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Malpractice during Practice: Should NCAA Coaches Be Liable for Negligence

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MALPRACTICE DURING PRACTICE: SHOULD NCAA COACHES BE LIABLE FOR NEGLIGENCE?

"Fatigue makes cowards of us all."[1]

"Rashidi was two players ahead of me in line. I never saw Rashidi go down, because I collapsed and fell unconscious, too. I got up, threw up and was as happy as I've ever been that I passed. Then I heard someone say, 'Rashidi lost his pulse.'"[2]

I. INTRODUCTION

On a humid, Midwestern summer day, while many remained indoors to avoid the unbearable heat, the Northwestern University football team attempted to complete a sprinting drill during a voluntary preseason practice.[3] Randy Walker, the team's coach and creator of this endurance challenge, was not present,[4] as the National Collegiate Athletic Association ("NCAA") Bylaws dictate.[5] However, a video camera recorded the drill[6] so Coach Walker could assess each player's performance.[7] Unfortunately, this footage also documented the last living moments of twenty-two year old Northwestern safety Rashidi Wheeler, who collapsed around 4:00 P.M.[8]

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1. *Vince Lombardi Quotes to Inspire You, at* http://www.cyber-nation.com/victory/quotations/authors/quotes_lombardi_vince.html (last visited Mar. 2, 2002).

2. Lance Pugmire & Mike Davis, *Northwestern Safety Dies at 22*, L.A. TIMES, Aug. 4, 2001, at D1 (quoting Jason Wright, a Northwestern running back).

3. *See* Lance Pugmire & David Wharton, *In Grief, a Search for Answers: College Football*, L.A. TIMES, Aug. 5, 2001, at D1.

4. *Id.*

5. NAT'L COLLEGIATE ATHLETIC ASS'N, 2001–02 NCAA DIVISION I MANUAL art. 17.02.13, at 222 (2001) [hereinafter NCAA BYLAWS]. "NCAA rules, which were changed last spring, require any preseason workout to be voluntary. Trainers and strength and conditioning staff may be present, but the coaching staff may not. Results of any workouts are not to be reported to the coaching staff." *NCAA Reviewing Northwestern Report of Wheeler's Death*, SPORTINGNEWS.COM (Oct. 10, 2001), http://www.sportingnews.com/cfootball/articles/20011010/350213.html [hereinafter *NCAA Reviewing Northwestern Report*].

6. Alan Abrahamson, *Drive to Excel Brings Death to the Gridiron*, L.A. TIMES, Aug. 27, 2001, at A1.

7. *See NCAA Reviewing Northwestern Report*, *supra* note 5. "Though the workout was voluntary, results of the drill—as well as results of earlier weightlifting and sprint drills—were reported to the coaching staff, a violation of NCAA rules." *Id.*

8. Pugmire & Davis, *supra* note 2.

and later died of bronchial asthma.[9] Even as Wheeler gasped for his last breath, and efforts to revive him on the field failed, the drill continued.[10]

Only a week earlier, eighteen-year-old Eraste Autin, a University of Florida football player, died of heatstroke after a similar preseason workout when his body temperature had soared to 108 degrees.[11] On that day, the temperature in Gainesville, Florida was eighty-eight degrees with seventy-two percent humidity, or the equivalent of 102 degrees.[12] Yet the coach and his staff planned the workout during the midday summer heat, a time when most doctors warn against exercising at all.[13]

The National Center for Catastrophic Sport Injury Research in North Carolina currently documents 105 heat-related high school and college football deaths[14] since 1955.[15] Nevertheless, in the last year sixteen football players have died while participating in this nationally admired and passionately venerated sport.[16] Some ask, "[w]hat kind of sport . . . requires conditioning drills so rigorous that . . . [an] athlete dies in February, six months before he was to play his first competitive down of college football?"[17]

Practice-related fatalities raise legal issues within the context of college athletics. Lawsuits implicating negligent conduct by coaches, staff, medical personnel, and schools indicate the growing concern for the health and safety of student-athletes.[18] Assumption of risk and comparative fault

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9. Pugmire & Wharton, *supra* note 3.

10. Abrahamson, *supra* note 6.

11. Wayne Drehs, *Is There Anything Else That Can Be Done?*, *at* http://espn.go.com/ncf/s/2001/0730/1232996.html (July 30, 2001).

12. *Id.*

13. *See* Bill Plaschke, *It's Time to Start Turning Up the Heat on Demanding, Tough-Guy Coaches*, L.A. TIMES, Aug. 5, 2001, at D1. The author quotes Rob Huizenga, team doctor for the Los Angeles Raiders from 1983 to 1990: "'Why do we need to practice in the heat? . . . . It is ludicrous. It is nonsensical. It's like some fraternity thing. It's hazing.'" *Id.*

14. "College" and "university" will hereinafter be used interchangeably.

15. *Annual Survey of Football Injury Research Data*, National Center for Catastrophic Sport Injury Research, *at* http://www.unc.edu/depts/nccsi/FootballInjuryData.htm (last updated Jan. 31, 2002).

16. Ben Bolch & Gary Klein, *Banning Player Dies of Cardiac Arrest*, L.A. TIMES, Nov. 13, 2001, at D1; *see* Mike Penner, *Summer of Tragedy: Rash of Player Deaths Prompts Reexamination of Our Obsession with Football*, L.A. TIMES, Sept. 3, 2001, at D1. The ages of the deceased ranged from thirteen to thirty-four years old. *Id.*

17. Penner, *supra* note 16 (discussing the death of Florida State freshman linebacker Devaughn Darling during an off-season conditioning drill).

18. *See* Rob Fernas, *School's Actions Are Key to Suit*, L.A. TIMES, Aug. 25, 2001, at D1 (discussing the legal contentions in the suit by the mother of Rashidi Wheeler against Northwestern University); *see also* Steve Springer, *Family Plans to Sue over Darling Death*, L.A. TIMES, Aug. 30, 2001, at D1 (discussing the legal contentions in the suit by Devaughn Darling's family against Florida State University).

theories have limited recovery for football and heatstroke-related deaths.[19] Several factors in current college sports, however, demand reassessment of the standard of care that colleges owe student-athletes.[20] The NCAA rules consider these preseason practices to be voluntary,[21] but players' performance and completion of these conditioning drills determine the extent of their playing time and participation on the team.[22] Therefore, the importance of participating in "voluntary" drills inhibits the student-athlete's freedom of choice, even if completion may be harmful.[23]

This Comment asserts that the standard of care that college coaches owe student-athletes must be raised to avoid unreasonably exposing their players to injury or death. Part II of this Comment presents the basic elements of negligence and applies the principles of negligence to college athletics, demonstrating the rationales courts traditionally have used to deny plaintiffs recovery from schools for student-athlete deaths. Part III provides specific cases that recognize the existence of a special relationship between the coach of a college athletic team and a student-athlete, demanding a heightened duty to avoid foreseeable harm. Part IV contends that the recruitment practices for student-athletes, the unreasonable pressure to succeed, and the public policy concerns surrounding these untimely deaths establish a necessity to enforce a heightened duty. Finally, Part V concludes that breach of this heightened duty should result in the liability of coaches and schools involved in negligence suits.

II. APPLICATION OF TRADITIONAL NEGLIGENCE IN THE CONTEXT OF COACH AND UNIVERSITY RESPONSIBILITY FOR STUDENT-ATHLETE DEATHS

Tort liability arises when one person injures another.[24] Although the injury may have been unintentional, a court may hold the person responsible whose action or inaction caused the injury.[25] Courts apply

19. *See* Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 SETON HALL J. SPORT L. 7, 43–66 (1996); *see also* discussion *infra* Part III.

20. *See* discussion *infra* Part IV.

21. *See* NCAA BYLAWS, *supra* note 5, art. 17.02.1, at 219–20 (identifying and defining athletically-related activities included in the general playing season). Voluntary conditioning drills do not fall within this section, but they must follow the guidelines in article 17.02.13. *Id.* art. 17.02.13, at 222.

22. Andrew Bagnato, *Coaches More Cautious in Heat Than in the Past: Recent Tragedies Change Thinking*, CHI. TRIB., Aug. 2, 2001, at 4:6.

