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Negligence

OBJECTIVES

Upon completing this chapter, you will:

- 1) understand the elements of negligence and be able to apply them to a real-life situation;
- 2) recognize the relationship between duty and foreseeability;
- 3) be able to articulate the defenses to negligence and give examples of each defense;
- 4) be confident in identifying and defining the particular kind of assumption of risk necessary in a range of situations;
- 5) know how to explain comparative negligence to a colleague;
- 6) recognize the types of premise liability and be able to locate local and state law in the area; and
- 7) understand the various kinds of immunity.

INTRODUCTION

A person acts negligently if the person does not exercise reasonable care under all circumstances. "Primary factors to consider in ascertaining whether the person's conduct lacks reasonable care are the foreseeable likelihood that the person's conduct will result in harm, the foreseeable severity of any harm that may ensue, and the burden of precautions to eliminate or reduce the risk of harm" (Restatement Third, Torts: Liability for Physical and Emotional Harm, Section 3). It is the person's acts and the person's omissions, or failure to act. Negligence also includes a balancing of risks and benefits or a cost benefit test. The "risk is the overall level of the foreseeable risk created by the actor's conduct and the benefit is the advantages that the actor or others gain if the actor refrains from taking precautions" (*Restatement Third, Torts: Liability for Physical and Emotional Harm*, Section 3 [e]).

ELEMENTS OF NEGLIGENCE

The following five elements must exist for a court to find a person or agency negligent:

- duty;
- breach of duty;
- factual cause;
- scope of liability including foreseeability; and
- damage.

Duty

"An actor ordinarily has a duty to exercise reasonable care when the actor's conduct creates a risk of physical harm. In exceptional cases, when an articulated countervailing principle or policy warrants denying or limiting liability in a particular class of cases, a court may decide that the defendant has no duty or that the ordinary duty or reasonable care requires modification" (*Restatement, Third, Torts: Liability for Physical and Emotional Harm*, Section 7). A relationship sufficient to create a legal duty may arise by statute, ordinance, administrative rule, contract, voluntary assumption, or judicial decision. Three different legal duties or standards of care (explained later) are reasonable person, special relationship, and professional standard. A reasonable person duty is the standard applicable to society in general. Parents are among those with special relationships. Coach-athlete, teacher-student, trainer-client, therapist-client, employer-employee, and principal-agent are relationships that establish a professional legal duty of care. The legal duty of care and the standards of the profession or industry dictate the duty elements of negligence.

Breach of Duty

Once the legal duty or standard of care is established, proof must be provided to the court by the plaintiff (injured person) that the duty was breached. Professional sport and physical activity specialists have specific duties. These legal duties (standards of care) are in writing for some professionals; for others they are unwritten standards commonly accepted by members of the profession. Among a number of sport and physical activity professionals, one legal duty is emergency care. Although professionals do not have to provide emergency care, they must make provisions for such care. Failure to make provisions for emergency care is an example of a breach of legal duty. Instructors, teachers, therapists, and exercise specialists are obligated to provide learning experiences that are challenging but not so difficult or so far beyond the capacity of the learner that injury is likely to occur. When clients or students are injured as a result of being allowed to participate in risk activities far beyond their physical capacity, professionals are in breach of their duty of care. If facilities are not maintained according to the expectations of the industry, professionals will also breach the duty of care.

Factual Cause

When it has been determined that the defendant breached the duty of care, the court identifies the relationship between the breach and the injury. A breach can be an act or omission. Was the breach the cause of the injury? For liability to be found, the breach must be the cause of the injury. The plaintiff must show a direct relationship between the breach of the duty and the injury or damage. For example, was the defendant's negligent act the cause of the injury? Would the same harm have resulted had the negligent act never occurred? Reasonable care is

the balance between the magnitude of the foreseeable risk and the burden of precaution that can eliminate the risk. The "magnitude" of risk includes the likelihood of a harm-causing incident and the severity of the harm that may occur. If the burden is greater than the magnitude of the risk, the actor who declines to adopt the precaution is generally not negligent. But if the risk is somewhat greater than the burden, the actor is negligent for failing to adopt the precaution. (*Restatement, Third, Torts: Liability for Physical and Emotional Harm*, Section 2 [d])

Scope of Liability Including Foreseeability

After establishing factual cause, scope of liability- foreseeability is ascertained. Foreseeability is the capacity of the defendant to anticipate an accident or incident. Was the harm to the plaintiff a reasonable, foreseeable, consequence of the defendant's actions? Was the defendant responsible? At trial, the court will ask if the accident or incident in which the plaintiff sustained injuries was an event that could or should have been predicted as one that might cause injury. To what extent could it have been predicted that participation in the activity would result in injury? Was the occurrence of the injury foreseeable? The harm must have been foreseeable before the event; decisions about foreseeability are not to be made after the injury has been sustained. Sufficient foresight must exist to enable professionals to prevent or alter actions in an effort to avoid injury. A remote possibility is not sufficient; substantial damage must be probable, not just possible. In sport and physical activity, risk management processes can be used to establish foreseeability.

Damage

For the court to find negligence, substantial damage must exist. Cuts and bruises are not sufficient; the person must be seriously damaged physically or psychologically. If the question exists as to whether the damages are substantial, the question of damages will go to the jury.

the public can rely on receiving a predictable level of performance from a professional because of the person's training, knowledge, and skill. The professional's legal duty of care to another is satisfied when unreasonable risks of harm are eliminated. To successfully eliminate unreasonable risks of harm, the professional must recognize and know the dangers of harm inherent in the activities in use.

Among the many professional standards in sport and physical activity are facility inspection, proper use of equipment, supervision, instructional protocols, rescue procedures, and emergency care. The legal duty or standard of care is the written statement or standard accepted by the profession. It may require specific courses or learning experiences, attainment of proficiency in competency tests, and periodic renewal of designated certificates. When a standard does not exist, the legal duty of care is that of a reasonable professional or a reasonable person under similar circumstances.

A legal duty of care may exist even though the professional is not on the payroll. Technical expertise, not job status or wage, is the basis upon which one's duty of care is judged. It is anticipated that certain expertise will accompany specific jobs. As mentioned earlier, a professional will be held to the level of expertise recognized in a job even if the professional does not hold the appropriate credentials for the job. Professionals are often surprised to learn that the same duty of care may exist when they serve as a volunteer as when they are a paid employee working in a professional capacity.

DEFENSES

The defenses against claims of negligence are:

- contributory negligence;
- assumption of risk; and
- comparative fault or comparative negligence.

Contributory negligence uses the objective standard of a "reasonable person," the standard used in negligence cases. The defense of assumption of risk uses a subjective standard based on the victim's knowledge of the risk and willingness to assume the risk. In most states, contributory negligence and assumption of risk are merged into comparative fault.

Contributory Negligence

Contributory negligence means that the plaintiff, or injured person, is responsible in part for his/her injuries. One has a duty to protect one's self from injury. The plaintiff's conduct has somehow contributed, as a legal cause, to the harm the plaintiff has suffered (*Restatement, Third, Torts: Liability for Physical and Emotional Harm*, Section 3 [k]).

The standard of conduct used in negligence, that of a reasonable person under ordinary circumstances, is also the standard applied in contributory negligence. In contributory negligence, the defendant is not relieved of a duty toward the plaintiff. Contributory negligence does, however, become a part of the formula in allocating

damages between the plaintiff and defendant. It is also a defense to negligence. It is not, however, a defense to an intentional tort.

Assumption of Risk

Assumption of risk occurs when the victim becomes responsible for some portion of the risk of an activity and, as a result of assuming the risk, assumes liability for that portion of damages. In complete assumption of risk, the victim has contracted away his/her right to a cause of action through a signed written agreement, which is considered a contract. Only adults, not minors, can create contracts. Therefore, minors cannot waive their right to sue. Also, in many states, a minor may sue over an injury sustained while a minor, after he/she becomes an adult.

Warnings, risk education, and signed forms may not bar recovery for all adults but will serve to inform participants of the dangers inherent in the activity. Even though a court may not accept an assumption of risk statement as a contract or a complete bar to recovery, the document will demonstrate that the victim had knowledge of the risk involved in the activity.

Knowledge and Appreciation

When a participant encounters a dangerous situation, the participant must have adequate knowledge to appreciate the danger. Knowledge and appreciation of danger is not based on a reasonable person standard but on a standard tailored for the individual involved. Persons using equipment or taking instructions for the first time are not expected to possess the same level of knowledge and appreciation of danger as persons with considerable experience in the activity. Once the person understands the danger, he/she is able to make informed decisions about taking the risk of participating in the activity.

In many court decisions, knowledge and appreciation of a danger is a question for the jury. A professional's method of demonstrating that students and clients had knowledge and appreciation of the risks in the activity in which they were participating involves the use of instructional protocols, records of progress, and other documents. Assumption of risk involves either express or implied consent. There are two types of assumption of risk, primary and secondary, which will be discussed after the types of consent.

Express Consent

Express consent is usually a signed agreement between the participant and the service provider that meets the standard of a contract and can relieve the provider of a lawsuit for negligence. The plaintiff expressly assumes the risk and agrees, prior to the time of the injury-causing event, to hold the defendant blameless. Some states and courts may refuse to honor these contractual agreements, stating that public policy prohibits injured parties from signing away their rights.

When a person who fully understands the risk of an activity voluntarily agrees to take part and to relieve the defendant of any duty, they are said to have given express consent. Under this agreement the plaintiff must:

- know that the risk exists;
- understand the nature of the risk; and
- freely choose to incur the risk.

The decision to assume the risk must be free and voluntary; some sign or manifestation of consent must be present to relieve the defendant of his/her obligation. Should the plaintiff be placed in a position where the consent was forced, the plaintiff cannot be said to have assumed the risk. Age, experience, and knowledge of information pertinent to the activity are critical factors in determining a plaintiff's ability to comprehend and appreciate a risk.

Implied Consent

In sport and physical activity, persons who understand the risk of an activity can, as a result of participating in the activity, agree to the inherent risks without signing a contract. In implied consent, the defendant is not relieved of a responsibility. Implied consent becomes a part of the comparative fault percentage. The following explanation of the two types of assumption of risk, primary and secondary, is somewhat unique to sport and physical activity.

Primary Assumption of Risk

Primary assumption of risk occurs when a party or potential plaintiff voluntarily participates in a sporting event or activity involving inherent risk and the defendant is under no duty to protect the plaintiff from the inherent risks of the activity. It should be noted that the defendant is liable for injury when his/her behavior becomes reckless. This heightened reckless standard was found in decisions in California, Kentucky, Louisiana, Michigan, Nebraska, Ohio, and Texas and is becoming more frequent across the United States. To recover in a court of law, an injured athlete must show that the injuries sustained in sport and physical activity did not flow from the normal course of participation or competition.

Secondary Assumption of Risk

Secondary assumption of risk occurs when a party voluntarily participates in a risky activity, has not consented to relieve the defendant of his/her duty of care, and the defendant breaches a duty of care owed the plaintiff. Secondary assumption of risk is not a bar to recovery; it becomes part of the comparative fault formula. In summary, primary and secondary assumption of risk are similar to express and implied consent. Primary assumption of risk is essentially consent and relieves the defendant of fault. Secondary assumption of risk does not involve consent and thus may only reduce, not remove, the plaintiff's liability for the harm.

COMPARATIVE NEGLIGENCE/COMPARATIVE FAULT

Comparative negligence is a system in which the percentage of responsibility of the injured party and the percentage of responsibility of the persons or agency that contributed to or caused the harm are balanced in a formula. The contributory negligence of the injured party is used to reduce the recovery for the injured party. Recovery is allocated in proportion to the relative fault of each party. For example, the injured party may be found to be 30 percent at fault (contributory negligence and assumption of risk) and the person causing the injury at 70 percent fault. Table 1.1 shows the allocation of a \$100,000 judgment.

TABLE 1.1: Comparative Negligence

Party	Fault	Judgment Sum
Plaintiff	30%	Assumes \$30,000 of expenses
Defendant	70%	Pays \$70,000 to plaintiff

Comparative fault, in contrast, is the apportionment of damages among the joint defendants according to the percentage attributed to each. Table 1.2 explains the above situation involving three—rather than one—defendants. The three defendants are responsible for 70% of the damage award with Defendant 1 responsible for 30%, Defendant 2 for 25%, and Defendant 3 for 15%.

TABLE 1.2: Comparative Fault

Party	Fault	Judgment Sum
Injured party	30%	Assumes \$30,000 of expenses
Defendant 1	30%	Pays \$30,000 to injured party
Defendant 2	25%	Pays \$25,000 to injured party
Defendant 3	15%	Pays \$15,000 to injured party

A modified system of fault allocation used in some states denies the injured party recovery if the injured party's negligence was as great as 50% or 51% of the fault. Other states have a system called "joint and several liability" for the damage award. That means that if only Responsible Party 1 was able to pay, he/she would be responsible for the total or \$70,000. If only Responsible Parties 2 and 3 could pay, each would be responsible for 50% of \$70,000, or \$35,000.

WAIVER OF LIABILITY

A range of educational tools and agreements are used in sport and physical activity to educate and inform participants about risks. These risk and/or informed consent documents will be used by the court to demonstrate that the parties were informed

of the risks, understood the risks (provided the forms withstand the scrutiny of the court), agreed to encounter the risks, and signed a statement acknowledging their understanding of the risks. Statements are to be so specific that the participant has an estimate of the probability of sustaining a loss and what the loss might be. Courts have found defendants not guilty of negligence when the plaintiff had signed a waiver of liability that fully conformed with the legal requirements of a contract. The release must be clear, unambiguous, explicit, and concise. On occasion, waivers of liability may be considered by the courts to be so offensive to society that parties are not permitted to sign away those rights. Signed statements of release are often misinterpreted to mean that the participant has agreed not to sue.

In addition to the contract requirements, it should be noted that only adults can enter into a contract; parents cannot sign away the rights of their children, but parents can sign away their own rights to a cause of action for their children. This means that they can agree to the knowledge of a full disclosure of the risks including probability, extent, and magnitude of the harm that could occur to their child while he/she participates in the activity. In the event of a lawsuit, such an agreement will be examined by the court to determine its validity as a defense. Injured children reaching the age of majority have the benefit of their state's statute of limitations, often two years, to bring a cause of action for a harm that occurred while they were a minor. All documents used as educational tools and waivers of liability are to be drafted by legal counsel and are to conform to relevant local and state statutes.

OWNERS AND OCCUPIERS OF LAND

Premises liability is a theory of property liability currently being incorporated into negligence in many states. An understanding of this area is essential for reviewing cases where it remains the law and for the examination of older cases. In early days in the United States, persons owning large tracts of land were encouraged to allow others to use their land for hunting, fishing, and recreation. To protect the owners of these lands from liability, property laws were created in various states. Premises liability defined the duty of care of the owner or person in possession of land to individuals injured on their property. Persons entering the land are classified as either:

- invitees;
- licensees; or
- trespassers.

Invitees have the greatest protection, while licensees are given less care. Trespassers are owed the lowest duty, sometimes referred to as zero duty. Tennessee, Maine, Connecticut, Florida, and Illinois were the first to abolish premises liability. Other states have followed their direction. As states reject the categories of invitee, licensee, and trespasser, they are moving toward a reasonable person standard for the liability of the landowner or person in possession of the land.

Invitee

An invitee is a person who has either expressly or impliedly been invited onto the land of another for an economic benefit to the person in possession of the land (known as a business invitee), or one who enters land open to the public (known as a public invitee). Patrons of stadiums are business invitees; the owner or operator of the stadium is thus responsible for providing a reasonably safe environment. In state and federal recreation areas and parks, the public has been impliedly invited onto the land. Even though no economic motive may influence the invitation to the public, the person or agency in possession of the land is responsible at an invitee level.

Duties owed to the invitee include keeping the premises in a reasonably safe condition and warning of known dangerous conditions. The possessor of land also has a duty to inspect for unknown dangers. The possessor of land is not only responsible for reasonable care and adequate warnings to invitees about known dangers, but also for care and warnings about those conditions of which the possessor/owner should have been aware.

Licensee

A licensee is a person who is on the land with the owner's consent but does not have a business purpose for being on the land. While the licensee is typically a social guest, an individual who goes onto someone's land and is not asked by the owner to leave is also considered a licensee. For example, a person who takes a shortcut through someone's land or a neighbor who is joined in a backyard activity are licensees. Duties owed to the licensee are the same as those owed to the invitee (reasonable care), with one important exception: the licensee is to be warned of or protected from only those harms of which the possessor of the land is aware. The owner must keep the property in a reasonably safe condition and warn or protect persons entering the land from harms of which the owner is aware. There is no duty to inspect or discover dangerous conditions. There is also no duty to make the land safe. Essentially, a licensee accepts the land in the same condition as the landowner.

Trespasser

A trespasser is a person who goes onto another person's land without permission and without the knowledge of the land owner. The owner of the land owes no duty of care to the trespasser. Land owners do not have a duty to inspect the premises, to make the land safe, to warn of dangers, or to use reasonable care in anticipating trespassers. However, when an owner or person in possession of land becomes aware that trespassers may be on their property or that trespassers frequent the property, their duties change. They must either remove the trespasser from the land or secure the land from the trespasser. Failure to do so entitles the trespasser to a licensee status or reasonable standard of care. Under a reasonable care standard, the owner is to exercise care and warn of known dangers.

Attractive Nuisance

When the trespasser is a minor, the reason that the trespasser is on the land becomes important. If the condition of the land or an object on the land is such that it entices someone to enter the land, an attractive nuisance may exist. In this situation, the possessor must foresee the potential attractiveness of the property and the fact that a child could be seriously harmed. Precautions must be taken when the owner or possessor knows or has reason to know that children will be attracted to the land. No defense is available in attractive nuisance, as children are considered too young to appreciate the danger.

Open and Obvious

Section 343A of the *Restatement of the Law of Torts (Second)* was the basis for the open and obvious application in tort. "A possessor of land is not liable to his invitee for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge of obviousness" (218). One area in sport and physical activity nearly always considered "open and obvious" is water. Thus, a person taking part in aquatic activities is to know and understand the potential harm water possesses. It is part of assumption of risk. In most states, open and obvious is a complete bar to liability, while in others it is a factor to be considered in determining liability in tort.

VIOLATION OF A STATUTE, ORDINANCE, OR REGULATION

On occasion, the defendant accused of negligence may be in violation of a statute, ordinance, or regulation. State statutes, for example, may define reasonable and prudent care, industry standards, or the application of negligence. Health codes for food preparation, swimming pool depths, and lifeguard-to-swimmer ratios are examples of state and local statutes. Federal statutes tend to influence watercraft and parks.

When negligence is based on the violation of a statute, the following questions are to be answered:

- 1) Was the statute designed to protect the type of conduct the actor violated?
- 2) Is the accident victim within the class of persons the statute was designed to protect? (*Restatement of the Law Third, Torts, Liability for Physical and Emotional Harm*, Section 14)

Sport professionals should become acquainted with local, state, and federal statutes, as well as ordinances and regulations that affect their position and profession. Also, professionals need to be aware of how violation of the laws will be enforced by public authorities. An example is exceeding the occupancy code of an arena, which is typically enforced by a city fire marshal.

IMMUNITY

Immunity is freedom from liability or freedom from suit. This special status is found most often in government entities. The Federal Tort Claims Act of 1946 played a

major role in the evolution of immunity as we know it today. The act states that when the government engages in activities in which private persons are also engaging, the government cannot be sued; the act gave the public consent to sue the federal government in tort. The act provides "monetary recovery from the federal government where damages, loss of property, personal injury, or death are caused by the negligence or wrongful acts of federal employees acting within the scope of their employment, and where the United States, if a private person, would be liable in accordance with the law of the place where the tort occurred" (28 USCS 2675). Immunity statutes include federal, state, and local government, Good Samaritan, hazardous recreation activity, and volunteer laws.

