

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

**Presenter:**

**LINDA A. SHARP  
Attorney at Law  
Assistant Professor  
Indiana University  
Bloomington, Indiana**

**Stetson University College of Law:**

**16TH ANNUAL LAW & HIGHER EDUCATION CONFERENCE  
Clearwater Beach, Florida  
February 12-14, 1995**

TORT LIABILITY UPDATE  
Issues in Collegiate Sport, Recreation and Physical Activity  
Linda A. Sharp, Esq.

I. Duty/No Duty Cases.

A. No Duty to Supervise/Instruct.

1. Hughes v. Beta Upsilon Building Ass'n, 619 A.2d 525 (Me. 1993).

The plaintiff fraternity member became a paraplegic after diving into a field which was being used for a "mud" football game. Defendant landlord also served as fraternity advisor particularly as it related to fraternity's liquor policy.

a. The defendant's ability to control activities of the fraternity did not give rise to a legal duty to protect the welfare of the adult fraternity members.

b. 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.

2. Albano v. Colby College, 822 F. Supp. 840 (D. Me. 1993). The men's college tennis team went to a resort in Puerto Rico during spring break. This annual trip was approved by the athletic department but funded entirely by the students and coach. Except for a 3 hour period for practice each day, the students were on their own. The plaintiff, age 20, was seriously injured after he drank excessively. The coach had told the team not to drink to excess but he did not chastise or attempt to control the plaintiff on the night of the accident even though he knew that the plaintiff had overindulged.

a. The coach had no duty to prevent this adult student from drinking.

b. Relying on the Hughes case, the district court held that the mere ability to control does not give rise to a legal duty.

3. Fisher v. Northwestern State University, 624 So.2d 1308 (La. Ct. App. 1993). A freshman cheerleader alleged negligent supervision as the student was injured during a practice conducted without supervision. The plaintiff had attended cheerleader camp but practices were conducted by the student captains of the cheerleading squad.

a. Relying on Fox v. Board of Supervisors, 576 So.2d 978 (La. Ct. App. 1991), a case in which a state university was held to owe no duty of

care to a student who participated in club rugby, this court held that there was no duty to provide supervision or to monitor the cheerleaders.

b. The court noted that the university tried to have students gain responsibility through autonomy and that it would be a "nigh-impossible" burden to provide more supervision.

B. Duty to Supervise/Instruct.

1. Kleinknecht v. Gettvsburg College, 989 F.2d 1360 (3rd 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.

a. There is a duty of care based on the "special relationship" between the college and a recruited student-athlete.

b. "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".

c. 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.

2. Clement v. Griffin, 634 So.2d 412 (La. Ct. App. 1994). Members of a college baseball team were injured in a single vehicle accident caused by a tire blowout. The van was being driven by a student coach who did not have a chauffeur's license. The driver had not been trained by the community college and had received no instruction on the actions to take in the event of a blowout.

a. The court stated that the evidence was sufficient to show that the community college breached its duty to maintain the vehicle, select a qualified driver and properly train the driver.

b. The failure to require that drivers of vans possessed the proper license, i.e., a chauffeur's license, was a breach of duty.

3. Loder v. State, 607 N.Y.S.2d 151 (App. Div. 1994). A university student enrolled in equine studies was kicked in the face by a horse as the

student attempted to enter the horse's stall. The Court of Claims found the state 60% liable. Upon appeal, the decision was affirmed.

a. The state was negligent in the training of the student in that she had not received instruction regarding the safe way to enter a "tie stall".

b. The state was also negligent in the manner in which it housed the horse based on the horse's known propensities to "kick out".

### C. Duty--Co-Participant Liability."

#### 1. Yancey v. Superior Court, 33 Cal. Rptr. 2d 777 (Ct. App. 1994).

A community college student was hit on the head by a discus thrown by a classmate during a physical education class. The plaintiff had thrown her discus and walked onto the field to retrieve it. The defendant classmate, who was throwing next, failed to look at the field before he threw, failed to warn plaintiff, and hit her with the discus which he threw. The trial court granted judgment for the defendant on the basis that plaintiff had assumed the risk. The court of appeals held that defendant owed plaintiff a duty of care in this situation.

a. This case raised a question left unaddressed in Knight v. Jewett, 3 Cal. 4th 296 (1992), i.e., whether the limited duty of care applicable to co-participants in such sports as football, baseball and skating, should be applicable to co-participants in a discus class.