23. *See id.*

24. GEORGE W. SCHUBERT ET AL., SPORTS LAW § 7, at 176 (1986).

25. *Id.* § 7.2(A), at 178.

principles of negligence in assessing tort liability when a defendant's conduct fails to meet the legal standard designated to protect against unreasonable risks.[26] The appropriate conduct of a reasonable person under the same or similar circumstances sets this standard of law.[27] However, courts extend the scope of duty beyond this standard of reasonable care if a special relationship existed between the parties at the time of the injury.[28] Furthermore, courts assign liability for negligence to an employer under a theory of vicarious liability if its employee committed the tort.[29] Application of these principles to collegiate athletics, especially a contact sport like football, makes tort liability difficult to determine due to the prevalence of injuries.[30] Nevertheless, decisions defining the respective duties of student-athletes and coaches—as agents of a university[31]—have allowed for the development of negligence liability in the context of collegiate sports.[32]

A. Standard Application of Negligence

1. Negligence Defined

A cause of action for negligence requires the following elements: (1) a duty of care based on the standard of a reasonable person in a similar or identical situation;[33] (2) a breach of duty by failing to act consistently with the standard of care;[34] (3) a breach of the duty of care substantially causing the injury;[35] and (4) actual damages or injury resulting from the breach.[36]

The minimum duty of care requires a person to avoid creating unreasonable risks of injury to others.[37] This minimum level of care can escalate to a duty to aid or protect depending on the circumstances of the

26. JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS § 8.02, at 933–34 (1979).

27. RESTATEMENT (SECOND) OF TORTS § 283 (1965).

28. Walter T. Champion, *The Evolution of a Standard of Care for Injured College Athletes: A Review of* Kleinknecht *and Progeny*, 1 VA. J. SPORTS & L. 290, 296 (1999); *see also* RESTATEMENT (SECOND) OF TORTS § 314 cmt. a.

29. *See* discussion *infra* Part II.A.2.

30. *See* WEISTART & LOWELL, *supra* note 26, § 8.01, at 933.

31. *See* SCHUBERT ET AL., *supra* note 24, § 7.2(D), at 202–03.

32. *Id.* § 7.1, at 177.

33. RESTATEMENT (SECOND) OF TORTS § 283.

34. SCHUBERT ET AL., *supra* note 24, § 7.2(A)(1)(b), at 181.

35. *Id.* § 7.2(A)(1)(c), at 185.

36. McCaskey & Biedzynski, *supra* note 19, at 14.

37. SCHUBERT ET AL., *supra* note 24, § 7.2(A)(1), at 178.

relationship between the tortfeasor and victim, and the nature of the harm.[38] For example, courts generally apply a higher standard of care to coaches, teachers, and administrators[39] because they can use their authority to put subordinates in potentially harmful activities,[40] which also places them in the best position to prevent their subordinates' injuries.[41] Consequently, courts impose a heightened duty of care on authority figures, especially when those in control supervise or conduct an inherently dangerous activity.[42] Therefore, the special relationship between an authority figure and a subordinate imposes a duty of care to protect against those risks that the authority figure did not create.[43]

Evidence that a defendant's conduct failed to conform to the requisite duty will satisfy the second element of negligence: breach.[44] "If a person realizes or should realize that their conduct exposes another to the unreasonable risk of injury from third parties, animals or forces of nature, then he or she will be negligent for acting in that manner."[45] A defendant who creates an unreasonable risk breaches the duty of reasonable care, satisfying the second element of negligence.[46]

A plaintiff must also establish a causal link from the breach in question to the injury.[47] A defendant's negligence does not have to be the only factor to cause the resulting harm.[48] If breaching the duty of reasonable care constitutes a substantial factor in bringing about the plaintiff's injury, the defendant will be liable for all of those injuries, including injuries caused merely by aggravating the plaintiff's preexisting condition.[49] In sum, the type of injury or the manner in which the

38. RESTATEMENT (SECOND) OF TORTS § 314A. This section identifies common carriers, innkeepers, possessors of land, and those required by law to protect others as the special relations necessitating a heightened duty. *Id.*

39. SCHUBERT ET AL., *supra* note 24, § 7.2(A)(1)(a), at 179.

40. *Id.* § 7.4, at 220. The American Law Institute noted that this section does not limit the types of special relationships; rather, courts have discretion to define other relationships as special and requiring a heightened duty. *See* RESTATEMENT (SECOND) OF TORTS § 314A.

41. *See* SCHUBERT ET AL., *supra* note 24, § 7.4, at 220.

42. *See id.* § 7.4(A), at 220 ("Greater care must be exercised if the participant is required to come in contact with an inherently dangerous object, or to engage in an activity likely to produce injury.").

43. *See* Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001).

44. SCHUBERT ET AL., *supra* note 24, § 7.2(A)(1)(b), at 181.

45. *Id.* at 182.

46. *Id.*

47. *Id.* § 7.2(A)(1)(c), at 183–84.

48. *Id.* at 184.

49. *Id.* at 185.

defendant's negligence causes the injury need not be foreseeable to satisfy the causation element of negligence.[50]

Finally, damages resulting from the breach, such as injury or death, must exist to satisfy the last and most conspicuous element of negligence.[51] Courts require that the damages profoundly impact the plaintiff's interests.[52] Thus, nominal injury or loss does not satisfy this final element of negligence.[53]

2. Vicarious Liability

When a third party employs someone who behaves negligently, that employer may be held vicariously liable for the employee's actions.[54] A plaintiff can seek recovery from an employer if an employee commits the tort while acting within the scope of employment.[55] Under this theory, an injured person can bring an action for negligence against the employee whose action or inaction caused the injury, as well as the employer.[56] Furthermore, the employer may be vicariously liable for negligence when the employee is merely carrying out tasks related to employment, even if they are performed after hours or outside of the place of business without compensation.[57] The rationale behind permitting vicarious liability emphasizes that employers control their employees' actions while they are on the job.[58]

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50. SCHUBERT ET AL., *supra* note 24, § 7.2(A)(1)(c), at 185.

51. *See* WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW, § 1.7, at 19 (1990).

52. *See id.*

53. *Id.*

54. SCHUBERT ET AL., *supra* note 24, § 7.2(D), at 202. "Vicarious liability usually arises under the doctrine of *respondeat superior* . . . a legal theory whereby a principal is made jointly and severally liable for the torts an agent commits." *Id.*

55. *Id.* at 203.

56. *See id.* "'Joint and several liability' means that one harmed by an agent's negligent conduct may, at his or her option, sue the agent, one or more principals separately, or any combination of agent and principals." *Id.*

57. *Id.*

58. RESTATEMENT (SECOND) OF AGENCY § 219, cmt. a (1958).

> The assumption of control is a usual basis for imposing tort liability when the thing controlled causes harm. . . . [T]he courts of today have worked out tests which are helpful in predicting whether there is such a relation between the parties that liability will be imposed on the employer for the employee's conduct which is in the scope of employment.

Id.

B. Imposing Liability on Coaches and Schools Under a Traditional Negligence Standard

1. Application of Negligence Elements to College Athletics

Due to the nature of their jobs, sports coaches bear the special heightened duty of minimizing the risk of injury to all participants, especially those under their control.[59] Courts currently assess coaches' duties by considering, for example, whether the coach provided proper supervision, training, and instruction regarding safety procedures.[60] Coaches must insist that their players maintain safe playing habits and adhere to the rules of the game to avoid preventable injuries, particularly in contact sports like football.[61] Additionally, coaches have a duty to warn against all dangers that are known or "should have been discovered in the exercise of reasonable care."[62] Because of this duty, coaches must supervise their players proportionately to the amount of danger inherent in the activity.[63] In other words, the more dangerous the sport, the higher the responsibility coaches bear to supervise their players.[64] Other factors in assessing coaches' liability include whether they furnished the proper safety equipment, provided experienced personnel and timely medical care, and demonstrated necessary concern for players with injuries.[65] Finally, the extent of a coach's duty depends on the age of the participants, as well as their skill and experience level.[66]

Sports coaches breach their special heightened duty if they do not prevent all reasonably foreseeable risks of harm to their players.[67] Because coaches are in the best position to avoid harm,[68] they must perform their specific duties without creating additional risks to their players.[69] Although coaches need not ensure the safety of their players, they must exercise the proper care and must conduct their teams in adherence to this heightened

59. McCaskey & Biedzynski, *supra* note 19, at 15.
60. SCHUBERT ET AL., *supra* note 24, § 7.4(A)(1)–(2), at 221–22.
61. *See id.* § 7.4(A)(2), at 222.
62. *Id.* § 7.4(A)(4), at 223–24.
63. *Id.* § 7.4(A)(5), at 224.
64. *Id.*
65. *See* McCaskey & Biedzynski, *supra* note 19, at 15–16.
66. *Id.* at 16.
67. *See id.* at 18.
68. *See* SCHUBERT ET AL., *supra* note 24, § 7.4, at 220.
69. *See id.* § 7.2(A)(1)(b), at 181.

duty.[70] By requiring players to participate in drills likely to cause an injury, a coach is in breach upon failure to provide additional supervision and competent medical personnel to avoid this risk.[71]

If the coach's action or inaction constitutes a breach of duty, and this breach was the direct or indirect cause of the athlete's injury or death, the plaintiff has met the third element of negligence.[72] Beyond this, coaches must protect their players from all foreseeable harm, even if the particular harm injures the player in an unforeseeable manner.[73] For instance, coaches may not avoid liability when their breach of duty further aggravates a player's preexisting condition, like asthma, and contributes to subsequent injury or death.[74]

In sports, negligent conduct usually results in severe physical injuries,[75] exemplifying the link between causation and damages.[76] Therefore, when a coach fails to provide proper instruction to avoid a foreseeable risk and that failure results in a life-threatening injury, the coach acts negligently.

