# LIABILITY OF A COLLEGE OR UNIVERSITY FOR INTRAMURAL AND RECREATIONAL ACTIVITIES OF STUDENTS

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# LIABILITY OF A COLLEGE OR UNIVERSITY FOR INTRAMURAL AND RECREATIONAL ACTIVITIES OF STUDENTS

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## INTRODUCTION

Can a college or university protect itself from excessive liability claims and awards resulting from injuries suffered in intramural or recreational activities? Does the "student-university" relationship create a special relationship and a greater duty of care on the part of the school? Are "assumption of risk" and "contributory/comparative negligence" still adequate defenses to negligence claims? Are exculpatory agreements and indemnification clauses sufficient to protect a college or university from negligence claims? The answer to each of these questions is a definite "maybe."

## NEGLIGENCE

A negligence, or tort, claim is a claim alleging the failure of one who owed a duty of care to another to fulfill that duty, resulting in an injury to the party owed the duty of care. Negligence is defined in the Restatement (Second) of Torts as conduct that falls below the established legal standard for the protection of others against "unreasonable risk of harm."[2] Negligence is the most often cited theory for a claim against a college or university for an extracurricular or recreational injury.[3] For a negligence claim to prevail, it must first be shown that there was a duty to the injured party. If a duty is established, then it must be shown that the duty was breached and that the breach was the cause of the injury.[4] Liability issues related to colleges and universities in the area of recreational and intramural activities primarily arise under the responsibilities of a landowner to invitees

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[2] Restatement (Second) of Torts §282 (1979).
[3] Tia Miyamoto, *Liability of Colleges and Universities for Injuries Sustained by Students While Participating in Extracurricular Activities*, 15 J.C. & U.L. 149,150 (1988).

or licensees, supervision of activities, training of employees and participants, and maintenance of facilities and equipment.[5]

## STATUS OF THE PLAINTIFF

### I. LICENSEES

The status of the plaintiff as a licensee, invitee or trespasser has a direct relation to the extent of liability for which a landowner can be held responsible as well as what degree of reasonable care is applicable. Restatement (Second) of Torts defines a licensee as a "person who is privileged to enter or remain on land only by virtue of the possessor's consent."[6] Generally, a landowner or possessor of land is subject to liability for harm or injury caused to licensees only if he/she/it fails to exercise reasonable care for their safety in carrying out the owner's activities and only if the owner should not expect these invitees to realize or discover the risk and if the invitee(s) had no reason to know of the dangerous activities and associated risks.[7] When the landowner or possessor knows of a condition potentially harmful to a licensee, there is a duty to either make the condition safe or to warn the licensee of the potential risk when the condition is not obvious enough to apprise the licensee of the danger.[8]

### II. INVITEES

An invitee is very similar to a licensee. Invitees are those persons "who enter or remain on land upon an invitation which carries with it an implied representation, assurance, or understanding that reasonable care has been used to prepare the premises, and make them safe for their reception."[9] Invitees fall into two categories: public and business invitees. Public invitees are "those who enter as members of the public for a purpose for which the land is held open to the public," and business invitees are "those who enter for a purpose connected with the business of the possessor."[10] An owner or possessor of land is generally liable to an invitee for physical harm or injury only if

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[4] *Id.*
[5] Robert D. Bickel, *Tort Accident Cases Involving Colleges and Universities: A Review of the 1995 Judicial Decisions*, 23 J.C. & U.L. 357, 358 (1997).
[6] Restatement (Second) of Torts §330 (1979).
[7] *Id.* at §341.
[8] *Id* at §342.
[9] Restatement (Second) of Torts §332 , cmt. a (1979).
[10] *Id.*

he/she/it knows or should have known by reasonable care of an unreasonable risk of harm to the invitee, and the owner or possessor should not expect the invitee to discover the danger or protect himself from it, and the owner or possessor fails to use reasonable care to protect the invitee from the danger.[11]

## III. TRESPASSERS

An owner or possessor of land has the least amount of liability to trespassers, one who enters upon the land with neither the owner's consent nor an invitation to do so and without a privilege, such as an emergency situation, to enter upon the land.[12] A landowner is not generally liable to a trespasser for any physical harm caused by the owner's failure to exercise reasonable care in the maintenance of the land in a reasonably safe condition or for failure to carry on activities in a manner which will not endanger the trespasser.[13] In limited cases, a landowner may be held to have some liability to a trespasser when an attractive nuisance has been created and the owner should have known it would induce trespassing.[14] Also, when the owner knows or should have known that a trespasser will enter upon his property and he fails to exercise reasonable care to avoid injury to the trespasser, there may be liability exposure.[15]

## DUTY AND RISK

When determining the extent of liability an owner or possessor of land has to an invitee or licensee, it must first be determined that the owner had a duty of care to the person harmed. That is a matter of state common law. The cautious administrator will determine whether the applicable state case law exempts the institution from this duty and, if so, under what circumstance. For a more complete explanation of the changing standards, see, generally Lake, et al, Rights and Responsibilities of the Modern University (Carolina University Press. 1999).

