held that the university owed a duty to the student to protect or warn of the risk of injury from sledding into the light pole. This duty arose from two factors; 1) the university's status as landowner, and 2) the university's relationship with the residential students. In regard to this latter point, the court noted that the university had a duty to take necessary steps to protect students from foreseeable harm in its attempts to regulate conduct of student life. "The impracticality of total control of on-campus activities does not entitle universities to abandon all efforts to insure the physical safety of its students. Parents, students and the general community have some expectations that reasonable care will be exercised by universities to protect students from foreseeable harm" (pp.1332-1333).

3. In Kleinknecht v. Gettysburg College, 989 F.2d 1360 3d Cir. 1993), a varsity lacrosse player suffered cardiac arrest during practice. No trainers or student trainers were present



nor did the coaches have certification in CPR. The player died allegedly because of the delay in procuring emergency medical treatment. The Third Circuit reversed the district court which granted summary judgment for the defendant college. In so doing the Third Circuit found a duty of care based on the special relationship between the college and this player who was a recruited student-athlete of an intercollegiate athletic team. In the court's view: "We cannot help but think that the college recruited Drew for its benefit, probably thinking that his skill at lacrosse would bring favorable attention and so aid the college in attracting other students". Therefore, a college owes a duty to a recruited intercollegiate athlete to provide prompt and adequate emergency medical service to the student-athlete who is engaged in a college-sponsored athletic activity for which he has been recruited by the college.

C. Reconciliation of the "Duty" and "No Duty" Cases. On first glance it may seem difficult to find guidance from the cases listed above as representative of courts' holdings on the question of "duty" as it relates to cases involving sport, recreation or physical activity of some kind. Although some commentators view Kleinknecht as ground-breaking, it seems logical that a university has a duty to take reasonable care for the safety of its intercollegiate athletes. The Pitre case, however, is more difficult since it involves pure recreational activity engaged in by a student without formal or informal organization by the university. The facts of the Pitre case are

all-important in assessing the outcome because the university sent a brochure to students warning of certain dangerous areas on campus which should be avoided while sledding. It did not, however, prohibit sledding on the hill in question which held the dangers of concrete poles at its bottom. Therefore, the university created an "illusion of safety" which removed or lessened the plaintiff's reality of danger to an activity which presented an unreasonable risk of injury to students. Pitre serves as an example of the proposition that if a university undertakes a duty of care (as it did here with its promulgation of the brochure) it must do so reasonably. An interesting article on the blurring of traditional boundaries between intercollegiate sport, club sport, intramural sports and recreational activity is "Welcome to the Club" by Rick Berg in the April, 1993 issue of Athletic Business, pp. 22-30. Many club sports now resemble varsity sports in terms of their operation and the liability issues are increasingly cloudy.

D. Scope of the Duty of Supervision. If a duty of supervision is present, the issue becomes whether the university, through its personnel, has met its duty of reasonable supervision. What is "reasonable" is always dependent upon the circumstances. In general, courts focus upon the questions of whether the quantity of supervisors (ratio) was reasonable and whether the supervision provided was competent. In some situations, reasonable supervision may demand specific supervision, i.e., a supervisor is in an instructional mode due

to participant inability or certain behavioral problems. In other situations, general supervision, i.e., a focus on the manner of doing an activity or supervision of a facility or area, may be appropriate. The case of Cirillo v. City of Milwaukee, 150 N.W.2d 460 (Wis. 1967), is helpful because it delineates a number of relevant considerations which are to be used in ascertaining the reasonableness of supervision. These considerations are: 1) the activity in which students are engaged; 2) the instrumentalities with which students are working; 3) the age (and skill level) and composition of the group; 4) a supervisor's past experience with a group and its propensities; and 5) the reason for and duration of the supervisor's absence.