2. Courts' Failure to Impose an Adequate Duty of Care on Coaches and Universities to Protect Student-athletes

Currently, coaches must act as would a reasonable person in the same or a similar situation.[77] However, the majority of courts do not extend a coach's duty beyond reasonable care.[78] Coaches generally have no duty to

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70. *See id.* § 7.4, at 220.

71. *See id.* § 7.4(A)(1), at 221–22. "A coach will often delegate these duties to an assistant, but delegation does not relieve the coach of the ultimate responsibility for proper supervision." *Id.* at 222; *see also id.* § 7.4(A)(5)–(6), at 224–25.

72. *See id.* § 7.2(A)(1)(c), at 183–84.

73. *See id.* at 185.

74. *See* SCHUBERT ET AL., *supra* note 24, § 7.2(A)(1)(c), at 185. Generally, as a matter of policy, courts adhere to the principle that defendants "take their victims as they find them." *Id.*

75. CHAMPION, *supra* note 51, § 1.7, at 19.

76. *See id.*

77. *See* Berg v. Merricks, 318 A.2d 220, 227 (Md. Ct. Spec. App. 1974); Lovitt v. Concord Sch. Dist., 228 N.W.2d 479, 483 (Mich. Ct. App. 1975); McGee v. Bd. of Educ., 226 N.Y.S.2d 329, 331–32 (App. Div. 1962); Vendrell v. Sch. Dist. No. 26C, Malheur County, 376 P.2d 406, 414 (Or. 1962); *see also* Morris v. Union High Sch. Dist. A., King County, 294 P. 998, 999 (Wash. 1931) (finding liability for a coach who forced a player to compete despite knowledge of his player's serious injuries).

78. *See* Champion, *supra* note 28, at 296–98. "We hold that a board of education, its employees, agents and organized athletic councils must exercise ordinary reasonable care to protect student[-]athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks." Benitez v. N.Y. City Bd. of Educ., 541 N.E.2d 29, 33 (N.Y. 1989).

ensure the safety of all players under their control[79] as they must merely maintain the specific duties set forth for coaches, which include protecting their players from foreseeable risks.[80]

The New York Court of Appeals' decision in *Benitez v. New York City Board of Education*[81] sets forth the traditional legal approach for assessing coaches' liability for injuries to players.[82] The court refused recovery to Sixto Benitez, a high school football player who suffered a broken neck during a varsity game.[83] The coach and assistant principal of the school knew the two teams playing were mismatched.[84] Additionally, the coach admitted to knowing that his players were fatigued and that their fatigue could lead to injury if he continued the game against the stronger opposing team.[85] Despite the court's recognition that Benitez's chances of a college scholarship probably compelled him to ignore a risk of injury,[86] the court failed to impose a heightened duty on the coach or the school because the plaintiff voluntarily participated in the game.[87]

Similarly, in *Orr v. Brigham Young University*,[88] the Court of Appeals for the Tenth Circuit did not find a special relationship between student-athletes and the university, thereby imposing only a minimum duty standard.[89] Vernon Orr played varsity football for Brigham Young University ("BYU") for two seasons and suffered multiple episodes of painful injuries to his back during participation in practices and games.[90] He brought suit against the university, contending breach of a heightened duty arising out of his special relationship with BYU as a student-athlete.[91]

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79. SCHUBERT ET AL., *supra* note 24, § 7.4, at 220.

80. *See* discussion *supra* Part II.B.1.

81. 541 N.E.2d 29 (N.Y. 1989).

82. *Id.* at 34.

83. *Id.* at 30–31.

84. *Id.* at 31.

85. *Id.*

86. *Id.* at 33–34.

87. *See Benitez*, 541 N.E.2d at 34. "The coach undeniably supervised plaintiff. . . . [T]here was no evidence at all that plaintiff was concerned about an unreasonably heightened risk of competition or that his coach directed him to disregard a risk he would not have otherwise assumed anyhow." *Id.* at 33–34. *But see* discussion *infra* Part IV.

88. No. 96-4015, 1997 U.S. App. LEXIS 6083 (10th Cir. Mar. 31, 1997).

89. *Id.* at *6–*7; *see also* Champion, *supra* note 28, at 296 ("[T]he courts have had real difficulty unearthing a relationship special enough to establish a duty on the part of colleges to either protect or administer to the injured collegian.").

90. *See* Orr v. Brigham Young Univ., 960 F. Supp. 1522, 1523–24 (D. Utah 1994).

91. Orr v. Brigham Young Univ., No. 96-4015, 1997 U.S. App. LEXIS 6083, at *2 (10th Cir. Mar. 31, 1997).

The Tenth Circuit, relying on *Beach v. University of Utah*,[92] affirmed the Utah district court's grant of summary judgment for BYU and rejected Orr's claim that universities owe a heightened duty to their student-athletes based on a special relationship.[93]

Comparing the facts of *Orr* to the *Beach* case, however, reveals an important distinction between a student-athlete who brings a negligence claim against the university and a non-athlete student who brings a similar claim.[94] The mutual dependence between student-athletes and universities, as well as the control universities have over student-athletes' lives, serve as the basis of their special relationship.[95] A typical private student, on the other hand, does not make such extensive contributions to the university as a student-athlete, so a heightened duty does not apply.[96] Therefore, the *Orr* court merely upheld *Beach* as previous precedent, not necessarily because of its applicability to the instant case.[97]

3. Affirmative Defenses Readily Available to Coaches and Universities Under a Traditional Negligence Standard

A defendant's strongest argument against a negligence claim is to deny "any breach of duty owed"[98] and establish that the defendant exercised reasonable care to avoid any foreseeable risks.[99] If the facts of the case reveal a special relationship requiring a heightened duty, and the court finds negligent conduct, the defendant may avoid liability by contending that the injured party implicitly or expressly assumed the risk of the harmful activity.[100] Also, a defendant may present evidence that the injured party's actions contributed to or escalated the risk of injury,[101] and the injured party should therefore be partially responsible.[102]

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92. 726 P.2d 413 (Utah 1986).

93. Orr v. Brigham Young Univ., No. 96-4015, 1997 U.S. App. LEXIS 6083, at *5–*7 (10th Cir. Mar. 31, 1997).

94. Michelle D. McGirt, Comment, *Do Universities Have a Special Duty of Care to Protect Student-athletes from Injury?*, 6 VILL. SPORTS & ENT. L.J. 219, 229–37 (1999).

95. *See* discussion *infra* Part IV.

96. *See* McGirt, *supra* note 94, at 235–37.

97. *See id.*

98. McCaskey & Biedzynski, *supra* note 19, at 43.

99. *See id.*

100. *See* Eugene C. Bjorklun, *Assumption of Risk and Its Effect on School Liability for Athletic Injuries, in* SPORTS AND THE LAW: A MODERN ANTHOLOGY 533, 534 (Timothy Davis et al. eds., 1999).

101. *See* McCaskey & Biedzynski, *supra* note 19, at 52–53.

102. *See id.*

a. Implied Assumption of Risk

A defense that a student-athlete implicitly assumed the risk of injury requires a showing that the student-athlete: (1) had some "actual knowledge" of a risk of injury; (2) "understood and appreciated the risk";[103] and (3) "voluntarily accepted the risk."[104] Moreover, student-athletes assume only the inherent risks commonly associated with their sports, not the extraordinary or unusual risks of harm or injury.[105] Consequently, universities and coaches may be held liable for injuries to their players when a breach creates risks not inherent to the sport.[106] In other words, a student-athlete on a university's football team assumes only foreseeable risks as a result of voluntary participation in team-related activities.[107]

Additionally, courts consider factors that may diminish the voluntary aspect of a student-athlete's participation when assessing assumption of risk claims.[108] For instance, a coach's instructions, comments, and behavior can have a definite effect on a student-athlete's decision to participate in a particular activity for which the student-athlete assumes the inherent risks.[109] Thus, courts' holdings will hinge on student-athletes' appreciation of these risks in light of the circumstances influencing their participation.[110]

b. Express Assumption of Risk: Waivers and Exculpatory Agreements

If an injured student-athlete signed an agreement expressly assuming the risk of injury prior to participating in team-related activities, the defendant university and its coaches may escape responsibility for their

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103. Bjorklun, *supra* note 100, at 534.

