

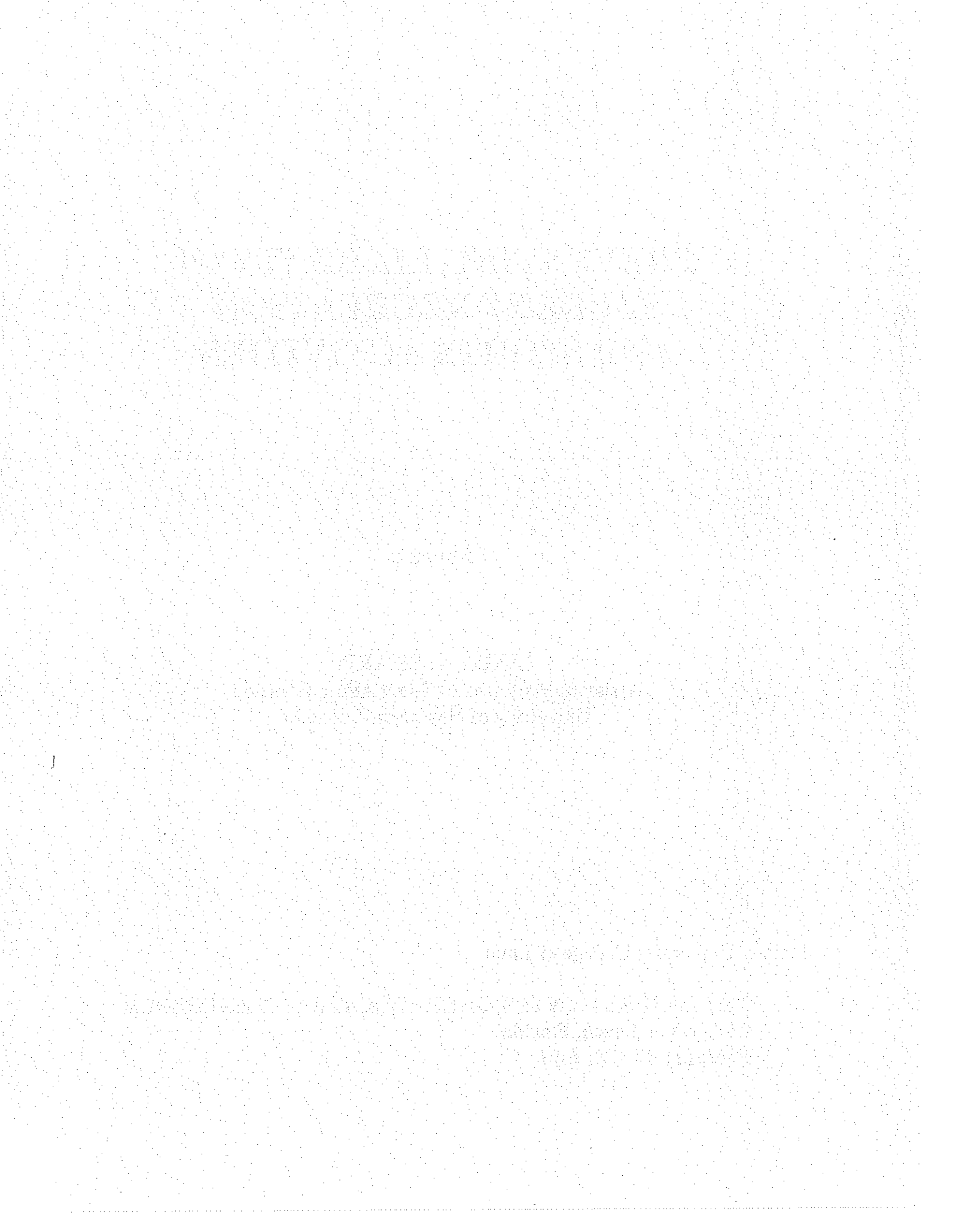
# **PREVENTING LIABILITY IN STUDENT RECREATION AND SPORTS ACTIVITIES**

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**Preventing Liability in Student Recreation and Sports Activities**  
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**Introduction**