Governmental Immunity

Sovereign or governmental immunity in the English common law was a system modified and adopted by the United States. An English subject could not sue the king, and America decided that the United States government could not be sued without its consent. Sovereign immunity protects the government against liability but doesn't protect all of the government employees against liability. Immunities and levels of immunity have been crafted for certain responsibilities. Those charged with making the most serious governmental decisions appear to have the greatest amount of immunity. Judges, legislators, and high executive officers usually have absolute immunity.

Immunity among public officials goes back to the statement of our founding leaders: that we cannot be sued without the consent of the federal government. As mentioned earlier, the Federal Torts Claims Act of 1946 provides, with exceptions, that when the government engages in activities in which private persons are also engaging, the government cannot be sued. Among the exceptions to the Federal Tort Claims Act are intentional torts, military personnel, contract interference, and torts committed in the conduct of government business. Thus, federal employees have immunity for discretionary decisions, but they do not have immunity for ministerial decisions. Discretionary functions are usually planning functions; the carrying out of the plan is ministerial and not covered by immunity (*Restatement, Second, Torts*, Section 895D [f, h]).

Immunity is governed by state and local laws, with state governments differing in the reach of immunity legislation. Schools and recreation agencies are among those provided a level of immunity by state and local governments. The law encourages risk management and appropriate insurance to cover potential risks.

Good Samaritan

Good Samaritan laws are state statutes that provide immunity from suit for negligence for persons who administer emergency care to others. In 1959, California was the first state to pass Good Samaritan legislation; the legislation was directed at medical doctors. Many states have enacted similar legislation to enable medical doctors to rescue and aid victims without fear of lawsuits. Some of these state statutes include nurses, paramedics, persons performing CPR, dentists, and others.

The majority of the state statutes grant immunity to anyone who renders emergency

care. The rescuer is to work only at the scene of the accident, act in good faith, be a reasonable and prudent rescuer, follow the methods advocated by his/her license or certificate, and provide service gratuitously. California's Business and Professional Code No. 2398 (2010), Aid to Participants in Athletic Events and Contests, states that

No licensee, who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a community college or high school athletic event or contest, at the site of the event or contest, or during transportation to a health care facility, for an injury suffered in the course of such event or contest, shall be liable for any civil damages as a result of any acts or omissions by such person in rendering such voluntary medical assistance. The immunity granted by this section shall not apply to acts or omissions constituting gross negligence.

Some states have sport-specific Good Samaritan or emergency care statutes. Under these statutes, physicians and other emergency care personnel are exempt from negligence for assistance provided in practice and games. The Wisconsin Statute (895.48, 2011) states that

Any physician or athletic trainer, ... chiropractor, dentist, ... emergency medical technician, first responder, ... physician assistant, ... registered nurse, ... or a massage therapist or bodyworker ... who renders voluntary health care to a participant in an athletic event or contest sponsored by a nonprofit or a school, ... is immune from civil liability for his or her acts or omissions in rendering that care if all of the following conditions exist:

- a) The health care is rendered at the site of the event or contest, during transportation to a health care facility from the event or contest, or in a locker room or similar facility immediately before, during or immediately after the event or contest.
- b) The physician, athletic trainer, chiropractor, dentist, emergency medical technician, first responder, physical assistant or registered nurse, massage therapist or bodyworker does not receive compensation for the health care, other than reimbursement for expenses.

The California Education Code No. 49409 (2011), immunity statutes for school districts, grants civil immunity to physicians and surgeons who render voluntary emergency medical assistance to participants in school athletic events or contests. The code reads as follows:

Notwithstanding any provision of any law, no physician and surgeon who in good faith and without compensation renders voluntary emergency medical assistance to a participant in a school athletic event or contest at the site thereof, or during transportation to a health care facility, for an injury suffered in the course of the event or contest, shall be

liable for any civil damages as a result of any acts or omissions by the physician and surgeon in rendering the emergency medical care. The immunity granted by this paragraph shall not apply in the event of an act or omission constituting gross negligence.

Recreational Use Statutes

Recreational use statutes and hazardous recreation sport statutes began to appear in the 1960s. Ski incidents may have prompted some of the early statutes; rights of skiers and rights of ski resort owners and operators are among the most detailed statutes. In most cases, the primary recreational activities of a state are reflected in its statutes. Colorado, for example, defines recreational purpose as including, but "not limited to, any sport or recreational activity of whatever nature undertaken by a person while using the land, including ponds, lakes, reservoirs, streams, paths, and trails ... and includes, but is not limited to, any hobby, diversion, or other sport or other recreational activity" (CRS 33-41-102, 2011).

The California Government Code Section 831.7 (2011) states that:

Neither a public entity nor a public employee is liable to any person who participates in a hazardous recreational activity, including any person who assists the participant, or to any spectator who knew or reasonably should have known that the hazardous recreational activity created a substantial risk of injury to himself or herself and was voluntarily in the place of risk, or having the ability to do so failed to leave, for any damage or injury to property or person arising out of that hazardous recreational activity.

(b) As used in this section, "hazardous recreational activity" means a recreational activity conducted on property of a public entity which creates a substantial as distinguished from a minor, trivial, or insignificant risk of injury to a participant or a spectator.

The act goes on to say that this does not limit liability in situations where the facility should guard or warn of known dangerous conditions or where injury was caused by negligent failure to maintain a facility.

Volunteer Immunity

Immunity for volunteers has become a popular topic of interest in sport contexts. Volunteer immunity is applicable only in negligence; it does not exist in recklessness. It merely transfers the responsibility for the incident from the non-paid staff to the facility itself; it does not absolve the facility, agency, or organization from liability. The Volunteer Protection Act of 1997, the first federal statute, provides the following limitations on liability for volunteers. Section 14503 (2011) provides:

- a) Liability protection for volunteers ... no volunteer of a nonprofit organization or government entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if
 - 1) the volunteer was acting within the scope of the volunteer's responsibilities in the nonprofit organization or government entity at the time of the act or omission;
 - 2) if appropriate or required, the volunteer was properly licensed, certified, or authorized by the appropriate authorities for the activities or practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity;
 - 3) the harm was not caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer; and
 - 4) the harm was not caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to (A) possess an operator's license; or (B) maintain insurance.

REMEDIES

In tort, damages are compensatory, occasionally punitive, and seldom injunctive. Compensatory damages are those fees paid for medical expenses, property repair, lost wages, pain or emotional suffering, loss of property, loss of bodily function, and any bills directly related to the incident. Compensatory damage is assessed to make the injured person whole, or to pay for the damage done.

Punitive damages, seldom found in negligent actions, occur in intentional torts and product liability claims. They are assessed in an effort to punish a party for the damage done to society in general, and to the plaintiff in particular. The purpose of a punitive damage award is to deter the person or agency from acting again in a similar manner. These damages are not in response to the bills the plaintiff has obtained as a result of the incident. Financial status and assets of the person or organization that caused the harm are used to arrive at a punitive damage award. The award is the amount of money essential to cause the wrongdoer sufficient financial loss such that they will avoid such harm in the future.

Injunctive relief, a request to the court to require the defendant to stop doing an offensive act, is discussed in Chapters 4 and 5, the civil rights chapters, and in civil rights cases where it is often used. While it is often listed with damages, it is seldom found in tort law decisions.

LITIGATION

The court decisions can be studied under a number of different categories. In this case, legal theories and sport and physical activity specifics will lead the discussion. Among the legal theories discussed are assumption of risk, open and obvious, spectators, statutes, waiver of liability, and risk management.

Decisions in Assumption of Risk

California took the lead in primary assumption of risk and in the theory of co-participant responsibilities in the classic decision of *Knight v. Jewett* (1992). Kendra Knight and Michael Jewett attended a Super Bowl party at the home of friends. During halftime, they were among a group who played touch football. No rules were agreed to prior to play and, at times during play, participants asked that roughness be eliminated. Michael Jewett jumped to catch a ball and collided with Kendra Knight, knocking her down and injuring her hand and finger as he returned to the ground. After three unsuccessful surgeries, one of Knight's fingers was amputated.

Knight filed suit against Jewett on theories of negligence, assault, and battery. Defendant Jewett moved for summary judgment on the theory that assumption of risk was a complete defense for his actions. "Defendant asserted that by participating in the touch football game that resulted in her injury plaintiff impliedly agreed to reduce the duty of care owed to her by defendant ... to only a duty to avoid reckless or intentionally harmful conduct and that the undisputed facts established both that he did not intend to injure plaintiff and that the acts of defendant which resulted in plaintiff's injuries were not reckless" (*Knight v. Jewett*, 1992, 698). Also, defendant claimed that plaintiff watched professional football on television and was familiar with the risks associated with playing football. Plaintiff, however, stated that she assumed that the game they were playing was "mock football" and not a serious, competitive sport.

The California Court concluded "that a participant in an active sport breaches a legal duty of care to other participants (i.e., engages in conduct that properly may subject him/her to financial liability) only if the participant INTENTIONALLY injures another player or engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport" (711). Jewett's conduct was found to be negligent or careless but not intentional. The touch football game did not breach a legal duty of care owed by defendant to the plaintiff. The case fell within primary assumption of risk, so comparative fault was not used.

The *Knight v. Jewett* case gave the sport industry a pass on liability in contact sports. The 2007 California golf case, *Shin v. Ahn*, took the primary assumption of risk from contact sports to noncontact sports, and what can be observed in the following cases is that assumption of risk has been further defined as part of physical activity. Shin and Ahn were part of a threesome playing golf. As they moved to the next tee, "plaintiff took a shortcut which placed him in front of the defendant and to his left. He stopped ... even though he knew (1) that he was in front of the tee box, (2) that defendant was preparing to tee off, and (3) that he should stand behind a player who was teeing off" (583). "Plaintiff's expert stated that golf etiquette requires that a player ensure that no one is in a position to be struck when he or she hits the ball" (583). Shin was hit in the temple by a ball driven by Ahn. Shin sued for negligence as a result of his injury.

The trial court found for the defendant and then reversed itself, saying that issues remained which could be examined by the court at a later date. The California court of appeals affirmed the trial court's decision. The Supreme Court of California

affirmed the lower courts' decisions and remanded the case with directions that litigation should continue under primary assumption of risk. An interesting point that sport professionals should consider is the Supreme Court of California's statement that the appeals court "relied too heavily on one of the golf's rules of etiquette involving safety.... Golf's first rule of etiquette provides that players should ensure that no one is standing close by or in a position to be hit by the club, the ball or any stones, pebbles, twigs or the like when they make a stroke or practice swing" (590). The court went on to say that "rules of etiquette govern socially acceptable behavior. The sanction for a violation of a rule of etiquette is social disapproval, not legal liability" (590).

Anand, et al. v. Kapoor (2010) was a New York case that emphasized the results of the *Shin* case. Anand was playing on a nine-hole golf course when he suffered a retinal detachment and permanent loss of vision after being hit in the eye by his partner's golf ball. Kapoor's ball went into the rough and he went to search for it. In the meantime, without waiting for Kapoor, Anand walked along the fairway to his lie. Kapoor found his ball and, without giving a warning, he hit the ball that struck Anand causing the injury. The court ruled for the defendant, finding that being hit by a ball without warning while searching for one's own ball was a risk of playing golf. No mention was made of the rules of etiquette of golf.

Examples of contemporary assumption of risk decision in skiing (*Fontaine v. Boyd*, 2011), trampoline play (*Kelly, et al. v. Roscoe, et al.*, 2009), use of playground monkey bars (*Smith v. City of New York*, 2010), and use of golf clubs (*Rudzinski, et al. v. BB*, 2010) follow.

Deborah Boyd, an intermediate skier, ran over the back of the skis of Andrea Fontaine, an expert skier, causing her to fall. Fontaine required several surgeries and considerable medical treatment, and has permanent injuries to both knees. Fontaine sued Boyd. The first question was the appropriate venue for the case. Fontaine was a Massachusetts resident; Boyd was a Rhode Island resident. The incident occurred in New Hampshire. The case was brought to a Rhode Island court but it was decided under New Hampshire law, the location of the incident. (Remember, tort law is state law.) The court had to determine "whether a claim of negligence by one skier against another skier for injuries sustained when the two friends collided while skiing recreationally is barred as a matter of law by the doctrine of primary assumption of risk under New Hampshire law" (*Fontaine v. Boyd*, 2011). The court found for the defendant, Boyd. The collision, as described, was an inherent risk of skiing.

A seven-year-old child broke her leg while jumping on a home trampoline with two other children (*Kelly, et al. v. Roscoe, et al.*, 2009). Kelly's mother filed suit on behalf of her daughter against the trampoline owners, the Roscoes, for "negligent supervision of the trampoline" (1008). The trial court found for the defendant. The injury was part of the ordinary risk associated with using a trampoline with other children. Kelly appealed. The court of appeals examined the issue of multiple persons on a trampoline and whether the potential risks were among the ordinary risks associated with trampoline activity. The court also noted that the parents of the injured child had forbidden

their daughter to jump with others on the trampoline because she could be injured, which confirmed that the risk was foreseeable. A combination of the foreseeability by the parents and primary assumption of risk enabled the court to affirm the trial court's decision.

Nine-year-old Isaiah Smith was injured when he fell from the monkey bars at a playground owned and operated by the City of New York (*Smith, et al. v. City of New York, et al.*, 2010). He was instructed by his parents not to play on the monkey bars; however, he chose to ignore his parents' instruction. He used the bars, fell, and sustained injuries. His parents sued under negligent supervision. An interesting statement in the case was the following: "It is well settled that one is deemed to have assumed, as a voluntary participant ... those commonly appreciated risks which are inherent in and arise out of the nature of the sport [physical activity] generally" (3). Defendant's motion for summary judgment was granted; the City of New York won.

Assumption of risk has consistently been upheld in golf for those persons whose golf balls hit others on the course; however, it was also found to be a valid defense when one golfer hit another with his club (*Rudzinski, et al. v. BB*, 2010). Two children, ages 9 (BB) and 11 (DB), were playing golf. The nine-year-old had never played before, so the eleven-year-old provided some instruction. "As BB was preparing to swing, DB saw an extra ball near the ball BB intended to strike, told BB not to swing, and went to move it" (2). DB was hit in the face, requiring hospitalization, but sustained no permanent injuries. Rudzinski filed suit on behalf of DB against BB for negligence, carelessness, gross negligence, and recklessness. The question for the court was whether the risk of being hit by a golf club was an inherent risk of golf. The court ruled for the defendant. Because the plaintiff's conduct was "consistent with the inherent risks presented by golf, and because there is no evidence of intentionally injurious or reckless conduct, the court finds that DB has failed to establish that BB's duty of care encompassed the risk involved" (11).

Decisions Finding Open and Obvious

"Open and obvious" tends to appear most often in water incidents. *Sholer v. ERC Management Group, et al.* (2011), and *Davis, et al. v. Accor North America, Inc., et al.* (2010) are examples of this pattern. Cassidy Jane Sholer became a quadriplegic after diving into an apartment swimming pool. The pool was open, lights were on, and there was no signage regarding pool depth, prohibiting diving or unsupervised swimming. She made a shallow dive and hit her head. She sued under negligence. The apartment complex countered with open and obvious. They also stated that the victim had been at least mildly intoxicated. The person who rescued her claimed that the shadows in the pool were such that the depth was difficult to recognize. The trial court and the court of appeals ruled for the defendants on the basis of open and obvious danger. The Supreme Court of Oklahoma reversed the trial court's decision, and returned the case to the lower court for an analysis of whether the pool may have had a hazard.

Davis presented a claim for wrongful death for the death of her husband in a hotel pool. The Davis family and their goddaughter were swimming and playing in the

shallow, three-foot end of the hotel pool when a foam noodle floated toward the nine-foot deep end of the pool. None of the family members were competent swimmers. Shylettia, the goddaughter, went after the noodle, got into trouble, and Mrs. Davis rescued her. In the confusion, Mr. Davis also jumped into the pool, pushed Mrs. Davis to safety, and drowned. The water in the pool was so cloudy that rescuers had to use walking search techniques to find him. Confusion occurred among the people sent to the front desk to call 911. Although the hotel had violated numerous provisions of the Ohio Administrative Code for the maintenance of swimming pools, the United States District Court for the Southern District of Ohio, Western Division, found for the hotel on the theory of open and obvious.

A case involving failure to pad a softball field fence post was considered open and obvious (*Kaitbenski v. Tantasqua Regional School District*, 2009). Taryn T. Kaitbenski, playing catcher in a varsity softball game, ran into an uncovered and unpadded fence post as she tried to catch a pop fly, and sustained injuries as a result. She sued the construction companies that built the stadium. They argued that she needed expert testimony to prove her claim and that her injury was open and obvious. This case points out the need for risk management in the areas of construction and for knowledge of safety standards by those engaging in the building of facilities.

Decisions Involving Spectators

Spectators have been injured from a flying ball or puck during the game (*Sciarrotta v. Global Spectrum, et al.*, 2008) and by a player who entered the spectator seating area (*Pickel v. Springfield Stallions, Inc., et al.*, 2010). The *Sciarrotta* decision contains a detailed discussion of the limited duty rule influencing safety planning for facilities housing sports where objects may fly into the seating areas, notably baseball and hockey facilities. Mrs. Sciarrotta attended an ice hockey game at the Sovereign Bank Arena in Trenton, New Jersey, to see her daughter sing the national anthem. She was injured when hit by a hockey puck driven from the rink during the team warm-up. Her seat was six or seven rows from the ice and above the Plexiglas protective barrier. She sued, alleging negligence by Global Spectrum, the facility, and by Comcast Spectator Co., owners and operators, and others responsible for the facility.

The limited duty rule originated in *Schneider v. Am. Hockey & Ice Skating Center, Inc.* (2001) and was further developed in *Maisonave v. Newark Bears Professional Baseball Club, Inc.* (2005) and in the New Jersey Baseball Spectator Safety Act of 2006. The limited duty rule

applies to sports venues in respect of a specific peril, that of objects leaving the field of play that may injure spectators in the stands. Under the rule, a sports venue owner or operator that provides screened seating (1) sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion, and (2) in the most dangerous section of the stands, has satisfied its duty of care. The rule applies not only while the game itself is in progress, but whenever spectators are located in the stands. (*Sciarrotta v. Global Spectrum, et al.*, 2008, 701)

In *Sciarrotta*, the court debated as to whether the application of the limited duty rule was adequate for the hockey warm-up session when many pucks were in play, or only for game play involving one puck. The trial court found for the facility; they had fulfilled the limited duty rule. The intermediate appellate court found a question as to whether the protection was adequate for the practice play when so many pucks were in the air, and reversed the decision, holding for *Sciarrotta*. The New Jersey Superior Court, Appellate Division, reversed and found for the facility; the limited duty rule was satisfied.

Wendy Pickel, a spectator at an indoor football game, was injured when one of the players fell over the wall separating the players from the playing court and ran into her. She sued the owners of the facility and the team for negligence. The defendants argued "that because football was a contact sport in which violent collisions were inherent in the game.... [This] required plaintiff to plead a greater culpability on behalf of the team than mere negligence" (879, 880). The trial court agreed and held for the defendants. Pickel appealed, arguing that the contact sport exception did not apply to spectators, only to participants. The court of appeals reversed and found for Pickel.

Decisions Under Statutes

Three examples of cases settled under statutes will be discussed. One was settled under a New Jersey Equine Activities Liability Act (*Hubner, et al. v. Spring Valley Equestrian Center*, 2010), and two others were settled under state recreational use statutes (*University of Texas Health Science Center at Houston v. Garcia*, 2011; *Coan v. New Hampshire Department of Environmental Services*, 2010).