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[11] Restatement (Second) of Torts §343 (1979).
[12] *Id.* at §329.
[13] *Id.* at §333.
[14] *Id.* at §§334-339.
[15] *Id. See also Lam v. Board of Educ., Cent. Islip Union Free Sch. Dist. No. 13,* 53 Misc.2d 238, 278 N.Y.S.2d 264 (1965).

A recent case delineating the methodology for ascertaining the liability of a university landowner to an injured invitee is *Pitre v. Louisiana Tech. University.*[16] The court employed a "duty-risk" analysis which "takes into account the conduct of each individual party and the peculiar circumstances of each case."[17] Such an analysis entails the following inquiries: "(1) Was the conduct of which the plaintiff complained a cause-in-fact of the resulting harm?; (2) What, if any, duties were owed by the respective parties?; (3) Whether the requisite duties were breached?; (4) Was the risk, and harm caused, within the scope of protection afforded by the duty breached?; (5) Were actual damages sustained?"[18] In the *Pitre* case, an extremely unusual snowstorm blanketed the university's campus with snow.[19] While the university placed a winter "bulletin" on all dormitory beds cautioning residents on proper behavior and precautions for handling such weather, it did not discourage students from participating in activities in the snow. Petri was a student of the university, a resident of Louisiana, and basically unfamiliar with this type of weather.[20] He and other students began "makeshift sledding," using a variety of objects as sleds, including the plastic garbage can lid Petri was using, down a hill in a parking lot owned and maintained by the university.[21] Unfortunately, Petri was paralyzed when the lid he was utilizing as a sled collided with the concrete base of a light pole in the parking lot.[22] In its application of the duty-risk analysis, the court acknowledged that a landowner had a duty to its invitees (i.e. students) to discover and correct any unreasonably dangerous condition or to warn of its existence.[23] In ascertaining the unreasonableness of a particular risk, the court compared the benefit of having the light poles and the cost of prevention of the harm with the poles potential for causing harm and found the cost of prevention prohibitive compared to the public benefit of having the poles.[24] More importantly, the court focused on the "obviousness and apparentness of a potentially dangerous condition" as relevant factors to consider, noting that if the "complained of condition should be obvious to all, the condition may not be

[16] *Pitre v. Louisiana Tech. Univ.*, 673 So.2d 585 (1996).
[17] *Id.* at 589.
[18] *Id.* at 589, 590.
[19] *Id.*
[20] *Id.* at 587.
[21] *Id.* at 587, 588.
[22] *Id.* at 588.
[23] *Id.* at 590.

unreasonably dangerous and the defendant [university] may owe no duty to the plaintiff."[25] The court concluded that the university had not breached its duty of reasonable care to its invitee, Petri, when it considered the benefit of the light poles and the minimal risk associated with sledding, as well as the obviousness of the potential dangerous condition to all parties.[26]

Of course, the *Petri* decision is fact specific. Those from northern climes understand that sliding down hills on something (anything!) is a "normal" campus activity.

In addition, many plaintiffs have begun alleging that the campus has a "special relationship" with its students, thus triggering a heightened general duty to supervise. In theatrical or intramural contexts it could be argued that in some instances, the sponsorship of an activity (i.e. intercollegiate athletics) created a special relationship and, hence, special duty.[27]

Fortunately, there is also the recognition that the institution cannot control unsupervised or social activities. Thus, the Colorado Supreme Court set aside a $5 million plus verdict against the University of Denver for injuries (quadriplegia) suffered in a trampoline accident at a fraternity house.[28]

## APPARENT AND OBVIOUS DANGER

In cases in which the danger is apparent and obvious, courts have not been consistent. Generally, in jurisdictions which have concluded that the university did not have a duty to warn of an unsafe condition when it is obvious, courts often apply "an underlying requirement to liability of a landowner ...that he have knowledge of that condition which is superior to that reasonably obtainable by the invitee."[29] The prevailing rule, however, is when the landowner "(1) knows or should know of a

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[24] *Id.*
[25] *Id.* at 591.
[26] *Id.* at 596.
[27] *Kleinknecht v. Gettysburg College,* 989 F. 2d 1360 (3rd Cir. 1993).
[28] *Denver v. Whitlock,* 774 P. 2d 54 (Colo. 1987). *See also, Bradshaw v. Rawlings,* 612 F. 2d 135 (3rd Cir. 1979)), where college not liable for injuries suffered at off-campus class picnic even if faculty advisor was aware of likelihood of underage drinking.
[29] *Rice v. Florida Power & Light Co.,* 363 So.2d 834, 840 (1978). *See also Peorio v. State of New York,* 144 A.D. 2d 129, 534 N.Y.S. 2d 459 (1988) in which plaintiff's failure to watch where he was going caused him to fail to observe a readily foreseeable hazardous condition.

condition that presents an unreasonable risk to the invitee and (2) should expect that the invitee will not discover or appreciate the dangerous condition, or will fail to protect himself against it," (emphasis added) then the landowner will be liable to the invitee, even in instances of obviousness.[30] In other words, there are instances where the danger is unclear to a casual observer, thus imposing a greater burden upon the institution. However, notwithstanding the above, a defendant can often successfully argue that a claimant must "see what there is to be seen."

