

Emerging Legal Issues in Sports Medicine: A Synthesis, Summary, and Analysis

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EMERGING LEGAL ISSUES IN SPORTS MEDICINE: A SYNTHESIS, SUMMARY, AND ANALYSIS

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INTRODUCTION

The recent tragic deaths of Minnesota Vikings offensive lineman Korey Stringer and Northwestern University football player Rashidi Wheeler raise important legal issues concerning the medical care provided to athletes. Since 1990 there has been a significant increase in sports medicine related litigation.¹ Because of the increasing economic benefits of playing sports, such as college scholarships or multi-million dollar professional contracts, injured athletes have a strong incentive to seek compensation for harm caused by negligent sports medicine care rendered by team physicians, athletic trainers, and others.

Athletes often encounter significant psychological, societal, and economic pressure from coaches and other team officials to play a sport despite an injury or illness.² Injured athletes have sought recovery against their teams and team officials for requiring them to "play hurt" or for other tortious conduct causing or aggravating athletic injuries.

Alternatively, notwithstanding the athletic participation recommendations of sports medicine personnel, athletes may wish to continue playing despite the risk of harm to their health. In some instances, athletes with physical abnormalities have asserted a legal right to participate in competitive athletics or have requested various accommodations to enable their participation in a particular sport, even if doing so exposes them to a significant risk of serious injury or death.³

This Article is a comprehensive survey, synthesis, and analysis of legal issues relating to the provision of sports medicine care to youth, high school, college, and professional athletes. It discusses athletes' injury compensation claims against providers of sports medicine care and available defenses to such actions. The Article also considers the rights of athletes, with physical abnormalities to participate in competitive

¹ See Craig A. Isaacs, Comment, *Conflicts of Interest for Team Physicians: A Retrospective in Light of Gathers v. Loyola Marymount University*, 2 ALB. L.J. SCI. & TECH. 147, 152 (1992).

² See James H. Davis, "Fixing" the Standard of Care: Motivated Athletes and Medical Malpractice, 12 AM. J. TRIAL ADVOC. 215, 216-20 (1988) (discussing the various pressures athletes face); Isaacs, *supra* note 1, at 158 (describing the various pressures that influence an athlete).

³ See Davis, *supra* note 2, at 227 (noting that athletes may accept a known risk of injury or even death giving rise to an assumption of risk defense).

athletics, and the degree of accommodation that must be provided to ensure their participation. Its objective is to trace the evolution of the "law of sports medicine," to identify developing common law trends, and to assist attorneys and judges in understanding this complex and expanding area of the law.

I. MALPRACTICE LIABILITY OF SPORTS MEDICINE PROVIDERS

A. *Team Physician*

Professional teams and collegiate educational institutions generally hire a physician or a group of physicians to provide medical care to their athletes. Many high schools also select a physician to provide pre-participation physical examinations and emergency medical care to athletes participating in interscholastic athletics. A "team physician" provides medical services to athletes that are arranged for, or paid for, at least in part, by an institution or entity other than the patient or his parent or guardian.⁴ A team physician may receive compensation for such services or render them gratuitously.

The team physician's primary responsibility is to provide for the physical well-being of athletes.⁵ Specific duties may include providing pre-season physical examinations; diagnosing, treating, and rehabilitating athletic injuries; and providing medical clearance for an athlete to play the sport. The team physician may also be responsible for overseeing all sports medicine services provided to a team's athletes and for the supervision of physician assistants, athletic trainers, student assistants, physical therapists, and nurses providing medical care to athletes.

The team physician must provide medical treatment and advice consistent with an individual athlete's best health interests because there is a physician-patient relationship

⁴ Joseph H. King, Jr., *The Duty and Standard of Care for Team Physicians*, 18 HOUS. L. REV. 657, 658 (1981).