Gloria Hubner was injured when she fell from her frightened horse as the horse backed into training poles. She sued claiming negligence. The trial court found for the defendant as the claim was barred by the New Jersey Equine Act. Hubner appealed. The Appellate Court reversed and remanded the decision for further proceedings. After several rounds of appeals, the Supreme Court of New Jersey found her claim was barred by the Equine statute. The Equine Act can operate as a complete bar to plaintiff if her injuries were caused by one of the inherent risks of the activity. The court analyzed the statute in the following manner:

- 1) Does the situation mirror the words of the statute?
- 2) Purpose of the statute is to protect equine activities due to their economy and open space preservation. Participant assumes defined risks.
- 3) Those assuming the defined risks are barred from recovery. It is one of a number of statutes "using assumption of risk principles to allocate responsibility for injuries sustained in inherently dangerous recreational activities."
- 4) In a previous case, the court discussed the allocation of losses for inherently dangerous recreational injuries. The "primary" assumption of the risk refers to an obvious inherent risk, as to which the facility operator owes participants no duty and a claim based on the risk is barred. The "secondary" sense of assumption of risks arises where the operator has a duty and breaches it, but asserts as

an affirmative defense that the participant "voluntarily exposed himself to a risk negligently created" by the operator.

- 5) Risks are to the listed.
- 6) The difference between the inherent risks and conditions within a facility's control are identified.
- 7) An exception to the statute is made where the operator acted with "negligent disregard for the participant's safety." (*Huber, et al. v. Spring Valley Equestrian Center*, 2010, 618, 619).

The Texas Recreational Use Statute and premises liability law became the focus of the *University of Texas Health Sciences Center at Houston v. Garcia* case (2011). Garcia sued the university for injuries to his big toe sustained while playing on the outdoor sand volleyball court. He stated that the institution knew or should have known that the court needed to be inspected, maintained, and repaired: the failure to do so was the cause of his injuries. The university said the claim was barred by sovereign immunity under the Recreational Use Statute. Before sovereign immunity could be waived, duty had to be determined. Under premises liability law, the plaintiff was owed the duty of care that a private person owes to a licensee on private property unless he/she paid to be on the premises. The Texas Recreational Use Statute states that:

If an owner ... gives permission to another to enter the premises for recreation, the owner, ... by giving permission does not:

- 1) assure the premises are safe for that purpose;
- 2) owe to the person to whom permission is granted a greater degree of care than is owed to a trespasser on the premises; or
- 3) assume responsibility or incur liability for any injury to any individual or property caused by any act of the person to whom permission is granted. (Tex. Civ. Prac. & Rem. Code Ann. Section 75.002[c])

The court of appeals held that the Recreational Use Statute applied. They reversed the trial court's order denying the defendant's motion to dismiss, and remanded or returned the case to the trial court for further proceedings.

Coan brought a wrongful death and negligence suit against the New Hampshire Department of Environmental Services for the drowning deaths of three young people—ages 16, 20, and 9—which resulted from the release of an additional 375 cubic feet per second to the flow coming out of the Dam into the lake in which they often swam. No warning or information about the flow was posted. The trial court found for the defendant under recreational use immunity; there was no duty to warn or place safety devices on the shore. The Supreme Court of New Hampshire affirmed the judgment.

Decisions Involving Waiver of Liability

Stelluti v. Casapenn Enterprises, LLC, et al. (2010) featured a situation where the waiver of liability won the case for the defendant despite the fact that the fitness equipment fell apart. Gina Stelluti, a member of spinning class, fell forward while her feet remained strapped to the peddles of the bike when the handlebars were dislodged. She sued under negligence, alleging failure to maintain the equipment, set up the equipment, and properly instruct her on the use of the equipment in such situations. The fitness center countered with the liability waiver she had signed. Trial, Appeals, and Supreme Courts of New Jersey all found for the defendant on the basis of the liability waiver.

Jakubovsky was skiing down a slope at Blackjack Mountain in Michigan when a snowboarder, coming at a high rate of speed, hit her, causing significant injuries as she was pushed into a fence (*Jakubovsky v. Blackjack Ski Corporation, et al.*, 2009). The snowboarder was never identified. She sued the resort. The resort claimed immunity under Michigan's Ski Area Safety Act which "provides that skiers are deemed to accept the dangers inherent in the sport of skiing, including injury from skier-to-skier collisions" (3). Jakubovsky claimed that the resort was not immune under the statute because it had violated the act "by failing to warn skiers of the unmarked trail which the snowboarder took prior to the accident" (3). The Michigan Ski Area Safety Act states the following:

Each person who participates in the sport of skiing accepts the dangers that inhere in that sport insofar as the dangers are obvious and necessary. Those dangers include, but are not limited to, injuries which can result from variations in terrain; surface or subsurface snow or ice conditions, bare spots, rocks, trees, and other forms of natural growth or debris, collisions with ski lift towers and their components, with other skiers, or with properly marked or plainly visible snow-making or snow-grooming equipment. (*Jakubovsky v. Blackjack Ski Corporation, et al.*, 2009, 4)

The defendant succeeded based on the Michigan Ski Area Safety Act. Similar acts exist in many states where ski resorts are located and, in most cases, the act enables the resort to succeed in a court of law.

SUMMARY

Negligence occurs when a person does not exercise reasonable care under all circumstances. It must be foreseeable that a person's conduct will result in harm. The five elements of negligence are duty, breach of the duty, factual cause, scope of liability including foreseeability, and damage. Violation of statutes, ordinances, or regulations are, on occasion, the basis for a negligence action.

The standards of care in sport and physical activity are reasonable person, special relationship, and professional. The reasonable person is a hypothetical person that represents what an ordinary person would do in the situation. Parents and schools have

special relationships with children that make them responsible for certain standards of care. A professional standard is established when a body of knowledge exists and a clearly recognized level of performance is adhered to by members of the profession. Defenses to negligence are contributory negligence, assumption of risk, and comparative negligence. Contributory negligence means that the victim contributed to his/her own injuries. Assumption of risk is that the participant knew and agreed to the risk when he/she chose to participate in the activity. Comparative negligence is a system of fault used to identify the extent of fault of the victim and the extent of fault of the person(s) responsible for the victim's injuries.

Premises liability is classified as invitee, licensee, and trespasser. An invitee has been invited onto the land, typically for a business purpose. The owner must keep the premises in a reasonably safe condition, inspect for problems, repair as needed, and warn of known dangers. A licensee is on the land with the owner's consent but does not have a business interest; he/she is a guest. The owner must keep the land in reasonable condition and warn of any known problems; he/she is not required to inspect the land. The trespasser is on the land without the owner's permission and is owed "zero duty."

Immunity is freedom from liability. The types of immunity include governmental immunity, Good Samaritan laws, and volunteer immunity. Damages in tort are compensatory and punitive.

DISCUSSION QUESTIONS

1. Identify the elements of negligence and describe the elements in the context of a sport environment.
2. Explain the Good Samaritan Laws and identify when they are used.
3. What is contributory negligence and when does it occur?
4. Do recreational use statutes cover scholastic and collegiate athletics?

ACTIVITIES

1. Read two assumption of risk cases in a sport in which you are familiar. Given your knowledge of rules and safety within the activity, including age appropriate understandings, assess the court with reference to sport.
2. Read the dissent and the statements on the etiquette of golf in the *Shin vs. Ahn* case. Did the California court choose to overrule the laws of golf in their decision?
3. Select a sport. Identify five issues of foreseeability in the sport. Outline an assumption of risk statement for the sport.

2

Intentional Torts and Criminal Law

OBJECTIVES

Upon completing this chapter you will:

- 1) know the difference between civil and criminal law: courts, decisions, and punishments;
- 2) be able to differentiate between negligence and intentional torts in sport and physical activity;
- 3) understand and be able to describe the role of immunity as a defense to torts;
- 4) recognize the differences between battery and assault; and
- 5) be able to explain the role of a release to your supervisor.

INTRODUCTION

Intentional torts are injuries caused by a deliberate act. Under the law, intent means that "the person acts with the purpose of producing a consequence (act) or the person acts knowing that the consequence is substantially certain to result" (*Restatement Third, Torts: Liability for Physical and Emotional Harm*, Section 1). The actor may not intend to injure someone. The intentional torts most often encountered in sport and physical activity are torts to persons and property. Sport managers will also encounter intentional torts in economic relations. The accepted contact between players in many sports and the violent nature of some competitions have caused the courts to find most incidents of play or practice involving injury among sport teammates or opposing players to be intentional torts. They are not considered to be negligence, something one did not know would happen. The intentional tort categories in which violent actions are intended are the vehicle for many sport decisions. The court will ask if the athlete intended to injure the fellow athlete or if the actions were so violent that recklessness bordered on intent.

An example of an intentional tort is a person hitting another in the heat of competition. The actor expects the act to be carried out; however, the actor does not intend that an injury will be sustained because of the act. In an intentional tort in sport, the court will attempt to ascertain if there was intent merely to do the act or there was

intent to do the act and to harm the plaintiff. An act executed with intent to harm another is not only an intentional tort but could become a criminal offense. If a substantial injury or death should occur, the person who carried out the act could be accountable for a criminal act.

INTENTIONAL TORT LAW VERSUS CRIMINAL LAW

There are major differences between intentional tort law and criminal law. The purpose of intentional tort law is to vindicate and honor the victim while enforcing appropriate standards of care. The role of criminal law, in contrast, is to support the state's interest in deterring crime. Litigation in tort law is between individuals or individuals and agencies. In criminal law, the state or federal government brings a cause of action against an individual or agency. For example, the State of New York brings an action against a person. On occasion, the same act can result in both tort and criminal law. An example of this is a state bringing a cause of action to prosecute a person for a crime, while the person harmed brings an action to recover compensation.

INTENTIONAL TORTS TO PERSONS

Intentional torts to persons include battery, assault, false imprisonment, and recklessness. They occur between persons engaging in an activity, or between a coach, teacher, or supervisor and a player or client. The civil rights statute 42 USC 1983, as it relates to intentional torts, is also reviewed in this section.

Battery

Battery is intentional, harmful, or offensive contact with another person, without that person's consent. The physical contact must be intentional; however, there does not have to be intent to injure, and injury or damage does not have to occur. Continuous intentional tagging and pushing in game play or engaging in locker room pranks could, given the right circumstances, become batteries. Horseplay is often found to include battery.

Numerous batteries, seldom recognized as such, exist in the traditional rituals of recreational and competitive sports. Today, hazing is considered to be among these batteries. In addition to batteries within the competitive arena, there are also batteries that occur as a result of athletes injuring spectators. For years, aquatic competitions ended with winners, losers, coaches, officials, and spectators being thrown into the water. When aquatic officials complained of these unsafe practices, administrators responded by stating that restricting such behavior would take the fun out of the event. Finally, serious life-threatening and debilitating injuries resulting from horseplay caused administrators to view this behavior in a different light. Today, most national swimming meets no longer finish with everyone in the water.

Pushing, shoving, chasing, and tagging are to be avoided in physical activity environments unless such activity is an element of regular game play, and officials are present to control the level of physical contact and safety. The majority of serious injuries attributed to horseplay occur in the home or in unsupervised recreational areas.

Battery does not take place if the other party consented to the act. Consent, however, is difficult to assess. For example, does a person's competing in and winning a swimming event give consent to a fellow team member to toss that person into the water in celebration of the victory? No matter the context, sexual contact among adults without consent is battery. Sexual contact between an adult and a minor with or without consent may be a criminal act.

Assault

Assault is the apprehension or belief that one will experience imminent contact; assault does not require physical contact. Again, the person has not consented or agreed to the act. When a person is threatened by an action such that he/she believes another is preparing to hit him/her, an assault has occurred. It is not necessary that the assaulting person intends to harm the individual. The person threatened need not be in fear of the other person's actions; only apprehension or threat is required. An example of an assault is a 6'4" basketball coach lunging toward a 5'2" seventh-grade athlete, telling him to move toward the basket now! If the two are in fairly close range, the young person may be in fear of being hit although he is not touched. This is an assault. The threat must be physical—words alone will not constitute an assault. If contact is made, it is a battery.

False Imprisonment

False imprisonment is the unjustified, unlawful, and intentional confinement, restraint, or detention of a person within specific boundaries against that person's will. Wrongful intent need not exist, nor is there a need for substantial damage. For example, store managers who restrain shoppers suspected of shoplifting could be charged with false imprisonment. While no false imprisonment court decisions currently exist in sport and physical activity, professionals who routinely restrain persons in locker rooms or gymnasiums as punishment could be liable for false imprisonment.

Recklessness

Recklessness describes a significantly high level of risk of which the actor is aware. A person acts recklessly in engaging in conduct if:

- a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation; and
- b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to the risk (*Restatement Third, Torts: Liability for Physical Harm*, Section 2, 2010).

In the past, recklessness was a tort of professional sport; today, intentional torts occur in many forms and at all levels of competition. For years, the courts found it difficult to assess sport injuries as intentional torts. As players have increasingly sustained severe injuries from the violation of game rules, these acts have been called intentional

torts. Just how far beyond the rules of the game can a player—even a professional player—be expected to assume a risk of injury? The courts appear to sense a need to declare that a player assumes all risks of injury up to the limits of the rules; however, when the injury is a clear violation of the rules, it becomes an intentional tort.

42 USC 1983

42 USC 1983 is a statute often used in civil rights cases that permits tort claims for deprivation of federal rights under the color of state law. Defendants are state or local government officials; victims may also sue under this law as private individuals.

Section 1983 provides a private right of action for damages to individuals who are deprived of “any rights, privileges, or immunities” protected by the U.S. Constitution or federal law by any person acting under the color of state law.... As such state officials may be held liable under Section 1983 if there is, at minimum, an underlying constitutional tort.... However, the defense of qualified immunity generally shields officials in the performance of their discretionary duties from liability of civil damages “insofar as their conduct does not violate clearly established statutory or constitutional rights of which reasonable person would have known.” (U.S. Code, 2011, 111, 112)

Victims of intentional torts may use 42 USC 1983 in place of or in addition to intentional torts to gain personal rights. *J. K. v. Arizona Board of Regents, et al.* (2008) and *Fitzgerald v. Barnstable School Committee* (2009) are cases involving 42 USC 1983. *J. K.* is discussed under battery while *Fitzgerald* follows here because the case established the connection between sexual assault and 42 USC 1983.

In 2001, a kindergarten student, Jacqueline Fitzgerald, told her parents that when she wore a dress to school, “an older student on her school bus would bully her to lift her skirt” (*Fitzgerald v. Barnstable School Committee*, 2007, 169). Later, the third grader also asked her to do more. Her mother reported the incidents to the school. The school studied the situation and the local police department held an investigation. All decided that insufficient information existed to find the young man criminally involved. Their solution was to provide a different bus schedule for Jacqueline or separate the kindergarteners from the third graders on the bus by three rows of seats. Mrs. Fitzgerald felt the solution was a punishment for her daughter and recommended that the young man be moved to a different bus. The school refused. There was a second encounter between the students in a gym class and Jacqueline began to miss a great deal of school and all of her gym classes.

In April of 2002, the Fitzgeralds sued the Barnstable School Committee and the superintendent. The claim against the school committee was for violation of Title IX; the claim against both the School Committee and the superintendent was under 42 USC 1983. A number of miscellaneous claims were also filed against both parties. The two major statutes addressed in this case were Title IX and 42 USC 1983. For a Title IX complaint to succeed, the following elements had to exist: the school was be under Title

IX; the harassment was severe, pervasive, and offensive; the student had to be deprived of educational opportunities as a result of the incidents; and educators had to have had actual knowledge of the situation and had done nothing about it. The case met all elements except the last one; the school had addressed the situation and provided a solution, which the parents deemed unreasonable. Thus, the Title IX statute failed to protect the plaintiff. The statute 42 USC 1983 was also a part of the pleadings to the court. The United States Court of Appeals for the First Circuit ruled that the plaintiff had to comply with Title IX, not with 42 USC 1983. *Fitzgerald* lost in the court of appeals; however, the case was appealed to the United States Supreme Court. The U.S. Supreme Court reversed the decision of the court of appeals, stating that 42 USC 1983 and the equal protection clause of the Fourteenth Amendment to the Constitution, in addition to Title IX, needed to be considered by the courts. The case was remanded to the lower court for further proceedings. No further information was available. Often, cases that are remanded are then settled and do not return to the courts.

42 USC 1983 "provides a right of action for any person who, at the hands of a state actor, has experienced the derivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States" (*Fitzgerald, et al. v. Barnstable School Community*, 2007, 176). The court ruled that "the comprehensiveness of Title IX's remedial scheme—especially as embodied in its implied private right of action—indicates that Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination" (2007, 179). The *Fitzgeralds* appealed, and the appeal was accepted by the United States Supreme Court (2009). The Supreme Court reversed the lower court's decision, concluding "that Title IX was not meant to be an exclusive mechanism for addressing gender discrimination in schools or a substitute for 1983 suits as a means of enforcing constitutional rights....[and that a] 1983 suit on the Equal Protection Clause remained available to the plaintiff" (*Fitzgerald*, 2009, Case Overview).

INTENTIONAL INTERFERENCE WITH PROPERTY

Intentional interference with property includes trespass to land, trespass to chattel, and conversion. Substantial damage is not required in intentional interference with property. Trespass to land (real estate) is an intentional entry—walking onto land or the projection of an object (e.g., shooting an arrow or hitting a golf ball) onto the land in possession of another. The action must have been executed without permission (either implied or expressed) from the owner of the property. The intent need only be to enter; no intent to harm is required. For example, a coach or teacher who advises his/her students to pass through a property owner's yard on their way to a playing field or campgrounds could be found liable for encouraging minors to trespass on land.

Trespass to chattel is interference with a person's personal possessions. The action must be intentional. Stealing a motorboat is trespass to chattel; intentionally hitting a sailboat in open waters may be trespass to chattel. Actual damage must exist. Trespass to chattel exists when a person who rightly has access to the property of another refuses to return the property. Conversion is trespass to land or chattel that so substantially

interferes with the owner's possession of the property that it is only fair to require the defendant to pay for the property (*Restatement of the Law of Torts, Second*, 1965, 222A). Many courts hold that a purchaser of stolen property is a converter whether or not he/she is aware that it is stolen. Other states have ruled that a person who becomes aware that property was stolen and returns the property will not be held for conversion.

BUSINESS TORTS: FRAUD, DECEIT, AND MISREPRESENTATION

Fraud and deceit are torts often appearing in athletics. Recruiting is an area in which fraud, deceit, and misrepresentation have been alleged. Fraud and deceit may also appear in the purchase of equipment and the construction of buildings. According to the *Restatement of the Law of Torts, Second* (1965), the elements of fraud and deceit are:

- 1) a false representation of a material fact;
- 2) knowledge that the fact is false;
- 3) intention to induce the other party to rely on the representation;
- 4) the other party's reliance on the representation; and
- 5) substantial damage as a proximate result of the other party's reliance. (525)

A school's description of a league rule and a health spa's explanation of anticipated health improvements are examples of situations that could make agencies vulnerable to litigation under misrepresentation. The opinions of coaches, teachers, trainers, therapists, doctors, and lawyers—on issues about which they are expected to possess knowledge—may be considered facts.

A misrepresentation of a law will not be actionable unless it is made by a person in a position of confidence, or by one expected to have knowledge of the law. A college coach, administrator, or recruiter may be actionable for misrepresenting the National Collegiate Athletic Association (NCAA) rules. An athletic recruiter may be liable for misrepresenting a university's requirements to a potential student-athlete.

The difference between fraud and misrepresentation is that fraud involves the intent to deceive. The deception was planned. Misrepresentation is:

- falsely denying knowledge of the facts;
- actively concealing the facts;
- disclosing only parts of the facts; or
- providing a false picture.

Persons who claim misrepresentation have to differentiate between non-disclosure and misrepresentation. If the question was never asked, the person making the representation may not have been obligated to disclose the facts. Non-disclosure or failure to disclose is usually not actionable unless there is a relationship between the plaintiff and the defendant that required that there be disclosure, or the plaintiff relied on the

Unlike other intentional torts, there must be substantial damage before one can make a claim under fraud, deceit, or misrepresentation. Damages usually include losses resulting from the injury. They may include lost work time, customers, time in school, or money. Some courts' awards are only for out-of-pocket expenses or expenses that can be verified by receipts; others may permit more abstract losses to be covered. Only when recklessness is involved are punitive damages awarded.

DEFENSES TO INTENTIONAL TORTS

Defenses to intentional torts are reasons to justify the actions of the actor. They include consent, self-defense, defense of other people or one's own property, necessity, and discipline.