## DUTY TO USE REASONABLE CARE

Because most courts have basically merged the meanings of invitees and licensees, the duty of a landowner to an invitee or a licensee is to use "reasonable care under all circumstances"[31] and to "use ordinary care to maintain the premises in a reasonably safe condition for use in a manner consistent with the invitation."[32] A seminal case in which the university landowner was found to have negligently failed to provide a safe environment for its invitees when it had knowledge or should have had knowledge and notice of a potentially dangerous situation is *Stockwell v. Board of Trustees of Leland Stanford Junior University*.[33] Stockwell, a student of the university, had attended a university sponsored activity and was en route home when he was shot in the eye with a BB gun by an unknown boy while on university property.[34] Even though the university had been designated a game refuge, evidence was presented that clearly showed that it was well known to university officials charged with the duty to maintain the grounds in safe condition that there had been "promiscuous use" of the campus grounds of BB guns by young boys and others at least for the two years prior to Stockwell's injury.[35] The court noted that the general rule was "An owner in occupation of the premises violates his duty to an invitee when he negligently allows conditions to exist on the property which imperil the safety of persons upon the premises. For such

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[30] *Bickel* at 363. *See also Brown v. Florida State Board of Regents*, 513 So. 2d 184 (1987), in which the court found that allegations referring to dangerous conditions known by the landowner have been found sufficient for a cause of action against the landowner.

[31] *Mortiboys v. St. Michael's College*, 478 F. 2d 196, 197 (1973).

[32] *Rice v. Florida Power & Light Co.*,363 So. 2d 834, 839 (1978).

[33] *Stockwell v. Board of Trustees of Leland Stanford Junior University*, 64 Cal. App. 2d 197, 148 P. 2d 405 (1944).

[34] *Id.* at 199, 406.

violation he is responsible to the injured person."[36] Keep in mind that in *Stockwell,* there was actual notice to the institution and nothing was done.[37] Would a sign prohibiting the carrying or use of firearms or BB guns have been sufficient to protect the university?

Once a duty has been found to exist, it is the plaintiff's burden to prove that the defendant university breached that duty. The elements required to prove a breach of duty are clearly delineated in *Berger v. Board of Trustees of the University of Illinois.*[38] The court indicated that (1) the plaintiff must prove that the university "breached its duty of reasonable care; (2) the Claimant was free of contributory negligence; (3) the negligence of Respondent proximately cause the injury, and; (4) the State had actual or constructive notice of the dangerous condition from all the circumstances in the case."[39] In this case, the plaintiff was injured while playing ping-pong when he tripped over a net installed by the university.[40] One wonders what he was doing on the table! The court found that the university was not negligent in its duty since there was no evidence that the nets were dangerous nor that the university had any notice of a potentially dangerous condition since there had never been any other reported accidents involving the nets since their installation several years earlier.[41]

## BASIS OF CLAIMS

### I. LACK OF SUPERVISION

Other factors often invoked in negligence litigation – and especially applicable to intramural and casual sports -- are the lack of supervision of activities, failure to properly maintain the facilities and equipment and lack of training and negligence of employees. Lack of supervision is perhaps the most often invoked of these factors in negligence claims. Case law has not been consistent in its decision-making regarding these factors, and it appears that the courts have chosen to address these issues on a case-by-case basis. A university's liability for lack of supervision or the failure to provide adequate

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[35] *Id.* at 200, 406.
[36] *Id.*
[37] This is consistent with a line of cases, notably *Mullins v. Pine Manor College,* 449 N.E. 2d 331 (Mass. 1983), holding the institution liable for failing to take steps to protect students from potential danger(s) where the institution had, or should have had, knowledge of the potential problem.
[38] *Berger v. Board of Trustees of the Univ. Of Ill.*, 40 Ill.Ct. Cl. 120 (1988).
[39] *Id.*
[40] *Id.*

supervision is often tied to the university's policies and the student's knowledge and assumption of inherent risks associated with the activity.

As noted in *Leahy v. School Board of Hernando County,* "recognizing that a principal task of supervision is to anticipate and curb rash student behavior, ...courts have often held that a failure to prevent injuries caused by the intentional or reckless conduct of the victim or a fellow student may constitute negligence."[42] In *Leahy*, a student was injured when he participated in an agility drill during football practice in which some of the students received helmets and other protective equipment and others, including the plaintiff, did not.[43] There were no cautionary instructions given by the coach and even though the drill was characterized as "noncontact" by the coach, contact was involved and became more intensive as the drill progressed, with no intervention by the coach.[44] In *Leahy,* there was a coach assigned by the school; hence a court could infer a "special relationship" with students place in his charge. At least in K-12 schools, *in loco parentis* is not dead.