104. *Id.*

105. *Id.*

106. *Id.*

107. *See* Fortier v. Los Rios Cmty. Coll. Dist., 52 Cal. Rptr. 2d 812, 817–18 (Ct. App. 1996).

108. *See* Bjorklun, *supra* note 100, at 534–37.

109. *See* Everett v. Bucky Warren, Inc., 380 N.E.2d 653, 659 (Mass. 1978). In this case, the defendant hockey coach supplied the plaintiff student-athlete with a helmet that failed to protect the student-athlete from head injuries when a hockey puck hit him. *Id.* at 656–57.

> The plaintiff testified that he did not know of any dangers that he was exposed to by wearing the helmet. He believed, he said, that it would protect his head from injury. The helmet had been supplied to him by a person with great knowledge and experience in hockey, a person whose judgment the plaintiff had reason to trust, and it was given to him for the purpose implied, if not expressed, of protecting him.

Id. at 659; *see* McCaskey & Biedzynski, *supra* note 19, at 47.

110. *See* McCaskey & Biedzynski, *supra* note 19, at 47.

allegedly negligent conduct.[111] These waivers release the university from liability if the agreement specifically delineates the particular injury suffered.[112] However, courts do not uphold the waivers or releases if universities allow student-athletes to play only after they sign the agreement.[113] Additionally, these agreements may be declared void if they violate public policy.[114] Therefore, the same public interest considerations that demand a heightened duty standard between universities and student-athletes participating in team-related activities should void any waiver of liability.[115]

c. Comparative Negligence

Comparative negligence apportions liability based on the relative fault of both parties when the plaintiff escalated the chance of injury by voluntarily participating in a foreseeably harmful activity.[116] In a comparative fault jurisdiction, courts assess the student-athlete's negligence that led to injury to determine a ratio of fault.[117] Courts apply the comparative negligence doctrine by assigning percentages of responsibility based on the nature and circumstances of both parties' conduct as well as the extent to which their conduct caused the harm.[118] Hence, despite a student-athlete's participation in a "voluntary" conditioning drill, the factors surrounding the activity and injury—not solely the act of participation—dictate the validity of this defense.

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111. WEISTART & LOWELL, *supra* note 26, § 8.04, at 965.

112. Andrew Manno, *A High Price to Compete: The Feasibility and Effect of Waivers Used to Protect Schools from Liability for Injuries to Athletes with High Medical Risks*, 79 KY. L.J. 867, 870 (1991).

113. Bjorklun, *supra* note 100, at 536–37.

114. Manno, *supra* note 112, at 870; *see, e.g.*, Wagenblast v. Odessa Sch. Dist., 758 P.2d 968, 970 (Wash. 1988) ("Courts . . . are usually reluctant to allow those charged with a public duty, which includes the obligation to use reasonable care, to rid themselves of that obligation by contract.").

115. *See* Manno, *supra* note 112, at 870 (stating factors that may lead to a waiver being declared void, such as when a party is a minor or when duress exists).

116. *See* SCHUBERT ET AL., *supra* note 24, § 7.2(A)(1)(d), at 187.

117. *See id.* Instead of comparative negligence, some jurisdictions adhere to a contributory negligence rule, which bars plaintiffs from recovery if courts deem them at fault. *Id.*; *see* McCaskey & Biedzynski, *supra* note 19, at 52–53.

118. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 8 cmt. c (2000).

III. A HEIGHTENED DUTY OF CARE: THE EMERGING TREND OF COURTS RECOGNIZING A COACH AND UNIVERSITY'S SPECIAL RELATIONSHIP TO STUDENT-ATHLETES

Some courts have accepted the argument that a special relationship exists between the student-athlete and the coach or university.[119] These decisions indicate that a heightened duty exists by virtue of the mutual dependence between the university and the student-athlete,[120] as well as the university's "control and dominance over every aspect of [the] student-athlete's collegiate life."[121] Application of these decisions to current concerns in college athletics programs makes the recognition of a heightened duty imperative to protect student-athletes from high risks.[122]

A. Kleinknecht v. Gettysburg College[123]

In *Kleinknecht*, the parents of a deceased student lacrosse player convinced the Third Circuit to impose liability on the college for breaching a heightened duty.[124] Gettysburg College ("Gettysburg") recruited Drew Kleinknecht to play on their intercollegiate lacrosse team.[125] During a fall semester "skills and drills"[126] practice supervised by coaches who lacked cardio-pulmonary resuscitation ("CPR") training,[127] Kleinknecht suffered a fatal heart attack.[128] Kleinknecht had no previous medical history of heart problems.[129] In fact, examinations by college and family physicians within that same year revealed that Kleinknecht was in perfect health.[130] In addition, autopsy records showed no bruises or contusions to his body, eliminating the possibility that factors other than participation in the drills

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119. Andrew Rhim, *The Special Relationship Between Student-athletes and Colleges: An Analysis of a Heightened Duty of Care for the Injuries of Student-athletes*, 7 MARQ. SPORTS L.J. 329, 341 (1996).

120. *Id.* at 339–42.

121. Monica L. Emerick, *The University/Student-athlete Relationship: Duties Giving Rise to a Potential Educational Hindrance Claim*, 44 UCLA L. REV. 865, 891 (1997).

122. *See* discussion *infra* Part IV.

123. 989 F.2d 1360 (3d Cir. 1993).

124. *Id.* at 1375. Under a theory of vicarious liability, the university is liable for the negligence of its employees. *See* discussion *supra* Part II.A.2.

125. *Kleinknecht*, 989 F.2d at 1362–63.

126. *Id.* at 1363.

127. *Id.* The college employed two full-time trainers as well as twelve student trainers, all of whom were trained in CPR, but they were only required to attend spring semester lacrosse practices. *Id.*

128. *Id.* at 1365.

129. *Id.*

130. *Id.*

caused the heart attack.[131] Consequently, the plaintiffs attributed Kleinknecht's death to the college's negligent act of failing to provide medically trained staff at Kleinknecht's practice.[132]

The court agreed with the plaintiffs' contention that the lacrosse coaches and trainers, as agents of Gettysburg,[133] owed Kleinknecht a special duty for three reasons.[134] First, a special relationship existed between Gettysburg and Kleinknecht due to his recruitment to play lacrosse.[135] The court recognized that Kleinknecht's recruitment to Gettysburg created a "mutual dependence" between them.[136] "[Kleinknecht's] skill at lacrosse would bring favorable attention"[137] to the college, while also allowing him to fulfill his desire to receive a college education and play lacrosse.[138] Second, Gettysburg should have protected Kleinknecht against all foreseeable harms, such as a cardiac arrest, while he participated in team activities within the scope of his role as a student-athlete.[139] The court limited this special duty to provide adequate "preventive emergency measures"[140] to student-athletes only.[141] The Kleinknechts proved the foreseeability of a life-threatening injury in a contact sport like lacrosse.[142] Therefore, the special duty required that Gettysburg "take reasonable precautions against the risk of death while [Kleinknecht] was taking part in [Gettysburg's] intercollegiate lacrosse program."[143] The court also emphasized that the fact-finder, in determining whether the school breached its duty, must assess the foreseeability of injury and the adequacy of safety measures.[144] Third, public policy imposed a heightened duty on Gettysburg to reasonably protect Kleinknecht—a recruited student-athlete—from a foreseeable injury.[145] Considerations of "[t]he hand of history, . . . ideas of morals and justice, the

131. *Kleinknecht*, 989 F.2d at 1365.

132. *See id.* at 1369.

133. *See* SCHUBERT ET AL., *supra* note 24, § 7.2(D), at 202–03.

134. *Kleinknecht*, 989 F.2d at 1366, 1372.

135. *Id.* at 1366–69.

136. Rhim, *supra* note 119, at 343; *see Kleinknecht*, 989 F.2d at 1368.

137. *Kleinknecht*, 989 F.2d at 1368.

138. *See* Rhim, *supra* note 119, at 343.

139. *Kleinknecht*, 989 F.2d at 1370.