b. According to the Knight analysis, a participant in an active sport breaches a legal duty of care to other participants only if the participant intentionally injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport (p.320). The Knight court applied this analysis to touch football and suggested application of this standard to other sports such as baseball, ice hockey and skating.

c. This court used the Knight analysis to focus on two questions. The first inquiry is whether the careless conduct of participants is an inherent risk of the sport? The second question is whether imposition of a legal duty of care will alter the nature of the sport or chill participation in it?

d. In this case, throwing the discus without first checking clearance in the target area is not an inherent risk of the sport.

e. Requiring participants to check the target area before throwing will not alter the nature of the sport. At most it will cause a slight delay.

2. Pfister v. Shusta, 627 N.E.2d 1260 (Ill. App. Ct. 1994). Two university students were playing a game of "kick the can" in the dormitory lobby. Plaintiff was injured when defendant pushed plaintiff, whose hand went through a glass door. The trial court granted summary judgment for the defendant. The appellate court reversed and remanded.

a. Whether defendant owes plaintiff a duty of care is a matter of law.

b. The court declined to use the recklessness standard enunciated in the seminal case of Nabozny v. Barnhill, 31 Ill. App. 3d 212 (1975). In Nabozny, a soccer goalie was kicked in the head by a member of the opposing team, despite the fact that the goalie was in a protected area of the field.

c. This court adopted the Restatement (Second) of Torts standard which makes it clear that there is no recovery for either intentional or negligent conduct sanctioned by game rules. The key question under this analysis is whether the contact is permitted by the rules or usages of the game.

d. The court remanded this matter to consider whether a game was being played here and if so, what were its rules or usages and was the contact in question here permitted by the rules?

## II. Immunity.

A. Kimps v. Hill, 523 N.W.2d 281 (Wis. Ct. App. 1994). A university student injured her foot in a physical education class as a volleyball standard separated from the pole. The standard was being pulled across the floor at the time of the mishap. In a negligence action brought against the professor and the university's safety officer, the trial court held that the safety officer was entitled to immunity but the professor was not. The appellate court, however, held that both the professor and the safety officer were engaged in discretionary duties and were, therefore, entitled to immunity.

1. "There is no question that Professor Hill's duty was discretionary. A professor is paid to teach, and should not be forced to spend his or her time checking nuts and bolts on classroom equipment" (p.285).

2. Safety officer was also entitled to immunity because his job description was written in discretionary terms.

3. On the question of Professor Hill's immunity, the dissenting judge wrote: " I agree with the majority that Professor Hill was paid to teach, but he was paid to teach physical education. Plainly, that duty included insuring that the equipment provided to the students was safe for their use" (p.290).

B. Lennon v. Petersen, 624 So.2d 171 (Ala. 1993). A university soccer player brought a negligence action against the coach and the athletic trainer. At the beginning of the season, plaintiff had sharp pain in his hip and groin area. The trainer applied ice and electricity to this supposed "groin strain". The plaintiff's pain persisted but the same treatment was continued throughout the soccer season. In mid-November the plaintiff consulted a physician in his hometown and avascular necrosis was diagnosed, necessitating surgery. The trial court held that the defendant trainer and coach were entitled to immunity. The appellate court affirmed.

1. As to the coach, his actions were clearly discretionary since he had to, among other things, decide what drills to run, evaluate players, decide what player should go to the trainer, and motivate players.

2. The trainer was engaged in discretionary actions in determining the source of injury, the extent of injury and the treatment for injury.

3. The concurring judge felt compelled by stare decisis to agree with the outcome but raised the question of "where is the discretion?" (p.175).

### III. Assumption of Risk/Comparative Negligence.

A. Schiffman v. Spring, 609 N.Y.S.2d 482 (App. Div. 1994). A member of the varsity soccer team was hurt when her foot stuck in the mud on a playing field at a rival university. Before the game began plaintiff and her teammates complained about the condition of the field to their coach. The plaintiff sued the athletic director and the soccer coach of that institution. The appellate court held for the defendants.

1. The court cited the case of Benitez v. New York City Bd. of Educ., 73 N.Y.2d 650 (1989), for the proposition that this was "a luckless accident arising from the vigorous voluntary participation in competitive interscholastic athletics" (p.659).