The issue of foreseeability of a harm in certain circumstances may infer liability, and if " an intervening cause is foreseeable, it cannot insulate a defendant from all liability."[45] As the court noted, "foreseeable consequences are those which a person by prudent human foresight can be expected to anticipate as likely to result from an act, because they happen so frequently from the commission of such act that in the field of human experience they may be expected to happen again. Although the actual harm that results may be seen as not foreseeable, ... all that is necessary is that the tortfeasor be able to foresee some injury as likely to result in some manner as a consequence of his negligence."[46] As in this case, failure to properly supervise an activity can defeat a

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[41] *Id.*

[42] *Leahy v. School Bd. Of Hernando County,* 450 So. 2d 883,887 (1984). *But see Fortier v. Los Rios Community College Dist.,* 45 Cal. App. 4th 430, 52 Cal. Rptr. 2d 812 (1996) in which plaintiff was denied recovery for injuries incurred from a collision with another student in noncontact football drills in which no protective equipment was used. He was deemed to have assumed the risk inherent in a contact sport such as football. *See also Convey v. City of Rye School District,* 271 A. D. 2d 154, 710 N. Y. S. 2d 641 (2000), in which the court found that the injury sustained by the student in playground horseplay could not be avoided through normal supervision and that the school was not negligent in providing supervision.

[43] *Id.* at 884-885. Later in this paper is a discussion of liability bases upon the failure to provide adequate equipment or failure to inspect that equipment.

[44] *Id.* at 886.

[45] *Id.*

[46] *Id.*

defense of assumption of risk.[47] To the extent that it was foreseeable by the university, that it should have known or knew the student was exposed to a risk of injury, will often play a role in the court's determination of whether a duty of care was owed and whether it was negligently breached.[48] Although this line of cases involves organized sports, they are applicable to intramural or casual activities to the extent the university undertakes supervision of the activities. In other words, if you provide supervision, you may be held to a higher standard of care. Think "special relationship."

## II. FAILURE TO ENFORCE POLICIES/RULES

A university's failure to enforce and implement its own policies and rules can also result in liability. In *Bishop v. Texas A&M University,* a student was accidentally stabbed in a school production of *Dracula.*[49] Bishop argued that the faculty advisors for the play were "negligent in using a real knife" and "in not properly overseeing the production to ensure that TAMU policies were enforced."[50] The school's student organizations handbook required that all school organizations and activities have a faculty advisor and that all faculty advisors had to be knowledgeable regarding university rules and policies, be aware of liability issues and were responsible for enforcing university policies and procedures, including the policy prohibiting deadly weapons on campus.[51] In other words, the university imposed a supervisory structure on the activity. The court found that the university could be held liable for the negligent actions of its employees, even when they are performing a voluntary function.[52] This case is representative of the liability a college or university can incur for school sponsored or sanctioned activities other than intramural sports and premises liabilities.

## III. EQUIPMENT

Providing adequate, safe and effective equipment for a university sponsored recreational or sports activity may mean the difference between prevailing in a suit or being held liable for a student's injuries. Rarely, however, is the condition of equipment

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[47] *See also Kane v. North Colonie Cent'l School Dist.*, 708 N.Y.S.2d 203 (2000) in which court stated that the plaintiff's assumption of risk was not an absolute defense to defendant's obligation of reasonable care when supervising an activity.
[48] Miyamoto at 150-151.
[49] *Bishop v. Texas A&M Univ.*, 2000 WL 854300 (Tex.) (2000).
[50] *Id.*
[51] *Id.*
[52] *Id.*

the overriding issue in a case. It is usually tied to the issues of lack of supervision and lack of training.[53] The need to provide proper and well-maintained equipment is fairly obvious. Of greater concern is whether or not there is a requirement to provide equipment for an intramural sporting activity. In *Lynch v. The Board of Education of Collinsville Community Unit District No. 19,* a student was injured in a "powderpuff" football game which was traditionally played as a part of homecoming activities at the high school.[54] The court indicated that a school "has an affirmative duty, where students are engaging in school activities, whether they are extracurricular, or formally authorized as part of the school program, to furnish equipment to prevent serious injuries."[55] The court also indicated that it was immaterial whether or not the school formally authorized the activity.[56]

A critical issue not addressed in this case, and similar cases, is the standard of quality the equipment, if provided, must have. Must a university maintain state-of-the art equipment, with the newest technology, for intramural and general recreational activities held on its property or sponsored by the university? What is the standard of improvement of equipment the university must maintain for such activities? Is the level of quality the same as for intercollegiate play or is there a lesser standard? A university must assess the degree of its exposure when it does provide equipment for intramural and recreational activities and govern its maintenance and upgrading of equipment policies accordingly.

## IV. PREMISES

It goes without saying that the owner of premises owes certain duties to the users of those premises. As discussed earlier in this paper, there are circumstances where the owner may be liable for injuries or loss caused by the premises. This may especially be true with respect to improvements on the premises.

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[53] *See generally, Zmitrowitz v. Roman Catholic Diocese of Syracuse,* 710 N.Y.S. 2d 453 (2000), in which student injured during a softball practice did not wear a catcher's mitt and the court found that the student did not assume the risk of injury due to the coach's breach of his responsibilities.

[54] *Lynch v. The Bd. of Education of Collinsville Community Unit Dist. No. 19,* 82 Ill. 2d 415, 417-419, 412 N.E. 2d 447, 450-451, 45 Ill. Dec. 96, 100 (1980).