140. *Id.*

141. *Id.*

142. *Id.* "In addition to the testimony of numerous medical and athletic experts, Coach Janczyk, Head Trainer Donolli, and student trainer Moore all testified that they were aware of instances in which athletes had died during athletic competitions." *Id.*

143. *Id.*

144. *Id.*

145. *Kleinknecht*, 989 F.2d at 1371–72.

convenience of administration of the rule, and . . . social ideas as to where the loss should fall"[146] demand the enforcement of this special duty by the courts.[147]

B. Knapp v. Northwestern University[148]

The Seventh Circuit permitted Northwestern University ("Northwestern") to deem Nicholas Knapp ineligible to play basketball on its team because the court considered a heart attack to be a foreseeable and unreasonable risk that the university should avoid.[149] During Knapp's junior year in high school, recruiters from Northwestern offered him an athletic scholarship to play basketball after he graduated.[150] At the beginning of his senior year, Knapp suffered a heart attack, and doctors implanted a cardioverter-defibrillator to jump-start his heart if it stopped again.[151] Although Northwestern promised that it would still grant him the scholarship,[152] it did not allow him to play or practice with the team.[153] The District Court granted an injunction against Northwestern, holding that the Rehabilitation Act of 1973 protected Knapp's right to play intercollegiate basketball.[154] Nonetheless, the Seventh Circuit reversed and remanded the case, stating that Knapp's condition could not be considered a disability under the Rehabilitation Act.[155] Furthermore, Northwestern's decision to deny Knapp the opportunity to play on the team did not deprive him of a "major life activity,"[156] but rather it protected him from a risk of death.[157]

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146. *Id.* at 1372 (quoting Gardner v. Consol. Rail Corp., 573 A.2d 1016, 1020 (Pa. 1990)).

147. *See id.*

148. 101 F.3d 473 (7th Cir. 1996). The suit also named Rick Taylor, Northwestern University's athletic director, as a defendant. *Id.*

149. *Id.* at 485.

150. *Id.* at 476.

151. *Id.*

152. *Id.*

153. Knapp v. Northwestern Univ., 101 F.3d 473, 477 (7th Cir. 1996).

154. Knapp v. Northwestern Univ., 938 F. Supp. 508, 512 (N.D. Ill. 1996). Under the Rehabilitation Act, "[n]o otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a) (1994); *see also* Knapp v. Northwestern Univ., 101 F.3d 473, 478 (7th Cir. 1996).

155. Knapp v. Northwestern Univ., 101 F.3d 473, 485–86 (7th Cir. 1996).

156. *Id.* at 481.

157. *See id.* at 485. "Northwestern's experts agreed with the school's team doctors that Knapp's participation in competitive Big Ten basketball presented an unacceptable level of risk. . . . Almost all experts agreed that the internal defibrillator had never been tested under conditions like an intercollegiate basketball game or practice . . . ." *Id.* at 483–84.

The Seventh Circuit's decision implies that the athletic director, as an agent of the university,[158] and the university itself have a special duty to reasonably protect their student-athletes from foreseeable harms.[159] Northwestern adhered to this heightened duty as a result of the special relationship it would have experienced had it permitted Knapp to play as a student-athlete.[160] Applying the *Kleinknecht* rationale, the special relationship arose from Northwestern's active recruitment of Knapp to play basketball for the school, the foreseeable risk of injury while participating in team-related activities, and the public policy concerns derived from protecting student-athletes, which required Northwestern to act accordingly.[161] In light of this heightened duty, the court enabled Northwestern to "make its own determinations of substantial risk and severity of injury if they are based on reliable evidence,"[162] as the university would be required to protect Knapp from these risks if he played on their team.[163]

C. Lamorie v. Warner Pacific College[164]

The Oregon Court of Appeals in *Lamorie* held Warner Pacific College ("Warner Pacific") and its basketball coach, Dan Dunn, liable for negligence because Dunn asked student-athlete Douglas Lamorie to participate in a basketball scrimmage with the team despite Dunn's knowledge that Lamorie's participation would likely result in injury.[165] Lamorie had an athletic scholarship to Warner Pacific, but after undergoing surgery for an injury to his nose, his doctor recommended that he not participate in athletic activities.[166] Less than a month after surgery, Lamorie's nose was still swollen, his face bruised, and his vision impaired.[167] Dunn, who knew about the doctor's instructions, asked Lamorie to play in a team scrimmage, and Lamorie agreed even though "he did not feel well enough."[168]

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158. *See* SCHUBERT ET AL., *supra* note 24, § 7.2(D), at 202–03.

159. Rhim, *supra* note 119, at 347.

160. *See* Knapp v. Northwestern Univ., 101 F.3d 473, 485 (7th Cir. 1996).

161. Rhim, *supra* note 119, at 347 & n.126.

162. Knapp v. Northwestern Univ., 101 F.3d 473, 485 (7th Cir. 1996).

163. *See id.*

164. 850 P.2d 401 (Or. Ct. App. 1993). The suit also named Dan Dunn, head basketball coach at Warner Pacific College, as a defendant. *Id.*

165. *Id.* at 402.

166. *Id.* at 401.

167. *Id.* at 402.

168. *Id.*

Like the plaintiff in *Benitez v. New York City Board of Education*,[169] Lamorie feared losing his athletic scholarship, compelling him to follow the orders of his coach instead of his doctor.[170] However, in contrast to *Benitez*, the *Lamorie* court recognized the coach's special duty to protect his player from all foreseeable risks.[171] Adopting the student-athlete's argument, the court held: "Dunn had acted in reckless disregard of [the] plaintiff's condition and doctor's orders in asking him to play basketball when he knew or should have known that [the] plaintiff would feel improperly pressured to play because of fears of losing his basketball scholarship."[172] Dunn knew or should have known of the increased risk to Lamorie because it was foreseeable that his bruised and swollen face would impair his vision.[173] Implying the special relationship between the coach and the student-athlete,[174] the court imposed a heightened duty of care on the coach to avoid a "risk reasonably to be anticipated."[175]

D. Davidson v. University of North Carolina at Chapel Hill[176]

In *Davidson*, the North Carolina Court of Appeals ruled that a special relationship demands a heightened duty of care when a mutual dependence exists between the university and the student-athlete, and when the university "exert[s] a high degree of control over many aspects of a student[-]athlete's life."[177] As a member of the defendant university's junior varsity cheerleading squad ("JV squad"), plaintiff Robin Davidson fell approximately thirteen feet from the top of a "two-one-chair" pyramid formation onto the hardwood floor, causing permanent brain damage and severe bodily injury.[178] The JV squad did not have a coach or an advisor, and the university did not provide the squad's members with safety training, proper instruction, or supervision.[179] However, the JV squad did receive uniforms, transportation to games and cheerleading events, equipment, and facility use from the university, as well as physical

169. 541 N.E.2d 29 (N.Y. 1989); *see supra* text accompanying notes 77–82.
170. *Lamorie*, 850 P.2d at 402.
171. *See id.*
172. *Id.*
173. *Id.*
174. *See id.*
175. *Id.*
176. 543 S.E.2d 920 (N.C. Ct. App. 2001).
177. *Id.* at 927.
178. *Id.* at 922.
179. *Id.*

education credit.[180] In return for these benefits, the JV squad cheered at various university sporting events and activities as university representatives.[181] This representative status required the members of the JV squad to uphold the specific standards set for all student-athletes at the university, such as maintaining a minimum grade point average and abstaining from drinking alcohol in public.[182]

The court emphasized that it must determine the existence of a special relationship on a case-by-case basis and only after weighing both factual and public policy considerations.[183] Because the university received significant benefits from the JV squad and provided them with the means to continue their program, the court determined that this mutual dependence between the university and the JV squad necessitated a special relationship.[184] Accordingly, the court imposed a heightened duty on the university to ensure the safety of the JV squad members, thereby assigning liability to the defendant university.[185] Furthermore, the university's control over the student-athletes led to an expectation that the university would provide safety measures during participation in university-related cheerleading activities.[186] In other words, the plaintiff assumed that her participation in the pyramid formation was not dangerous because the university did not warn her about possible injury.[187] The university breached this duty of care to the cheerleader by failing to provide proper supervision, safety equipment, and warnings to the members of the JV squad considering the student-athletes' age and skill level.[188]

E. Kennedy v. Syracuse University[189]

Kennedy exemplified a university's adherence to a heightened duty as a result of a special relationship with a student-athlete.[190] Although the court granted the defendant university's motion for summary judgment[191]

180. *Id.* at 923.

181. *Id.*

182. *Davidson*, 543 S.E.2d at 923.

183. *See id.* at 927.

184. *Id.*

185. *Id.* at 928.

186. *Id.* at 927.

187. *Id.*

188. *See Davidson*, 543 S.E.2d at 928.

189. No. 94-CV-269, 1995 U.S. Dist. LEXIS 13539 (N.D.N.Y. Sept. 12, 1995).

190. *See* McGirt, *supra* note 94, at 221 (stating that "courts have recognized . . . [the] student-college relationship as special").