⁵ See *Team Physician Consensus Statement*, 32 MED. & SCI. IN SPORTS AND EXERCISE 877, 877-78 (2000) (asserting that "by educating decision makers about the need for a qualified team physician," the Team Physician Consensus Statement is helping to "ensure that athletes and teams are provided the very best medical care").

between them.⁶ Although one of the team physician's objectives is to avoid the unnecessary restriction of athletic activity, his paramount responsibility should be to protect the competitive athlete's health. Team physicians may face extreme pressure from coaches, team management, fans, or the athlete to provide medical clearance to participate or treatment enabling immediate return to play. The team physician's judgment, however, should be governed only by medical considerations, rather than by the team's need for the services of the player or the athlete's strong desire to play.⁷

1. Standard of Care

During the care of a patient, a physician "must have and use the knowledge, skill and care ordinarily possessed and employed by members of the [medical] profession in good standing."⁸ Malpractice liability is based on harm caused by a physician's negligent conduct in light of the general knowledge and skill of the medical profession. The law generally permits the medical profession to establish the bounds of appropriate physician care and treatment under the circumstances.⁹

⁶ See King, *supra* note 4, at 661-85 (discussing the existence of the doctor-patient relationship and the nature of the duties owed by a team physician). There is also a fiduciary relationship between the physician and an athlete. See, e.g., *Nelson v. Gaunt*, 178 Cal. Rptr. 167, 172 (Cal. Ct. App. 1981).

⁷ See King, *supra* note 4, at 691 ("The professional standard of care should be conceived in a way that makes it clear that the interests of the athlete are paramount."). Several other commentators have discussed the potential conflicts inherent in the team physician's dual obligations to an athletic team and its athletes. See Hayden Opie, *The Team/Doctor/Athlete Legal Relationship*, 2 SPORTS TRAINING, MED. & REHAB. 287 (1991); Charles V. Russell, *Legal and Ethical Conflicts Arising from the Team Physician's Dual Obligations to the Athlete and Management*, 10 SETON HALL LEGIS. J. 299 (1987); Isaacs, *supra* note 1, at 147; Twila Keim, Comment, *Physicians For Professional Sports Teams: Health Care Under the Pressure of Economic and Commercial Interests*, 9 SETON HALL J. SPORT L. 196 (1999); Scott Polsky, Comment, *Winning Medicine: Professional Sports Team Doctors' Conflicts of Interest*, 14 J. CONTEMP. HEALTH L. & POL'Y 503 (1998).

⁸ W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 187 (5th ed. 1984).

⁹ See Page Keeton, *Medical Negligence—The Standard of Care*, 10 TEX. TECH L. REV. 351, 359 (1979) (acknowledging that the law permits the customary practice standard in medical malpractice because the jury is not able to appreciate the complexity of medical decisions); Richard N. Pearson, *The Role of Custom in Medical Malpractice Cases*, 51 IND. L. J. 528, 535-37 (1976) (explaining the need for a customized standard in medical malpractice). In some states, the standard is whether the physician's conduct was reasonable under the circumstances, with medical expert testimony being admissible but not conclusive. See *Harris v. Robert*

Team physicians often are either family practitioners or orthopedic surgeons. Specialists such as internists, cardiologists, pediatricians, dermatologists, and gynecologists also practice sports medicine. Although the American Board of Medical Specialties does not currently recognize a specialized practice area for sports medicine, the American Osteopathic Association does have a certification board for sports medicine.¹⁰

Team physicians have a legal duty to conform to the standard of care corresponding to their actual specialty training. For example, an orthopedic surgeon should be held to the standard of an orthopedist providing sports medicine care.¹¹ Historically, courts have not recognized sports medicine as a separate medical specialty,¹² presumably because no national medical specialty board certification or standardized training previously existed. This judicial view, however, may change as sports medicine becomes more standardized as an area of specialization within the medical profession. Some commentators assert that because a team physician implicitly holds himself out as having special competence in sports medicine, he should be treated as a specialist and held to an awareness of "fundamentals which all practicing specialists in

C. Groth, M.D., Inc., 663 P.2d 113, 117-19 (Wash. 1983); *Hood v. Phillips*, 554 S.W.2d 160, 165-66 (Tex. 1977). *But see Helling v. Carey*, 519 P.2d 981 (Wash. 1974) (holding an ophthalmologist negligent as a matter of law for failing to administer glaucoma test even though he conformed to medical custom). It should be noted that *Helling* has not been followed by other courts and has been convincingly criticized. See Joseph H. King, Jr., *In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula*, 28 VAND. L. REV. 1213, 1247-51 (1975); Pearson, *supra*, at 528-34.

¹⁰ A physician certified by the American Boards of Emergency Medicine, Internal Medicine, Family Practice, or Pediatrics may earn a certificate of added qualification in sports medicine by passing a written examination. Physicians may also obtain training in sports medicine by serving a one-year fellowship offered by various clinics.

