Recruitment Eligibility and Health of Intercollegiate Athletics

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Americans love their sports and collegiate sports hold a particular place in many of their hearts. Not only a school's alumni and students can take pride in their teams, but a whole state or region can have spirits lifted up by a team's victory.

Little wonder then that the natural competitiveness that occurs in athletic events is intensified by pressures from multiple forces, from a board of trustees to the governor of a state, to recruit the most talented student-athletes for a school's team. Those pressures can lead to decisions based more on physical then academic prowess and recruiting techniques that are intended to dazzle the prospective student-athlete. Pressure to be successful athletically can also result in poor decision-making regarding a student-athlete's health situation, not only by the institution but by the student-athlete as well.

This paper will explore some of the legal consequences of instructional decision-making as it pertains to athletic injuries and institutional liability. It also will discuss recruitment issues and eligibility of student-athletes.

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Duty of Care Owed by Institutions to Student-Athletes for Sports Related Injuries

There is a recent trend in the courts to hold institutions accountable when a student-athlete is injured. While "it is generally agreed that a university is not an insurer of its students' safety," there is continuing debate over the level of duty owed to a student-athlete who is injured while participating in sport. *University of Denver v. Whitlock,* 744 P.2d at 17 (Colo. 1987) (citing *Bradshaw,* 612 F.2d at 138; *Beach,* 726 P.2d at 418-19; *Hegel v. Langsam,* 29 Ohio Misc. 147, 273 N.E.2d 351, 352 (Ohio Ct. of Common Pleas 1971)). In some cases the courts have found that a special relationship exists between institutions and their student-athletes. Once a special relationship is established, the courts can determine that a heightened duty of due care is owed to the student-athlete by the institution. Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries on Student-Athletes,* 2 Sports Law. J. 25 (1995) (hereinafter Whang). Once a heightened duty of care is established, the likelihood of a successful claim of negligence against the institution is significantly increased.

Generally, courts agree that a special relationship and thus a heightened duty of care is owed by an institution to a student-athlete when a mutual dependency exists. However, courts have demonstrated different views regarding the elements that establish a mutual dependency and thus a special relationship. See *Vistad v. Bd. of Regents,* 2005 Minn. App. Unpub. LEXIS 37 (Minn. Ct. App. 2005) (ruling no duty of care was owed to an injured student-athlete because the institution did not provide a coach for the cheerleaders and did not generate revenue from the cheerleading program); *Davidson v. Univ. of N.C. at Chapel Hill*, 142 N.C. App. 544 (N.C. Ct. App. 2001) (ruling a heightened duty of care was owed because student-athlete was injured while practicing as a part of a school-sponsored intercollegiate team); *Orr v. Brigham Young Univ.*, 960 F. Supp. 1522, 1524 (D. Utah 1994) (determining the institution did not owe a duty of

care because the institution did not have a custodial relationship with the student-athlete); *Klienknecht v. Gettysburg College,* 989 F.2d 1360, 1365 (3d Cir. Pa. 1993) (ruling a duty of care was owed because the student-athlete was recruited and his injury was reasonably foreseeable).

There are three primary concepts courts consider when determining whether a mutual dependency and special relationship exists between and a heightened duty of care is owed by institutions to student-athletes who are injured during practice or play:

1) institutions reap tremendous benefits from their student athletes both economic and non-economic,

2) student-athletes receive benefits from institutions such as athletic scholarships, (the combination of (1) and (2) creating a mutual dependence between the institution and the student-athlete), and

3) institutions exert a heightened degree of control over student-athletes.