191. *Kennedy*, 1995 U.S. Dist. LEXIS 13539, at *10.

on the grounds that the plaintiff failed to establish the proximate cause element of his negligence claim,[192] the court chose not to dispute the plaintiff's argument that the university breached its duty of care to the student-athlete by failing to have an athletic trainer at a practice.[193] Russell Kennedy, a student-athlete on the gymnastics team, brought a negligence action against the university after fracturing both bones in his lower right arm during a routine practice.[194] He claimed that his coaches and teammates caused "compartment syndrome"[195] after they administered improper emergency care immediately following the injury.[196] Moreover, Kennedy argued that the university breached a duty to provide medical trainers at his practice.[197] Despite this alleged breach of the duty of care, the court accepted an expert doctor's affidavit presented by the university[198] that attributed the compartment syndrome directly to the injury and not as a result of the treatment.[199] By deciding this case based on Kennedy's inability to show proximate cause, the court implied that Kennedy met all elements of negligence except for proximate cause.[200] Kennedy properly showed that the university had a duty to provide a trainer at every practice so as to reasonably avoid all foreseeable risks, and the university breached its duty by not having a trainer at practice on the day the plaintiff suffered the injury.[201]

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192. *Id.* at *8.

193. *Id.* at *5–*6.

194. *Id.* at *1–*2.

195. The compartment syndrome is "characterized by swelling of the soft tissue in the forearm." *Id.* at *3.

196. *Id.* at *6. Kennedy needed another operation to alleviate the compartment syndrome. *Id.* at *3.

197. *Kennedy*, 1995 U.S. Dist. LEXIS 13539, at *10. "This claim is based on [the] plaintiff's allegation that the University adopted a custom and practice of providing trainers for all football and basketball practices and games and, as a result, it voluntarily assumed a duty to do the same for all other sports." *Id.*

198. *See id.* at *6–*8. The plaintiff did not present evidence to refute this finding. *Id.* at *5–*6. Therefore, the court granted summary judgment because the defendant met the proper burden and the plaintiff failed to show causation. *Id.* at *8.

199. *Id.* at *6. Specifically, the injury was caused when Kennedy slammed his wrist against the high bar. *Id.*

200. *See id.* at *5–*9. The court identified the elements of negligence and did not reject the plaintiff's claim that the university owed Kennedy, as a student-athlete, a heightened duty of care to have a trainer at practice to avoid foreseeable injuries. *Id.* at *5.

201. *See id.* at *10.

IV. DO OR DIE: A HEIGHTENED DUTY MUST BE IMPOSED ON COACHES AND UNIVERSITIES

The tragic deaths of Rashidi Wheeler, Eraste Autin, and other student-athletes as a result of their participation in intercollegiate team activities[202] necessitate a reexamination of the accountability of coaches and universities under traditional elements of negligence. The three factors enumerated in *Kleinknecht v. Gettysburg College*[203] and the rationale of similar decisions related to the current conditions surrounding student-athletes on NCAA-affiliated teams support a finding that coaches, as agents of a university,[204] should be held liable when they fail to protect their players from foreseeable injury.[205] A heightened duty on coaches to preserve the health and safety of their student-athletes is also necessitated by such factors as university recruiters' appealing offers to talented high school student-athletes, the student-athletes' enduring dedication to contribute to the success of their college teams, and society's moral and ethical concerns about preventing the college athlete's experience from becoming fatal.

A. Advantage University: Corruption of the Recruitment Process

The *Kleinknecht* court partially based its finding that a special relationship existed between coaches and student-athletes on the university's active recruitment of student-athletes, justifying a heightened duty.[206] The court's rationale identified the benefits gained by universities through the student-athletes' contributions to their teams, creating a favorable reputation for the university.[207] A successful sports dynasty invites world recognition, making the university more attractive to other potential students and student-athletes.[208] Universities also benefit from recruiting the best athletes because a good reputation attracts economic success in the form of "gate proceeds, television and licensing revenues, in addition to corporate sponsor and boosters contributions."[209]

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202. *See* discussion *supra* Part I.
203. 989 F.2d 1360 (3d Cir. 1993).
204. *See* SCHUBERT ET AL., *supra* note 24, § 7.2(D), at 202–03.
205. *See* discussion *supra* Part II.A.
206. *See Kleinknecht*, 989 F.2d at 1368.
207. *See id.*
208. *See* Rhim, *supra* note 119, at 340.
209. *Id.* at 339–40.

In return for these precious benefits, universities promise student-athletes a college education, a full scholarship,[210] and a chance to follow their athletic dreams.[211] Unfortunately, university agents, such as members of the coaching staff,[212] often corrupt the recruitment process, diminishing a student-athletes' bargaining power.[213]

All of the positive contributions intercollegiate athletics make to higher education are threatened by disturbing patterns of abuse grounded in institutional indifference, presidential neglect, and the growing commercialization of sport. "Big-time athletic programs promise a fast track to revenue, recognition and renown for the institution, but the institution's intrinsic educational value is easily lost in the promotion of these non-academic goals."[214]

Given that recruiters frequently emphasize the athletic abilities of their prospects[215] and rarely their academic or character achievements, the universities eventually break their promise of a college education to the student-athlete.[216] High schools notoriously inflate their student-athletes' grade point averages[217] to meet minimum NCAA requirements for

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210. *See id.* at 340–41. When a university recruits an eligible high school senior, the student-athlete, who plans on attending that university, must sign a National College Letter of Intent. Louis Hakim, *The Student-athlete vs. the Athlete Student: Has the Time Arrived for an Extended-Term Scholarship Contract?*, 2 VA. J. SPORTS & L. 145, 162–63 (2000). Then, the university provides the student-athlete with an athletic scholarship, covering only "educational expenses" like "tuition, room and board, and required course-related books." *Id.* at 161.

211. *See* Fred M. Hechinger, *About Education: Abuses in Athletics*, N.Y. TIMES, June 30, 1987, at C7. "What about the students? Star players are turned into celebrities. They and the undergraduates who watch the process 'are sent a twisted, distorted message.'" *Id.*

212. *See* SCHUBERT ET AL., *supra* note 24, § 7.2(D), at 202–03.

213. *See* Larry Elder, *Exploiting Student Athletes*, WASH. TIMES, May 2, 2000, at A16, LEXIS, News, News Group File, All. For example, a professor at the University of Tennessee studied the records of thirty-nine athletes and discovered "a pattern of changing grades from an 'F' to an 'Incomplete'" in order to maintain their academic eligibility. *Id.* Upon expiration of the student-athlete's scholarship, the incomplete grade "often reverted to an 'F.'" *Id.*

214. Hakim, *supra* note 210, at 167.

215. *See* NCAA BYLAWS, *supra* note 5, art. 13.02.9, at 88. "A prospective student-athlete ('prospect') is a student who has started classes for the ninth grade." *Id.*

216. Shannon Brownlee & Nancy S. Linnon, *The Myth of the Student-athlete*, U.S. NEWS & WORLD REPORT, Jan. 8, 1990, at 50. "Corruption and violence are nothing new in college athletics, but the money has increased the pressure on recruiters to pay more attention to athletic prowess than to character." *Id.* at 51.

217. *See* Hechinger, *supra* note 211.

> Promising athletes are often watched and encouraged as early as junior high school. Some schools encourage seventh and eighth graders to repeat a grade to give them an advantage in size and strength in high school sports. . . . They are often given special treatment and, when they enter college, they receive special grants, special accommodations and even special food. They will be enrolled in classes whose teachers understand the system and act accordingly.

recruitment.[218] Once their student-athletes are enrolled, coaches do not make their players' education a priority[219] and universities enable student-athletes to barely meet the eligibility requirements through academic tutoring and easier classes.[220] In the end, student-athletes lose a major benefit promised to them upon recruitment, namely a college education,[221] thereby placing student-athletes at a disadvantage.

Furthermore, the recruiters' promises to fulfill a prospect's dreams of using intercollegiate athletics as a stepping stone to professional athletics often fail to materialize.[222] A recent statistic reveals the National Football League drafts approximately two percent of NCAA football players to their professional teams, and the National Basketball Association drafts only about one percent from the NCAA.[223] Student-athletes attend classes and tutoring sessions in order to remain eligible and continue to play for the team, with hopes of signing a multi-million dollar contract to play professionally.[224] "Some view college as a mere formality . . . . But for every athlete who makes it to the big time there are hundreds more who neglect their studies in the mistaken belief that they too can cash in on their physical skills for a shot at a sweeter life."[225] Therefore, if these aspirations do not materialize, student-athletes might possess a worthless diploma, little actual education, and possibly fewer significant employment

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Id. (revealing student-athletes' academic accommodations from junior high school through college).

218. *See* NCAA BYLAWS, *supra* note 5, art. 14.3.1.1, at 141–42.

219. Emerick, *supra* note 121, at 870–71 (describing two cases in which student-athletes alleged their respective universities kept them eligible to participate on the teams by suggesting enrollment in easy courses). "[S]ome athletic directors schedule games to get their teams on prime-time television, without paying attention to the classes the players will miss." Hechinger, *supra* note 211.

220. *See* Elder, *supra* note 213 (describing an example of the University of Tennessee "coddl[ing]" student-athletes "by lowering academic standards and assigning Mickey Mouse classes" to them). The NCAA Bylaws provide a general framework for the amount of academic support services a university can give their student-athletes. NCAA BYLAWS, *supra* note 5, art. 16.3, at 206.