2. The court had no difficulty in characterizing plaintiff's conduct as "voluntary" despite her protests about the condition of the field prior to the game.

3. Plaintiff, therefore, voluntarily participated in game with knowledge and appreciation of risks inherent in playing on a wet, slippery and muddy field.

B. Giovinazzo v. Mohawk Valley Community College, 617 N.Y.S.2d 90 (App. Div. 1994). A community college softball player was hurt because of a wet, spongy area in the outfield. The plaintiff brought a negligence action against the defendant college and county which owned the field. The trial court granted summary judgment to defendants and the appellate court affirmed.

1. The court relied on Benitez and Schiffman in holding that plaintiff voluntarily participated in the game with knowledge and appreciation of the risks inherent in playing on a wet field.

C. Nova University v. Katz, 636 So.2d 729 (Fla. Dist. Ct. App. 1994). A university cheerleader fell and severely injured her foot during practice. The jury agreed that the school was negligent in that the coach failed to have the necessary spotters and otherwise engaged in negligent supervision. The defendant argues that the plaintiff's claim should have been barred by the doctrine of express assumption of risk.

1. First, note that this court, in direct opposition to the Fisher case discussed above, felt that supervision of cheerleaders was a duty of the school.

2. The cheerleader's conduct in proceeding with a stunt even though she had no spotters is "implied qualified assumption of the risk". Although she may have waived risks inherent in the sport itself, those do not include the failure to have proper supervision and to have spotters.

3. Her conduct, therefore, should be evaluated under traditional comparative negligence principles.

D. Tan v. Goddard, 17 Cal. Rptr. 2d 89 (Ct. App. 1993). A student who was enrolled in a jockey school sued the school and the instructor after a

horse fell with him aboard. The plaintiff, a Malaysian, was not fluent in the English language and had no experience riding horses before his enrollment at the school, eight months before this incident. In those eight months, the plaintiff had fallen and seen others fall but had not seen a serious accident.

1. The riding instructor and the school owed plaintiff a duty of ordinary care to see that the horse assigned to the plaintiff was safe to ride.

2. Using the precedent of Knight v. Jewett, the court held that a reasonable implied assumption of risk may diminish recovery but does not bar it completely.

#### IV. Exculpatory Clauses.

A. Kyriazis v. University of W. Va., 450 S.E.2d 649 (W. Va. 1994). A university sophomore suffered a thrombosis while playing in a club rugby match. He had signed a release as a condition of participating in this club sport. The trial court granted summary judgment for defendants on the basis that the release was an absolute bar to plaintiff's negligence claim. The Supreme Court of Appeals reversed and remanded.

1. The court reviewed the leading case, Tunkl v. Regents 60 Cal.2d 92 (1963), which is cited quite often for its six-factor test used to determine whether a release violates public policy under the "public service" exception.

a. The agreement concerns an endeavor of a type generally thought suitable for public regulation....

b. The party seeking exculpation is engaged in performing a service for any member of the public who seeks it, or at least for any member coming within certain established standards.....

c. Such party holds itself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards....

d. Because of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks the services....

e. In exercising a superior bargaining power, the party confronts the public with a standardized adhesion contract of exculpation, and



makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence....

f. The person or property of members of the public seeking such services must be placed under the control of the furnisher of the services, subject to the risk of carelessness on the part of the furnisher, its employees or agents.

2. Using the Tunkl criteria, the court held that a state university's provision of recreational activities to its students is a part of its educational mission and thus, the performance of a public service. "When considering whether an enterprise qualifies as a public service, we must examine the nature of the enterprise itself".

3. Further, since the plaintiff had no choice but to sign the release if he wished to play club rugby, the university possessed a decisive advantage in bargaining strength.

4. Based on the above two points, the court found the release to be void as a matter of public policy.

B. Boyce v. West, 862 P.2d 592 (Wash. Ct. App. 1993). A wrongful death action was brought against the instructor of a scuba class and his employer, a private college. The student died from an air embolism as he ascended too rapidly from a deep water dive. The student had signed a waiver form at the beginning of the semester which made specific mention of the university in its language but not of the instructor. The appellate affirmed summary judgment for the instructor and college.

1. The release of an "employer" from liability serves to release the "employee" as well.

2. This court also reviewed Tunkl as it held that the waiver was not against public policy; there is no public interest in a private school offering scuba diving instruction to qualified students as an elective course.