1. The Activity.

a. Surface Dive. In Perkins v. State Board of Education, 364 So.2d 183 (La. Ct. App. 1978), a thirty-four year old university student was working with another student immediately after class on a surface dive which had been explained three times in class and which was a non-hazardous dive. The teacher was serving as a lifeguard (general supervision). The plaintiff hit his head on the bottom of the pool. The court held that the teacher's general supervision as a lifeguard was sufficient in this post-class situation since adequate instruction had been given in class and the dive was not so dangerous as to create a duty of individual instruction, i.e., specific supervision.

b. "Open" Swim. In a recreational setting, it is clear that qualified lifeguards must be present for student "open swim" times in indoor pools. See Walker v. Daniels, 407 S.E.2d 70 (Ga. Ct. App. 1991). Also, if the university operates an outdoor lake proper lifeguards must be provided (Brown v. Florida State Board of Regents).

c. Enforcement of Rules. A supervisor is responsible for the enforcement of rules which have been promulgated for the safety of the recreational user. See, e.g., Economy Engineering v. Commonwealth, 604 N.E.2d 694 (Mass. 1992) (negligent supervision for failure to keep intramural participants off of ladder on wheels) and Nganga v. College of Wooster, 557 N.E.2d 152 (Ohio Ct. App. 1989) (no negligent supervision by referees in intramural soccer game). However, game rules need not be enforced when students are engaged in informal activity. See, e.g., Dillon v. Keating Racquetball Club, 390 N.W.2d 212 (Mich. Ct. App. 1986) ("pick up" game of wallyball).

## 2. The Instrumentalities.

a. Chemicals. See LaVoie v. State, 458 N.Y.S.2d 277 (1982).

b. Saws. See Richmond v. Ohio State University, 564 N.E.2d 1145 (Ohio Ct. Cl. 1989).

c. Scaffold. See Miller v. Macalester College, 115 N.W.2d 666 (Minn. 1962).

3. Age (Skill) and Composition of Group. The age factor may come into play if the university sponsors certain activities on-campus for minors. See Graham v. Montana State University, 767 P.2d 301 (Mont. 1988). Usually, however, the factor to be considered is not age but rather, the skill level of the participant. See Chapman v. State of Washington, 492 P.2d 607 (Wash. Ct. App. 1972) (freshman student who was proficient on the trampoline did not need specific supervision by instructor).

4. Propensities for Rowdiness. Although supervisors are dealing with an adult population, students may, while engaged in certain activities display rowdy and exuberant behavior. The primary issue for consideration is whether the negligent actions of a fellow student become the intervening cause of the harm, in effect relieving the university from liability for failure to supervise. This proximate causation argument is litigated very often in negligent supervision cases.

a. Minority position--No proximate cause. In this school of thought the tortious conduct of a fellow student can be the proximate cause. See Segerman v. Jones, 259 A.2d 794 (Md. 1969).

b. Majority position--Proximate Cause. The majority view is that the intervening negligence of a third party does not relieve the university of liability for negligent supervision if the intervening negligence is foreseeable. See Rupp v. Bryant, 417 So.2d 658 (Fla. 1982) and Dailey v. Los Angeles Unified School District, 470 P.2d 360 (Cal. 1970).

c. Negligent Supervision in Intramurals. See Pape v. State, 456 N.Y.S.2d (App. Div. 1982) (student fractures cervical spine after attacking opponent in intramural floor hockey game) and Nganga v. College of Wooster, 557 N.E.2d 152 (Ohio Ct. App. 1989) (student breaks ankle in intramural soccer game when opponent uses slide tackle).

## II. Adequate Instruction.

A. Selection of Qualified Personnel. In the collegiate setting this may become an issue relative to the choice of "teaching assistants" for physical education activity classes. Students pursuing graduate study in schools of physical education (kinesiology) may be chosen as T.A.s despite their lack of pedagogical training. This may pose liability issues when they are chosen as instructors in activity classes. See, e.g., De Mauro v. Tusculum College, 603 S.W.2d 115 (Tenn. 1980) (student injured in golf class because of inexperience of teaching assistant).

B. Safety Rules and Warnings. The issue of "failure to warn" has become an increasingly potent weapon for a plaintiff's attorney. Thus, even if an activity is conducted in a reasonably prudent manner, there still may be liability predicated upon the failure to warn of the specific risks inherent in an activity. This requisite of full disclosure rests on the premise that participants need full information regarding the risks of an activity in order to make a truly informed decision about participation. Betty van der Smissen in Legal Liability and Risk

Management for Public and Private Entities (Anderson Publishing, 1990) sets forth the following criteria for effective warnings.

1. Obvious and Direct. Avoid subtlety in giving warnings. Make sure that contradictory messages are not conveyed to participants. The Pitre case discussed above is an example of this point. The university distributed literature identifying unsafe areas but neglected to discuss the unsafe area at issue in this case. The court construed this omission as creating an "illusion of safety" which removed or lessened the plaintiff's reality of danger to an activity which presented an unreasonable risk of injury to the students.