221. *See* Hakim, *supra* note 210, at 161–63 (describing recruiters' promise of a college education).

222. *See* Brownlee & Linnon, *supra* note 216, at 50 ("[O]nly a tiny fraction [of student-athletes] make it to the pros.").

223. Tara Tuckwiller, *Falling Short: Less Than Half of WVU, MU Football Players Graduate*, CHARLESTON GAZETTE, Sept. 26, 2001, at P1A, LEXIS, News, News Group File, All. The Knight Foundation Commission of Intercollegiate Athletics, a philanthropic foundation that formulates studies and reports suggestions regarding academic enhancement in NCAA sports, reported these statistics. *Id.*

224. *See* Brownlee & Linnon, *supra* note 216, at 52.

225. *Id.*

opportunities.[226]

As a result, realistic consequences of the recruitment process provide universities with countless benefits, while leaving the student-athletes with no bargaining power and even fewer benefits.[227] The NCAA Bylaws try to even the unfair power differential between recruiting universities and prospects by severely limiting the number and means of contact[228] so recruiters have a harder time taking advantage of an eager prospect. During the recruitment process, universities promise a free ride to higher education, a chance in the spotlight, and a possible future in the pros.[229] In return, student-athletes give their blood, sweat, tears, and sometimes their lives for the success of the team and the school's reputation.[230] According to *Kleinknecht*, this mutual dependence[231] and the university's power to control the student-athletes' lives create a special relationship that imposes a heightened duty on coaches and universities to protect their players from the foreseeable risk of injury.[232]

B. Giving Your Life to the Team: Dedication of Student-athletes to Their Teams

On April 18, 2001, the NCAA adopted a bylaw regulating voluntary athletically-related activities such as preseason conditioning drills.[233] Because these summer conditioning drills would cause teams to exceed the limited number of practices allowed during the regular playing season,[234] NCAA-affiliated teams must adhere to the guidelines set forth in the NCAA Bylaws or suffer disciplinary repercussions.[235]

> (a) . . . [N]o athletics department staff member who observes the activity (e.g., strength coach, trainer, manager) may report back to the student-athlete's coach any information related to the activity;
>
> (b) . . . Neither the institution nor any athletics department staff member may require the student-athlete to participate

226. *See* Hechinger, *supra* note 211.

227. *See id.*

228. NCAA BYLAWS, *supra* note 5, art. 13.1, at 89–99.

229. *See* Hechinger, *supra* note 211 (describing the student-athlete's expectation of making it to the pros as a "callously implied promise").

230. *See, e.g.*, discussion *supra* Part I.

231. Rhim, *supra* note 119, at 341–42.

232. *Id.*

233. *See* NCAA BYLAWS, *supra* note 5, art. 17.02.13, at 222.

234. *See id.* art. 17.1.1, at 222.

235. *See id.* art. 19, at 311–19.

> in the activity at any time. . . ;
> (c) The student-athlete's attendance and participation in the activity (or lack thereof) may not be recorded for the purpose of reporting such information to coaching staff members or other student-athletes; and
> (d) The student-athlete may not be subject to penalty if he or she elects not to participate in the activity. . . .[236]

Despite clear and specific regulations, Northwestern trainers conducted a preseason conditioning drill on August 3, 2001 and reported the results to the coaching staff in violation of article 17.02.13(a).[237] In general, if players know their performance during these drills will influence the coach's decisions to put them in during games, these players will be compelled to attend and complete the drills at any cost,[238] no longer making attendance "voluntary." This pressure causes student-athletes to ignore the serious health risks of energy-enhancing supplements[239] as well as the regulations prohibiting their use.[240] These players strive to successfully contribute to the team, even if the means to this end require breaking the rules. Additionally, the psychological aspect of group sports like football presents another severe risk—in the spirit of competition, these student-athletes will be pressured by their teammates to continue to play regardless of the fatal consequences.[241] In effect, the widespread use of energy-enhancing drugs and peer pressure in sports pose foreseeable health risks to student-athletes and coaches should create practices with full awareness of these influences.[242] Because of these inherent dangers, the special relationship between coaches and student-athletes imposes a heightened duty on the coaches to avoid conducting activities, such as conditioning drills in 102-degree heat, that would exacerbate these risks.

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236. *Id.* art. 17.02.13, at 222.

237. *NCAA Reviewing Northwestern Report*, *supra* note 5; *see* NCAA BYLAWS, *supra* note 5, art. 17.02.13(a), at 222.

238. *See* Bagnato, *supra* note 22.

> The sessions are termed "voluntary," but it is understood that players who don't participate could lose playing time in the fall. . . . NCAA rules bar coaches from having contact with players until three weeks before the first game, but that doesn't stop coaches from pressuring players to work out during the summer.

Id.

239. *See generally* Benedict Carey, *Risks of Ephedra Usage in Spotlight*, L.A. TIMES, Aug. 27, 2001, at S1 (presenting the major health risks of ephedra-use to the cardiac and nervous systems and exposing the prevalence of use among athletes and the general population despite these possibly fatal risks).

240. NCAA BYLAWS, *supra* note 5, art. 31.2.3.1(a), at 390–92.

241. Abrahamson, *supra* note 6.

242. *See* discussion *infra* Part IV.B.1–2.

1. Ephedrine Use

When players know that their performance at preseason conditioning drills will determine the coach's decision in planning their playing time during the season,[243] they feel the pressure of competition among their teammates[244] and often resort to using supplements.[245] With two strenuous workouts each day, the physical difficulty in conditioning practices surpasses any typical two-minute drill during regular season practices.[246] Student-athletes know the consequences if they struggle during these challenging drills, so they take energy supplements such as ephedrine to heighten their endurance level and to "activate the . . . nervous system [by] opening bronchial airways, increasing blood pressure and heart rate, releasing adrenaline and putting the body into a state of full alert."[247] Despite the NCAA's ban on substances like ephedrine[248] and the drugs' severe health risks,[249] nearly sixty percent of 21,000 male and female college athletes in the NCAA use dietary supplements,[250] and more than fifteen percent of these users obtained them from a coach, trainer, team physician, or other college official.[251]

Wheeler and other student-athletes on the Northwestern football team took ephedrine-laced supplements to gain an extra boost of energy during the crucial drills.[252] The pressure on Wheeler and his teammates to perform

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243. Bagnato, *supra* note 22.

244. *See* discussion *infra* Part IV.B.2.

245. Abrahamson, *supra* note 6.

246. Drehs, *supra* note 11. "Two-a-days" are typical off-season workouts in which the players participate in conditioning drills two times a day. *See id.*

247. Carey, *supra* note 239.

248. NCAA BYLAWS, *supra* note 5, art. 31.2.3.1(a), at 390. "The presence in a student-athlete's urine of a substance and/or metabolite of such substance belonging to a class of drugs currently banned by the NCAA may be cause for loss of eligibility." NAT'L COLLEGIATE ATHLETIC ASS'N, 2001–02 NCAA DRUG-TESTING PROGRAM PROTOCOL art. 1.1 (2001), *at* http://www.ncaa.org/sports_sciences/drugtesting/program_protocol.html.

249. Carey, *supra* note 239.

> The products' amphetamine-like punch, they say, hits a small percentage of apparently healthy people very hard, putting them at increased risk of heart palpitations, stroke, and cardiac arrest . . . Add 100 degrees of summer heat, a heavy quilt of humidity—plus the exercise—and you put an enormous strain on the heart, doctors agree.

Id.

250. *Coaches, Congress Put Young Athletes at Risk*, USA TODAY, Aug. 16, 2001, at 14A [hereinafter *Young Athletes at Risk*]. The NCAA also reported that 3.9 percent of college athletes used ephedrine last year, an increase from 3.5 percent in 1997. Gary Mihoces, *Ephedrine: Safe or Lethal?*, USA TODAY, Nov. 8, 2001, at 2C.

251. *Young Athletes at Risk*, *supra* note 250.