¹¹ See *Mikkelsen v. Haslam*, 764 P.2d 1384, 1386 (Utah Ct. App. 1988) (noting that the physician was found negligent because he departed from orthopedic medical standards); Jay M. Zitter, Annotation, *Standard of Care Owed to Patient by Medical Specialist as Determined by Local, "Like Community," State, National, or Other Standards*, 18 A.L.R. 4TH 603, 607 (1982 & Supp. 1992) (summarizing the applicable standard of care for specialists).

¹² See, e.g., *Fleischmann v. Hanover Ins. Co.*, 470 So. 2d 216, 217 (La. Ct. App. 1985) (rejecting the sub-specialty of sports medicine); cf. *Dotti v. Va. Bd. of Med.*, 407 S.E.2d 8, 12 (Va. Ct. App. 1991) (finding that there were no state board of medicine standards that a chiropractor must satisfy in order to advertise himself as a sports medicine specialist).

sports medicine should know, based on the types of athletes with whom the physician is involved."¹³

In malpractice suits involving a medical specialist, the trend is to apply a national standard of care because national specialty certification boards exist to ensure standardized training and certification procedures.¹⁴ A national standard of care for team physicians is preferable because appropriate sports medicine care and treatment should not vary with the geographic location in which it is provided. As sports medicine continues to develop as a medical specialty, it is likely that courts will hold that a national standard of care applies to team physicians.¹⁵ This will facilitate the provision of quality sports medicine care to athletes and help to establish a nationwide pool of experts available for sports medicine malpractice cases.

The applicable legal standard of physician conduct is "good medical practice" within the physician's type of practice.¹⁶ In other words, what is commonly done by physicians in the same specialty generally serves as the standard by which a physician's conduct is measured. Courts traditionally have equated "good medical practice" with what is customarily and usually done by physicians under the circumstances.¹⁷

There are few reported appellate cases discussing the appropriate standard of care for a malpractice suit involving sports medicine physicians. Generally, an athlete must establish physician malpractice liability through the use of expert testimony.¹⁸ In *Rosensweig v. State*,¹⁹ a New York intermediate appellate court held that physicians who had provided a boxer with the customary pre-fight medical examination were not

¹³ Russell, *supra* note 7, at 306-07; see also JOHN C. WEISTART & CYM H. LOWELL, *THE LAW OF SPORTS* § 8.08, at 986-87 (1979).

¹⁴ See Zitter, *supra* note 11, at 607-08 (comparing the views that specialists should be held to either local standards or national standards).

¹⁵ See King, *supra* note 4, at 695-96 (explaining that since team physicians perform various services "on the road," varying the standard of care by location makes little sense).

¹⁶ KEETON ET AL., *supra* note 8, § 32, at 189.

¹⁷ *Id.*

¹⁸ See *Gardner v. Holifield*, 639 So. 2d 652, 656 (Fla. Dist. Ct. App. 1994) (relying on expert testimony of malpractice to preclude summary judgment); *Toppel v. Redondo*, 617 N.E.2d 403, 404 (Ill. App. Ct. 1993) (noting that expert testimony is relevant to prove medical malpractice); *Mikkelsen v. Haslam*, 764 P.2d 1384, 1386 (Utah Ct. App. 1988) (using expert testimony to prove medical malpractice);

¹⁹ 171 N.Y.S.2d 912 (3d Dep't 1958), *aff'd*, 158 N.E.2d 229 (N.Y. 1959).

liable for malpractice.²⁰ The court refused to rely on expert medical testimony that, even though a standard examination found no evidence of a brain injury, good medical practice required the boxer to be withheld from fighting for two to six months due to a severe head beating received in a prior fight.²¹

As an alternative to *Rosensweig's* customary medical practice standard, some recent sports medicine malpractice cases have adopted an "accepted practice" standard of care.²² Under this standard, acceptable or reasonable medical practices establish a physician's legal duty of care in treating athletes.²³ In other words, what *should* have been done under the circumstances, not what is commonly done, determines the applicable standard. Physicians have a legal obligation to keep abreast of new developments and advances in sports medicine, and they may be liable for using outdated treatment methods that no longer have a sound medical basis or that do not currently constitute appropriate care.²⁴

In many situations, customary practices reflect accepted medical practices; thus a determination of malpractice liability will be the same under either standard. Like customary practices, proof of accepted medical practices will require expert medical testimony for litigation purposes, but the "basis of an expert's testimony will be broader."²⁵ To determine acceptable medical practice, a medical expert may utilize his own education, training, and experience, as well as any relevant medical literature and medical association guidelines.²⁶

²⁰ *Id.* at 914.