[55] *Id.* at 434, 459, 108.

## DEFENSES

### I. ASSUMPTION OF THE RISK – EXPRESS AND IMPLIED

The two primary defenses to negligence claims are assumption of the risk and contributory negligence.[57] These defenses have been complete bars to recovery in the past or have significantly reduced damage awards. These defenses are closely associated with the discussions on "Inherent Risks of Sports and Releases," in Sections III and IV below..[58] Assumption of risk simply means that a plaintiff has voluntarily assumed a risk of harm arising from the negligent or reckless conduct of the defendant and cannot recover for such harm.[59] The doctrine of assumption of risk is not universally accepted and has been either severely limited in some jurisdictions or completely abolished in other jurisdictions, usually for public policy reasons.[60]

Assumption of risk may be express and/or implied. According to the Restatement (Second) of Torts, express assumption of risk is when a person, either by contract or an express action of consent, agrees to accept a risk of harm arising from the defendant's negligent conduct, unless the agreement is determined to be contrary to public policy.[61] In order for an express assumption of risk to be valid, "the plaintiff must have voluntarily exposed himself to a known risk."[62] Examples of express assumption of risk documents are exculpatory waivers, disclaimers, statement of risk forms and liability releases.[63] Surgery patients are asked to sign waivers. Given the inherent unfairness and the public policy against releasing someone from actual negligence before the fact, these waivers are usually unenforceable.[64]

Implied assumption of risk is when a person fully understands the risk of harm involved due to defendant's conduct and by voluntarily choosing to proceed in a manner which exposing him/her to the risk, he/she manifests his/her willingness to accept the risk

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[56] *Id.*
[57] John L. Diamond, *Assumption of Risk after Comparative Negligence: Integrating Contract Theory into Tort Doctrine*,52 Ohio St.L.J. 717, 718 (1991) (hereinafter *Diamond*).
[58] *Id.*
[59] Restatement (Second) of Torts, §496 A (1979).
[60] Eugene C. Bjorklun, *Assumption of Risk and its Effects on School Liability for Athletic Injuries*,_55 Ed. Law Rep. 349,354-355 (1989).
[61] Restatement (Second) of Torts, §496 B (1979).
[62] *Leahy v. School Bd. Of Hernando County*, 450 So. 2d 883, 887 (1984).
[63] Bjorklun at 356.
[64] *See* cases cited *infra*, in88-91 notes.

of harm, thereby barring any recovery for defendant's negligent conduct.[65] As with express assumption of risk, the rule does not apply if it is contrary to public policy.[66] Implied assumption of risk has been divided into two categories of primary and secondary implied assumption of risk.[67] Under primary assumption of risk as it relates to sporting activities, the risks are "incidental to a relationship of free association between the defendant and the plaintiff in the sense that either party is perfectly free to engage in the activity or not as he wishes" and the defendant's duty of care is to maintain the conditions as safe as they appear to be to all the parties.[68] It reflects a plaintiff's voluntary acceptance of a lack of duty in the defendant and the known risks that the plaintiff "impliedly assumes." [69] Secondary assumption of risk is the "voluntary encountering of a known risk created by a defendant's negligence" and the decision to assume the risk may be "reasonable, cautions, or both, when assessed objectively against the degree of risk."[70]

As discussed in Sections III and IV, the institution can go a long way in protecting itself by taking such simple steps as: obtaining consents, waivers, or exculpatory agreements, posting signs, preparing brochures, etc. Moreover, the assumption of the risk may directly relate to the nature of the activity. To explain, an international student from China would not understand the risks of participating in football. The American counterpart would be similarly naïve about the risks of martial arts. So, especially where the institution "sponsors" the intramural activity, it is best to assume little or no knowledge on the part of participants and to provide appropriate caveats. And, the institution should review the publications of the campus recreation operation, to make certain that no promises have been made which cannot be kept.

## II. CONTRIBUTORY/COMPARATIVE NEGLIGENCE

Contributory negligence as a defense is not favored in the courts and has been replaced in most jurisdictions by the doctrine of comparative negligence.[71] Contributory negligence served as a complete bar to recovery and involved "an unreasonable

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[65] Restatement (Second) of Torts, §396 C, cmt. B (1979). *See also* Bjorklun at 355.
[66] Restatement (Second) of Torts, §496 C (1979).
[67] Diamond at 730.
[68] *Gehling v. St. George's Univ. School of Medicine, Ltd.*, 705 F. Supp. 761, 767 (1989).
[69] *Mizushima v. Sunset Ranch, Inc.*, 103 Nev. 259,262, 737 P. 2d 1158, 1160 (1987).
[70] *Id.*

encountering of a known risk" by taking an "unnecessary and inexpedient shortcut... , confronting known and hazardous obstacles."[72] Under the comparative negligence doctrine, the plaintiff's negligence does not serve as a complete bar to recover; instead, the plaintiff's negligence serves to attribute a portion of accountability to the plaintiff, reducing their recovery accordingly.[73] The doctrine of comparative negligence serves to remove the extremely harsh effect of a plaintiff's own contributory negligence completely barring any recovery when the defendant clearly served as a source of injury under the circumstances.[74] Keep in mind that the effect of comparative negligence differs according to state law. In some jurisdictions, comparative negligence of over 50% bars recovery while in others, it merely reduces the award.