2. Specific to the Risk. A warning must be specific to the risk at hand so the person can make an informed decision. Advising people to proceed at "their own risk" is without value if the person does not know what the risks are.

3. Comprehensible. The warning language must be understandable to the persons being warned. This issue includes the question of terminology and the "native" language of the participants. Also, use a variety of methods to convey warnings, e.g., oral warnings by supervisors, written warnings in Agreements to Participate, and signage.

4. Location of the Warning. A warning sign must be located at the point of hazard. For example, if there are four entrances to an area, warning signs must be located at all entrances.

C. Matching of Participants. In activities which involve contact, consideration must be given to match participants so that disparities in size or skill level do not lead to unsafe conditions. This issue is not simply relevant to instructional settings; the question of mismatch in scheduling athletic contests must be considered. See, e.g., Benitez v. New York City Board of Education, 543 N.Y.S.2d 29 (1989) (although the student lost this case based on "assumption of risk" it involves the question of mismatch in an interscholastic football setting). Although Benitez involves high school athletics, I believe that the mismatch concept could be applicable to intercollegiate athletics when contests are scheduled for financial reasons putting athletes at risk because of vast disparities in size and skill differentials.

III. Adequate Medical Care. Traditionally, the two areas of concern relative to medical care have been: 1) the provision of emergency first aid assistance until medical personnel arrive; and 2) exercising reasonable care in procuring medical treatment for an injured party. Recently, however, another medical issue has arisen, i.e., the question of whether student-athletes with serious medical conditions should be allowed to return to competition.

A. Emergency First Aid Assistance. All personnel who have coaching, teaching or supervisory responsibilities as related to physical activity settings should be competent in the administration of emergency first aid and CPR. In the



Kleinknecht v. Gettysburg College case discussed above, neither of the coaches present at the practice had certification in CPR. No trainers or student trainers were present.

B. Timeliness of Procuring Medical Treatment. Emergency procedures must be developed to procure timely medical assistance to injured participants. See Barth v. Board of Education, 490 N.E.2d 77 (Ill. App. Ct. 1986) (a \$2.5 million judgment was rendered for delay in procuring medical assistance for a student with a head injury). In Kleinknecht, there were no radios or telephones at the practice field with the nearest telephone inside the training room at the stadium which was 200-250 yards away from the practice field. There was a factual dispute about the time which elapsed between the athlete's collapse and the time initial CPR was administered but the plaintiffs contend that 12 minutes elapsed and that it was approximately another 10 minutes before the ambulance arrived.

C. The Decision to Return to Competition. The recent cases of Gathers v. Loyola Marymount University and Buoniconti v. The Citadel raise some troubling issues about student-athletes who are allowed to return to competition after suffering illness or injury.

1. Gathers v. Loyola Marymount University. In this case, now settled, a collegiate basketball player with a cardiovascular abnormality was allowed to return to competition even though he displayed an irregular pattern of heartbeats. The player was put on medication to control the arrhythmia. However,

the dosage of the medication was progressively decreased, allegedly at the coach's urging. When the player died during a game due to this condition, the amount of medication in his body was a nontherapeutic dosage.

2. Buoniconti v. The Citadel. A college football player became paralyzed after making a tackle in a game. The player had suffered a neck injury in the three previous games and was allowed to play on the day in question, even though he had not practiced at all the week before. Further, the player was fitted with a strap which ran from his face mask to his shoulder pads to try to prevent hyperextension of his neck but which pulled his head downward, perhaps limiting his vision in tackling.

3. Issues to Consider. The above cases are indicative of a recurring problem in athletics concerning the administrative decision to allow such athletes to return to competition. The following issues are raised: 1) what is the duty of informed consent to a player?; 2) how do administrators insure that the team physician fulfills his fiduciary responsibility to the player and does not compromise the player's welfare for team interests?; 3) what rules should be in place to insure that an injured player who does not practice before a game does not play in the contest?; 4) how does an administrator respond if a collegiate athlete who is an adult wants to continue to participate even though he is aware that he has a medical condition which could cause severe injury or death if he returns

to competition? On this latter point there are the cases of Stephen Larkin, a baseball player with a cardiovascular abnormality, who is playing at the University of Texas after signing a "waiver" and the recent case of Steve Hagins, a highly recruited catcher who has been forbidden to play baseball at Arizona State University. ASU has taken the position that it will not allow Hagins to play despite Hagins' desire to sign a waiver absolving ASU of liability.