²¹ *Id.*

²² See *Classen v. Izquierdo*, 520 N.Y.S.2d 999, 1002 (Sup. Ct. N.Y. County 1987) (explaining that a physician who treats an athlete must "practice in accordance with good and accepted standards of medical care"); *Classen v. State*, 500 N.Y.S.2d 460, 466 (Ct. Cl. 1985) (finding no negligence because there was no evidence that physician who examined boxer "did anything less than follow accepted procedures" in providing medical clearance).

²³ *Izquierdo*, 520 N.Y.S.2d at 1002 (explaining that a physician who renders medical treatment has a duty to do so in a non-negligent manner consistent with "good and accepted standards of medical care").

²⁴ See *Nowatske v. Osterloh*, 543 N.W.2d 265, 271-74 (Wisc. 1996) (discussing the liability of a physician where the treatment methods utilized are outdated).

²⁵ See Matthew J. Mitten, *Team Physicians and Competitive Athletes: Allocating Legal Responsibility for Athletic Injuries*, 55 U. PITT. L. REV. 129, 146 n.129 (1993).

²⁶ See King, *supra* note 9, at 1241-43.

The accepted practice standard would have several advantages in the sports medicine context. Because it focuses on the current state of the medical art rather than on the historical conduct of sports medicine physicians, it enables a physician to deviate from an undesirable custom that is inconsistent with his best judgment and thereby facilitates the development of sound sports medicine practices. Similarly, it permits physicians to adopt innovative treatments and rehabilitation procedures for athletes. Additionally, it alleviates the need to search for a discernible custom among a diverse group of sports medicine physicians and provides a standard in the absence of any custom.

2. Pre-participation Physicals and Screening Examinations

a. *Physician-Patient Relationship and Legal Duty to the Athlete*

Professional teams and educational institutions generally require an athlete to undergo a pre-participation physical examination to determine his or her physical fitness and capabilities to participate in a sport. Another objective of the examination may be to prevent harm to an athlete by screening for dangerous medical conditions, injuries, or illnesses.

If the pre-participation medical examination was intended by the team and the physician to benefit the athlete, the team physician might be liable for non-discovery or non-disclosure of a harmful medical condition on third party beneficiary contract principles or the tort theory of a gratuitous undertaking to provide medical services.²⁷ It appears that most pre-participation physical examinations, particularly those involving youth, high school, or college athletes, would satisfy at least one of these theories of liability.

In the context of pre-employment physical examinations, some courts hold that a physician owes a general duty to the examinee to use reasonable care solely by virtue of conducting a medical examination.²⁸ Under this authority, a physician may be liable for negligently failing to discover an adverse medical condition or for failing to disclose the existence of an illness or

²⁷ See King, *supra* note 4, at 665.

²⁸ See, e.g., *Daly v. United States*, 946 F.2d 1467, 1469-72 (9th Cir. 1991) (applying Washington law); see also King, *supra* note 4, at 668-71 (summarizing and discussing cases).

physical abnormality to the examinee.²⁹

Other cases, however, hold that no general duty of reasonable care is owed to the examinee if the physician is retained solely to determine a prospective employee's physical fitness and capacity to perform a particular job.³⁰ These cases require more than merely providing a single medical examination before a physician becomes liable for a negligent omission in connection with the examination.³¹ Under this authority, a physician is not liable to an examinee unless he affirmatively provides medical treatment or advice directly to the examinee.³² These cases suggest that a team physician who merely provides a pre-draft or pre-trade examination to a professional player does not create a physician-patient relationship or the corresponding general duty of care.

b. Nature and Scope of Examination

The team physician is liable for any affirmative acts of negligence committed while conducting a medical examination; for example, utilizing an improper physical manipulation that adversely affects an athlete's health.³³ Assuming the existence of a physician-patient relationship, a team physician may incur malpractice liability for deviating from customary or accepted sports medicine practices during pre-participation screening and medical evaluation of athletes if he or she fails to use appropriate diagnostic criteria and methods that would have disclosed a medical abnormality.³⁴

²⁹ See King, *supra* note 4, at 668-71 (explaining how a general duty may arise in the context of a pre-employment examination).