Consent

Consent occurs when a reasonable person does not object to or attempt to stop the action of another. It may be verbal consent, or implied consent as a result of silence. A minor is not able to consent. As the minor moves closer to the age of majority or gains the ability to understand and weigh risks, he/she becomes capable of consenting. If the consent occurs under duress, it will not be considered valid in the eyes of the court. Participation in a game involves a manifestation of consent to those bodily contacts which are permitted by the rules of the game. It should be noted that a person must know the risks involved in an activity and the extent of the damage that could occur before giving informed consent.

Self-defense

Self-defense and defense of others permits a person who is under attack to take reasonable steps to prevent harm to him/her or to others, when there is not time to obtain professional assistance. Reasonable force may be used to prevent threatened harm, offensive touching, or bodily contact. An individual must sense imminent extreme danger; revenge is not a defense. A person can use deadly force in self-defense or defense of others only when that degree of force is essential to prevent imminent harm. A person who is attacked should retreat if he/she can do so safely. A person defending him/herself and others in that person's own home may use deadly force and need not retreat. In addition, a person may use reasonable force to defend the rights of family members and others against attack. The property owner may use force that is necessary to protect property. Verbal commands are to be used first. If the verbal commands are not successful, the owner may use force.

Necessity

Necessity is a privilege, due to unusual circumstances, to harm a person or property even though the person or property has done nothing wrong. A sailing group that is subject to threatening weather can tie its craft to a private dock and make camp on a private shore. In this case the necessity is seeking shelter in a life-threatening situation. Those who use necessity are financially responsible for the extent of any damage to property; however, they are not liable for having entered the property of another without permission.

CRIMINAL LAW

Tort law, previously studied, was civil law; the injured party or plaintiff brought a cause of action against the defendant, the person(s) who had caused the harm. In criminal law, the wrong is considered harm to society, not a wrong to another individual. Therefore, a prosecutor, an official of the federal or state government, brings a cause of action against the person accused of the harm (defendant) in a criminal court. The prosecutor has the burden of proving "beyond a reasonable doubt" the elements of the crime. In both criminal and civil court a judge or jury determines the guilt or innocence of the defendant. Criminal law is a combination of federal and state law. Federal law applies when the incident occurs in a military, international, interstate, or navigational environment. Although state laws differ, they tend to have considerable commonality. In an effort to demonstrate the differences among states, details of criminal law in Florida, New York, and California are described in the following.

In criminal law, a guilty defendant is punished by jail or prison, execution, the death penalty, and fines paid to the state or federal government. There are two broad classes of crimes, felonies and misdemeanors. In general, felonies carry a maximum incarceration sentence of more than a year. Misdemeanors usually carry a sentence of less than a year. In criminal litigation the burden of proof is always on the state. The state must prove guilt. Also, criminal litigation requires that the state or federal government satisfy each element of the statutory definition of the crime and that the defendant has been found culpable "beyond a reasonable doubt". Usually a warrant is issued on "probable cause," a much lower standard.

In Florida, a misdemeanor offense is classified as first degree or second degree. Offenses include driving with a suspended license, battery, petit theft, and possession of marijuana. Second degree misdemeanors require no more than sixty days in jail, six months of probation, and a \$500.00 fine. A first degree misdemeanor requires no more than one year in jail, one year probation, and a \$1,000 fine. Felony offenses are classified as third degree, second degree, and first degree, capital, or life offense. These include a DUI with injuries, robbery, burglary, and possession of cocaine. Third degree results in up to five years in prison, five years' probation, and a \$5,000 fine. Second degree results in up to 15 years in prison, 15 years' probation, and a \$10,000 fine. First degree results in up to 30 years in prison, 30 years' probation, and a \$10,000 fine. A life felony results in up to life in prison; if released, probation for the rest of one's life, and a \$15,000 fine. Capital death results in life in prison without the possibility of parole.

In New York, the offenses are classified as felonies, misdemeanors, and third category violations. Felonies are classified A through E with A the most severe. A I results in 15 years to life in prison, A II has a maximum of life in prison. B has a maximum of 25 years in prison, C has a maximum of 15 years in prison, D has a maximum of 7 years in prison, and E has a maximum of 4 years in prison. Misdemeanors are listed under A and B. A has a maximum of one year in jail while B has a maximum of 90 days in jail. Violations are usually fines and/or community service, and on occasion, up to 15 days in jail.

California is one of twenty-four states that has a three-strikes law requiring that a person convicted of three serious crimes be sent to prison for 25 years. They also have the death penalty for first degree murder. Murder can also result in life in prison, without parole, for 25 years to full life. A conviction of rape results in three to six years in prison while robbery results in three to nine years in prison.

LITIGATION IN INTENTIONAL TORTS

Litigation in sport-specific intentional torts differs from general intentional tort cases. An intentional tort requires only the intent to execute an act; results of court decisions in sport require the intent to act, and the intent to injure.

Battery and Assault

Examples of court decisions of battery in sport include a volunteer coach beaten by opposing team coaches in a Little League baseball tournament (*Hill, et al. v. Bridgeview Little League Association, et al.*, 2000, 2001), a person injured by a drunken spectator at a tailgate party (*Bearman v. Notre Dame*, 1983), a head injury in a high school basketball game (*Brokaw v. Winfield-Mt Union Community School District, et al.*, 2008), and two sexual assaults (*J. K. v. Arizona Board of Regents, et al.*, 2008, and *Kaster v. Smith*, 2008). John Hill was attacked and beaten by the Loy brothers while coaching third base in a Little League tournament. The brothers were coaching the opposing team. Hill sustained several injuries including a gouged eye and a broken nose. He sued the Loys; Bridgeview Little League (Bridgeview), the opponents; and Justice Willow Springs Little League (Justice), the sponsor of the tournament. Negligence claims were filed against Bridgeview and Justice for failing to protect Hill. The trial court "entered an order of default against the Loys for failure to answer or otherwise plead" (1177).

The jury verdict for Hill was \$632,710 and \$125,000 for his wife. Fault was apportioned equally between Bridgeview and Justice. Defendants appealed, challenging the finding of negligence and the exclusion of the Loys from the fault apportionment. The Supreme Court of Illinois reversed the trial court's decision finding that Bridgeview could not foresee the actions of the Loys, and that Justice did not owe a duty to Hill. Hill, however, could sue the Loys for intentional tort.

One of the most publicized cases of spectator violence was *Bearman v. Notre Dame* (1983). Christenna Bearman suffered a leg fracture when she was knocked down by a drunken spectator as she returned to her car following a football game at the South Bend campus. The Circuit Court, St. Joseph County, granted the university a motion for judgment on the evidence. Bearman appealed, arguing that

she was a business invitee of the University of Notre Dame; therefore, Notre Dame owed to her a duty to protect her from injury caused by the acts of other person on the premises. On the other hand, Notre Dame argues that absent notice or knowledge of any particular danger to a patron, the University cannot be held liable for the acts of third persons (1197).

The Court of Appeals of Indiana reversed the judgment of the trial court, and remanded for further proceedings based on the following statement:

The University is aware that alcoholic beverages are consumed on the premises before and during football games. The University is also aware that "tailgate" parties are held in the parking areas around the stadium. Thus, even though there was no showing that the University had reason to know of the particular danger posed by the drunk who injured Mrs. Bearman, it had reason to know that some people will become intoxicated and pose a general threat to the safety of other patrons. Therefore, Notre Dame is under a duty to take reasonable precautions to protect those who attend its football games from injury caused by the act of third persons. (1198)

Although this case involved a battery and is often thought of as a battery case, the final legal analysis was under the liability of property ownership.

In *Brokaw, et al. v. Winfield-Mt Union Community School District and McSorley*, 2008, Jeremy Brokaw, a high school junior and starting guard for the basketball team, was struck in the head by the elbow or fist of an opposing team guard, Andrew McSorley. Jeremy fell to the floor sustaining head injuries including headaches, hallucinations, post-concussion syndrome, and epilepsy spectrum. McSorley was ejected from the game on a technical foul. He received a one game suspension from the league and a five game suspension from his high school. Brokaw's parents sued McSorley for assault and battery including punitive damages, and sued McSorley's school district for negligence supervision. The district knew that McSorley behaved aggressively and they did nothing about it. The trial court ruled that McSorley committed a battery and awarded Brokaw's parents \$13,000 for their son's medical expenses and \$10,000 in damages to Jeremy. Punitive damages were denied as the incident did not rise to the level of recklessness. The claim for negligent supervision was also denied.

Two examples of the many sexual assaults deemed batteries by the courts include an assault of a woman by a football player (*J. K. v. Arizona Board of Regents, et al.*, 2008), and assaults by a high school swimming coach of a number of female students (*Kaster v. Smith*, 2007, 2008). J. K. was allegedly raped by a football player in a University of Arizona dorm where they both resided. J. K. had never met Darnel Henderson, the football player, before the attack. The football player had a history of misconduct and sexual harassment. A university investigation concluded "that the 'football player' had more likely than not sexually assaulted J. K. in violation of the Student Code of Conduct" (9). In addition, the Arizona University Department of Public Safety's "formal investigation concluded that Henderson had non-consensual sexual intercourse with J. K. and that there was probable cause for criminal prosecution" (9). The Maricopa County Attorney refused to prosecute the athlete for the rape. No reason was provided in the case for this decision.

J. K. filed a complaint against the football player and the Arizona Board of Regents, et al. in the Maricopa County Superior Court; defendants removed the case to the

United States District Court for the District of Arizona. The complaint included a violation of Title IX of the Education Amendments of 1972 in the conduct of the proceedings and follow-up on campus; and a violation of her due process rights under 42 USC 1983 against Koetter, the football coach. The plaintiff contends that

but for: a) Koetter's knowledge of Henderson's predatory sexual harassment and threatening behavior, b) his affirmative actions in facilitating and permitting Henderson to return to ASU in August 2003 after already being expelled from the Summer Bridge for sexual harassment, c) his affirmative action in concealing relevant information from Clubb and Sullivan at Student Affairs ... In addition to alleging that Koetter failed to act, Plaintiff alleged that Koetter affirmatively ensured that Henderson returned to school, where he was assigned to the very dormitory where his acts of sexual harassment against females had occurred just one month earlier. (22)

As a result of these findings coach Koetter's motion for summary judgment was denied.

Many of the individual defendants for the Arizona Board of Regents were dismissed and the issue of ASU's willful destruction of documentation regarding the football player's earlier misconduct was settled. In reference to the Title IX claim the court also denied the motion for summary judgment, claiming that "the court cannot hold as a matter of law that ASU's response to Henderson's known misconduct during the Summer Bridge program, as well as J.K.'s allegation that Henderson raped her, were not 'clearly unreasonable'" (53, 54).

Kaster v. Smith was a case of sexual relationships between minor girls and the coach of their swimming team. The facts involve "two counts of sexual assault by a school staff member, one count of fourth-degree sexual assault, and one count of disorderly conduct with respect to a sexual relationship with a student" (Case Overview). Mr. Kaster, a swimming coach for both men and women at a Green Bay, Wisconsin, high school from 1983 to 1999 was convicted of the offenses mentioned above under Wisconsin Statute 948.095 that makes sexual contact between a student and a member of the school staff illegal. "The statute defines 'school staff as 'any person who provides services to a school or a school board, including an employee of a school or a school board and a person who provides services to a school or a school board under a contract" (951). While the case was an attempt by the defendant to claim that the fact he was not a teacher, but a contract coach, meant that he was not under the above statute. The court found that his position was under the definition of the statute.

Recklessness

Recklessness is a concept that often relates to sport cases in that an athlete assumes certain risks when engaging in sport, risks beyond those assumed in regular life activities, and that the rules of each game or activity and the duties of the referees and persons in charge, when appropriate, are to control the situation. Unfortunately, games and activities get out of control and those injured in these out of control situations need a

legal cause of action. Recklessness is one of those necessary legal causes of action. We begin with the early cases that paved the way for the standard recklessness and move to contemporary decisions made in a range of sports and activities.

Hackbart v. Cincinnati Bengals, Inc. (1979) played an important role in establishing the concept of recklessness. On September 16, 1973, Dale Hackbart, a veteran free safety for the Denver Broncos, was involved in a play that resulted in a pass interception by the Broncos. Acting as an offensive player, Hackbart attempted to block Charles Clark, an offensive back for Cincinnati, by throwing his body in front of him. Clark struck Hackbart, who was still on his knees, with a blow to the back of his head. No penalty was called and Hackbart continued to play. Later, Hackbart had pain, and when he sought medical attention, it was discovered that he had a neck fracture. The trial court judge resolved the liability issue in favor of the Cincinnati Bengals and Clark reasoning that

professional football is a species of warfare and that so much physical force is tolerated and the magnitude of the force exerted is so great that it renders injuries not actionable in court, that even intentional batteries are beyond the scope of the judicial process.... Despite the fact that the defendant Charles Clark, admitted that the blow which had been struck was not accidental, that it was intentionally administered, the trial court ruled as a matter of law that the game of professional football is basically a business which is violent in nature, and that the available sanctions are imposition of penalties and expulsion from the game. (518-519)

This case weighs the notions of violence, consent, and assumption of risk. The court of appeals reversed and remanded the case for a new trial, holding, among other reasons, that the tort law was applicable to an athletic event and that recklessness, not assault and battery, was a standard for measuring liability in this situation.

Reckless misconduct, later referred to as recklessness, was applied in an amateur sport league for high school age boys in *Nabozny v. Barnhill* (1975). Nabozny was the goalkeeper for the Hansa team; Barnhill was a forward for the Winnetka team. The goalkeeper was kicked in the head by a midfielder while the goalkeeper was on his left knee in the penalty zone. Experts agreed that the contact in question should not have occurred. The court stated:

That when athletes are engaged in an athletic competition; all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs the conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule. A reckless disregard for the safety of other players cannot be excused. To engage in such conduct is to create an intolerable and unreasonable risk of serious injury to other participants. We have carefully

drawn the rule announced herein in order to control a new field of personal injury litigation. Under the facts presented in the case at bar, we find such a duty clearly arose. Plaintiff was entitled to legal protection at the hands of the defendants.... It is our opinion that a player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or wanton or with a reckless disregard for the safety of the other players so as to cause injury to that player, the same being a question of fact to be decided by a jury. (260–261)

The case was reversed and remanded to the circuit court for a new trial.

Examples of contemporary cases are taken from a recreation league, colleges, including spectators, theme park, golf, and ski/snowboard. *Feld, et al. v. Borkowski, et al.* (2010) involved teammates on an intramural slow-pitch softball team composed of high school students. Feld was playing first base while Borkowski was practicing batting, when he hit a high flying ball and let go of the aluminum bat, hitting Feld. Borkowski yelled a warning but it was too late. Feld's left eye was severely injured. Feld, through his parents, filed suit in negligence. Borkowski responded that softball was a contact sport and was an exception to the rule of negligence. Feld then changed the charge to reckless conduct. To support the reckless conduct action an expert witness stated that the "only way a right-handed batter could hit a first baseman with a bat in such a manner is if the batter followed through and rotated around after striking the foul ball and deliberately threw the bat or let go of the bat in such a way that it was flung with considerable force through the air toward the first base position" (74). The district court granted Borkowski's motion for summary judgment noting that softball was a contact sport. The Felds appealed. The court of appeals affirmed the lower court's decision.

Plaintiff Mary Kalan and defendant Adrienne Fox were members of opposing teams competing in a recreational softball league (*Kalan v. Fox*, 2010). As Kalan was catching the ball to make a tag she collided with Fox. Plaintiff's injuries required hospitalization. Kalan sued Fox alleging negligence and reckless conduct; the conduct was beyond the rules of the game. Defendant argued that the state's recreational use statute precluded recovery for a person's injuries (Recreational Use Statutes were explained in Chapter 1). A point of debate was whether Fox, the homebound runner, had slide into base. She claimed she was in a slide. If it was a slide, she was within the rules of the game. The trial court found for the defendant runner. Plaintiff appealed. Again, the issue was the position of the runner at the time of impact. Evidence was produced to show that the runner was on her feet, not sliding, at the time of impact. Thus, the court reversed the judgment on the issue of recklessness.

Another adult case, this time in ice hockey, was *Archibald v. Kemble* (2009). Both men were playing in an adult "no check" league. No check means no body contact. Kemble, an eighteen-year-old, jammed his right skate into Archibald's left skate, sending Archibald into the boards and shattering his femur. Archibald was transported to the hospital by ambulance. He received multiple surgeries and has been advised that

the injury is permanent. The trial court called it recklessness. A debate existed as to whether recklessness in sport should be analyzed under negligence or intentional tort. The court permitted the case to go to trial. No further information was available.

The United States Coast Guard Academy was playing a varsity soccer match with Trinity College when Cadet Trujillo was struck in the head by Yeager, a Trinity player. Trujillo sued Yeager for careless neglect and reckless use of force in creating the injury (*Trujillo v. Yeager, et al.*, 2009). He also sued Yeager's coach, Pilger, for negligence in failing to properly educate his athlete. Yeager, the defendant, moved to dismiss the complaint stating that one cannot be held liable for negligence for injuries occurring in the course of a competitive contact sport. Trujillo's negligence count was dismissed. Most states have adopted an intentional or reckless standard of care for injuries occurring in competitive sport. Trujillo's complaint against the opponents' coach also failed, with the Court "holding that coaches liable in negligence, particularly to players on a different college's team, would unreasonably threaten to chill competitive play" (91).

In *Nalwa v. Cedar Fair*, plaintiff broke her wrist when her bumper car in a fair was hit from behind and then in front. The lower court found for the fair on primary assumption of risk of the plaintiff. She appealed, "The court of appeals reversed the judgment holding that the primary assumption of risk doctrine was inapplicable to regulated amusement parks, where the activities involved an illusion of risk rather than actual risk" (*Nalwa v. Cedar Fair*, 2011, Case Overview). The Court concluded that issues of liability and cause of action for willful misconduct existed for the fair.

Recklessness incidents seem to occur more often in golf and skiing than in other sports. In golf, two courts, one in Ohio (*Alexander v. Tullis*, 2006) and one in Hawaii (*Yoneda v. Tom, et al.*, 2006) involved golfers struck by fellow golfers' balls, one in the eye. The courts found for the defendants, in *Yoneda*, stating that "there was an inherent risk that golf participants would be hit by errant shots and because plaintiff adduced no evidence that defendant golfer intentionally injured him or acted recklessly beyond the ordinary activities of golf, the doctrine of primary assumption of risk applied, barred plaintiff's actions against defendant golfer" (*Yoneda v. Tom, et al.*, 2006, Case Overview). The same reasoning occurred in the *Alexander* decision.

In skiing the incidents involved equipment problems (*Jozewicz v. GGT Enterprises, LLC; K2 Corporation, et al.*, 2010) and insufficiently marked resort boundaries (*Ciocian v. Vail Corporation*, 2010, and *Anderson v. Vail Corporation*, 2010). Laura Jozewicz's binding released for no reason on her rental ski causing her to fall and injure her neck. It was discovered that the company had failed to remove a binding from her rental ski that was on recall by the Consumer Product Safety Commission. The defendants countered with the fact that she had signed an equipment rental and release agreement which included the following:

I understand that the binding system cannot guarantee the user's safety. In downhill skiing, the binding systems will not release at all times or under all circumstances where release may prevent injury or death, nor is it possible to predict every situation in which it will release.... I understand that the sport of skiing, snowboarding, skiboarding, snowshoeing

and other sports (collectively "RECREATIONAL SNOW SPORTS") involve inherent risks of INJURY and DEATH. I voluntarily agree to expressly assume all risks of injury or death that may result from these RECREATIONAL SNOW SPORTS, or which relate in any way to the use of this equipment. . . . (Alta Ski Resort, 3)

The United States District Court for the District of Utah, Central Division, held that the pre-injury release was unenforceable and invalid as a matter of public policy. They noted that the "implication of allowing distributors and retailers to contract away liability for noncompliance with established safety standards would increase the risk of injury and would be contrary to Congress's express public policy concerns.... Public policy should encourage compliance with safety laws, not disregard for such laws" (11).