4. Literature to Review. There are a number of articles pertinent to this issue. Among them are: 1) "College Athletes: Illness or Injury and the Decision to Return to Play" by Cathy J. Jones in 40 Buffalo Law Review 113 (1992); 2) "Conflicts of Interest for Team Physicians: A Retrospective in Light of Gathers v. Loyola Marymount University" by Craig A. Isaacs in 2 Albany Law Journal of Science & Technology 147 (1992); 3) "A Social Network Analysis of Influences on Athletes to Play with Pain and Injuries" by Howard L. Nixon II in 16 Journal of Sport and Social Issues 127 (1992).

IV. Equipment Concerns. In supplying equipment for use in instructional, competitive or recreational activities, the university has a duty to exercise reasonable care to supply equipment that is in a safe and suitable condition for the intended use. The equipment must be chosen appropriately based on the skill level of the participant.

A. Choice of Equipment. The coach/instructor, based on his expertise in a sport, is in the best position to evaluate the

type of equipment necessary to protect players from injury. See Everett v. Bucky Warren, 380 N.E.2d 653 (Mass. 1978).

B. Protective Equipment. If necessary protective equipment cannot be afforded, the activity cannot be prudently continued. See, e.g., Berman v. Philadelphia Board of Education, 456 A.2d 545 (Pa. Super. Ct.) (failure to purchase mouthguards for floor hockey program) and Lowe v. Texas Tech University, 540 S.W.2d 297 (Tex. 1976) (removal of supportive leg brace on football player at direction of coach).

C. Failure to Warn. Warning labels should be affixed to equipment in a clearly visible fashion. See Pell v. Victor J. Andrew High School, 462 N.E.2d 858 (Ill. App. Ct. 1984) (warning label placed on underside of mini-trampoline). Warnings should be given about the dangers of various equipment. See Kirk v. Washington State University, 746 P.2d 285 (Wash. 1987) (cheerleaders given no warning regarding dangers of practicing on astroturf).

D. Fitting Equipment Properly. Participants should be given assistance in the proper fit and correct usage of equipment. See Meese v. Brigham Young University, 639 P.2d 720 (Utah 1981) (student hurt in university sponsored beginning ski class because of improper adjustment of bindings performed by bookstore employee who rented skis to plaintiff).

E. Inspection and Maintenance of Equipment. Equipment must be regularly inspected and maintained by knowledgeable personnel. See Halbrog v. Oregon State University, Case No. 16-

83-04631 (Or. Cir. Ct. 1983) (failure to perform regular inspections regarding shock absorbency tendencies of artificial turf).

V. Premises Liability. The university may also have responsibility pursuant to its obligations as landlord or landowner.

A. Invitee, Licensee, Trespasser Status. Liability of the institution for injury to third parties may depend upon their status relative to the institution. For example, in Light v. Ohio University, 502 N.E.2d 611 (Ohio 1986), the injured party was a minor who accompanied her mother to defendant university to use its recreational facilities which were open to the public without charge. In the lockerroom, the minor pulled some lockers, which were not secured to the wall, over on herself. The decision was favorable to the university because the minor and her mother were held to be licensees rather than invitees. The university, in such a case, was not liable for ordinary negligence. The duty was only to refrain from wantonly or willfully causing injury. See also Scaduto v. State, 446 N.Y.S.2d 529 (App. Div. 1982) (intramural softball player stepped into drainage ditch - no liability by university) and Lamphear v. State, 458 N.Y.S.2d 71 (App. Div. 1982) (intercollegiate softball player hurt in depression in field - liability by university). Obviously, the use of the status categories is a matter of state law but, if status distinctions are made, this plays an often determinative role in liability by the landowner.

B. Duty to Inspect. The courts expect a regular program of preventive maintenance and remediation taken promptly after hazards/defects have been identified. In regard to the duty of inspection, see Woodring v. Board of Education, 435 N.Y.S.2d 52 (App. Div. 1981). See also Van Stry v. State, 479 N.Y.S.2d 258 (App. Div. 1984) (university student slipped in water in lockerroom - university had notice of condition through its employee and failed to use reasonable care to eliminate the hazard).