See Whang at 39-42. Courts have argued that institutions, especially colleges with elite athletic programs, not only generate substantial income from their student-athletes, but also school spirit, marketing, media exposure and recruitment advancement. James J. Hefferen *Taking One for the Team: Davidson v. University of North Carolina and the Duty of Care Owed by Universities to Their Student-Athletes,* 37 Wake Forest l. Rev. 589 (2002) (hereinafter Hefferen). In return, student-athletes often receive tuition, room and board, and exposure to professional sports avenues. *Id.* at 605. Not only does this demonstrate a benefit to the institution, but also a mutual dependence between the parties. Additionally, institutions often exert a higher degree of control over their student-athletes as opposed to their general student population. *Id.* at 607. Many are required to maintain a certain grade point average, take certain courses to accommodate their

participation in athletics, and refrain from certain social activities. *Id.* Additionally, because of single academic year scholarships, there is often pressure on the student-athlete to perform in order to earn a scholarship renewal. *Id.*

Based on these same concepts, however, courts have used different rationale to determine whether a special relationship exists between the institution and the student-athlete.

Kleinknecht v. Gettysburg College

In *Klienknecht*, a case of first impression in Pennsylvania, the parents of lacrosse player Drew Klienknecht brought suit after he died from cardiac arrest during practice. Drew did not have a history of heart problems. The court determined the college owed a duty to Drew to have reasonable measures in place at the practice on the day of his death to provide prompt treatment in the event that he or any other member of the lacrosse team suffered a life-threatening injury. *Kleinknecht*, 989 F.2d at 38. In its reasoning, the court emphasized that Drew had been recruited to play lacrosse for "the institution's own benefit" of drawing attention to its lacrosse program and recruiting other students. *See* Hefferan at 606. The court also considered that Drew's injuries were reasonably foreseeable because lacrosse is a contact sport and it ranks fourth in sports-related injuries among college sports. *Kleinknecht*, 989 F.2d at 5.

Davidson v. University of North Carolina at Chapel Hill

In *Davidson*, a case of first impression in North Carolina, a non-recruited cheerleader from the junior varsity school sponsored squad was severely injured during a practice prior to a basketball game. The cheerleading squad did not have a coach. The court ruled the institution had a special relationship with the cheerleader because the school "depended on the cheerleading program for a variety of benefits." *Davidson*, 142 N.C. App. 544 at 21. It argued the junior varsity squad was responsible for representing the institution at athletic and school sponsored

events, the institution provided uniforms and transportation to the squad, it allowed the squad to use university facilities and equipment for practice, and it allowed the student to substitute cheerleading for the required one hour of physical education credit. *Id.*

Vistad v. Board of Regents of the University of Minnesota

In another case of first impression, *Vistad v. Board of Regents,* however, the court determined the institution did not owe a heightened duty of care to a cheerleader who was injured during a practice. *Vistad,* 2005 Minn. App. Unpub. LEXIS 37. The court determined a special relationship did not exist between the institution and the student-athlete because the cheerleading squad did not generate a profit for the institution, and it exercised minimal control over the cheerleaders because it did not provide a coach to impose rules. *Id.* at 4. The court also noted that as a cheerleader, Vistad knew the risks involved in performing cheerleading stunts and thus had undertaken an assumption of risk. *Id*. In this case, the court placed more emphasis on the monetary benefit received by the institution in making its determination and did not consider non-economic benefits provided by its cheerleaders like the court in *Davidson*. *Id.*

Orr v. Brigham Young University

Finally, in *Orr*, also a case of first impression in Utah, a recruited member of the Brigham Young University football team had suffered from chronic back pain throughout two seasons of play. He was consistently treated by the team's athletic training staff with heat, massage, mobilization and electric stimulation but continued to practice and play even though the pain would return on an inconsistent basis. The following season, Orr had mild episodes of back pain. However, during the last game of the season, he suffered a severe injury during practice and was discovered to have three herniated disks. Orr brought suit against the university alleging negligence and seeking damages, claiming the training staff was not qualified to diagnose and

treat football related injuries, and the school excessively pressured him to perform even after he was injured. The court determined that because a custodial relationship did not exist between the university and Orr there was not a special relationship. The court in this case also noted that it considered "any distinctions between a regular student and a student-athlete as more contractual in nature than custodial." *Orr*, 960 F. Supp. 1522 at 19.