Two Colorado cases in which the court found that ski area boundaries were not adequately marked were *Ciocian v. Vail Corporation* (2010) and *Anderson v. Vail Corporation* (2010). Both skiers, Ciocian on a snowboard and Anderson on skis, skied off a 19-foot retaining wall onto a paved access road, sustaining serious injuries. The trial courts found for the resort; there was no issue of material fact, and the resort's exculpatory agreement was clear and unambiguous and did not violate public policy. These cases were combined on appeal. The markings of the boundaries of the resort became the issue. Was the area of the injury properly marked according to Colorado Revised State Statute 33-44-107 (2010)? Evidence provided by the skiers and ski patrols present at the scene of each of the respective incidents was that the boundary signs were not readily visible to a skier, or as one mentioned, "there was no way she could have known" (*Ciocian, et al. v. Vail Corporation, et al.*, 2010, 1132). The Court of Appeals of Colorado, Division Three, reversed the lower court's decision and remanded the cases for further proceedings. No further proceedings were available at time of publication.

In Minnesota (*Meyers v. Lutsen Mountains Corporation*, 2009) and in California (*Gregorie, et al. v. Alpine Meadows Ski Corporation*, 2010) the resort releases in question were enforced by the courts at the trial and court of appeals levels. Meyers, a self-described expert skier, "lofted" into an area of rocks and trees on the edge of an intermediate hill, sustaining severe injuries. Again, the release was detailed and upheld by the court because Meyers had signed away his rights. Jessica Gregorie sustained injuries resulting in death while snowboarding when she lost control, slid down an icy slope, and went over the marked ski area boundary into the rocks. Although the markings of the boundary lines were an issue, the court found for the resort because the "fatal injuries resulted from risks inherent in snowboarding" (188).

Hazing

Hazing may be treated as a civil or criminal incident. In a national survey conducted by Allan and Madden (2008) of 11,480 students enrolled in 53 universities, they found that 55% of college students involved in clubs, teams, and other extra-curricular organizations reported having been hazed. An example of one of the many extreme

CRIMINAL LITIGATION

In criminal law, the state or federal government charges the person with a crime. *State of Ohio v. Guidugli* (2004) occurred in an intramural basketball game at the University of Cincinnati. Campus police were called to the situation. There were few eyewitnesses, and a great deal of pushing and shoving. The intramural supervisor, Steinman, saw Guidugli punch one of the opposing players with a full swing toward the player's eyes. The defendant, Guidugli, was convicted of misdemeanor assault for his role in the fight with the opposing team. He unsuccessfully pleaded self-defense. Guidugli was formally charged with criminal assault that resulted in a 180-day suspended jail sentence.

A recent Florida decision in an area other than sport, in which a minor threw a stapler with intent to hit a fellow student but it hit an employee instead, was viewed under both civil battery and criminal battery and provides the reader with an understanding of how a sport battery might be viewed by the courts in a future decision (*S. G., A Child v. State of Florida*, 2010).

Section 784.081(2)(c) of the Florida Statutes (2008) reclassifies the crime of battery from a misdemeanor of the first degree to a felony of the third degree when the battery is committed upon "any elected official or employee of: a school district; a private school; the Florida School for the Deaf and the Blind; a university lab school; a state university or any other entity of the state system of public education, as defined in s.1000.04; a sports official; an employee or protective investigator of the Department of Children and Family Services; an employee of a lead community-based provider and its direct service contract providers; or an employee of the Department of Health or its direct service providers, when the person committing the offense knows or has reason to know the identity or position of employment of the victim.... (*S. G., A Child v. State of Florida*, 2010, 385)

A case that stunned the sport nation was the State of Kentucky's action against Jason Stinson, a football coach at Pleasure Ridge Park High School, in Louisville, Kentucky. A fifteen-year-old player under his direction collapsed and died from a heat stroke, sepsis, and multiple organ failure. The athlete's body temperature was found to be 107 degrees. Prior to the day of the incident the same athlete had collapsed during a practice in 94-degree heat. The local prosecutor charged Stinson with reckless homicide. Although Stinson was found not guilty at trial, the incident has served as a warning to coaches practicing in severe weather and other conditions (Marck, 2011).

SUMMARY

Intentional torts are injuries that are caused by deliberate acts or deliberate failure to act. Intentional torts to persons include battery, assault, false imprisonment, and recklessness. Intentional torts to property include trespass to chattel, trespass to personal property, and conversion. Business torts are fraud, deceit, and misrepresentation.

Defenses to intentional torts include consent, self-defense, defense of others, necessity, and discipline.

Criminal law involves harms to society. A prosecutor brings the cause of action against the person who caused the harm. The burden of proof must be "beyond a reasonable doubt." Crimes are usually listed as felonies or misdemeanors with punishments including jail and prison sentences, fines, community service, and in some states a death sentence. For years, society and the courts held that the person engaged in physical activity assumed all the risks inherent in the sport. In some cases, the triers of fact have even ruled that participants assume the risk of intentional torts that might occur in the heat of battle.

DISCUSSION QUESTIONS

1. Contrast negligence with intentional tort. When does each occur?
2. How does the application of criminal law differ from the application of civil law?
3. What is the difference between battery and assault?

ACTIVITIES

1. Persons aspiring to employment in collegiate athletic departments are to read the case *J. K. v. Arizona Board of Regents, et al.* (2008) in detail and create a risk management outline to be used by management in such a situation. Legal, ethical, and public relations decisions are to be considered.
2. Locate two recent cases involving hazing in either college or scholastic athletics. Did the state in which the case was decided have a hazing statute? If such a statute existed what role did it play in the decision?
3. Read the Feingold and Marck articles and decide how heat and other serious issues in athletics should be handled.

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Product Liability

OBJECTIVES

Upon completing this chapter, you will:

- 1) understand the policy rationale for imposing liability on the manufacturers and sellers of defective sports and physical activity equipment;
- 2) be able to differentiate between manufacturing and design defects;
- 3) understand the importance of warnings to protect users from harm;
- 4) be able to distinguish express and implied warranties; and
- 5) be able to explain the defenses available to manufacturers in product liability cases.

INTRODUCTION

Product liability is of concern to manufacturers, retailers, and sellers of sport and physical activity equipment. Owners and agencies leasing sport and physical activity equipment may also be sued under product liability. Historically, product liability has been considered strict liability, where the manufacturer, wholesaler, and retailer of a faulty product are automatically liable for putting an unreasonably dangerous product in the marketplace. And, with the exception of the very few courts that have decided to include a product liability category of negligence in a decision, it remains strict liability today. While “services” are not covered under product liability, occasionally a service provider may be included as a defendant in a product liability lawsuit.

Participants in sports and physical activity generally assume that the products they purchase or lease are safe and will enable them to perform to their maximum capacity in the sport or activity. Often, however, the product is so technically complex that users are not able to examine the equipment for any faults or flaws. This complexity increases with advances in technology and, in many cases, makes it impossible for even skilled performers to assess the condition of their equipment. Because sport and physical activity equipment is expensive, users expect the equipment to be safe and appropriate to the activity. Furthermore, since the user is typically not in the best position to assess the safety of the equipment he/she is using, the responsibility for discovering

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product defects and correcting them is appropriately borne by those who design and manufacture the product, rather than the consumers of such products.

Sport professionals, sport personnel, team or sport club managers, and others responsible for the selection and purchase of sport and fitness equipment need to be aware of product liability. They must be able to protect their organizations against the purchase and installation of faulty products, know the organizations' rights when products fail, and effectively relay manufacturers' warnings to appropriate audiences.

Under product liability, the manufacturer, wholesaler, retailer, supplier, and vendor are liable for placing a defective product—one that might cause injury—on the market. Product liability theory presumes that the manufacturer and seller are in the best position to become aware of problems, to eliminate defects, and to absorb losses from product changes and/or litigation. A product is considered defective under product liability when the defect existed at the time the product left the manufacturer or retailer (defendant) and the defect caused the injury. Components of the product liability statute also include non-compliance with safety standards, misrepresentation, and failure to recall. The Consumer Product Safety Commission also allows for an action in federal court against a manufacturer in violation of a consumer product safety rule.

Defenses to product liability include contributory negligence, assumption of risk, misuse, and the Uniform Commercial Code (UCC) disclaimers. Product liability is governed by state and federal laws. States may differ in their laws and in the interpretation of similar laws. *Restatement (Third) of Torts: Product Liability* (1998) is the guide for the discussion that follows. It defines a product as a "tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to the distribution and use of tangible personal property" (267). A person, according to Section 20, who sells or distributes a product is defined in the explanation below:

- (a) One sells a product when, in a commercial context, one transfers ownership thereto either for use or consumption or for resale leading to ultimate use or consumption. Commercial product sellers include but are not limited to, manufacturers, wholesalers, and retailers.
- (b) One otherwise distributes a product when, in a commercial transaction other than a sale, one provides the product to another either for use or consumption or as a preliminary step leading to ultimate use or consumption. Commercial nonsale product distributors include, but are not limited to, lessors, bailors, and those who provide products to others as a means of promoting either the use or consumption of such products or some other commercial activity.
- (c) One also sells or otherwise distributes a product when, in a commercial transaction, one provides a combination of products and services and either the transaction taken as a whole, or the product component thereof, satisfies the criteria in ... (a) or (b). (284)

CATEGORIES OF PRODUCT DEFECT

Product liability exists when a manufacturer, retailer, or seller sells or distributes a defective product. The categories of product defect include a manufacturing defect, a design defect, or defect as a result of providing inadequate instructions or warnings. According to the *Restatement (Third) of Torts: Product Liability* (1998), Section 2, a product

- (a) contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;
- (b) is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;
- (c) is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe. (14)

Manufacturing Defect

A manufacturing defect is an unreasonably unsafe product created in the construction process; it may include the improper construction of a part (or parts) or the improper assembly of the parts. A manufacturer's defect means that the product does not perform or was not built as the manufacturer planned or according to the design. As a result of the change, an unsafe product has been created. The manufacturer's defect may occur in all of the products or may occur only in a few random products.

For example, in 2009, the U.S. Consumer Product Safety Commission (CPSC) in association with the manufacturer issued a nationwide recall of a specific brand and model of basketball hoops. Approximately 1,700 in-ground basketball hoops were recalled because the bolts at the base could fail, causing the unit to fall. This would be considered a manufacturing defect because the defect occurred during the manufacturing stage rather than during the design process and some, not all, of the hoops manufactured were defective.

To determine liability for manufacturing defects, strict liability is used.

Design Defect

A design defect means that the product, when built according to the manufacturer's plan, contains a design flaw or fault that will subject the user of the product to unreasonable harm; the original plans or specifications are flawed. A design defect makes all of the products unreasonably dangerous, not just a few of them. This unreasonable

danger is one that has not been contemplated by the user or consumer. The manufacturer is held to the status of an expert in the design area. An examination of the manufacturer's schematics or design plans must reveal a flaw in the design and analysis of the manufacturing protocol which demonstrates that the product was created according to the faulty design. Those persons who created the design and specifications will ultimately be held responsible. Bessinger and Cade (2010) noted that there has been a dramatic increase in design defect litigation, which has also been seen in sport litigation.

The role of the manufacturer and the seller or distributor for failure to note the design flaw will be based upon whether the defendant had expertise or reason to know (through complaints or otherwise) that the design flaw might exist. However, a recent trend being used by some courts is considering the obviousness of the danger as one factor in determining if the product is unreasonably dangerous, rather than as a complete defense to product liability.

The *Restatement (Third) of Torts: Product Liability* (1998) exclusively adopts a risk/utility analysis in determining whether a design defect exists. Under this approach, a product will be found defective as designed only if the magnitude of the risk created by the design is greater than the utility of the product (*Restatement [Third]*, Sec. 2[b]). Specifically, the *Restatement (Third) Torts* Section 2(b) provides that a product is defective when "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe" (14).

Instructions

Adequate instructions on how the product is to be used and information about potential hazards in the use of the product are to be provided. These instructions are to include: assembly, cleaning, periodic inspection, routine care, and method of repair. If the equipment is to be installed under supervision, it should be noted.

The nature of some products causes them to be considered dangerous. At times, the purchaser may not understand the obvious danger of a product he/she is using. For example, all boats and personal watercraft present a hazard to any person who is unable to right his/her body and come to the surface after being thrown into the water. For anyone unable to execute this minimal personal rescue skill, the use of all watercraft is hazardous.

Warnings

When manufacturers or sellers become aware of a dangerous product, they have an obligation to warn the user about the specific danger(s) involved. Merely placing a warning label on a product is not enough. The product must be manufactured to be as safe as is reasonable. What cannot be incorporated into the safe manufacture of the product must be explained in the warning. Warnings must be adequate to perform their intended function of risk reduction (*Pell v. Victor J. Andrew High School and AMF*, 1984). Warnings may be inadequate, however, if they

Manufacturers, wholesalers, retailers, sellers, and persons supervising the use of a product can be held for failure to adequately warn users of foreseeable dangers or failure to pass on the warnings to others. These dangers include foreseeable use and misuse of the product. A warning of danger must: a) identify the risk, b) provide the reason for the warning, and c) reach the user. The user is to be warned and to understand the importance of the warning. Warnings are to be written in such a manner that users recognize the significance of the warning. When the significance of the warning is obvious, there is a far greater chance the warning will be taken seriously. Manufacturers, retailers, and wholesalers must place the warning on the product in such a way that it cannot be missed.

The manufacturer is to provide the product user with information and directions regarding the qualities, characteristics, and uses of the product. The information is to be written in such a way that if caution were essential, a reasonable person would recognize the need to exercise caution. The objective is to avoid injuries that could occur from ignorant misuse of the product. Instructions are to be provided to enable the purchaser to pass on the instructions and warnings to all potential users of the product.

When a warning is justified, the courts will determine the adequacy of the warning on a case-by-case basis, considering whether it was noticeable, accurate, clear, and strong. It must capture the attention of those who will use the product and inform them of the dangers in the use of the product. Even in situations where the user is sophisticated, a warning to remind the user of the potential danger associated with the product may be in order.

Manufacturers, retailers, and supervisors of activity have a duty to instruct the participant on the safe use of the equipment and to warn against dangers. The warning must be sufficient to enable the average person to understand the probability, frequency, and magnitude of the occurrence of the risk and the extent of the potential injury. It is this duty to warn and to instruct about the dangers of the use of certain equipment that is the responsibility of those who supervise, manage, or teach physical activity.

When a manufacturer provides a warning to a sport professional, such as the manager of a fitness center, the manufacturer also gives responsibility to that person to properly inform or pass on the warning to those who will use the equipment. Warnings are to be placed on the face of the equipment or on the wall above the equipment; they are not to be thrown out in the empty cartons used to ship or deliver the product.

Professionals have an additional duty to inform and to warn participants about the skill and physical capacity essential to safely use certain pieces of equipment. This includes the duty to warn and to provide instruction sufficient to enable the average person to ascertain the need for experience before using various pieces of equipment. Participants need to know and understand when the equipment is beyond their skill level. Warnings need to be tailored to the specific skill level of the performer.

MISREPRESENTATION

Misrepresentation is an inaccurate statement that leads another to believe a "fact" that is not actually true. The statement may be an unintentional error or an intentional falsehood. In *Restatement of Torts (Third): Product Liability* (1998) Section 9, it is stated that "One engaged in the business of selling or otherwise, distributes products, who, in connection with the sale of a product makes a fraudulent, negligent, or innocent misrepresentation concerning the product is subject to liability for harm to persons or property caused by the misrepresentation" (187).

When product facts and use statements are misrepresented by the seller, an injured plaintiff may have a cause of action for misrepresentation. The product does not have to be defective or unreasonably dangerous. However, a claim may only be brought for physical injury. Care should be taken to ensure that advertisements, brochures, and salespersons' comments given face-to-face or over the phone or Internet do not directly or inadvertently cause product misrepresentations. Salespersons are to be monitored by management to ensure that purchasers are informed of the potential hazards and risks in the use of equipment.

BREACH OF WARRANTY

A warranty is a guarantee by a manufacturer, wholesaler, or retailer to a buyer that the product will perform according to identified standards for a specified period of time. Requirements for maintenance, intended use, and other specifications must be given to the buyer. The warranty is a part of the contract between the buyer and seller. If the seller violates the warranty, the seller breaches the contract; if the buyer violates the warranty, the buyer breaches the contract. In warranty, the liability of the industry exists without regard to fault. For example, if the product does not meet the specifications of the fitness industry, the liability of the manufacturer, retailer, or wholesaler is automatic; there is no need to investigate the intent of the parties. Breach of warranty, also covered by the Uniform Commercial Code (UCC), may occur through breach of express or implied warranty.

Many laws relating to business are similar from state to state. "The states, not the federal government, are the primary source of law on commercial transactions in the U.S. In all 50 states and the District of Columbia, at least some of that commercial law is based on the UCC" (Cornell Legal Information Institute, n.d.).

Express Warranties

Express warranties are written statements about the product; implied warranties are warranties the purchaser assumes. An express warranty is a statement or document containing promises or descriptions of the product. Sections 2-313, 2-314, and 2-315 of the Uniform Commercial Code (UCC) cover express or verbal warranty, implied warranty of merchantability, and implied warranty of fitness for a particular purpose. UCC 2-313 explains the express warranties that a manufacturer, wholesaler, retailer, or supplier may make:

UCC 2-313 *Express Warranties by Affirmation, Promise, Description, Sample*

(1) Express warranties by the seller are created as follows:

- (a) Any affirmation of fact or promise made by the seller to the buyer which relates to the goods and becomes part of the basis of the bargain creates an express warranty that the goods shall conform to the affirmation or promise.
- (b) Any description of the goods which is made part of the basis of the bargain creates an express warranty that the goods shall conform to the description.
- (c) Any sample or model which is made part of the basis of the bargain creates an express warranty that the whole of the goods shall conform to the sample or model.

(2) It is not necessary to the creation of an express warranty that the seller use formal words such as “warranty” or “guarantee” or that he have specific intention to make a warranty, but an affirmation merely of the value of the goods or a statement purporting to be merely the seller’s opinion or commendation of the goods does not create a warranty. (UCC 2-313)

In breach of an express warranty, the plaintiff must establish that:

- The warranty was made. The seller made the statement.
- The seller’s statement was part of the bargain. The purchaser relied upon the seller’s statement in making his/her decision to purchase.
- The product did not conform to the warranty. The product’s behavior is not in line with the warranty.
- A causal connection exists between the breach of the warranty and the plaintiff’s economic or physical injury.

A breach of an express warranty occurs when the plaintiff is injured and the seller or manufacturer made statements of fact about the product that were false. These statements may be express; for example, the plaintiff was told or it was implied that the lifejacket would support a person of ordinary size in deep water. The statement must be made to the plaintiff or made generally to the public. The plaintiff has to have relied on the statement, and the reliance on the statement or “facts” has to be the cause of the injury.

When the goods are described—and that description is made a basis of the bargain or relied upon by the purchaser—there is an express warranty that the goods shall conform to the description (UCC 2-313 [1, b]). The description can be contained in a brochure, blueprint, written specification, or sample model.

Implied Warranties

Implied warranties exist at the time the person contracts for an article of goods. The purchaser assumes that the product will be what it purports to be and that it will be fit for its intended use. These warranties do not have to appear in writing, nor be mentioned. It is assumed that a boat will float and that a bathing suit will not shrink in water. The goods are expected to pass without objection in the trade and are to be fit for the ordinary purposes for which such goods are used.

Implied warranties include merchantability and fitness for a particular purpose. Merchantability means that the product is suitable for the purposes for which it was created. The level of suitability is to be average or reasonable; it need not be perfect. According to UCC 2-314, this section's ultimate objective "is to require the seller to assume responsibility for a substandard product."