³⁰ See, e.g., *Violandi v. City of New York*, 584 N.Y.S.2d 842, 843 (1st Dep't 1992) (stating that "[a] physician-patient relationship does not exist where the examination is conducted solely for the purpose or convenience or on behalf of an employer" (citing *Lee v. City of New York*, 560 N.Y.S.2d 700 (2d Dep't 1990))).

³¹ See *id.* (finding that no breach of duty had occurred within a physician-patient relationship because "there was simply an examination and a recommendation given").

³² A series of annual pre-season examinations provided by a team physician to an athlete might establish an ongoing course of medical treatment, creating a physician-patient relationship and thereby imposing a general duty of reasonable care on the physician. See *Lee*, 560 N.Y.S.2d at 702-03.

³³ See generally King, *supra* note 4, at 674 (discussing the duty a team physician owes to a patient-athlete).

³⁴ See *Deaner v. Utica Cmty. Sch. Dist.*, 297 N.W.2d 625, 627 (Mich. Ct. App. 1980) (recognizing that a team physician's failure to diagnose a defect may constitute negligence).

The law requires that a medical examination of an athlete to determine his fitness to play a sport be reasonable under the circumstances. An athlete's level of competitive play appears to be a relevant factor in defining a pre-participation physical examination as appropriate and reasonable.³⁵ Professional and college players generally receive more comprehensive medical examinations because of the extreme physical demands of these levels of play and the economic ability of teams to pay for extensive examinations. Conversely, youth and high school athletic activities generally are less physically demanding. Moreover, it may not be economically feasible to provide extensive medical examinations to large numbers of participants at these lower levels of competition.

Athletic teams generally require medical clearance from a physician before permitting an athlete to play. It is left to the examining physician's medical judgment, however, to determine the requirements for medical clearance. To assist physicians in this endeavor, some medical organizations and conferences have formulated guidelines for determining the physical fitness of youth athletes and detecting any conditions that may predispose an athlete to injury or warrant medical exclusion of an athlete from participation in a sport.³⁶ These guidelines may serve as evidence of the medically acceptable scope of a physical examination for youth athletes, but whether an athlete's physical condition was properly evaluated will be determined on a case-by-case basis.³⁷

³⁵ *Id.* at 147.

³⁶ For example, the American Academy of Family Physicians, American Academy of Pediatrics, American Medical Society for Sports Medicine, American Orthopedic Society for Sports Medicine, and American Osteopathic Academy of Sports Medicine recently updated a monograph which establishes guidelines for examinations of young athletes. See AMERICAN ACADEMY OF FAMILY PHYSICIANS ET AL., *PREPARTICIPATION PHYSICAL EVALUATION* (2d ed. 1997); see also Barry J. Maron, et al., *American Heart Association Scientific Statement: Cardiovascular Preparticipation Screening of Competitive Athletes*, 94 CIRCULATION 850 (1996) (recommended guidelines to detect cardiovascular abnormalities).

³⁷ See *James v. Woolley*, 523 So. 2d 110, 112 (Ala. 1988); *Cornfeld v. Tongen*, 262 N.W.2d 684, 703-04 (Minn. 1977); *Darling v. Charleston Cmty. Mem'l Hosp.*, 211 N.E.2d 253, 256-57 (Ill. 1965); *Stone v. Proctor*, 131 S.E.2d 297, 299 (N.C. 1963); *Davenport v. Ephraim McDowell Mem'l Hosp.*, 769 S.W.2d 56, 61-62 (Ky. Ct. App. 1988); *Pollard v. Goldsmith*, 572 P.2d 1201, 1203 (Ariz. Ct. App. 1977). But see *Swank v. Halivopoulos*, 260 A.2d 240, 242-43 (N.J. Super. Ct. App. Div. 1969) (holding that generalized medical society recommendations that leave individual treatment decisions to a physician's own judgment are not admissible evidence).