Rashidi Wheeler, Northwestern University[1]

A case that received considerable publicity that never went through trial was that of Northwestern University football player Rashidi Wheeler who had taken supplements containing ephedra on his own and suffered an asthma attack and died during a voluntary workout in 2001. The training staff allegedly made several mistakes in handling the emergency, and after his death a Northwestern doctor burned the record of his last physical. Wheeler's mother, Linda Will, sued the university alleging that the university failed to have adequate emergency equipment, an emergency plan, or trainers on hand. Will was offered a $16 million settlement but she turned down the settlement, insisting that the case go to trial so that the Northwestern coaching staff and school officials were forced to answer for their actions. A judge ordered her to accept the settlement and she appealed that to the Illinois Supreme Court which denied the appeal in November 2008.

[1111] Tania Ganguli, "The Unclosed Story of Rashidi Wheeler: A Northwestern safety died tragically on the practice field four years ago. His mother is still fighting for answers." *SI On Campus*, http://sportsillustrated.cnn.com/2005/sioncampus/11/09/wheeler1110/index.html November 14, 2005.

Duty Owed by Institutions Regarding Injuries Suffered "Off the Field"

There are also circumstances in which the court has had to evaluate whether an institution owed a duty of heightened care to a student or student-athlete who was injured outside of competition or practice but in association with a team or athletics.

Simpson v. University of Colorado Boulder

In December 2007, the University of Colorado settled a Title IX lawsuit in which female university students alleged they were sexually assaulted at a party attended by university football players and recruits. *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170 (10th Cir. Colo. 2007). Title IX provides, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or *be subject to discrimination under any education program or activity receiving Federal financial assistance."* 20 U.S.C. § 1681(a) (2008) (emphasis added). Plaintiffs sought relief under Title IX claiming "[Colorado University] knew the risk of sexual harassment of female CU students in connection with the CU football recruiting program and that it failed to take any action to prevent further harassment before their assaults." *Id.* at 1174. They claimed the assaults "arose out of an official school program, the recruitment of high-school athletes . . . [and that] the assaults were the natural, perhaps inevitable, consequence of an officially sanctioned but supervised effort to show recruits a 'good time.'" *Id.* at 1174-1175. In order to determine institutional liability, the central question of law was "whether the risk of sexual assault during recruiting visits at CU was obvious." *Id.* at 1171. Although the case was later settled, the appellate court found,

> "…that the alleged sexual assaults were caused by CU's failure to provide adequate supervision and guidance to player-hosts chosen to show football

> recruits a ‘good time’, and that the likelihood of such misconduct was so obvious that CU's failure was the result of deliberate indifference. Therefore, CU was not entitled to summary judgment on the victims' claims of sexual assault under Title IX.”

Id at 1173.

Albano v. Colby College

However, in *Albano,* the court found that neither the college nor the coach had a legal duty to prevent the injuries sustained by a member of its tennis team during a “goodtime,” off-campus event. *Albano v. Colby College*, 822 F. Supp. 840 (D. Me. 1993). In that case, twelve members of the Colby tennis team took a trip to the Palmas del Mar resort in Puerto Rico. The spring break trip was approved by the Colby athletic department; however, the students and their coach funded the trip. While this was an annual tradition for the tennis team, attendance was not mandatory.

During this trip, after an afternoon practice, Albano, age 20, began to consume a substantial amount of alcohol. The coach was aware that he was drinking and actually broke up an altercation between Albano and another team member that afternoon. Albano continued to consume alcohol throughout the evening, and eventually he became separated from the group. He was discovered around 6:00 a.m., unconscious, having sustained severe head injuries. Albano has no memory of what caused his injuries. He later sued the college and the tennis coach for negligence.

The court reasoned that neither the college nor the tennis coach had a legal duty to prevent this injury because Albano was an adult and chose to drink, his activity did not take place on the

college premises but instead at a public resort, drinking was not part of the tennis practice or the instructions of the coach, and the coach did not provide the alcohol. *Id.* at 841-842. The court further argued that even though the drinking age is eighteen in Puerto Rico, the coach had warned his players not to drink excessively and Albano voluntarily ignored that warning.