It has become commonplace for colleges and universities, both small and large, to make huge expenditures to renovate or build new and spacious facilities for student recreation. The 1990s brought a recognition that a beautiful recreation facility can serve as an important tool in student recruitment and retention. Further, the recreation center can help students to gain physical and social benefits. Examples of recent expenditures for such facilities include Baylor University's 156,000 square foot facility which cost \$18.4 million, DePaul University's 121,000 square foot facility which cost \$13 million, Ithaca College's 42,800 square foot facility which cost \$5 million, and Slippery Rock University's 82,000 square foot facility which cost \$10.4 million. All of these facilities were awarded the Facilities of Merit distinction from Athletic Business (December, 2000 issue) and are indicative of the type of expenditures institutions of higher education are making for student satisfaction in the realm of recreational activities. For a further discussion of this issue see, Steinbach, P. "Ground-Floor Lobbying" in Athletic Business (August, 2000) pp.47-56.

It will be interesting to see the evolution of the standard of care as it pertains to a university relative to supervision issues in the realm of recreational sport and activities. Most courts are still very much wedded to the "no duty to supervise" adult students rationale as we deal with informal sport. As universities vie for students through the use of state of the art facilities, and admit that they are trying to compete with local health and fitness facilities for this youthful population, it would not surprise me to see a shift in thinking so that courts look at

the duty of care analysis as they do for the commercial fitness club and not just as an extension of the educational mission, as has been the norm in the past. This analysis should not affect the issues dealing with facility defects, since the university is already under the duty of care applicable to its students as invitees, but it may affect the role universities are expected to play as supervisors in the recreational facility. The following outline discusses the caselaw which exists in regard to various legal issues in this area and I have included recent cases which might be harbingers of new approaches to liability.

## **I. Supervision in Sports and Recreational Activities.**

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 student.

1. In Robertson v. State of Louisiana, 747 So.2d 1276 (La. Ct. App. 1999), a college student, who had been drinking alcohol, received fatal injuries when he fell from the natatorium roof which he had been attempting to climb. The roof was constructed with outside supports which the student attempted to climb but he slipped, fell to the ground, and received a deadly blow to the head. Prior to this incident, three other students had attempted to climb the roof and were injured. The plaintiffs argued that the university acted unreasonably in failing to take action to dissuade students from climbing the roof supports. The appellate court, however, affirmed summary judgment for the university as it held that there is no custodial duty for the university to protect against injury from youthful misjudgments, pranks or alcohol-related incidents. Further, the duty of the university to provide a safe campus and not to act

unreasonably with regard to students does not extend to protect a student from a deliberate act of recklessness in climbing the roof. The three prior incidents on campus, do not give rise, reasoned the court, to an affirmative duty to act in light of the non-custodial university-student relationship and the obvious danger of the roof.

2. In Apffel v. Huddleston, 50 F. Supp. 2d 1129 (D. Utah 1999), a college freshman was killed while attending a party for incoming freshmen. The party was held at a nearby state park with sandstone cliffs as a prominent feature of the terrain. The decedent tried to climb the cliffs and fell to his death. The plaintiffs asserted, in their § 1983 action against the college, that the defendant administrators who organized the party had knowledge of the extreme danger posed by the cliffs and therefore, the planning of the party in this area was in willful disregard for the safety of “out-of-state” students who would be uninformed about the dangers of climbing these cliffs. The district court held that no “special relationship” existed between the decedent and the college sufficient to create a legal duty to protect the freshman from the inherent danger of climbing the cliffs. The defendants’ motion to dismiss the suit was granted.

3. In Whitlock v. University of Denver, 744 P.2d 54 (Colo. 1987), a student was injured on a rather unstable trampoline that 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.