Athletes or their families have sued sports medicine physicians alleging negligent failure to discover latent injuries or physical defects. In *Rosensweig*,³⁸ the heirs of a boxer who died after a head injury suffered in a fight claimed that the examining physicians negligently failed to discover his pre-existing brain injury.³⁹ The New York intermediate appellate court found that a "careful individual medical examination" found no evidence of a brain injury and decedent's medical history indicated no symptom of a concussion or brain injury; therefore, the court held that there was no negligence on the part of the examining physicians.⁴⁰

Although *Rosensweig* addresses the potential liability of a physician for negligence in examining an athlete, it does not establish an exact standard for pre-participation physical examinations and screening procedures. The court does not discuss the appropriate parameters of a "standard examination."⁴¹ Whether or not a particular physical defect or injury should have been discovered will generally be a factual issue dependent on the customary or accepted medical practice under the circumstances.⁴²

3. Diagnosis and Treatment of Injuries

A team physician must adhere to customary or accepted sports medicine practice in diagnosing or treating an athlete's injuries.⁴³ In a malpractice action, expert testimony regarding the appropriate standard of sports medicine care is generally required to prove liability.⁴⁴

In *Zimbauer v. Milwaukee Orthopedic Group, Ltd.*,⁴⁵ a federal district court dismissed a professional baseball pitcher's malpractice claim against his treating physician because there was no expert testimony proving that the alleged negligent

³⁸ 171 N.Y.S.2d 912 (3d Dep't 1958).

³⁹ See *id.* at 913.

⁴⁰ *Id.* at 914.

⁴¹ *Id.*

⁴² See *Deaner v. Utica Cmty. Sch. Dist.*, 297 N.W.2d 625, 627 (Mich. Ct. App. 1980) (reversing the trial court's summary judgment for the defendant because a team physician's alleged negligent failure to discover wrestler's spinal abnormality was a question for the jury).

⁴³ See *supra* notes 8-26 and accompanying text.

⁴⁴ See cases cited *supra* note 22.

⁴⁵ 920 F. Supp. 959 (E.D. Wis. 1996).

misdiagnosis and treatment of his injured shoulder caused permanent disability.⁴⁶ The court also refused to apply the doctrine of *res ipsa loquitur* to prove breach of the medical standard of care because there was no proof that the aggravating of plaintiff's shoulder injury was more likely than not caused by the treating physician's negligence.⁴⁷

Protecting the athlete's health should always be the team physician's paramount objective when providing medical care to injured athletes. In some instances it may be necessary to consult with specialists in order to provide proper sports medicine care, and a team physician may be negligent for failing to consult with specialists regarding an athlete's injury.⁴⁸ A physician may be liable for not using recognized and appropriate tests or examinations to gather information necessary to determine the proper treatment of an athlete's injury or illness.

In *Speed v. State*,⁴⁹ the Iowa Supreme Court held that a team physician negligently failed to order testing to diagnose a basketball player's condition.⁵⁰ The player suffered a cranial infection that resulted in blindness, although not until after he had complained of persistent head and body aches and other symptoms consistent with an infection. The court relied on expert testimony that the team physician should have given the player various tests and a more thorough physical

⁴⁶ See *id.* at 965 (stating that in order to hold a physician liable for malpractice an expert must testify that the physician failed to use the required degree of care and skill).

⁴⁷ See *id.* at 968-69 (explaining that Wisconsin law permits the application of *res ipsa loquitur* when "the testimony and the medical records taken as a whole would support the inference of negligence or if direct testimony is introduced that the injury in question was of the nature that does not ordinarily occur if proper skill and care are exercised") (citations omitted).

⁴⁸ See, e.g., *Keir v. United States*, 853 F.2d 398, 412-14 (6th Cir. 1988) (holding a doctor negligent for failing to refer the plaintiff to a specialist); *Speed v. State*, 240 N.W.2d 901, 904 (Iowa 1976) (finding a doctor negligent for "fail[ing] to employ recognized and appropriate tests or examinations to gather the information necessary to prescribe a proper course of treatment"). The team physician also has a duty to inform an athlete of the risk of failing to see a recommended specialist. See *Moore v. Preventive Med. Med. Group, Inc.*, 223 Cal. Rptr. 859, 863-64 (Cal. Ct. App. 1986). But see *Freeman v. Cleveland Clinic Found.*, 713 N.E.2d 33, 38 (Ohio Ct. App. 1998) (holding that, absent an indication that the patient was contemplating suicide, an orthopedic surgeon treating an athlete's knee injuries did not breach his duty by failing to refer the athlete to a mental health or pain management professional).

⁴⁹ 240 N.W.2d 901 (Iowa 1976).