## III. INHERENT RISK OF SPORTS

Generally, courts have held that students have assumed the risks inherent with the type of sport being played.[75] In *Nganga v. College of Wooster,* a student participating in an intramural soccer game was injured while playing against a team known for their rough play.[76] The court held that soccer was a contact sport with certain risks associated with contact sports and that the player "assumes the ever increasing risk by choosing to continue his participation in a high-contact sport."[77]

As noted in *Regents of the University of California v. Superior Court (Roettgen),* the assumption of risk doctrine is an exception to the general rules of liability.[78] In this case, University of California student Roettgen was killed while participating in a rock climbing class.[79] Even though evidence was presented which indicated that the university's instructor's negligence either proximately caused or (at least) contributed to Mr. Roettgen's fall, the claim was denied based upon the doctrine of primary assumption

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[71] Diamond at 718.
[72] *Mizushima* at 262, 1160.
[73] Diamond at 719.
[74] *Mizushima* at 264, 1161.
[75] *See generally Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P. 2d 696 (1992), *Ford v. Gouin*, 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P. 2d 724 (1992), *Gehling v. St. George's Univ. School of Medicine, Ltd.*, 705 F. Supp. 762 (1989).
[76] *Nganga v. College of Wooster,* 52 Ohio App. 3d 70, 557 N.E. 2d 152, 153 (1989).
[77] *Id.* at 72. 154.
[78] *Regents of the Univ. of California v. Superior Ct.(Roettgen),* 41 Cal. App. 4th 1040, 1045, 48 Cal. Rptr. 2d 922, 924 (1996).
[79] *Id.* at 923, 1042.

of risk.[80] The case of *Rubtchinsky v. State University of New York at Albany* is another example of an activity sponsored by a student organization resulted in the university being sued when the student participant was injured.[81] In *Rubtchinsky,* a freshman student was injured while participating in a Student Association sponsored game of pushball, a "rough physical game" similar to football or rugby.[82] The court held that the college was not required to provide supervision for "organized extracurricular activities of students on or off school grounds, unless such activities are so inherently dangerous that the College authorities are under actual or constructive notice that injuries may result to students."[83] The court held that the university should not be "made the insurer of the safety of those who participate in this type sport."[84] Would the same result have been reached if the university had a rule requiring the active presence of an advisor or a supervisor from the recreation office? Probably.[85]

## IV. RELEASES

Exculpatory agreements, consent documents and waivers of liability are the most commonly used express assumption of risk documents in the areas of recreation and sports activities by institutions as a means of limiting their liability in an ever-burgeoning field of interest as well as litigation. Such documents are known as releases, which are "contract[s] in which one party agrees to abandon or relinquish a claim, obligation or cause of action against another party."[86] While courts generally disfavor agreements in which an individual contracts away his rights in order to participate in an activity (i.e. the rationale behind the voidability of before the fact releases), they have reluctantly found them enforceable, especially in the athletics and recreational arenas, perhaps because of the voluntary nature of the participation and the general knowledge of risks inherent in sports.[87] There are circumstances, however, when courts will decline to enforce such agreements and waivers. Reasons for not enforcing such agreements usually are for

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[80] *Id.* at 923, 1043.
[81] *Rubtchinsky v. State Univ. of New York at Albany,* 46 Misc. 2d 679. 260 N.Y.S. 2d 256 (1965).
[82] *Id.* at 680, 258
[83] *Id.* at 681, 259.
[84] *Id.* at 682, 260.
[85] *See supra* case at note 49.
[86] Mario R. Arango and William R. Trueba, Jr., *The Sports Chamber: Exculpatory Agreements Under Pressure,* 14 U. Miami Ent. & Sports L. Rev. 1, 7 (1997).
[87] *Id.* at 10.

public policy reasons, ambiguity and the execution of the release by parties who do not have the ability to release the rights in question.

## ENFORCEABILITY OF EXCULPATORY AGREEMENTS

Public policy issues regarding exculpatory clauses and agreements have been only moderately successful in blocking their enforcement by the courts. *Tunkl v. The Regents of the University of California* is the seminal case that delineates the six characteristics which should be evaluated when determining if an exculpatory agreement is violative of the public interest.[88] *Tunkl* involved the validity of a release from liability for future negligence required as a condition to being admitted into the University of California at Los Angeles Medical Center.[89] Prior to Mr. Tunkl being admitted to the hospital, he was required to sign an exculpatory release.[90] The court cited the following six characteristics as the basis for determining if an exculpatory agreement violates the public interest:

> "[1] It concerns a business of a type generally thought suitable for public regulation. [2] The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. [3] The party holds himself 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. [4] As a result 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 his services. [5] 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. [6] Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents."[91]

The court held that a release signed by a patient was invalid as being against public policy because the hospital had a superior bargaining position to the patient and it provided an essential public service.[92]

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[88] *Tunkl v. The Regents of the Univ. of California,* 60 Cal. 2d 92, 383 P. 2d 441, 32 Cal. Rapt. 33 (1963).
[89] *Id.* at 94, 442, 34.
[90] *Id.* at 98, 444, 36.
[91] *Id.* at 99-101, 444-446,36-38. *Note:* Author added numerals for clarity.
[92] Arango and Trueba at 13.