4. In Swanson v. Wabash College, 504 N.E.2d 327 (Ind. Ct. App. 1987), the university had no duty to supervise baseball practices that 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.

5. 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, traveled 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.

6. In Fisher v. Northwestern Univ., 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. Relying on the Fox case discussed above, the court held that there was no duty to provide supervision or to monitor the cheerleaders. 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.

7. 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".

8. 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 that 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.

9. In 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 the 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. the court held that the coach had no duty to prevent this adult student from drinking and that the mere ability to control doe snot give rise to a legal duty.

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 life vests.

2. In 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. On appeal, the court held directly contrary to the Fisher case noted above, in that the supervision of cheerleaders was a duty of the university.

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.

4. In Howell v. Calvert, 1 P.3d 310 (Kan. 2000), two female basketball athletes were hit by a truck while running on an early morning conditioning run mandated by the coach. One of the athletes was killed and the other athlete was injured. The route for the run was designated by the coach and portions of the run were done in roadways which had heavy traffic and were without sidewalks. Requests for alternative routes were denied. A jury found the athletes to be 28.6% at fault, the truck driver to be 46.6% at fault and the college was 24.8% at fault. The plaintiffs appealed as they argued that the jury instructions were erroneous because they failed to specify that the college had a "special duty of care" relative to its athletes. The Kansas Supreme Court held that there was no error since the plaintiffs had confused the question of duty with one of breach. There is an ordinary duty of care, which the college did not contest. The standard of care is one of ordinary negligence which was used appropriately by the jury in making its decision.

5. In Stevens v. West Va. Institute of Technology, 532 S.E.2d 639 (W. Va. 1999), a student who was a member of a sorority was a participant in the "Greek Week" social events which included volleyball games. She went to the storage closet at the gymnasium to retrieve the volleyball equipment. As she and two other students attempted to roll the standard out, the base of the standard disconnected from the pole and hit the plaintiff in the leg. She suffered a deep laceration to her leg which required a number of stitches. The plaintiff alleged that the university was negligent in allowing students to use defective equipment and that the university

was negligent in its supervision of this event. The lower court granted summary judgment for the university. The West Virginia Supreme Court of Appeals found that the student had not provided enough evidence to support a breach of duty regarding either allegation. However, the court did find that there was a duty of care to its students when it encouraged its students to participate in any sport. The court adhered closely to the rationale of the Kyriazis case (see VII Exculpatory Agreements) which stated that “when a state university provides recreational activities to students it fulfills its educational mission and performs a public service. As an enterprise charged with a duty of public service, the university owes a duty of care to its students when it encourages them to participate in any sport”.

6. In Schneider v. Plymouth State College, 744 A.2d 101 (N.H. 1999), a non-sport case, a female student was sexually harassed by one of her professors. The New Hampshire Supreme Court found, that in the circumstances of this type of case, the college owed the student a fiduciary duty. The court stated that “when the plaintiff enrolled at PSC, she became dependent on the defendants for her education, thereby requiring them to act in good faith and with due regard for her interests”. Further, the relationship between students and those who teach them is built on a professional relation of trust and deference, rarely seen outside the academic community. There is, therefore, continued the court, a fiduciary duty on behalf of the defendants to create an environment in which the plaintiff could pursue her education free from sexual harassment by faculty members.. Although this analysis was confined by this court to a sexual harassment situation because of the “power differential” and thus the vulnerability of the student, it will be interesting to see if this fiduciary duty analysis will be extended to other student-university situations. I believe that some instances of the student-athlete relationship with the coach/university could use this type of fiduciary duty argument because of the degree of

control athletic programs have over the lives of student-athletes.