⁵⁰ See *id.* at 904-05.

examination.⁵¹

A physician generally does not warrant the correctness of a diagnosis, and a doctor is not liable for honest mistakes of judgment if the appropriate diagnosis is in reasonable doubt.⁵² Nevertheless, a physician may be liable for malpractice if he does not use the requisite degree of care and skill ordinarily possessed by those within his specialty in interpreting test results and determining a patient's need for treatment.⁵³

In *Gardner v. Holifield*,⁵⁴ a deceased basketball player's mother alleged that a cardiologist misinterpreted two echocardiograms ordered to confirm an initial diagnosis during a routine physical examination that the player had Marfan's Syndrome.⁵⁵ As a result, proper follow-up care, including the probable need for cardiovascular surgery, was not provided and the athlete died six months after his initial evaluation by the cardiologist.⁵⁶ Medical experts testified that a proper confirming diagnosis and treatment would have prevented the athlete's death and given him a normal life expectancy.⁵⁷ This testimony created a factual issue requiring resolution by the jury regarding the physician's alleged malpractice.⁵⁸

The physician has a legal duty to either provide appropriate sports medicine care or to ensure that an athlete with a known injury, illness, or medical condition receives necessary treatment in a timely manner. In *Dailey v. Winston*,⁵⁹ expert testimony showed that a surgeon, after discovering that a basketball player had an arterial blockage, negligently failed to immediately order an arteriogram and inform him of the seriousness of the condition. This created an issue of malpractice liability

⁵¹ See *id.*

⁵² See KEETON ET AL., *supra* note 8, § 32, at 186.

⁵³ See *Capone v. Donovan*, 480 A.2d 1249, 1251 (Pa. Super. Ct. 1984) (holding three physicians jointly liable for an athlete's elbow injury because of their negligent misinterpretation of X-rays); see also *Harris-Lewis v. Mudge*, No. CIV.A.96-2349-F, 1999 WL 253037, at *1 (Mass. Super. Apr. 16, 1999) (holding, based on expert medical testimony, that there was sufficient evidence for jury to find that physicians negligently failed to rule out that professional athlete was suffering ventricular arrhythmia and may have need an implantable defibrillator).

⁵⁴ 639 So. 2d 652 (Fla. Dist. Ct. App. 1994).

⁵⁵ *Id.* at 653.

⁵⁶ *Id.*

⁵⁷ *Id.* at 656.

⁵⁸ See *id.* at 657.

⁵⁹ 1986 WL 12063 (Tenn. Ct. App. Oct. 28, 1986) (unpublished opinion).

requiring resolution by a jury.⁶⁰

A team physician may also be liable for failing to provide proper emergency medical care to an injured athlete. In *Welch v. Dunsmuir Joint Union High School District*,⁶¹ a physician was found negligent for failing to promptly tend to an injured football player and to supervise his removal from the playing field.⁶² Moving the plaintiff without a stretcher was determined to be an improper medical practice in light of his symptoms and was thus deemed the cause of his permanent paralysis.⁶³

In prescribing rehabilitation therapy for an injured athlete, the team physician must also adhere to good medical practice consistent with an athlete's best health interests. If there are various recognized and accepted methods of treatment, a physician may select the one he deems best without being liable for malpractice merely because some physicians utilize other procedures.⁶⁴

An injured athlete's unique physiology and physical condition, as well as the level of competition, are factors in determining the appropriate treatment. Professional and college players may be able to recover from injuries more rapidly because of their superior conditioning, physical development, and team-provided rehabilitation. Due to their still-developing bodies, different rehabilitation procedures and longer periods of inactivity may be appropriate for high school athletes.

4. Prescription of Drugs

When prescribing drugs to athletes, team physicians should comply with all laws regarding dispensation and record keeping and should follow accepted medical practices regarding the appropriate type and dosage of pharmaceutical treatment.⁶⁵ Team physicians may be liable for negligently prescribing anesthetics and pain killers to athletes to facilitate athletic

⁶⁰ *Id.* at *5.

⁶¹ 326 P.2d 633 (Cal. Ct. App. 1958).

⁶² *See id.* at 638-39.

⁶³ *See id.* at 635.

⁶⁴ *See James v. Woolley*, 523 So. 2d 110, 112-13 (Ala. 1988); *Riggins v. Mauriello*, 603 A.2d 827, 831 (Del. 1992); *Jones v. Chidester*, 610 A.2d 964, 965 (Pa. 1992); *Hood v. Phillips*, 554 S.W.2d 160, 165 (Tex. 1977).