The characteristics outlined in *Tunkl* have been applied to public school institutions and have been held valid, most notably in *Wagenblast v. Odessa School District No. 105-157-166J.*[93] In *Wagenblast,* the court held that releases required by the public school district in order for students to participate in interscholastic sports activities were against public policy and that the public school district met each of the characteristics delineated in *Tunkl.*[94] The court also noted that because such releases, which are express assumptions of risk releases, had been found to be against public policy, it would also be against public policy to state that the plaintiff had assumed the particular risk.[95] The court did allow, however, that risks other than those generated by the district's negligence may qualify as an assumption of the risk and would be a question for the court.[96] It would be fairly easy to apply the six characteristics outlined in *Tunkl* to any recreational and intramural activities at a college or university. However, the defense of assumption of risk has not been entirely overruled. Instead, it must be assessed on a case-by-case basis. For example, *Tunkl* involved interscholastic (i.e. organized) sports where, presumably, the school has vastly superior bargaining power. This can be contrasted with college intramurals or recreation where the scales are far more even.

Could a university or college be held in violation of the public interest by applying the six determinative characteristics delineated in *Tunkl*? First, a college or university lends itself to public regulations by their very nature of being accessible to the public. Public universities and colleges are subject to state or "public" regulations statutorily. Second, the educational and social benefits provided by a college or university are of great significance and importance to the public as a whole. Third, because colleges and universities have anti-discriminatory policies and because they admit persons who meet the criteria established for admission, they hold themselves out as willing to provide the service for those who seek it. Otherwise, they may as well close their doors and go home. Fourth, a person seeking the services offered by the college or university would not be in as strong of a position to negotiate the terms of admission or utilization of the services. Fifth, if it is found that, under all the circumstances, the

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[93] *Wagenblast v. Odessa School Dist. No. 105-157-166J,* 110 Wash. 2d 845, 748 P. 2d 968 (1988).
[94] *Id.* at 856, 973.
[95] *Id.*
[96] *Id.* at 857,974.

institution had an unfair bargaining position, the document might be voidable as a contract of adhesion unless there are alternative services or opportunities. Finally, and arguably, once the release has been executed, the student has placed himself under the control of the university or college as it relates to the service being contracted and has thereby subjected himself to the risk or carelessness or harm by representatives of the institution. Undeniably, a college or university could fit the characteristics as delineated in *Tunkl.* A college or university is not, however, without defenses, such as assumption of the risk; the informed choices made by their students, most of whom are adults,[97] or their guardians, if applicable; and the ability to get similar services elsewhere.

In any event, the court will very often leave the determination to the trier of fact. The recent case of *Quinn v. Mississippi State University* is an example of the court's unwillingness to summarily dismiss a claim against a college or university.[98] In *Quinn,* the minor child Quinn was injured by a bat during a demonstration by an instructor at a university sponsored baseball camp.[99] The child's parents paid a fee for his participation and signed an exculpatory release.[100] The court held that the university had entered into an implied contract with the Quinns which carried with it "an implied promise that the university would provide a safe instructional environment for the campers."[101] The court also held that the type and degree of risk assumed by the Quinns when they executed the release was for a jury to decide and that the university could not "use an anticipatory release to escape liability for tortious acts."[102] As the court noted, such clauses are subject to strict scrutiny and will not be enforced "unless the limitation is fairly and honestly negotiated and understood by both parties."[103] Such a determination cannot be summarily dismissed.

Another issue raised in determining the validity of exculpatory releases is whether the person signing the release has the authority to do so. Courts have consistently upheld

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[97] For this reason, the cases involving primary or secondary schools, where students are usually under the age of eighteen, especially those involving a knowing assumption of the risk or failure to supervise, may have limited applicability to higher education .
[98] *Quinn v. Mississippi State Univ.*, 720 So. 2d 843 (1998).
[99] *Id.* at 844.
[100] *Id.* at 850.
[101] *Id.*
[102] *Id.* at 851.
[103] *Id.*

the ruling of a seminal case on this issue – *Doyle v. Bowdoin College.*[104] In *Doyle,* the court held that a parent could not release the cause of action of a minor child for injuries caused as a result of an institution's negligence.[105] It should be noted that the child was injured in a hockey clinic, an activity sponsored by the college, and that the child was not a student of the college.[106] Some courts have clarified *Doyle* further by noting that the parent can only release a cause of action on behalf of the parent of an injured child, but not that of the child himself.[107]