UCC 2-314 *Implied Warranty: Merchantability: Usage of Trade*

- 1) Unless excluded or modified ... a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind. Under this section the serving for value of food or drink to be consumed either on the premise or elsewhere is a sale.
- 2) Goods to be merchantable must be at least such as
 - a) pass without objection in the trade under the contract description; and
 - b) in the case of fungible goods, are of fair average quality within the description; and
 - c) are fit for the ordinary purposes for which goods are used; and
 - d) run, within the variations permitted by the agreement, of even kind, quality, and quantity within each unit and among all units involved; and
 - e) are adequately contained, packaged, and labeled as the agreement may require; and
 - f) conform to the promises or affirmations of fact made on the container or label if any.
- 3) Unless excluded or modified ... other implied warranties may arise from course of dealing or usage of trade. (UCC 2-314)

Fitness means that the product has been made for a particular purpose. UCC 2-315 describes fitness in the following way:

Where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods, there is unless excluded or modified under the next section an implied warranty that the goods shall be fit for such purpose. (UCC 2-315)

prove that the manufacturer has distributed a product which presents a hazard, and that the manufacturer failed to give notice to the CPSA despite knowledge of the hazard. The failure to give notice must be the proximate cause of the plaintiff's injury. In addition to being made whole or receiving compensatory damages, a successful victim may recover the costs of the lawsuit and attorney fees.

Professionals may not "manufacture for sale, offer for sale, distribute in commerce, or import into the United States any consumer product which is not in conformity with an applicable consumer product safety standard" (15 USCA 2068). Any person who knowingly violates Section 2068 is subject to a civil penalty of \$5,000 or less for each violation. The maximum penalty is not to exceed \$1,250,000 (15 USCA 2069). These figures are to be adjusted yearly for increases. The Commission recalls over 200 products each year; most of the recalls are voluntary.

COMPLIANCE WITH PRODUCT SAFETY STATUTES

Within the *Restatement (Third) of Tort: Product Liability* (1998), there is a section titled "Noncompliance and Compliance with Product Safety." The statutes or regulations contained therein state:

In connection with liability for defective design or inadequate instructions or warnings:

- (a) a product's noncompliance with an applicable product safety statute or administrative regulation renders the product defective with respect to the risks sought to be reduced by the statute or regulation; and
- (b) a product's compliance with an applicable product safety statute or administrative regulation is properly considered in determining whether the product is defective with respect to the risks sought to be reduced by the statute or regulation but such compliance does not preclude as a matter of law a finding of product defect. (120)

STATE PRODUCT LIABILITY LAW

Buckley (1993) noted that there are five elements of product liability that are found in most state statutes or case law. These five elements are listed below:

- 1) The defect must render the product unreasonably dangerous to use.
- 2) The seller or manufacturer must be in the business of selling products such as the flawed one(s).
- 3) The product cannot have been substantially changed between the time it left the seller's or manufacturer's hands and the time it reached the ultimate user.
- 4) The defect must have proximately caused the ultimate user's injuries.
- 5) The ultimate user must have used the product properly (i.e., in a way that the product was designed to be used).

DEFENSES

Defenses to product liability are contributory negligence, assumption of risk, misuse, and disclaimers. Apportionment of responsibility between and among plaintiffs, sellers, and distributors of defective products considers the contributory negligence of the plaintiff as well as the liability of the defendant.

Contributory Negligence

Contributory negligence means that the user was negligent in his/her use of the equipment. A user who ignores the manual and warranty, assembles the equipment in a faulty manner, or uses a product in a new and unusual way not anticipated by the manufacturer or the retailer is contributorily negligent. Users who fail to discover a defect that a reasonable person should have discovered are contributorily negligent. In states that have comparative negligence, contributory negligence will be used in arriving at the percentage of fault.

Assumption of Risk

Assumption of risk is recognized in most product liability situations. Assumption of risk requires that the plaintiff knew of the risk of danger or should have known of the risk of danger. The user must:

- 1) Be aware of the danger.
- 2) Recognize and appreciate the
 - a) significance, and
 - b) magnitude of the risk associated with the use of the product.
- 3) Voluntarily take the risk.

Knowledge and appreciation of the danger means that the user must actually have known of the danger rather than should have known of the danger. This means that the injured person was properly informed of the danger. It also means that when an elite athlete is injured, his/her previous experience and observation of others sustaining injury as a result of using a product will serve to inform him/her of potential hazards in the activity.

A person assumes a risk when he/she discovers a product defect, ignores the risk, and uses the product. The courts will examine the owner's liability in ignoring a discovered product defect.

Misuse

Mishandling, abuse, or the use of a product for abnormal purposes is called misuse. The manufacturer, wholesaler, and retailer are liable for warning the user about foreseeable misuse. A product must be used for its intended purpose—the function for which it was designed. Use of a product for a purpose other than that envisioned by the manufacturer is considered misuse and could bar recovery to the injured party. When the manufacturer, wholesaler, and retailer become aware that their products are being used in ways other than the intended purpose, they are to provide warnings

to the public and to all new product purchasers. To avoid liability, sport and physical activity professionals, such as fitness center managers, are to demand that participants use equipment only for the manufacturer's intended use. When professionals wish to use equipment in ways other than its intended use, they should seek written permission from the manufacturer and request that reasons be provided for denial of requested use.

Disclaimers

A disclaimer is a defense in breach of warranty lawsuits. A manufacturer and a seller may place disclaimers or statements declaring they are not responsible or liable for the product if the product is used for a purpose or in a manner beyond the limits of those uses recommended by the manufacturer, retailer, etc. These statements explain product use and disclaim responsibility for products used in ways other than those recommended. "As is" and "with all faults" are disclaimers about the quality of the product.

Disclaimers must be conspicuous and unambiguous, and clearly convey their message. An injured party needs to give notice to the defendant of the breach of warranty within a reasonable time after the injury. This enables the defendant to investigate and, when warranted, take action on the product for the benefit of other consumers.

DAMAGES

Product liability damages are usually compensatory. On occasion, punitive damages are awarded. Compensatory damages provide for the expenses directly involved in the injury and rehabilitation. Punitive damages are awards assessed against the party responsible for the harm in an effort to stop the party from continuing to create the harm. Usually, the defendant's level of liability must be reckless before punitive damages are awarded. Prior knowledge of the defective condition and failure to do anything about it may result in punitive damage awards. Failure to inspect or to test may also be reasons for the award of punitive damages.

LITIGATION

In *Ontiveros v. 24 Hour Fitness USA, Inc.* (2008), Susana Ontiveros was a member at a 24 Hour Fitness Center in Los Angeles. This fitness center contained numerous exercise machines and also offered aerobic exercise classes. For an additional fee, Ontiveros received an upgraded membership that gave her access to additional equipment, services, and amenities, such as equipment to test her blood pressure. To obtain this membership, Ontiveros was required to sign a membership agreement containing a release from liability, which included the following stipulation:

You understand and acknowledge that [defendant] is providing recreational services and may not be held liable for defective products. By signing below, you acknowledge and agree that you have read the foregoing and know of the nature of the activities at [defendant's facilities] and you agree to all the terms of the front and back pages of this agreement and acknowledge you have received a copy of it and the membership policies. (*Ontiveros v. 24 Hour Fitness USA, Inc.*, 2008, 427)

not need or receive assistance concerning proper use of equipment. Ontiveros was injured while using a stairstep machine, alleging that she fell backwards onto the floor because of the failure of a component of the machine. She brought suit against the fitness center, asserting a product liability claim using strict liability. Ontiveros asserted that the fitness center provided her no services, making them part of the product distribution chain and liable for defective equipment under the strict liability doctrine.

The court ruled in favor of the fitness club, finding that the dominant purpose of the membership agreement she signed was for fitness services. Thus, she had no valid claim under the strict liability doctrine. Had the gym simply made exercise equipment available for her use, the gym could have been held strictly liable for defective equipment. However, the membership agreement between the plaintiff and defendant included aerobics classes, dance classes, yoga, and additional health testing centers which the court concluded was indicative of fitness services. Since it was primarily a fitness service that the plaintiff was provided, the defendant could not be found liable for her injuries using product liability.

When one thinks of product liability in sport, one usually thinks of football. Among the more notable football product liability cases are *Byrns v. Riddell, Inc.* (1976), *Rawlings v. Daniels* (1981), *Hemphell v. Sayers* (1982), *Galindo v. Riddell, Inc.* (1982), *Carrier, et al. v. Riddell, Inc., et al.* (1983), *Fiske v. MacGregor, Division of Brunswick* (1983), *Gentile v. MacGregor Mfg. Co.* (1985), *Lister v. Bill Kelly Athletic, Inc.* (1985), *Austria v. Bike Athletic Co.* (1991), *Rodriguez v. Riddell Sport Inc.* (2001), and *Green v. Schutt Sports Manufacturing, et al.* (2010). Cases involving Riddell include *Byrns*, *Galindo*, *Carrier*, and *Rodriguez*.

The eleven football helmet litigations span a period of time from the *Byrns* case of 1976 to *Green*, a 2010 decision. The majority of the cases were litigation on defective design or defective manufacture by high school athletes. A few mentioned failure to warn.

Examples of the litigation are the lawsuits filed by *Byrns* (1976), *Daniels* (1981), and *Green* (2010). Football player Kevin Byrns received an on-side kick, fell to the ground, and was hit by one or more players. The impact resulted in serious head injuries. His suit against Riddell was that the helmet "was defective by design and manufacture and by reason of such defects was inherently dangerous to the user" (1066). The argument was over the helmet's ability to absorb force during impact. The trial court found for the manufacturer. After hearing the views of experts and watching films, the trial court concluded "that the film, as a matter of law, left no reasonable doubt as to the place of impact, thus ruling that the appellant failed to show causation between the impact and the injury" (1069). Byrns appealed the decision and the Supreme Court of Arizona reversed and remanded the case for further proceedings on the issue.

Mike Daniels experienced severe brain injuries that reduced his abilities when his football helmet collapsed as he collided with another player during practice. He sued Rawlings for a defective helmet and for failure "to warn of the protective limitations of the helmet" (437). The district court awarded Daniels \$1,500,000. Rawlings appealed. The Court of Civil Appeals of Texas at Waco affirmed the district court's decision.

Green (2010), a high school football player, sued Schutt Sports when he suffered a severe burst—a fracture of a neck vertebra resulting in quadriplegia in a tackle. His suit was for defective helmet design. The Court found that it was the way he executed the tackle rather than the helmet design that caused the injury. The U.S. Court of Appeals for the Fifth Circuit found for the manufacturer.

SUMMARY

Product liability is the liability of the manufacturer, retailer, and seller for placing a defective product on the market. A product is defective under product liability when the defect existed at the time the product left the manufacturer or retailer and the defect caused the injury. Product liability may be negligence, misrepresentation, breach of warranty, violation of a Consumer Product Safety Commission rule, or strict liability in tort. Defenses to product liability include contributory negligence, assumption of risk, misuse, and the Uniform Commercial Code (UCC) disclaimers. In product liability cases, the damages are compensatory and punitive.

DISCUSSION QUESTIONS

1. How should a sport professional implement product warnings?
2. Describe the various kinds of product warranties and give an example of each.

ACTIVITIES

1. Research a recall involving a sport product on the United States Consumer Product Safety Commission website (<http://www.cpsc.gov>). Identify the risk presented by the product? Why do you think the recall was necessary to protect the public?
2. Locate two cases in sport, one representing a manufacturer defect and one representing a design defect. Contrast the differences between the two.

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Part II

— CONSTITUTIONAL LAW —

The United States Constitution is the supreme law of the land. Judges in every state are bound by the Constitution of the United States and by the constitutions of their respective states. The First, Fourth, and Fourteenth Amendments to the U.S. Constitution are the aspects of constitutional law most often affecting participants and managers of sport and physical activity.

Chapter 4 addresses laws associated with the First, Fourth, and Fourteenth Amendments. Only the due process clause of the Fourteenth Amendment is addressed. Chapter 5 addresses gender equity by discussing the Equal Protection Clause of the Fourteenth Amendment, Title IX, and the Civil Rights Acts of 1987 and 1991. The Americans with Disabilities Act (ADA) and related disability laws impacting the sport industry are discussed in Chapter 6.

All constitutions can be amended. An amendment to the United States Constitution may be proposed by a two-thirds vote of those present in each house of Congress, or by a committee of the legislatures of two-thirds of the states. Amendments may be ratified by the legislature of three-fourths of the states or by conventions in three-fourths of the states. There are times when an amendment may be acceptable within a particular state but will not be acceptable to the entire country. The Equal Rights Amendment's success in numerous states and failure at the federal level is such an example.

The Constitution of the United States guarantees—or enforces—individual rights only with reference to the federal government and to state actions as they are incorporated within the Fourteenth Amendment. When a complaint involves a guarantee of a personal right, a court must determine whether the action challenged is a federal or state action. A person challenging a privately owned and operated agency forces the court to determine whether the agency is subject to state protection and regulation.

When challenging a denial of First Amendment rights, an individual requests that a court of law examine the facts with respect to the particular situation and balance the personal rights in relation to the authority of the state, federal government, or private agency to effect a particular rule, law, or regulation for the benefit of society. Sport and speech have been described as intersecting American icons (Wasserman, 2004). That intersection often creates collisions between fans, the media, and sport organizations (Grady & Moorman, 2008). While "fan expression is a long-standing and expected part" of modern-day sporting events and is "encouraged by the teams, the players, [and] the cheerleaders," how far does the right to engage in this expression go (Wasserman, 2006, p. 526)? Current application of the First Amendment in sport is seen in cases involving athletes criticizing coaches via social media, fans being ejected from stadiums for wearing T-shirts or holding up signs with offensive messages, and the ongoing debate about the role of prayer in sport.

Freedom of Religion

Freedom of religion is analyzed under the Establishment and Free Exercise of Religion Clauses. The Establishment Clause separates church and state. For example, the United States Supreme Court decision *Santa Fe v. Doe, et al.* (2000) bans prayer at United States Supreme Court decision *Santa Fe v. Doe, et al.* (2000) bans prayer at public high school events, including football games. In 1992, the United States Supreme Court found that conducting a religious exercise as part of a high school graduation ceremony was a violation of the First Amendment (*Lee v. Weisman*, 1992). The Court held that "the Constitution forbids the state to exact religious conformity from a student as the price of attending her own high school graduation" (2660).

In the *Santa Fe* case, current and former students at a Texas public high school complained to school administration about the prayer before varsity football games. In response to the complaint, the school adopted a policy of holding a student election to determine whether an "invocation should be delivered at games" (308). If the results of the election approved the invocation, a second vote was to be held to select the person to give the invocation. The election results favored giving an invocation and a student was elected to give the invocation. Current and former students then filed another complaint. Eventually, the Fifth Circuit held that "permitting student-led, student-initiated prayer at football games violated the Establishment Clause" (310). The school district petitioned for review by the U.S. Supreme Court. Their argument was that the facts of the current situation were distinguishable from the prayer policy in the *Lee* case. Graduation was a requirement of all students; a student's attendance at a football game was elective. The Court, however, pointed out that football games were mandatory for some students, including band members and cheerleaders. The Supreme Court found that the delivery of an invocation prior to home football games violated the establishment of religion clause of the First Amendment.

Good News Club v. Milford (2001) was an example of the Free Exercise of Religion Clause. A New York school district opened its facilities for the public's use, specifically for education, recreation, and the welfare of the community. The policy stated that the schools were not to be used for religious purposes. The Good News Club, a

private Christian organization for children between the ages of 6 and 12, requested permission to use the school facilities. The request was denied under the school district's public use policy. The Good News Club brought suit, arguing "that denial of the club's request violated the club's free speech rights under the Federal Constitution's First Amendment" (99).

The district court granted the Good News Club's request for a preliminary injunction. The school district could not enforce its public use policy. The Good News Club subsequently held meetings in the school. The district court then decided that exclusion of the club was permissible. The club appealed the decision. The United States Supreme Court reversed, holding that

- (1) the district's exclusion of the club constituted viewpoint discrimination in violation of the First Amendment's free speech guarantee, for (a) any group that promoted the moral and character development of children was eligible to use the school building, (b) the club's activities did not constitute mere religious worship that was divorced from any teaching of moral values, (c) there was no reason to treat the club's use of religion as something other than a viewpoint merely because of any evangelical message that the club conveyed, and (d) for purposes of the free speech guarantee, there was no logical difference in kind between the club's invocation of Christianity and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for such associations' lessons; and
- (2) the free speech violation was not justified by the district's concern that permitting the club's activities would violate the First Amendment's establishment of religion clause. (99)

Subsequent cases involving freedom of religion have focused on displaying a Ten Commandments monument on the grounds of the Texas state capitol (*Van Orden v. Perry*, 2005) and the required recitation of the Pledge of Allegiance by a school student (*Elk Grove Unified School District and Gordon v. Nedow*, 2004). While not dealing directly with sport, these cases have application and are analogous to the use of religious symbols or pledges in or around sporting events and at other public forums. In *Van Orden* (2005), plaintiffs sued for a declaration finding that the Ten Commandments monument violated the Establishment Clause and an injunction to have it removed. The district court, in denying declaratory and injunctive relief, concluded that the monument did not contravene the establishment of religion clause, because the state had a valid secular purpose in recognizing and commending the donating organization's efforts to reduce juvenile delinquency, and a reasonable observer would not conclude that the monument conveyed a message that the state was seeking to endorse religion. The United States Court of Appeals for the Fifth Circuit affirmed, finding that the monument did not contravene the Establishment Clause. The Supreme Court found that (1) the establishment of religion clause did not bar any and all governmental preference for religion over irreligion; (2) the *Lemon* test was not useful in

dealing with the sort of monument in question; (3) although the Ten Commandments had religious significance, they also had an undeniable historical meaning; and (4) the placement of the Ten Commandments monument on the capitol grounds was a far more passive use of those texts than the posting of the Ten Commandments in public schoolrooms, a practice that the Supreme Court had found to have an improper and plainly religious purpose.

Elk Grove Unified School District and Gordon v. Nodow (2004) involved a public school district in California that required each elementary school class to recite daily the Pledge of Allegiance. The father of one of the students filed suit, alleging that the school district's policy requiring the recitation of the Pledge violated the Establishment and Free Exercise Clauses of the First Amendment. The district court dismissed the complaint. However, the United States Court of Appeals for the Ninth Circuit concluded that the father had standing as a parent to challenge a practice that allegedly interfered with his right to direct his child's religious education, and the district's policy violated the establishment of religion clause.

On appeal before the Supreme Court, it was determined that the father lacked standing to bring the case; however, a concurring opinion by Justices William Rehnquist and Sandra Day O'Connor ruled that the school district's Pledge of Allegiance policy did not violate the establishment of religion clause because reciting the Pledge, or listening to others recite it, was a patriotic exercise, not a religious one (99). Justice Clarence Thomas, in a concurring opinion, found the establishment of religion clause was a federalism provision intended to prevent Congress from interfering with state establishments. Thus, it made little sense to incorporate the establishment of religion clause into the Constitution's Fourteenth Amendment so as to be applied against the states. Justice Thomas felt that the school district's policy did not infringe any religious liberty right that would arise from incorporation of the establishment of religion clause; and the Pledge policy did not infringe the Free Exercise of Religion Clause (100). It is easy to see how cases involving team prayer before sporting events could raise similar constitutional challenges as the cases discussed in this chapter.

Freedom of Speech

Freedom of speech is the freedom to speak, remain silent, discuss with others, advocate, and communicate ideas. Freedom of speech does not protect speech that is libelous, slanderous, lewd, or obscene. The possibility of creating a breach of peace or advocating the commission of a crime is also not protected.

Students, athletes, teachers, government employees, and employees of private industry possess all First Amendment rights available to all citizens. Despite these general First Amendment rights, professionals in education are expected to maintain an atmosphere in which all persons can learn at their maximum potential. Sometimes, the First Amendment is perceived to be in conflict with the mandate to maintain the learning environment so that all can achieve at maximum potential.

Speech may be verbal or expressive (e.g., protests and demonstrations). In order to determine whether speech merits protection, the courts will examine and balance the

following factors:

- The subject of the speech;
- To whom it was directed;
- The forum in which it occurred; and
- The manner of delivery.