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 viewed Kleinknecht as ground-breaking, it seems logical that a university has a duty to take reasonable care for the safety of its intercollegiate athletes, since it completely controls all aspects of these programs. The Schneider case is an analysis of fiduciary duty, presently adopted only for a sexual harassment situation. The Stevens case is still in the minority relative to its discussion of duty for "all" recreational activities, including informal recreation settings. Further, if a university undertakes a duty of care as it did in Brown and Katz, 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. Duty--Co-Participant Liability. The majority rule remains consistent with the seminal case of Nabozny v. Barnhill, 31 Ill. App. 3d 212 (1975), which enunciated a recklessness standard relative to co-participant liability in contact sports. For a discussion of a recent case dealing with the reckless misconduct standard in the context of professional ice hockey, see "A Late Hit" by Chad McEvoy and Linda Sharp in Athletic Business (November 1999), pp. 22, and 24.

1. In 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 his discus. The appellate court held that the defendant owed the plaintiff a duty of care. Throwing the discus without first checking clearance in the target area is not an inherent risk of the sport. Also, requiring participants to check the target area before throwing will not alter the nature of the sport. The Nabozny recklessness standard is not applicable in this situation.

2. In Moore v. Phi Delta Theta Co., 976 S.W.2d 738 (Tex. Ct. App. 1998), a prospective pledge was injured during a paint ball "war game" which was sponsored and organized by the fraternity. The defendant nonparticipant sponsors sought summary judgment based on the argument that the standard of care owed to a player in a competitive contact sports event was only one of refraining from recklessness or intentional injury. However, the appellate court held that the competitive contact sports rule extends only to participants and that those who sponsor or otherwise administer games are held to a negligence standard.

E. 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 that 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 that 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. There may be certain instrumentalities used which necessitate more supervision because of the risks involved with the equipment. See Sicard v. University of Dayton, 660 N.E. 2d 1241 (Ohio Ct. App. 1995) (intercollegiate basketball player injured while in weight-lifting program because person who ran the program failed to spot the lift as promised).

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. In Ochoa v. California State Univ, Sacramento, 85 Cal. Rptr. 2d 768 (Ct. App. 1999), one player, in an intramural soccer game, was hit in the jaw by an opposing player. The plaintiff alleged that there was escalating roughness in the game which was not corrected by the referees. The injured player asserted that the university negligently supervised the game. The appellate court affirmed summary judgment for the university. First, stated the court, the university did not have a "special relationship" with the intramural participants so that it had a duty to protect the plaintiff from the criminal acts of a third person. Second, the court reasoned that the soccer game was a "hazardous recreational activity" under the state statute which immunized the university from liability, since fisticuffs between participants was reasonably foreseeable.

5. Respondeat Superior. A recent case is interesting in its discussion of respondeat superior in a supervision situation. In Bishop v. Texas A&M University, 2000Tex. LEXIS 68 (June 29, 2000), a student was injured while playing the role of Vlad the Impaler in a drama club performance. A fellow student missed the stab pad attached to the student's chest and stabbed him with a Bowie knife. The plaintiff alleged that the drama club advisors were negligent in failing to enforce a university prohibition against deadly weapons on campus. The main issue in this case was whether the drama club's faculty advisors, who were serving as "volunteer" advisors, were employees of the university for the purposes of the Texas Tort Claims

Act. The Texas Supreme Court held that the faculty members, even when functioning in their nonacademic capacity still had responsibilities to the university. Although the faculty members did not receive additional remuneration for their service to the drama club, the evidence supported the conclusion that the faculty members remained in the paid service of the university in their advisory roles to the drama club and respondeat superior was applicable. This case should serve as a reminder to athletic administrators that those employees who wear more than one hat in the service of the university are also considered to be employees in their secondary roles. For a further discussion of this case, see "Dramatic Irony" by L. Sharp in Athletic Business (January 2001), pp.18, 20.

## **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.

C. Matching of Participants. In activities that 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. For a discussion of a recent case (Spiegler v. State of Arizona, Case No. CV 92-13608, Arizona Maricopa County Supreme Court) involving the failure to provide CPR at a university campus recreation center, resulting in a \$5 million judgment against the University of Arizona, see "Costly Failure to Provide Emergency

Response" by David Herbert in Fitness Management (May 1996), p. 24.