#### V. Premises Liability.

A. Bellezzo v. State, 851 P.2d 847 (Ariz. Ct. App. 1992). A spectator at a college baseball game was hit in the head by a foul ball. Summary judgment was granted to the defendant university. On appeal, this was affirmed.

1. The plaintiff was an invitee and owed the duty to protect her against foreseeable and unreasonable risks of harm.

2. However, the danger of being hit by a foul ball is open and obvious. The lack of a screen is as obvious as the fact that the Grand Canyon is a chasm.

3. Further the university met its duty to protect spectators by offering protected seating, in which the plaintiff chose not to sit.

B. Cannon v. University of Utah, 866 P.2d 586 (Utah Ct. App. 1993). Pedestrians were injured while they crossed a state-owned street en route to a university basketball game.

1. There was no duty owed by the university to these individuals who were not business invitees since they were on a state-owned street when the accident occurred.

C. Rispono v. Louisiana State Univ., 637 So.2d 731 (La. Ct. App. 1994). The plaintiff, who was attending a baseball game at the university stadium, fell on a "non-uniform" step in temporary bleachers. A jury award to the plaintiff, who suffered two broken ribs and a ruptured achilles tendon, was affirmed.

1. The existence of the "non-uniform" step created an unreasonable risk of harm to plaintiff.

#### VI. Miscellaneous Cases.

A. State of Oregon v. Superior Ct. (Lillard), 29 Cal. Rptr. 2d 909 (Ct. App. 1994). A mother, resident of California, brought a wrongful death action against Oregon State University after her son, a California resident, died while playing basketball for that university. The complaint alleged that the university was negligent in its treatment of the athlete's medical condition, which had resulted in a stroke earlier in his career. The California appellate court held that the exercise of personal jurisdiction in this case was appropriate.

1. Since the university had recruited the son in California and had assured the mother in its "re-recruitment" efforts that it would take care of the athlete, there was a sufficient nexus to justify personal jurisdiction.

2. It was fair and reasonable to subject the Oregon university to California jurisdiction because of California's strong interest in protecting the rights of its residents who are allegedly victims of medical malpractice.

B. Dismuke v. Quaynor, 637 So.2d 555 (La. Ct. App. 1994). A fifteen year old girl participated as a camper in an educational day camp which was

staffed by university employees and student aides. The program was run on the university campus. On the day in question, campers were dismissed early due to bad weather. Shortly thereafter, the fifteen year old was allegedly sexually assaulted by a twenty-five year old camp aide. The legal issue is whether the university can be vicariously liable for the sexual assault of this employee.

1. The appellate court found a strong causal connection between the assailant's employment and the sexual encounter. He used his position as counselor to facilitate contacts with the camper.

2. The court also found that this incident was "foreseeable" because university officials could have anticipated that an assault could occur even if precautions were taken. The trial court characterized this incident as part of "the more or less inevitable toll" of running a sports program for children.

C. Lamorie v. Warner Pacific College, 850 P.2d 401 (Or. Ct. App. 1993). The plaintiff, who was on a basketball scholarship, had his nose severely injured while playing football. He had surgery and was forbidden to participate in athletics while his nose healed. His eye was almost swollen shut and his face was noticeably bruised. Nonetheless, his basketball coach "urged" him to play in a basketball scrimmage. The plaintiff stated that he was afraid that if he did not play he would lose his basketball scholarship. In the course of the scrimmage, he was hit in the eye and his nose was reinjured. Summary judgment for the defendant coach was reversed.

1. The appellate court held that a jury could find it foreseeable that the student would suffer an eye injury when directed to participate in a scrimmage after suffering injuries which had impaired his vision.

D. Maynard v. Daily Gazette, 447 S.E.2d 293 (W. Va. 1994). A defamation action was brought against a newspaper publisher by a former director of a university program for student-athletes. An editorial "accused" the plaintiff of using goodwill generated by the program to secure a basketball scholarship for his son. The editorial also alleged that the plaintiff was primarily interested in maintaining the athletic eligibility of athletes. The trial court entered judgment for the plaintiff but the Supreme Court of Appeals reversed.

1. The editorial was not actionable because it did not contain any provably false assertions of fact.

2. A statement of opinion which does not contain a provably false assertion of fact is entitled to full constitutional protection.