Symbolic gestures have been used to influence and alert the public to new and oftentimes controversial ideas. *Tinker v. Des Moines School District* (1969), the case most often cited in symbolic protest, involved three students who wore black armbands in public protest of the government's participation in the Vietnam War. School authorities, knowledgeable on the proposed armband protest, established a school policy on armbands a few days prior to the event.

The students were asked to remove their black armbands, but they refused. They were suspended from school and told not to return until the armbands were removed. The students sought injunctive relief from the courts but were unsuccessful in their quest. The United States District Court "upheld the constitutionality of the school authority's action on the grounds that it was reasonable in order to prevent disturbance of school discipline" (505). The United States Court of Appeals for the Eighth Circuit reversed and remanded the lower court's decision, stating that the Constitution of the United States did not permit state officials to deny a form of expression which "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others" (514). The court saw the activity as one to stimulate discussion outside of the classroom rather than to disrupt the learning environment.

A more recent case raising similar student speech issues is *Morse v. Frederick* (2007). In 2002, Frederick was a high school student who attended a school-supervised and school-sanctioned event to watch the Olympic Torch Relay as it passed by their high school in Juneau, Alaska, on its way to the Winter Games in Salt Lake City. Students were allowed to watch the Torch Relay on both sides of the street as it passed by, under the supervision of teachers and school administrators. Growing impatient waiting for the torch to pass by, some students became rambunctious, throwing plastic cola bottles and snowballs and scuffling with their classmates (397). As the torchbearers and camera crews passed by, Frederick and his friends unfurled a 14-foot banner bearing the phrase "BONG HiTS 4 JESUS" (397). Upon seeing the sign from the other side of the street which was also easily readable to other students, school principal Morse crossed the street and demanded that the banner be taken down (398). Everyone but Frederick complied. Principal Morse confiscated the banner and told Frederick to report to her office, where she suspended him for 10 days, later explaining that she told Frederick to take the banner down because she thought it encouraged illegal drug use (398). This violated an established school board policy which "specifically prohibits any assembly or public expression that ... advocates the use of substances that are illegal to minors" (398). Frederick appealed his suspension to the school superintendent, who reduced it to 8 days, finding that Frederick "was not disciplined because the principal of the

school 'disagreed' with his message, but because his speech appeared to advocate the use of illegal drugs" (398).

Frederick then filed suit under 42 USC §1983, alleging that the school board and Morse had violated his First Amendment rights (398). The district court granted summary judgment for the school board and Morse, ruling they were entitled to qualified immunity and finding that their actions did not violate Frederick's First Amendment right of free speech. The district court noted that "Morse had the authority, if not the obligation, to stop such messages at a school-sanctioned activity" (App. to Pet. for Cert., 37a).

On appeal, the Ninth Circuit reversed the district court's decision, finding that even though Frederick "acted during a 'school-authorized activit[y],' and 'proceed[ing] on the basis that the banner expressed a positive sentiment about marijuana use," Frederick's First Amendment rights were violated "because the school punished Frederick without demonstrating that his speech gave rise to a 'risk of substantial disruption' (2006, 1118, 1121-1123). Furthermore, the court held that "Frederick's right to display his banner was so 'clearly established' that a reasonable principal in Morse's position would have understood that her actions were unconstitutional, and that Morse was therefore not entitled to qualified immunity" (1123-1125). Morse and the school district then petitioned the U.S. Supreme Court to hear the case.

The U.S. Supreme Court granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. The Supreme Court found this was a school speech case, agreeing with the superintendent that the school could supervise students' behavior at a school-sanctioned activity. While Frederick himself claimed "that the words were just nonsense meant to attract television cameras," the high court found that the principal thought that the sign would be widely understood by students and others as referring to marijuana use and that it violated the policy against promoting illegal drug use. As phrased by the Court, "The question thus becomes whether a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. We hold that she may" (403). As noted by the Court in *Morse*, "*Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school'" (*Morse*, 2007, 403 citing *Tinker*, 1969, 513). While students "do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the First Amendment rights of students must be applied in light of the special characteristics of the school environment (*Tinker*, 506). Thus, consistent with First Amendment principles, the Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" (*Morse*, 396). The Court therefore concluded "that the school officials in this case did not violate the First Amendment by confiscating the pro-drug banner and suspending the student responsible for it" (396).

Similar to the educational disruption arguments in *Frederick v. Morse*, sport participants and groups, including Olympic athletes, have occasionally engaged in symbolic protest. The courts have permitted such gestures, denying them only when the actions were thought to disrupt the peace or threaten the safety of society.

More frequently occurring instances involving free speech issues in sport include fans wearing T-shirts or holding signs, flags, or banners that contain or convey messages that may be perceived as offensive to some fans, particularly children. These cases, referred to as forms of "cheering speech" by Wasserman (2006), raise fundamental First Amendment issues. "Cheering speech can be oral, symbolic, or written on signs, banners, clothing, and body parts. It can be in good taste or bad, clean or profane, provocative, clever, or otherwise. And it will be loud and obvious" (Wasserman, 2006, p. 528).

These cases are often resolved with the sport facility or athletic department deciding to deny or stop the speech (in the form of a T-shirt, sign, or banner), and typically run afoul of well-established First Amendment case law. Calvert and Richards (2004) analyzed one of the more controversial instances of "cheering speech," which occurred in 2004 at the University of Maryland during the men's basketball game between Maryland and Duke. "Maryland fans chanted and wore T-shirts reading 'F--- Duke' and directed homophobic epithets at Duke's star player" (Calvert & Richards, 2004, p. 2). In reviewing the incident, Maryland officials considered implementing regulation of student cheering speech, and the NCAA responded that screaming obscenities at players was not acceptable (Wasserman, 2006). Furthermore, the university sought the counsel of the Maryland Attorney General, who advised the school that a carefully drafted fan code of conduct would be constitutionally permissible (Wasserman, 2006). Cheering speech is not isolated to collegiate sports by individual fans' crazy signs or shirts. It occurs at all levels of sport, and determinations that regulate speech must be made carefully.

Cheering speech can also occur on sport merchandise produced for entire fan bases to purchase and can also raise trademark infringement concerns. A T-shirt with the phrase "Muck Fizzou" sold by a Kansas retailer, Joe-College.com, containing the same shade of blue as the school colors of Missouri's rival, the University of Kansas, resulted in a lawsuit by the University of Kansas against the retailer (Nystrom, 2007). Plaintiffs alleged the shirts could cause consumers to believe that the shirts were licensed by the University of Kansas to poke fun at their rivals. University of Kansas filed suit alleging that Joe-College.com was infringing the university's trademarks (Nystrom, 2007). The school's athletic director also added that the messages on the shirts were in poor taste and cast the school in a bad light. The retailer cited the First Amendment right of free speech as a defense to trademark infringement and asserted that signs in his store make clear that the merchandise is not licensed by the University of Kansas, in effect a disclaimer. The case resulted in a jury verdict in 2008 for the university (Diepenbrock, 2009). In 2009, the judge ordered Joe-College.com to pay \$667,507 in attorneys' fees and costs, which would essentially put the company out of business (Diepenbrock, 2009). The recurring theme in these cases is that many were resolved with the sport organization or university responding with a heavy-handed approach to suppress the

speech that, in effect, sanctioned them for speaking (Grady & Moorman, 2008). This approach suggests that sport organizations may resort to using the threat of a lawsuit to stop speech they find offensive or against their commercial interests.

Freedom of the Press

Freedom of the press includes freedom to write, draw, and create models. Ideas may be published and conveyed. Absolute freedom of thought and belief is guaranteed under the First Amendment. In *Marcum v. Dahl* (1981), female basketball players at the University of Oklahoma stated to the press that, if the current coach was hired for the following year, they would not play. Shortly after the press released the statement, the athletes' scholarships were not renewed. The athletes filed suit, stating that their First Amendment free speech rights had been violated in the non-renewal of their scholarships. The court concluded "that the plaintiffs' First Amendment rights were not violated by the defendants' refusal to renew the plaintiffs' athletic scholarships" (485). A person's freedom of speech and of press depends upon the circumstances under which the freedoms are used; certain language is not protected.

Defamation

Defamation is the "holding up of a person to ridicule, scorn or contempt in a respectable and considerable part of the community.... A communication is defamatory if it tends to do harm to the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him" (*Black's Law Dictionary*, n.d.). Defamation may be of a living person, a corporation or business, or an association. Defamation does not exist unless the statements are communicated to a third person. If the communication is oral (i.e., spoken), it is slander; if the communication is in print, it is libel. To establish liability for defamation, the following elements must be present:

- a defamatory statement concerning another must be made;
- the statement must be published to a third person (publication can be in writing, spoken to the person, or overheard by the third party);
- the person publishing the statement must intend to publish the statement (there is no need of intention to hurt someone); and
- damage must occur.

The status of a person is a factor in defamation. Whether the person is widely known or known only by a few is a factor in what can be said about a person in a public forum, or what can be revealed about the same individual to a third party. People are classified into two categories: public figures/officials and private individuals. Public figures are people known to the community. Athletes, sports professionals, and administrators may be public figures. Private persons are those not widely known in the community. The decision of whether a person is a public figure or a private person will be determined by the judge and/or jury. A public figure is defamed only when the

defamatory statement is false. A private individual is defamed whether the defamatory statement is true or false.

The “public figure”—“private individual” comparison is related to the individual’s right to maintain his/her reputation and the public’s interest in preserving free speech. A need exists for the public to be informed about its leaders, but at the same time, an individual’s personal life should be secure. In *New York Times Co. v. Sullivan* (1964), the court, under the First Amendment, permitted a statement that was true to be made against a public official and public figure.

Private individuals continue to have a cause of action under defamation, even though the statement may be true. A 1974 case, *Gertz v. Robert Welch, Inc.*, extended the idea of a public figure from one who was known by all, to one who voluntarily injected oneself or was drawn into a particular controversy. As a result of being drawn into the controversy, one becomes a public figure for a limited period of time or for a range of issues (345).

Defenses to defamation are truth and privilege. The defendant must establish that what was said was the truth. A defendant may be excused under privilege if his/her conduct was an act in furtherance of some socially useful interest. Privilege is a difficult element to establish. Like truth, it must be established by the defendant.

Damages in defamation may be compensatory and punitive. They may be a result of the damage to one’s business or reputation (compensatory) or they may involve punitive damage (awarded to discourage similar actions on the part of the plaintiff or others).

A very public sport-related defamation case was *Curtis Publishing v. Butts* (1967). Curtis Publishing, publisher of the *Saturday Evening Post*, printed an article that alleged Butts—who at the time was the athletic director at the University of Georgia—was involved in fixing a football game between Georgia and the University of Alabama. Butts, a former football coach at Georgia, was a well-known and respected person, and at the time of the defamation was a candidate for a position with a professional team.

George Burnett, an Atlanta insurance salesman, had accidentally overheard, because of electronic error, a telephone conversation between Butts and the head coach of the University of Alabama, Paul Bryant, which took place approximately one week prior to the game. Burnett was said to have listened while “Butts outlined Georgia’s offensive plays ... and told ... how Georgia planned to defend.... Butts mentioned both players and plays by name.” The readers were told that Burnett had made notes of the conversation, and specific examples of the divulged secrets were set out. (136)

The article went on to discuss the game and the players’ reactions to the game, concluding that “the Georgia players, their moves analyzed and forecast like those of rats in a maze, took a frightful physical beating” and said that the players and other sideline observers were aware that Alabama was privy to Georgia’s secrets. It set out the series of events commencing with Burnett’s later presentation of his notes to the Georgia head coach, Johnny Griffith, and culminating in Butts’s resignation from the

university's athletic affairs for health and business reasons (136–137). In the football game, Georgia was sorely defeated by Alabama.

Butts brought a libel action in federal court for \$5 million in compensatory and \$5 million in punitive damages. All parties involved conceded that Butts was a public figure. Curtis Publishing Company's only defense was substantial truth. The evidence showed that Butts and the Alabama coach had discussed football, but failed to prove that what had been discussed would have been of value to the Alabama coach. Butts's contention was that the magazine's investigative reporting was reckless and wanton misconduct. The jury returned a verdict of \$60,000 in general damages and \$3 million in punitive damages. The latter was later reduced to \$460,000.

Of particular importance in the *Curtis* case was the fact that what might have appeared as "kidding" could be taken seriously and completely misconstrued by another. One responsible for reporting information must be diligent in checking the accuracy and reliability of all sources used.

Hunter, an orthopedic surgeon and consultant to the University of Minnesota football program, sued Sid Hartman, a sportswriter, for comments made by the writer in his news column and radio show. Hunter had been interviewed on the topic of Lou Holtz's handling of injured athletes. Hunter's statements were specific and negative. Hartman reviewed Hunter's statements but attributed them to the fact that Holtz had replaced Hunter after his first year at Minnesota. The defamatory statement was:

And, uh, we were talking last night about the great Doctor Hunter, yesterday noon, talking about the great Doctor Hunter who ripped Lou Holtz for firing him. We were talking at lunch at the Marriott Hotel and Joe said in 1982 Mr. Hunter operated on 12 players. Hardly any of them came back to play at all. Some of them never played. Some of them played at, uh, about half their ability. So there was a good reason, Mr. Hunter, why Mr. Holtz discharged ya. (*Hunter v. Hartman*, 1996, 702)

The court noted that "to show actual malice, a defamation plaintiff must demonstrate by clear and convincing evidence that the defendant made defamatory statements either knowing the statements were false or acting recklessly with regard to whether the statements were true" (703). The trial court granted summary judgment for Hartman. The Court of Appeals of Minnesota affirmed the lower court's decision, saying that under the public figure analysis, the plaintiff had to show malice and that, in this instance, he had failed to do so.

In *Sprewell v. NYP Holdings* (2007), plaintiff Latrell Sprewell, a high-profile professional basketball player formerly with the New York Knicks, claimed that he was libeled by statements in articles by sports writer Berman. The articles regarding the cause of Sprewell's hand injury were published in *The New York Post* and were based, in part, on information provided by confidential sources. It was undisputed that at some point in September 2002, Sprewell sustained a fracture to the fifth metacarpal bone on his right (shooting) hand while on his boat at a marina in Milwaukee. He did not inform the Knicks of the injury until he arrived at the team's practice facility on September

30. Berman wrote an article describing the injury and the fact that the plaintiff had not reported it sooner. Berman, who accompanied the team to its training camp, tried unsuccessfully to contact Sprewell's agent, Gist, to inquire about the cause of the injury.

Marvet Britto, Sprewell's publicist, told Berman that Sprewell himself had "no clue" how he had injured his hand, but noted that Sprewell lived and worked out on his boat all summer. Berman reported that conversation in another article. Berman received a telephone call from a sportscaster for a New York cable channel, who stated that he had suffered an injury similar to the plaintiff's as a result of punching a pole on a basketball court in anger and that such an injury is commonly referred to as a "boxer's fracture." Berman then contacted two physician hand specialists, who explained that boxer's fractures are "caused by a punch, usually by punching a hard object like a wall or a pole" (18). Gist, returning Berman's earlier telephone messages, related that plaintiff had told him the fracture occurred while "frantically pulling on a rope" to gain control of his boat in rough waters. *The New York Post's* first two editions of October 4 ran Berman's article recounting those details and the fact that the team's general manager had been "peppered with questions regarding how Sprewell broke his pinkie and was even asked if he may have been in a fight" (18).

The court found that, assuming that Berman's statements regarding how the player injured his hand and his alleged attempt to cover up the incident were false, the news corporation and the writer were entitled to summary judgment. The information was not reported as incontrovertible fact, but rather cautioned the reader that it was based on two confidential witnesses and was denied by the player. The record demonstrated that the writer subjectively believed the sources, whose partial description of the interior of the player's boat provided additional indicia of reliability. The writer's investigative efforts demonstrated that the writer did not deliberately fail to seek confirmatory information or otherwise act with reckless disregard for the truth. Thus, the player had not presented any evidence to raise a triable issue of fact concerning actual malice, let alone sufficient evidence to establish actual malice by clear and convincing evidence.

Invasion of Privacy

Invasion of privacy is closely related to the Fourth Amendment's search and seizure clause. It is often found in drug testing and the reporting of suspicion of drug use. The government's interest in the drug testing of athletes is the athletes' health and the maintenance of a level playing field or the natural competitive qualities of the performers. The athletes' interests are in maintaining their privacy. Invasion of privacy, in violation of the First Amendment, has been raised in the context of pat-down searches conducted as a condition of entry to sporting events.

While balanced against the overall interest in safety of the public at large, individual legal challenges to the routinely used practice of pat-down searches persist. One high-profile case receiving much media attention was *Sheehan v. San Francisco 49ers, Ltd.* (2009). The case was brought by two season ticket holders challenging the constitutionality of the team's implementation of a league policy requiring all fans at the team's home games to submit to a pat-down search before entering the stadium. The season

ticket holders argued that the California state constitution's guarantee of privacy was violated by the pat-down searches. The court found that, "presumably, the league, and ultimately the team adopted the patdown policy to enhance spectator safety," but the court could not judge the reasonableness of the policy under the circumstances because the record did not establish the circumstances of, or the reasons for, the policy (992). Furthermore, the team had not yet given any explanation or justification for the policy.

The court provided some interesting guidance in approaching the constitutionality of actions in cases such as these:

[I]n reviewing a private entertainment venue's security arrangements that implicate the state constitutional right of privacy, the court does not decide whether every measure is necessary, merely whether the policy is reasonable. The state constitutional right of privacy does not grant courts a roving commission to second-guess security decisions at private entertainment events or to micromanage interactions between private parties.... Private entities that present entertainment events, like the 49ers, necessarily retain primary responsibility for determining what security measures are appropriate to ensure the safety of their patrons, subject, when those security measures substantially infringe on a privacy interest, to judicial review for reasonableness. (480)

A related pat-down case claiming a Fourth Amendment violation was *Johnston v. Tampa Sports Authority* (2008). The pat-down searches were upheld on appeal in the Eleventh Circuit Court of Appeals using a consent theory rationale. *Johnston* involved an NFL pat-down search policy that was similar to but slightly different from the one in *Sheehan*. The search policy described in *Johnston* encompassed only "limited above-the-waist pat-down searches" (1323). In *Sheehan*, plaintiffs alleged that the screeners "ran their hands around the [plaintiffs'] backs and down the sides of their bodies and their legs" (996). The court in *Johnston* noted "the government had no role in formulating or mandating the pat-down policy. The policy exists solely because of the NFL's mandate" (1329). "Because the condition for entry was imposed by a private party, Johnston was not forced by the government to choose between his constitutional rights and obtaining a benefit to which he was entitled" (1329). The court ultimately held that, considering the totality of the circumstances, Johnston voluntarily consented to the pat-down searches each time he attended a game.

FOURTH AMENDMENT

The Fourth Amendment to the Constitution states that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person to be seized."

The system for analyzing Fourth Amendment violations is the same as the system used in analyzing First Amendment facts: balancing of the participant's interest in

privacy against the agency's right to maintain order in an environment in which others can safely participate. In order to establish or maintain order, it may be necessary to suspend or discipline a participant; however, valid evidence must be obtained before a complaint can be filed.

Searches

In *New Jersey v. T. L. O.* (1985), a case involving teenage students who lied about smoking in a school bathroom, the United States Supreme Court established that searches could be conducted by persons other than law enforcement officers. The ruling stated that the "Fourth Amendment is applicable to the activities of civil as well as criminal authorities" (740). The Court also attempted to establish a standard that could be used to govern school searches. The question of balance in this situation was identified as an analysis of the individual's expectation of privacy and personal security versus the government's need for an effective method of dealing with breaches of order (741). In this case, order meant to maintain an environment in which learning can occur.

The Court noted that the school setting required restrictions on searches different from those needed by other public authorities.

The warrant requirement, in particular, is unsuited to the school environment; requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.