252. Abrahamson, *supra* note 6.

successfully at Northwestern in order to get drafted by the NFL intensified their desire to complete the drill.[253] Although they trained six to seven days a week during the summer, the Northwestern football players still took the supplements for an extra edge.[254] Wheeler took a mixture of two supplements, Ultimate Punch and Xenadrine, both containing ephedrine.[255] Another player who took Ultimate Orange, which also contains ephedrine, claimed he took the stimulant because he was "worried about these [conditioning drills]."[256] In fact, one player recalled the conversations in the locker room just before the drill: "'A lot of them were saying it was an energy drink like Gatorade, something with electrolytes, which would help us that day. . . . [Players] were just going around putting it in our drinks.'"[257] These comments evince the student-athletes' understanding that the coach's assessment of their performance during "voluntary" drills would determine their success on the team,[258] and that taking supplements was a common means to increase their performance.[259]

2. Group Mentality

Theories about group behavior or "mob mentality" provide a psychological explanation for horrific events throughout history,[260] such as the Holocaust and lynchings in the South.[261] In colleges, many studies attribute fraternity hazing and binge drinking to this psychological phenomenon.[262] Mob mentality describes the force driving a group to commit acts together that its members would not otherwise commit alone.[263] The security of being in a group gives each member the courage to behave extraordinarily.[264] Consequently, adherence to the group causes

253. *See id.*

254. *Id.*

255. *Id.*

256. *Id.*

257. *Id.*

258. *See* Bagnato, *supra* note 22.

259. *See* Carey, *supra* note 239.

260. *See generally* Note, *Feasibility and Admissibility of Mob Mentality Defenses*, 108 HARV. L. REV. 1111 (1995) [hereinafter *Mob Mentality Defenses*] (refuting the use of psychological testimony of a defendant's "mob mentality" as an excuse defense for criminal behavior).

261. *Nightline: Racism in the Extreme, When Does a Social Ill Become a Mental Illness* (ABC television broadcast, May 30, 2001), LEXIS, News, News Group File, All.

262. *See* Randy McClain, *Brutal Fraternity Hazing Tough Tradition to Beat*, ADVOCATE, Apr. 3, 2001, at 7B.

263. *See* Susan Blocker, *Mob Mentality Possible Cause*, WIS. STATE J., Nov. 1, 1993, at 3A, LEXIS, News, News Group File, All.

264. *See id.*

its members to lose sight of their own desires, hesitations, and limits, possibly leading them to participate in dangerous activities.[265]

Group behavior in college football is a goal that most coaches aim to attain from their student-athletes.[266] Some sports commentators have compared the type of group mentality promoted by college football coaches "to that of dogs or skinheads in a pack."[267] Because cohesion and cooperation among team members often results in a winning record, coaches of team sports, like football, promote player interdependence and interaction by constructing a collective identity: the team.[268] The team's primary goal is to win, so all players on the team must sacrifice their desires and hesitations to achieve that goal.[269]

College football players typically develop a support network based on their team identity and end goal of winning.[270] Accordingly, college football players will encourage each other during games and practices to continue exerting themselves despite a player's obvious signs of failing health.[271] For example, as Wheeler struggled to complete the drill—his breathing heavily labored and his body ready to collapse—his teammates yelled, "'Let's go, Shidi. Come on! Keep moving!'"[272] After collapsing once, Wheeler "stood up and walked about five yards before falling again."[273] Many attribute Wheeler's drive to continue running the drill to the group mentality that caused him to ignore his pain.[274] A comment by a teammate of the late Devaughn Darling exemplifies this mentality further: "'One thing I will take from him is that he never quit . . . [a]nd no matter what comes in my life, I won't quit until I pass out like he did. He gave it everything he had. What a way to go.'"[275]

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265. *See Mob Mentality Defenses*, *supra* note 260, at 1111.

266. David P. Yukelson, *Group Motivation in Sport Teams*, *in* PSYCHOLOGICAL FOUNDATIONS OF SPORT 229, 231 (John M. Silva III & Robert S. Weinberg eds., 1984).

267. Steve Jacobson, *Sherrill Can Teach Brutality with the Best*, L.A. TIMES (Southland ed.), Sept. 19, 1992, at C6, 1992 WL 2862717.

268. Yukelson, *supra* note 266, at 230.

269. *See id.* at 233–34.

270. *See generally id.* at 230–31 (discussing "excellence and affiliation" as being an athlete's main incentives for joining sport groups, and describing how sports teams are comprised of players that are "interdependent").

271. *See* Abrahamson, *supra* note 6.

272. *Id.*

273. *Id.*

274. *See* Doug Russell, *We Don't Know When to Say When*, SPORTING NEWS RADIO (Aug. 6, 2001), *at* http://radio.sportingnews.com/profiles/doug_russell/20010806.html.

275. Penner, *supra* note 16 (quoting Florida State linebacker Michael Boulware, teammate and roommate of deceased Devaughn Darling).

C. How Far Can a Coach Go? Public Policy Concerns

Courts balance moral and ethical considerations against the consequences for the parties of imposing a duty to prevent another's harm.[276] Issues of fairness are significant after courts assess factors such as the nature of the relationship, the gravity of the harm, and the reprehensibility of the defendant's conduct.[277]

> During the last century, liability for [omissions] has been extended still further to a limited group of relations, in which custom, public sentiment and views of social policy have led the courts to find a duty of affirmative action. In such relationships the plaintiff is typically in some respect particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare. In addition, such relations have often involved some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain.[278]

Public policy concerns may warrant a heightened duty if the defendant could easily prevent a potentially fatal risk to the plaintiff, and the parties' relationship provokes the plaintiff to think the defendant should protect the plaintiff from that risk.[279]

The NCAA Bylaws reflect a public interest to protect student-athletes from self-interested universities[280] that gain significant economic and non-economic benefits from their success in athletics.[281] Despite the NCAA's strict framework, universities and coaches make student-athletes vulnerable to harm because they exert control over student-athletes' lives.[282]

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276. Orr v. Brigham Young Univ., 960 F. Supp. 1522, 1527 (D. Utah 1994) (citing Higgins v. Salt Lake County, 855 P.2d 231, 236–37 (Utah 1993)).

277. *See* Emerick, *supra* note 121, at 885.

278. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984); *see also* Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 926–27 (N.C. Ct. App. 2001) (quoting KEETON ET. AL., *supra* § 56).

279. *See* Emerick, *supra* note 121, at 885.

280. *See* THE RULES OF THE GAME: ETHICS IN COLLEGE SPORT 195 (Richard E. Lapchick & John Brooks Slaughter eds., Macmillan Publ'g Co. 1989) [hereinafter RULES OF THE GAME].

281. *See* discussion *supra* Part IV.A.

282. *See* Emerick, *supra* note 121, at 899–903 (finding a potential educational hindrance claim against the university as a result of the time constraints and physical demands on student-athletes).

Therefore, courts address public policy concerns when a university finds a loophole in the NCAA rules by determining accountability for the injury caused.[283] For instance, when the NCAA deems a preseason conditioning drill as "voluntary,"[284] but student-athletes know that their participation will dictate their future on the team, the court will consider policy and impose liability on the university for a student-athlete's death while participating in the drill.[285] One commentator voices the following public policy argument: "[I]t's time we stop shuffling around [the universities'] culpability for the sake of protecting this cherished notion of football's tough-guy culture. When that culture turns deadly, we must hold accountable its keepers."[286] In public policy discussions, courts consider factors that escalate the risk of injury or death,[287] such as pressure to succeed, ephedrine use, and group psychology.[288] Indeed, the court's imposition of a heightened standard of care for public policy reasons represents the best interests of student-athletes.[289]

V. CONCLUSION

It is time for the courts to answer this question: Are colleges institutions of higher learning or football factories? The NCAA Bylaws enforce the integrity of the educational system by prescribing rules that foster growth and secure protection for student-athletes.[290] Eligibility and academic course requirements delineated within the NCAA Bylaws[291] represent the NCAA's intention to prepare student-athletes for the future, even if a multi-million dollar contract to play on a professional sports team never transpires.[292]

"Universities are supposed to be about finding the truth."[293] Nonetheless, investigations into preseason conditioning drills in conjunction with the application of the *Kleinknecht v. Gettysburg*

283. *See id.* at 885.

284. NCAA BYLAWS, *supra* note 5, art. 17.02.13, at 222.

285. *See Kleinknecht.*, 989 F.2d at 1372.

286. Plaschke, *supra* note 13.

287. *See* Emerick, *supra* note 121, at 885.

288. *See* discussion *supra* Part IV.A–B.

289. *See* Emerick, *supra* note 121, at 876.

290. *See* RULES OF THE GAME, *supra* note 280, at 195.

291. *See* NCAA BYLAWS, *supra* note 5, art. 14, at 129–74.

292. *See* discussion *supra* Part IV.A.

293. Diane Pucin, *Northwestern Avoids Search for the Truth*, L.A. TIMES, Oct. 11, 2001, at D1.

College[294] factors reveal the dangerous truth: Coaches and universities' athletic departments subject their student-athletes to risks of death despite the NCAA rules.[295]

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294. 989 F.2d 1360 (3d Cir. 1993).

295. *See NCAA Reviewing Northwestern Report*, *supra* note 5. Coach Randy Walker's preseason conditioning drill was in violation of a newly-adopted provision of the NCAA Bylaws, requiring that results of these "voluntary" workouts not be reported to the coach or his staff. *Id.*

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