Athletes with a Physical Impairment and the Rehabilitation Act of 1973

The federal Rehabilitation Act of 1973 provides, in part, "No otherwise qualified handicapped individual in the United States . . . shall solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. 794(a) (1973). An "otherwise qualified handicapped individual" is defined as, "one who is able to meet all of a program's requirements in spite of his handicap." 34 C.F.R. § 104.3(l).

In order to prevail on a claim for discrimination under the Act, one court stated a student-athlete must prove that:

(1) he is disabled as defined by the Act;

(2) he is otherwise qualified for the position sought;

(3) he has been excluded from the position solely because of his disability; and

(4) the position exists as part of a program or activity receiving federal financial assistance

Knapp v. Northwestern Univ., 101 F.3d 473 at 9 (7th Cir. Ill. 1996). To show that he is disabled under the terms of the Act, the court said he must demonstrate that he

(1) has a physical . . . impairment which substantially limits one or more of [his] major life activities,

(2) has a record of such an impairment, or

(3) is regarded as having such an impairment.

Id. at 10.

Knapp v. Northwestern University

In November of 1994, Nicholas Knapp**,** one of the top high-school basketball recruits in the state of Illinois, accepted Northwestern University's offer of a basketball scholarship. He later suffered sudden cardiac arrest during a pick-up basketball game during his senior year in high school. Knapp recovered, but the university, while honoring his scholarship, disqualified him from playing on its intercollegiate basketball team. Disqualification was based on an evaluation by Northwestern's group of team physicians.

Knapp sued the school to be able to play, arguing that playing an intercollegiate sport "[was] an integral part of his major life activity of learning and that his education [would] be substantially limited if he [could not] play on the team." *Id.* at 13. He stated that he could not "obtain confidence, dedication, leadership, perseverance, discipline, and teamwork in any better way." *Id.* at 14.

The court determined, however, that playing intercollegiate basketball was not a major life activity because it is not like walking, breathing or speaking. *Id.* at 15. Also, not everyone has the opportunity to go to college or to play intercollegiate sports. *Id.* Finally, numerous students graduate from college every year without participating in intercollegiate sports, and their degrees are no less valuable because of the lack of athletics involved in their experience. *Id.* at 15-16. It

is not “a necessary part of learning for all students.” *Id.* The court ruled in favor of Northwestern. *Id.* at 37.

Wright v. Columbia University

In this case however, a federal district court concluded that the school had violated the Rehabilitation Act of 1973 when it refused to allow Wright to participate in its intercollegiate football program because he only had one eye. *Wright v. Columbia University*, 520 F. Supp. 789, 792 (E.D. Pa. 1981). Wright argued, even with his lack of vision in one eye, he was an outstanding high school running back, he was capable of playing on Columbia's team, and he was "otherwise qualified" to participate in the program. *Id* at 792. Wright and his parents were also willing to release the institution from any potential liability.

The court determined Wright was disabled for purpose of the Act and ordered Columbia to allow him to participate in the football program. *Wright*, 520 F. Supp. 789. The court did not discuss whether the participation in the program was a “major life activity” which may indicate it believed it qualified as such at the outset of the action.

Pahulu v. University of Kansas

The University of Kansas disqualified Pahulu, a recipient of an athletic scholarship to play football, after he suffered a hit to the head during a tackle. He was briefly dazed, experiencing numbness and tingling in his arms and legs. Doctors described this episode as transient quadriplegia. A team physician conducted an examination and found he had a congenitally narrow cervical canal, which neurosurgeons concluded put him at extremely high risk for a subsequent and potentially permanent neurological injury. Pahulu was then disqualified from

play. He brought an action in order to be reinstated claiming he was "otherwise qualified" to play.