C. Crowd Control. Proper crowd control involves the prevention of reasonably foreseeable acts of third parties. See, e.g., Bearman v. University of Notre Dame, 453 N.E.2d 1196 (Ind. Ct. App. 1983), in which plaintiff patron's leg was broken by a third party who had been tailgating. The university had constructive knowledge of the danger since the university was: 1) aware of the tailgate parties; 2) aware that the drinking of alcoholic beverages occurred at the parties; and 3) aware that intoxicated persons pose safety threats to other patrons. Thus, the injury to the plaintiff was reasonably foreseeable and required supervisory measures to be undertaken in regard to this hazard.

VI. The Role of Exculpatory Agreements and Agreements to Participate. Exculpatory agreements are analyzed under usual principles of contract law. However, since the intent of an exculpatory agreement is to relieve a party from liability for its own negligence, courts are faced with the clash of two

contradictory legal premises, i.e., a basic premise of tort law which holds parties responsible for their own negligence versus a basic premise of contract law which states that competent parties should have the freedom to fashion their own agreements. There are a number of concerns which courts address relative to the enforceability of exculpatory agreements.

A. Public Policy. Before addressing the specific language of a document, courts decide whether the document should be enforceable as a matter of public policy. Jurisdictions vary in their assessment of what is contrary to "public policy". Two cases which are essential to this inquiry (as applied to the collegiate setting) are Tunkl v. Regents, 60 Cal.2d 92 (1963), which sets forth a six factor test used to determine whether a release violates public policy and Wagenblast v. Odessa School District, 758 P.2d 968 (Wash. 1988) in which the Washington Supreme Court applied the Tunkl factors to invalidate release forms used to exculpate the school district from liability from its own negligence in connection with interscholastic sports.

B. Parties to the Contract. A minor who has signed an exculpatory agreement may ratify or void the agreement upon reaching majority. Also, a parent or guardian cannot release or waive the potential claims of the minor in most jurisdictions.

C. Acts Beyond Negligence. Generally, an exculpatory agreement may only be held enforceable to deny a recovery based on negligence. An attempt by a defendant to release himself from liability for an intentional tort is against public policy.

Likewise, attempts to release liability for gross negligence or willful and wanton misconduct are usually unenforceable.

D. Language Must be Conspicuous, Clear, and Unambiguous. Any ambiguity in a contract will be resolved against the drafter of the document. This principle is even more strictly construed because parties are giving up valuable rights in this situation.

1. Conspicuousness. The exculpatory language must be in a typeface easily read and legible.

2. Using the Term "Negligence". The courts are split on whether the "magic word" negligence need appear in order to be sufficiently clear. Even if the term "negligence" is not in the document, it must somehow be conveyed to the plaintiff what is within the contemplation of the parties.

3. Risks/Injuries Addressed with Specificity. Generally, the exculpatory agreement will not be upheld if the risk which caused the injury is not one which ordinarily accompanies the activity because this is not within the contemplation of the parties when the document is signed.

E. Application to College/University Setting. In last year's presentation at this conference on the topic of exculpatory agreements, I used the rationale of Tunkl and Wagenblast to argue that exculpatory agreements would probably not be upheld in conjunction with intercollegiate sports or curricular offerings but most likely would be upheld, assuming that the document is drafted properly, in intramurals and other



recreational programs. For case citations dealing with this issue see the 1993 compilation of materials from this conference.

F. Agreements to Participate. Agreements to Participate may contain waiver/release language in the appropriate setting but it has additional components which are very important in activity settings. Most importantly, it conveys information regarding the risks which are inherent in an activity. This information is important in order to maximize the ability to use assumption of risk as a defense. The dissemination of risk information is also important to prevent a plaintiff from making a claim in negligence based upon "failure to warn". According to Betty van der Smissen in Legal Liability and Risk Management for Public and Private Enterprises (Anderson Publishing Co., 1990) there are four components of the Agreement to Participate (in addition to the exculpatory language where applicable).

1. Nature of the Activity. The activity should be described in some detail and not just named. It is not adequate to state that the person "understands and appreciates" the risks in the activity because the inexperienced participant simply does not know the risks involved.

2. Possible Injuries Which may Occur. The potential or possible consequences of participation should be set forth so that the participant can appreciate what could happen. This statement should be specific to the activity in question but phrased in a positive light, i.e., "While few injuries occur,

participants must be aware that injuries could occur, including the following..."