Although there is no definitive standard yet regarding the availability of an Automated External Defibrillator (AED) for use in medical emergencies, there are some indicators that it will soon be a standard for the health club industry, which may be a precursor to it becoming part of the standard of care in university recreational facilities. A recently settled lawsuit in Florida dealt with the issue of the unavailability of an AED in a health club when a member had a heart attack while working out. There was a settlement of \$2.25 million in this matter. For further discussion of this issue, see "AED Lawsuit Results in \$2.25 Million Settlement" by David Herbert in Fitness Management (October 2000), p. 62. Another article relates to the use of AEDs and also discusses legislation which exists to allow public access defibrillation (PAD) users to use AEDS to save the life of someone in cardiac arrest. This legislation is often a part of the state's Good Samaritan legislation. See "AED Use in Your Club" by Larry M. Starr in Fitness Management (December 2000), pp. 40-44.

**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 that 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.

#### **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 or is not provided, 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). See also Moose v. Massachusetts Institute of Technology, 683 N.E.2d 706 (Mass. App. Ct. 1997) (failure to provide supplemental padding for pole vault landing pit even though coaches were aware that vaulters bounced off the pit mattress and landed out of the pit).

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 Halbrook 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 that were open to the public without charge. In the locker room, the minor pulled some lockers, which were not secured to the wall, over on her. 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. Criminal Acts of Third Parties. As a general rule the landowner is not responsible for

the criminal acts of third parties. However, if the criminal act was reasonably foreseeable, the landowner owes a duty to take reasonable care to protect the invitee against the criminal behavior.

1. In L.W. v. Western Golf Ass'n, 712 N.E.2d 983 (Ind. 1999), a university student sued the scholarship foundation which owned the coed house in which she was required to reside, after she was raped by a male resident in her room. Using the totality of the circumstances test, the court held that the rape was not reasonably foreseeable and, therefore, the landowners owed the student no duty to protect her from the rape. The court, in looking for prior similar incidents in the record, noted that, although there were some unpleasant experiences for the female residents, there was no evidence of prior violent acts or sexual assaults.

2. In Hayden v. University of Notre Dame, 716 N.E.2d 603 (Ind. Ct. App. 1999), another Indiana Court used the totality of circumstances test to ascertain whether Notre Dame owes a duty to protect a football spectator from harm by fellow spectators. The plaintiff, an end-zone spectator, was injured when her fellow spectators knocked her down as they tried to retrieve a football that had been kicked into the stands. Although there was a net to catch the kicked balls, it only succeeded in catching the balls about one-half of the time. Based on the fact that there was evidence of many prior incidents in which fans were jostled or injured by efforts of fans to retrieve balls, the court held that the university owed a duty to protect the plaintiff from the type of injury suffered.

C. 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 locker room - university had notice of condition through its employee and failed to use reasonable care to eliminate the hazard).

D. Recreational Use Statute. There is a great diversity in interpretation about the applicability of state recreational use statutes to activities held on university campuses. A recent case is Smith v. Arizona Bd. of Regents, 986 P.2d 247 (Ariz. Ct. App. 1999), in which a university student was injured while using a carnival-type apparatus temporarily placed on university property. During a campus event called “Mardi Gras”, the plaintiff went on the “Trampoline Thing”, a jumping apparatus which combined a trampoline and a bungee cord. While doing maneuvers on the apparatus, the plaintiff collided with the trampoline frame and was seriously injured. The university asserted that it should be immune from liability under the state recreational use statute but the appellate court held that the statute was inapplicable in this situation. The court noted that the intent of the statute was “designed to encourage landowners to open certain lands to recreational users by limiting liability for injuries to those users”. In this case, the plaintiff was not injured by a condition of the land but by a piece of equipment stationed on the land. The court, therefore, reasoned that the statutory definition of “premises” was not meant to encompass a commercial apparatus, not naturally occurring in the “true outdoors”. The court also stated that they did not believe that the legislature intended to immunize a landowner for injuries on such a transient apparatus placed temporarily on its property. This case, concluded the court, was not really a premises liability suit but rather one involving the negligent placement of and supervision over a dangerous apparatus.