While the court here determined that playing football was a "major life activity," it concluded that denying him the right to play football did not substantially limit his opportunity to learn because his scholarship was not revoked. *Pahulu v. Univ. of Kan,* 897 F. Supp. 1387 at 1 (D. Kan. 1995). The court denied the motion for preliminary injunction because there was a rational and reasonable explanation for the defendants' actions. *Id.*

Sickle Cell Trait

Sickle cell trait is the inheritance of one gene of normal hemoglobin (A) and one gene for sickle hemoglobin (S) giving the genotype AS.[2] Sickle cell trait causes few clinical problems. While having the sickle cell trait does not lead to sickle cell anemia, it is possible to have symptoms of the disease under extreme conditions of physical stress or low oxygen levels. In some cases, athletes who have the trait have expressed significant distress, collapse and even die during rigorous exercise.

Those at high risk for having the sickle cell trait are those whose ancestors come from Africa, South or Central America, Caribbean, Mediterranean countries, India, and Saudi Arabia. Sickle cell trait occurs in one in twelve U.S. African Americans. According to NCAA guidelines, screening for the sickle cell trait as part of the standard medical examination process for student-athletes is an institutional decision.

[2] All of the information regarding sickle cell trait is reported directly from the 2008-2009 NCAA Sports Medicine Handbook Guideline 3c "The Student-Athlete with Sickle Cell Trait" Revised June 2008.

It is important for coaches and trainers to be aware that athletes with sickle cell trait cannot be "conditioned" out of the trait. The harder and faster the athletes go, the earlier and greater the sickling. It can begin in only two to three minutes of sprinting or all-out exertion.

Dale Lloyd v. William Marsh Rice University[3]

Lloyd, a 19-year-old African American freshman who played for the Rice University football team, was allegedly given a nutritional supplement shake that contained creatine prior to practice. Creatine can cause dangerous side effects, including dehydration, headaches, kidney failure and rhabdomyoloysis, a breakdown of muscle fibers that causes the release of harmful substances into the bloodstream.

After taking the supplement, Lloyd was allegedly ordered by his coaches to run 16 individual 100-yard sprints. Despite his having trouble breathing and being in obvious pain, the coaching staff allegedly ordered other players not to help him as he was forced to complete the sprints. When the session was over, Lloyd allegedly collapsed on the field and never regained consciousness. He died the next day, and the Harris County Medical Examiner allegedly determined his death as the result of "acute excertional rhabdomyoloysis secondary to sickle cell trait." Llyod's parents have filed a wrongful death suit against the university, the NCAA and others.

NCAA Policies and Procedures

Mandatory Medical Examinations

[3] PRNewswire, Press Release, *The Lanier Law Firm Announces Wrongful Death Lawsuit Against Rice University, Former Coach, NCAA, Others in Student's Sickle-Cell Death*. FindLaw. http://news.corporate.findlaw.com/prnewswire/20080923/23sep20081406.html. September 23, 2008.

NCAA Division I and Division II Bylaw 17.1.5, "Mandatory Medical Examination" states that prior to participation in any practice, competition or out-of-season conditioning activities, student-athletes who are beginning their initial season of eligibility are required to have a medical examination or evaluation administered or supervised by a physician. The examination must be administered within six months prior to participation in any practice, competition or out-of-season activity. In the following years, an updated history of the student-athlete's medical condition shall be administered by an institutional medical staff member to determine if additional examinations are required. This must also be done sixth months prior to the athlete's participation. Division II recently revised this bylaw to clarify that students who are trying out for a team must have an exam prior to engaging in any athletically related activities.

Annually, the NCAA produces a Sports Medicine Handbook which is sent to directors of athletics, senior women administrators, faculty athletic representatives, athletic trainers, team physicians, related committee members, and conference commissioners. The handbook serves as a tool to help institutions develop administrative policies. The most recent publication offered guidelines that are associated with some of the situations described in the cases above.

Guideline 1c: Emergency Care and Coverage

The NCAA recommends that its member institutions include an emergency plan for each scheduled practice or contest of an institution sponsored intercollegiate athletics event, and all out-of-season practices and skills sessions. Components of such a plan should include:

1. The presence of a person qualified to render emergency care to a stricken participant.
2. The presence or planned access to a physician for prompt medical evaluation.
3. Planned access to early defibrillation.