3. Expectations of the Participant. In this section, the participant agrees to follow the rules and regulations applicable to the activity and to follow the directions of the activity leader/supervisor. It is important to set a tone in which the participant acknowledges his responsibility in helping to make the activity a safe experience for all concerned.

4. Condition of the Participant. Finally, it is helpful to have the participant affirm that he has the physical ability and/or skill level to participate safely in the activity in question. Since the participant has been apprised earlier in the form of the strenuousness of the activity, it is appropriate that the participant acknowledge his ability to perform this activity. The participant is also informed, in this section, of the emergency procedures to be followed and the participant agrees to bear financial responsibility for any medical treatment arising from participation in this activity.

## Hypothetical Cases to Consider

1. Assume that your university has an intramural basketball program which is very popular and in which the students take an intense interest. The tournament has been hotly contested and the two teams in the finals have met before with several near-altercations. On the day of the finals two officials are assigned who have had limited experience and who have been warned about the necessity to control the contests.

During the game, the officials fail to control the game and one player suffers a broken jaw when an opponent punches him in a scuffle for the ball. The perpetrator had previously engaged in unsportsmanlike conduct for which he received no penalty. In the suit which is sure to follow against the university for negligent supervision, can the university successfully argue that the tortious conduct of the competitor was the proximate and superseding cause of the harm?

2. You are the coordinator of the elective activity program in the physical education department which offers approximately thirty different activities each semester. Because of a shortage of graduate teaching assistants who have prior teaching/coaching experience, you will have to place a number of inexperienced personnel in teaching positions. You are concerned about liability issues. What preventive measures can you take to insure appropriate instruction is provided? Also, what is the role of the "Agreement to Participate" in this situation?

3. Discuss the enforceability of each of the foregoing clauses taken from "Agreements to Participate".

A. Nature of the Activity--for aerobic dance class

"...includes exercises covering the following areas: muscular strength, muscular endurance, flexibility, cardiovascular endurance, basic relaxation and general fitness assessment...exercises will include: 1) a warm-up period aimed at gradual acceleration of the pulse; 2) a cardiovascular exercise period aimed at accelerating the pulse to the target heart rate; and 3) a cooldown period in which individuals are not to leave the exercise floor before the pulse drops below 110/min. for women..."

B. Possible Injuries Which May Occur--for lacrosse club

"I am aware that such participation may result in possible injury as a result of the nature of the sport and that I am assuming any risk that may be involved in this sport."

C. Possible Injuries Which May Occur--whitewater rafting

" The Risks:

1) If you miss a little to the left you hit Dildo Rock and everybody in the boat gets scattered.

2) If you miss to the right, you go over an 8 foot vertical, the bottom of which is a keeper. (A keeper hole is one that can hold you longer than you can hold your breath.)

3) Even on a clean run, the impact of the drop sometimes scatters people.

4) The current feeds right into a big, flat, undercut rock. This is bad enough if you hit it with your crew more or less together. But if you have a swimmer from 1), 2), or 3) above, and the boat is out of control and catches the swimmer between it and the undercut rock, it's curtains for the swimmer."

D. Possible Injuries Which May Occur--football

" I understand that the dangers and risks of playing or practicing to play/participate in the above sport include, but are not limited to, death, serious neck and spinal injuries which may result in complete or partial paralysis, brain damage, serious injury to virtually all internal organs, serious injury to virtually all bones, joints, ligaments, muscles, tendons, and other aspects of the muscular skeletal system, and serious injury or impairment to other aspects of my body, general health and well-being."

E. Expectations of Participant--Recreational Boating

"I promise to and will familiarize myself with the rules and regulations that apply to the use of \_\_\_\_\_ and with the rules of safe boating before I make use of the facilities, equipment or boats there."

"I agree that before each occasion on which I use any equipment, boat or part of the \_\_\_\_\_ facility, it is my responsibility to learn the proper use of, and to inspect and assure the suitable condition of, the articles or property I will use. That is my responsibility and I shall not depend upon anyone else to assure that the equipment, boat or property is safe to use and that I know how to use it properly."

F. Condition of Participant--Fitness Activities Offered by Recreational Sports

" I certify that I am physically fit and sufficiently trained to participate in this program. Further, I assume responsibility for the payment of medical and emergency expenses in the event of an accident, illness or other incapacity.

G. Exculpatory Language--Whitewater Rafting

"...I agree to hold ..... harmless for injury including death that may arise as a consequence of running the falls for any reason whatsoever, including negligence."