The legality of a search of a student should depend simply on the reasonableness, under the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception." Second, one must determine whether the search as actually conducted was reasonably related in scope to the circumstances which justified the interference in the first place. (743-744)

In *Gruenke v. Seip* (2000), the court was faced with issues related to both the First and Fourth Amendments. A swim coach suspected one of his swimmers of being pregnant and required her to take a pregnancy test. She and her mother sued, claiming that the requirement of a pregnancy test was an illegal search under her Fourth Amendment rights, interfered with her right to familial privacy, and violated her First Amendment free speech and association rights. Swim team members harassed Gruenke about taking a pregnancy test. Then, they ostracized her after she was found to be pregnant. Medical authorities ruled that swimming competition would not be detrimental to a pregnant person.

The District Court granted the coach immunity. Gruenke then appealed. The United States Court of Appeals for the Third Circuit had subject matter jurisdiction over Gruenke's Section 1983 claims. Section 1983:

Imposes civil liability upon any person who, acting under the color of state law, deprives another individual of any rights, privileges, or immunities secured by the Constitution or laws of the United States. This section does not create any new substantive rights but instead provides a remedy for the violation of a federal constitutional or statutory right....

In a typical 1983 action, a court must initially determine whether the plaintiff has even alleged the deprivation of a right that either federal law or the Constitution protects....

If the plaintiff's allegations meet this threshold, we must next determine whether, as a legal matter, the right that the defendant's conduct allegedly violates was a clearly established one, about which a reasonable person would have known. If so, then the defendant is not entitled to qualified immunity. If, in contrast, the plaintiff's allegations fail to satisfy either inquiry, then the defendant is entitled to summary judgment. Until the question of qualified immunity is addressed, a court cannot reach the underlying merits of the case.

It is not sufficient that the right at issue be clearly established as a general matter. Rather, the question is whether a reasonable public official would know that his or her specific conduct violated clearly established rights.

Under a Fourth Amendment analysis, the court held that the swimming coach was not entitled to qualified immunity from the Fourth Amendment, a Section 1983 claim, because the coach should have known that his conduct would violate a clearly established right. The fact that the swim coach, without a medical background, had forced the swimmer to take a pregnancy test was the issue. "His responsibilities can be reasonably construed to include activities related to teaching and training. They cannot be extended to requiring a pregnancy test. Moreover, a reasonable swim coach would recognize that his student swimmer's condition was not suitable for public speculation. He would have exercised some discretion in how he handled the problem" (302). Thus, the court found the swimmer's Fourth Amendment rights were violated.

Drug Testing

Drug testing of athletes continues to be a popular deterrent mechanism utilized in professional, collegiate, and high school sports. Not only can drug use by athletes result in serious health problems, but organizers of athletic events are also interested in maintaining a level playing field or avoiding an unfair advantage to athletes on performance-enhancing drugs. Court decisions involving drug testing programs in industry find the courts upholding pre-employment testing, while random testing has not been upheld. For tests to be upheld among veteran employees, there has to be reason to believe that the employee is on drugs.

Olympic and intercollegiate athletes have challenged the standards used in drug testing, league rules, and university policies in the courts. The classic case of Butch

Reynolds is one of those tests. Reynolds, a world-class runner, was randomly tested for drugs in August 1990 by the International Amateur Athletic Federation (IAAF) following a meet in Monte Carlo. He was suspended from competition for two years, including the 1992 Olympics, for allegedly testing positive for the anabolic steroid Nandrolone. Reynolds appealed his suspension. When he was unable to obtain the information needed to prepare for the appeal hearing, he filed suit to stop The Athletic Congress (TAC) and IAAF from conducting the hearing. Reynolds's evidence was that a similar test, taken seven days later, had no trace of Nandrolone. He concluded that the reported results of the first test had been an error. The court, in its decision to dismiss the case, ruled that Reynolds had failed to use the sport's official appeal processes before going to court.

Reynolds then participated in an arbitration governed by the Amateur Sports Act and the United States Olympic Committee (USOC) Constitution. The arbitrator found that there was strong evidence that the urine sample did not belong to Reynolds. The IAAF refused to accept the arbitrator's decision, saying that the arbitration had not been conducted under international rules. Reynolds appealed the IAAF decision using the procedure required by the IAAF—an appeal to The Athletic Congress (TAC). TAC made the same decision—that there was strong evidence that the urine did not belong to Reynolds. The IAAF again refused to accept the decision even though it was made according to its governing rules. The international sport governing body conducted its own arbitration in London in May of 1992. The IAAF found the drug test to be valid and the federation upheld the two-year competition suspension.

Reynolds filed an action against IAAF in the Southern District of Ohio requesting a temporary restraining order allowing him to compete in the Olympics and to collect money damages. The IAAF refused to appear. The district court, after establishing jurisdiction over the IAAF, issued a temporary restraining order allowing Reynolds to prepare for the Olympic team; this was followed by a preliminary injunction permitting Reynolds to participate in the Olympic trials.

On the day of the above decision, TAC—an organization that no longer supported Reynolds—asked for and was granted a “stay” of the court's decision. Reynolds was stopped from entering the Olympic trials. The next morning Reynolds filed and was granted an emergency motion with the United States Supreme Court asking that the district court “stay” be vacated. Now, Reynolds could compete in the Olympic trials.

The IAAF, aware of the court's decision, ruled that athletes who competed with Reynolds in the United States trials would be barred from the Olympics. TAC filed an application to the Supreme Court barring Reynolds from competing. The application was denied and Reynolds was allowed to compete in the trials. He made the team as an alternate for the 400-meter relay team. The IAAF removed Reynolds from the team roster.

Reynolds filed a supplemental complaint to the district court regarding his elimination from the team. Neither the IAAF nor TAC responded or appeared for the proceedings. Reynolds was awarded \$27,356,008. The award included treble punitive damages. In February of 1993, Reynolds began garnishment proceedings against

four corporations with connections to the IAAF to obtain the damage award. He also brought a new cause of action against the federation. This time, the Sixth Circuit of Appeals decided that it did not have jurisdiction (authority) over the IAAF. As a result of the Sixth Circuit's decision, the judgment of the district court (for Reynolds, with money damage) was reversed and remanded.

Mary Decker Slaney, a world-class runner accused of a drug doping offense in the 1996 national trials for the Atlantic Olympics, faced a series of confusing decisions similar to Reynolds's experience. Her urine sample was tested for prohibited substances including exogenous testosterone. The court reported:

Because current technology cannot detect the presence of prohibited testosterone in the body, testing programs measure the ratio of testosterone to epitestosterone ("T/E") in the body. This test, referred to as the T/E test, assumes that an ordinary T/E ratio in humans is one to one, and thus any ratio of above six to one is consistent with "blood doping." The ratio was established at six to one in order to account for non-doping factors that might cause elevated ratios in female athletes. Factors which may influence T/E ratio include an individual changing birth control pills, age, menstrual cycle, bacterial contamination of the urine sample, and alcohol use [Slaney tested significantly higher than the accepted ratio].

Slaney claimed that her elevated level was the result of (1) her menstrual cycle, and (2) her changing of birth control pills. Furthermore, Slaney posited that there was no scientific validity to the hypothesis that a T/E ratio above six to one was not normal for female athletes. Nonetheless ... the IAAF adopted the investigating doctor's recommendation and found Slaney's specimen positive for the prohibited substance testosterone. (586)

The IAAF suspended Slaney just prior to the National Track and Field Championships. The federation also involved the contamination rule used earlier in *Reynolds*, "whereby anyone who competed with a suspended athlete would themselves be suspended." (587)

The Hearing Board, unpersuaded by the testimony of the IAAF investigating doctor, unanimously determined that no doping violation had occurred. Satisfied with the USATF Hearing Board's finding that the IAAF's rules regarding the use of the T/E ratio test were vague and inconsistent and the six to one ratio was not scientifically proven to be inconsistent with the normal ratio in humans, Slaney withdrew her complaint with the USOC....

The IAAF was unsatisfied with the USATF Hearing Board's findings, and invoked arbitration ... the Tribunal issued an interlocutory decision

upholding the IAAF's interpretation of how to adjudicate a testosterone doping offense, and found that the rules were neither vague nor inconsistent. Thus, once the IAAF showed that Slaney had a T/E ratio greater than six to one, Slaney had to come forth and show by clear and convincing evidence that the elevated ratio was attributable to a pathological or physiological condition. Believing that it was scientifically impossible to prove by clear and convincing evidence that her high T/E ratio was due to pathological or physiological factors, Slaney withdrew from the arbitration ... [and] filed suit. (587)

Slaney filed suit in District Court, Southern District of Indiana, for an extensive list of contract, tort, RICO, and 18 USC 1961 claims. The District Court held that 1) the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards barred her claims against the IAAF, 2) the Amateur Sport Act gave the USOC exclusive right to determine eligibility disputes, and 3) her RICO claims were not adequate. Slaney appealed the ruling. The Court of Appeals for the Seventh Circuit, following a lengthy analysis of each claim, affirmed the decision of the district court. The most important point was that Slaney participated in a valid arbitration with the IAAF which, under the New York Convention, the court was obligated to recognize.

University of Colorado v. Derdeyn (1991, 1993, 1994) involved the constitutionality of the university's drug-testing policy. The policy, created to prepare athletes for NCAA mandatory drug testing, included a range of tests from random testing of athletes' urine samples obtained under direct visual observation to the use of rapid-eye-movement examinations. The trial court found that the program violated the students' Fourth Amendment and Colorado Constitution rights.

Following a bench trial, the court found that "obtaining a monitored urine sample is a substantial invasion of privacy" (*University of Colorado v. Derdeyn*, 1993). Also, "the trial court found that there is no evidence that the university instituted its program in response to any actual drug abuse problem among its student athletes. There is no evidence that any person has ever been injured in any way because of the use of drugs by a student athlete while practicing or playing a sport" (933). The trial court concluded that "CU's random urinalysis drug testing of athletes without individualized suspicion violates the Fourth Amendment's guarantee that persons shall be secure against unreasonable searches and seizures conducted by the government" (934). The trial court's decision was affirmed by the Colorado Supreme Court. The court stressed that when student consent was not voluntary, it could not be used to validate an unconstitutional search. The University of Colorado's petition to the United States Supreme Court for a writ of certiorari was denied in May of 1994 and its petition to the same court for rehearing was denied the following month.

In January of 1994, the Supreme Court of California held in *Hill v. National Collegiate Athletic Association (NCAA)* that the NCAA drug-testing program did not violate the plaintiff's constitutional right to privacy. Student privacy was balanced against the NCAA's need to maintain equitable competition and a safe competitive environment.

In contrast to *Derdeyn*, the NCAA discussed the problems of drug use in athletics. The *Hill* case was the result of a series of complaints in which Hill and earlier parties to the case were successful in the trial and appeals courts. The courts were required to examine the invasion of privacy issue that required the NCAA to prove a compelling state interest and the absence of an alternative method for accomplishing its goal.

The Supreme Court of California (1994) stated that persons choosing to be elite athletes agree to intrusions, including the reporting of medical information to trainers and coaches, dressing in same-sex locker rooms, and frequent physical examinations. Further, the court noted that the

NCAA's rules contain elements designed to accomplish the purpose, including (1) advance notice to athletes of testing procedures and written consent to testing, (2) random selection of athletes actually engaged in competition, (3) monitored collection of a sample of a selected athlete's urine in order to avoid substitution or contamination, and (4) chain of custody, limited disclosure, and other procedures designed to safeguard the confidentiality of the testing process and its outcome. (637)

Acton v. Vernonia (1995) was the Supreme Court decision that upheld the right of public schools to randomly test athletes for drugs. Vernonia, a small Oregon town, had experienced an increase in drug use among young people; athletes appeared to be the leaders in the drug culture. In response to this change in drug use, the school created a policy. Acton's parents refused to consent to the drug-testing policy, thus denying him an opportunity to play football. His parents filed suit against the school district for declaratory and injunctive relief on the grounds that the Student Athletic Drug Policy violated their son's Fourth Amendment, Fourteenth Amendment, and Oregon Constitutional rights.

The District Court found for the school district; the United States Court of Appeals, Ninth Circuit reversed, finding that the policy violated the Fourth and Fourteenth Amendments and the Oregon Constitution. The Supreme Court of the United States granted certiorari. This court's emphasis was on the reasonableness of the search as it balanced the rights of the individual required to take the test with the interests of the government. The Supreme Court reversed the Ninth Circuit's decision and found the Vernonia School District's Student Athletic Drug Policy constitutional under the Fourth and Fourteenth Amendments. The Court found the search to be reasonable, as student-athletes have a "lesser privacy expectation with regard to medical examinations and procedures than the general population. Student athletes have even less of a legitimate privacy expectation, for an element of communal undress is inherent in athletic participation, and athletes are subject to preseason physical exams and rules regulating their conduct" (2387, 2388).

In the 2002 United States Supreme Court decision in *Board of Independent School District, No. 92 of Pottawatomie County, et al. v. Earls, et al.*, drug testing without suspicion was held not to violate the Fourth Amendment to the United States Constitution. The Student Activities Drug Testing Policy required all middle and high school students

wishing to participate in an extracurricular activity to consent to urinalysis testing for drugs. Students' parents sued under 42 USC 1983. They claimed that the policy violated the Fourth Amendment. The District Court found for the School District; the Tenth Circuit reversed, stating that the policy violated the Fourth Amendment. It concluded "that before imposing a suspicionless drug testing program a school must demonstrate some identifiable drug abuse problem among a sufficient number of those tested, such that testing that group will actually redress its drug problem. The court then held that the School District failed to demonstrate such a problem among [the school district's] students participating in competitive extracurricular activities" (824).

The school district's certiorari to the United States Supreme Court was accepted. The Court used *Vernonia* as a model for a number of issues. In reversing the court of appeals' decision, the Supreme Court stated, "Within the limits of the Fourth Amendment, local school boards must assess the desirability of drug testing schoolchildren. In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren" (749–750).

FOURTEENTH AMENDMENT: DUE PROCESS

Procedural due process is the opportunity to be heard. It is a system to assure people of fair treatment when a "life, liberty, or property" right is challenged. No right is to be taken prior to due process. The Fifth and Fourteenth Amendments to the United States Constitution guarantee life, liberty, and property rights. Federal rights are embedded in the Fifth Amendment; state rights are in the Fourteenth Amendment. While the "life" right is complex, it does not create the legal confusion that "liberty" and "property" rights create. "Liberty" rights are, for example, privileges essential to the pursuit of happiness and safe working conditions. "Property" rights include claims of entitlement, termination of benefits or status, and exclusion from state or federal opportunities without cause.

Professionals will be called upon to fashion due process systems such as club membership rights, as employment termination agreements, and for various other occasions. A hearing is usually part of the system. The system is to include the written charge or complaint and detailed reasons for the charge or complaint; adequate time for the defendants to prepare for a hearing and to retain representation; an opportunity for the defending party to present evidence and arguments, including witnesses; and ample time for each party to confront adverse witnesses. The hearing and decision should be made by an impartial decision maker with the ruling based on the evidence provided in the hearing. A clear and comprehensive statement giving the reasons for the decision is to be provided to the parties.

Tarkanian v. NCAA (1987, 1989, 1994), *NCAA v. Tarkanian* (1988, 1992, 1993, 1997), and *University of Nevada v. Tarkanian* (1979, 1994) involved a number of legal theories, including the Due Process Clause of the Fourteenth Amendment. Beginning in 1970, the National Collegiate Athletic Association (NCAA) orchestrated an

investigation of the University of Nevada, Las Vegas. At the completion of the NCAA's first hearing, after naming the coach—Jerry Tarkanian—in 10 of the 38 violations, the association “directed UNLV to show cause why additional penalties should not be imposed against it if it does not suspend Tarkanian from involvement with the University's Intercollegiate Athletic Program for two years” (*Tarkanian v. NCAA*, 1987, 1347).

In September of 1977, UNLV suspended Tarkanian. After requesting and being granted an injunction, he returned to coaching. The court reversed the injunction, saying that Tarkanian should include the NCAA in his suit. Tarkanian then sued UNLV and the NCAA, arguing that he was suspended from his job without due process. The NCAA does not use a formal due process system in most of its investigations.

In 1987, the Supreme Court held that the NCAA had to use due process. The NCAA petitioned that court. The court reversed the ruling, declaring that the NCAA was not a state actor and thus not required to honor Tarkanian's due process rights. The case was remanded to the Nevada courts, as UNLV was the only agency that could discipline and/or suspend Tarkanian, who was a faculty member. Since 1992, Tarkanian has worked at collecting financial damages.

Fourteenth Amendment claims have also been raised in the school setting by students and parents of students who have been disciplined for some form of speech critical of the school or its personnel. In *J. S. v. Blue Mountain School District* (2011), a high school student was suspended for ten days for “creating, on a weekend and on her home computer, a MySpace ‘profile’ making fun of her principal, which contained adult language and sexually explicit content” (920).

The high school student and her parents sued the school district, claiming First Amendment free speech violations, unconstitutionally overbroad and vague policies, and violation of the parents' due process rights under the Fourteenth Amendment to raise their child in the manner that they saw fit. Specifically, they argued that, in disciplining J. S. for conduct that occurred in her parents' home during non-school hours, the school district interfered with their parental rights, and punishing the student for out-of-school speech was outside the district's authority.

Under *Tinker*, the court found the school district violated J. S.'s First Amendment free speech rights when it suspended her for creating the profile, citing the fact that “J. S. was suspended from school for speech that indisputably caused no substantial disruption in school and that could not reasonably have led school officials to forecast substantial disruption in school” (920). On the Fourteenth Amendment due process claims, J. S.'s parents alleged that the school district interfered with their ability to determine what out-of-school behavior warranted discipline and what form that discipline took (934). The court, however, found this was not an accurate description of the impact that the school district's actions had upon J. S.'s parents' ability to make decisions concerning their daughter's upbringing because the school district's actions in no way forced or prevented J. S.'s parents from reaching their own disciplinary decision, nor did its actions force her parents to approve or disapprove of her conduct (934). Further, there was no triggering of the parents' liberty interest due to the subject

matter of the school district's involvement; a decision involving a child's use of social media on the Internet is not a "matter of the greatest importance" (934). The appellate court thus affirmed that the school district did not violate the parents' Fourteenth Amendment substantive due process rights to raise their child (920).

The decision in *Blue Mountain School District* raises several questions about how the boundaries of student speech, as delineated in *Tinker*, apply in the context of social media. Questions include whether, as a result of the decision, students have the right to make malicious comments about school personnel, so long as the speech takes place off campus (Bemiller & Trendafilova, 2011). Furthermore, the need for schools to create social media policies to apply to (and therefore regulate) comments made by students and student-athletes using social media will need to be explored as decisions involving First Amendment rights in the Internet age continue to be handed down.

SUMMARY

The First Amendment to the United States Constitution includes freedom of religion, freedom of speech, freedom of the press, and defamation. Freedom of religion separates church and state and prohibits the government from enacting laws that aid a church or religion. Freedom of speech is the freedom to speak, remain silent, discuss with others, advocate, and communicate ideas. Freedom of the press is the freedom to write, draw, and create models. Ideas can be published and conveyed. Defamation is influenced by the status of the person—whether he/she is a public figure or an ordinary person. Sport seems to have many cases in defamation; athletes and coaches meet the status of a public figure.

The Fourth Amendment of the Constitution of the United States covers searches and drug testing. It guarantees the rights of people to be secure in their persons and homes against unreasonable searches and seizures. As in the First Amendment, the system for analyzing violations is to balance the rights of the individual with the rights of society.

The Fourteenth Amendment (Due Process Clause) of the United States Constitution is the right of people to be treated fairly when a life, liberty, or property right is challenged. No right can be taken away without providing due process.

DISCUSSION QUESTIONS

1. Many of the student speech cases involved schoolchildren who were minors. Why must colleges and universities be cautious in trying to regulate speech by college students at sporting events? Why are the constitutional issues less of a concern when the speaker is a minor?
2. How can stadiums effectively balance the security needs to protect the general public against terrorism with the constitutional protections guaranteed to each citizen at sport venues in the United States?