## **VI. The Role of Assumption of Risk/Comparative Negligence.**

Although secondary assumption of risk has been modified or abolished in many states, e.g., in many states it has been subsumed by the doctrine of comparative negligence, it is critical to understand the concept of primary assumption of risk, in which a participant understands and accepts the risks inherent in an activity.

A. In Regents of the Univ. of Cal. v. Superior Ct. (Roettgen), 48 Cal. Rptr. 2d 922 (Ct. App. 1996), a student in a rock-climbing class fell to his death when anchor devices failed. The student, who had taken three previous courses, was in an intermediate rock-climbing course, the purpose of which was to give climbers the experience of placing pieces of climbing equipment in the rock face of a mountain as they climbed. No evidence was presented to show that the instructors were negligent in the selection of sites for placing the anchors nor in the way the anchors were set. There were no allegations of equipment malfunction. The court granted summary judgment for the university as it applied a primary implied assumption of risk analysis. The court held that "Inherent in the sport of rock climbing is the fact a fall can occur at anytime ... Falling, whether because of one's own slip, a co-climber's stumble, or anchor system giving way, is the very risk inherent in the sport of mountain climbing and cannot be completely eliminated without destroying the sport itself". For a more detailed discussion of this case, see "Fault Lines" by L. Sharp in Athletic Business (September 1996), pp. 10, and 14. The concept of primary assumption of risk is an important one in developing Agreements to Participate (see below).

B. In Regan v. State, 654 N.Y.S.2d 488 (App. Div. 1997), a rugby club member broke his neck during practice and alleged that the university negligently supervised the club and furnished an unsafe playing field. The court held that the player had assumed the risks of injury, since the

risk inherent in the sport of rugby is apparent.

C. In Giovinazzo v. Mohawk Valley Community College, 617 N.Y.S.2d 90 (App. Div. 1994), a softball player was hurt because of a wet, spongy area in the outfield. The court held that the plaintiff voluntarily participated in the game with knowledge and appreciation of the risk inherent in playing on a wet field.

D. In Zachardy v. Geneva College, 733 A. 2d 648 (Pa. Super. Ct. 1999), a college baseball player was injured when he stepped in a hole in the field while pursuing a fly ball. Prior to the game, the player had observed many holes and ruts in the outfield grass. The court held that the player voluntarily and knowingly proceeded to play in the face of obvious and dangerous conditions. Since the player assumed the risk, the college owed no duty to the player. The dissent believed that the majority opinion incorrectly dealt with the issue of voluntariness in that the jury should hear evidence on whether the player felt compelled to accept the risk of playing in order to protect his position or scholarship.

E. In Heminway v. State Univ. of N.Y., 665 N.Y.S.2d 493 (App. Div. 1997), a student's eye was injured by a stick while he was sledding on property owned by the faculty-student association (FSA) with an innertube provided by FSA. In regard to the issue of assumption of risk, the court declined to grant summary judgment for the defendant, because there were issues of fact as to whether the sledder knew that there were branches on the side of the hill that could hit him in the eye.

## **VII. 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 that 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 Kyriazis v. University of W. Va., 450 S.E.2d 649 (W. Va. 1994) in which 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, thus invalidating on public policy grounds a release which had been signed by the plaintiff student as a condition of participating in the club sport of rugby.

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 that caused the injury is not one that ordinarily accompanies the activity because this is not within the contemplation of the parties when the document is signed.

E. Agreements to Participate. Agreements to Participate may contain waiver/release language in the appropriate setting but it has additional components that are very important in activity settings. Most importantly, it conveys information regarding the risks that 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 that 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.