4. Planned access to and transportation between the athletics site and a medical facility. Access to a telephone whether fixed or mobile should be assured.

5. All emergency equipment at the site should be quickly accessible. Equipment should be in good operating condition and staff should be trained in it use. Emergency information about the student-athlete should be available to medical personnel.

6. An inclement weather policy including evacuation plans.
7. An understanding of such policies by all the parties including leadership from visiting teams.
8. Certification in CPR for all athletics personnel associated with practices, competition, skills instruction and strength and conditioning.

9. A member of the institution's sports medicine staff should have the unchallengeable authority to cancel or modify a workout due to safety reasons.

Guideline 2a: Medical Disqualification of the Student-Athlete

The team physician has the final responsibility to determine when a student-athlete is removed or withheld from participation due to an injury, illness or pregnancy. The NCAA tournament physician as designated by the host school has the unchallengeable authority to determine whether a student-athlete with an injury, illness, or other medical condition may expose others to a significantly enhanced risk of harm, and if so, to disqualify them from participation.

Guideline 3a: Participation by the Student-Athlete with Impairment

Medical exclusion of a student-athlete from an athletics program should occur only when a mental or physical impairment presents a significant risk of substantial harm to the health or safety of the student-athlete and/or other participants that cannot be eliminated or reduced by reasonable accommodations.

It is recommended that an institution require joint approval from the physician most familiar with the student-athletes condition, the team physician, and an appropriate official of the institution as well as his or her parent(s) or guardian.

Factors to be considered in determining participation:

1. Available published information regarding the medical risks of participation in the sport with the athlete's mental or physical impairment.
2. Current health status of the student-athlete.
3. Physical demands of the sport and position(s) the student-athlete will play.
4. Availability of acceptable protective equipment or measures to effectively reduce the risk of harm to the student-athlete or others.
5. Ability of the student-athlete to fully understand the risks of participation.

In a case of organ absence or non-function, the following issues should be addressed:

1. Quality and function of the remaining organ.
2. Probability of injury to the remaining organ.
3. Availability of current protective equipment and the likely effectiveness of such equipment to prevent injury to the remaining organ.

Medical Release

When a student-athlete with impairment is permitted to participate in the intercollegiate athletics program, it is recommended that the institution be released from any legal liability or injury or death arising out of participation by a properly executed document of understanding and a waiver. The document should evidence the student-athlete's understanding of his or her medical condition and the potential risk of participation. This document may not however, completely immunize the institution from legal liability for injury to the student-athlete. The following parties should sign the document:

1. Student-athlete.
2. Student-athlete's parent or guardian.
3. The team physician and any consulting physician.
4. A representative of the institution's athletic department.
5. The institution's legal counsel.

Guideline 3b: Pregnancy in the Student-Athlete

The NCAA rules permit a one-year extension of the five-year period of eligibility for a female student-athlete for reasons of pregnancy. Each institution should have a clear policy that addresses the rights and responsibilities of the pregnant student-athlete. The policy should include:

1. Where the student-athlete can obtain confidential counseling.
2. Where the student-athlete can access timely medical and obstetric care.
3. How the pregnancy may affect the student-athlete's team standing and institutional grants in aid.

4. That pregnancy should be treated as any other temporary health condition regarding receipt of institutional grants-in-aid.

Conclusion

Participation in college athletic inherently carries risk of injury. Society accepts such risk as foreseeable and non-compensable. The duty of care owed to a student-athlete for injury that occurs at practices, competition or away from the site of play can depend upon the factors described in this paper. Those decisions that add to or accelerate the risk in sport are likely to create vulnerability for the school.

Because determinations of institutional liability can be so fact-driven, it is not possible to predict exactly how a court will resolve every case. The best course to follow therefore, are to not let dreams of victory cloud reasonable judgment and considerations of what are the best health and safety practices for the student-athlete that can practically be implemented by the school.