Another issue which arose under *Doyle* and which has been another basis for non-enforcement of exculpatory releases was the ambiguous language of the release.[108] As the court noted, the documents signed by the parents did not expressly refer to the college's liability for its own negligence and noted that the language indicating the college would not "assume" or "accept" responsibility for the child's injuries, it could only be interpreted as meaning the college would not assume any additional responsibility over and above its responsibilities for its own negligent conduct.[109]

So, the language of the agreement can make or break a case. Because courts tend to disfavor exculpatory releases and will interpret releases in a manner most favorable to the injured party, it is incumbent upon the preparers of the documents themselves that they assure that the language is unambiguous and what is expressly being released is abundantly clear. As the court stated in *O'Connell v. Walt Disney World Company,* unless a release "clearly and unequivocally provides for indemnification for the indemnitee's own negligence, that obligation will not be inferred."[110] In *O'Connell* a minor child was injured during a horseback riding activity during a stampede supposedly caused by the negligent acts of Walt Disney World employees.[111] Although the parents signed a release, the court held that the release was unclear and had ambiguous language which did not clearly indicate that the O'Connells were fully aware of the risks involved

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[104] *Doyle v. Bowdoin College,* 403 A. 2d 1206 (1979).
[105] *Id.* at 1208-09.
[106] *Id.* at 1206.
[107] *See Childress v. Madison County,* 777 S. W. 2d 1 (1989).*See also Meyer v. Naperville Manner, Inc.,*262 Ill. App. 3d 141, 634 N.E. 2d 411, 199 Ill. Dec. 572 (1994) in which mother's pre-injury waiver did not bar child's claim unless expressly provided for by statute.
[108] *Doyle* at 1208.
[109] *Id.*
[110] *O'Connell v. Walt Disney World Company,* 413 So. 2d 444, 447 (1982).
[111] *Id.* at 446.

in the activity.[112] The risks which are to be assumed by the plaintiff must be indicated in unambiguous language and it must be clear that the plaintiff understood the risk and intended to assume it.[113]

The need for clear and unambiguous language is reinforced in the recent case of *Turnbough v. Ladner.*[114] A scuba diving student was seriously injured when the diving instructor negligently miscalculated dive times and depths.[115] Turnbough had signed an exculpatory release which was preprinted and contained a broad provision for the waiver of negligence on the part of the instructor, Ladner, and the Gulfport Yacht Club, her employer.[116] The court held that the release was ambiguous and unclear as to the extent of exemption from liability Turnbough had agreed to.[117] As the court noted, "the wording of an exculpatory agreement should express as clearly and precisely as possible the extent to which a party intends to be absolved from liability" and "those who wish to relieve themselves from responsibility associated with a lack of due care or negligence should do so in specific and unmistakable terms."[118]

When the language is clear and unambiguous, however, the court will most likely rule in favor of the defendant, as in *Poskozim v. Monnacep.*[119] In *Poskozim,* a sky diving student was injured in his first jump in a skydiving class offered as a joint venture between the local community college, school districts and sports business establishment.[120] The plaintiff signed an exculpatory agreement which the court held was "clear, explicit and unequivocal in demonstrating the party's intent to exculpate..."[121] The agreement specifically excluded all of the parties, directly or indirectly, related to or arising out of the activity from liability for any claims.[122] There was no room for misunderstanding by any of the parties as to the intent of the agreement, therefore, the agreement was enforceable.

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[112] *Id.* at 449.
[113] *Id.*
[114] *Turnbough v. Ladner,* 754 So. 2d 467 (2000).
[115] *Id.* at 468.
[116] *Id.*
[117] *Id.* at 469.
[118] *Id.* at 469, 470.
[119] *Poskozim v. Monnacep,* 131 Ill. App. 3d 446, 475 N. E. 2d 1042, 86 Ill. Dec. 663 (1985).
[120] *Id.*
[121] *Id.* at 449, 1044, 665.
[122] *Id.*

## SUGGESTIONS

While there are many issues to consider when assessing the degree of liability a college or university may have to its students and others participating in activities either sponsored by the institutions or held on their property, it is not impossible and there are steps the institutions can take to protect themselves. In his commentary Managing Athletic Liability: An Assessment Guide, Philip Burling provides six helpful requirements for successfully managing risks.[123] First, clear and direct policies and procedures must be instituted directing those in positions of supervision over activities to manage foreseeable risks. Second, substantive, formal training must be given to all persons with any responsibility for risky activities. Third, proper supervision must be stressed and adhered to. Fourth, when a failure to adhere to the rules, policies and procedures does arise or comes to the attention of anyone in authority, corrective action must be taken quickly and in a manner relevant and commensurate with the infraction. Fifth, administrators should make use of any and all information available to them to continuously review and revise policies and procedures and to provide updated training. Sixth, advice and support from the institution's legal counsel before a problem arises can often avoid problems later.[124] There are no substitutes for adequate supervision, proper maintenance of facilities and equipment, proper training of staff and clear, unambiguous exculpatory documents when seeking to reduce an institution's liability.

And, buy insurance. Lots of insurance.

[123] Philip Burling, *Managing Athletic Liability: An Assessment Guide*, 72 Ed. Law Rep. 503 (1992).
[124] *Id.* at 503-504.