⁶⁵ *See Wallace v. Broyles*, 961 S.W.2d 712, 719 (Ark. 1998) (stating that a team physician may be found negligent for any illegal or careless manner in which controlled drugs are dispensed to university athletes).

participation. Medication to relieve pain masks the seriousness of an injury and may cause aggravation or re-injury of a preexisting condition.⁶⁶ Physicians should prescribe drugs to enable athletic participation only if doing so is consistent with an athlete's best health interests.

In 1990, Hank Gathers collapsed and died of a heart attack while playing in a basketball game for Loyola Marymount University. Gathers had previously been diagnosed with a potentially life-threatening heart rhythm disorder. After his death, Gathers' heirs sued his treating physicians claiming, *inter alia*, that he was given a non-therapeutic dosage of heart medication to enable him to continue playing basketball at an elite level. Although the lawsuit ultimately settled, such conduct, if proven, would have constituted actionable negligence.

A physician may be liable under tort law for harm caused to an athlete by improperly prescribed steroids. Some physicians have been disciplined by state medical boards for violating statutes prohibiting the use of steroids for the purpose of enhancing athletic ability. In *State Medical Board of Ohio v. Murray*,⁶⁷ the Ohio Supreme Court upheld the revocation of a physician's medical license for prescribing steroids to approximately two hundred patients solely to enhance their athletic ability.⁶⁸ This conduct expressly violated a state statute regulating the practice of medicine and constituted a failure to use reasonable care in the administration of drugs in conformance with the minimal standards of professional medical care.⁶⁹

A team physician's prescription of steroids to an athlete in violation of a statute similar to the one discussed in *Murray* may constitute negligence *per se*.⁷⁰ A court may find that an athlete whose health is adversely affected by steroids prescribed for a non-therapeutic purpose is within the class of persons protected by such a statute and suffers the harm it is intended to prevent.⁷¹ Alternatively, a court may find that a physician has a

⁶⁶ James J. Thornton, *Playing in Pain: When Should an Athlete Stop?*, THE PHYSICIAN & SPORTSMEDICINE, Sept. 1990, at 138, 140.

⁶⁷ 613 N.E.2d 636 (Ohio 1993).

⁶⁸ *Id.*; see also *State v. Spencer*, 710 N.E.2d 352, 355 (Ohio Ct. App. 1998) (prescribing steroids to enhance athletic performance is criminal conduct).

⁶⁹ See *Murray*, 613 N.E.2d at 636.

⁷⁰ See KEETON ET AL., *supra* note 8, § 36, at 220-26.

⁷¹ Upon such a determination, most courts hold that the defendant's duty is

common law duty not to prescribe steroids solely to enhance athletic ability and is liable for foreseeable harm to an athlete caused by a breach of this duty.⁷²

5. Medical Clearance Recommendations

a. *Negligent Clearance to Play*

The team physician generally has the primary responsibility for medically clearing athletes to participate in a sport or to return to play after an injury.⁷³ Athletes have sued physicians for injury or death caused by reliance upon alleged negligent advice that it was medically safe to participate in the subject sport.

In their 1990 lawsuit, Hank Gathers' heirs alleged that the team physician and consulting specialists improperly cleared him to resume playing college basketball with a serious heart condition.⁷⁴ This case left open several important issues concerning the nature and scope of a team physician's legal duty in making medical clearance recommendations. Physician liability for negligent medical clearance recommendations must necessarily be considered on a case-by-case basis,⁷⁵ but there is currently no well-defined judicial precedent establishing the specific parameters of a physician's legal duty of care in clearing athletes to participate in competitive athletics.⁷⁶ Reflecting the fact-specific nature of sports medicine malpractice actions,⁷⁷ some cases have found physician liability while others have absolved physicians from malpractice liability under similar circumstances.

conclusively established. *See id.* at 229–30.

⁷² *See* Curry v. State, 496 N.W.2d 512, 516 (Neb. Ct. App. 1993) (suggesting that prescribing steroids to enhance a patient's ability to train for athletics violates the standards of practice for the medical profession).

⁷³ *See* Keim, *supra* note 7, at 199.

⁷⁴ Plaintiffs alleged that the defendant physicians not only negligently diagnosed and treated Gathers, but also that defendants conspired to intentionally fail to inform Gathers of the seriousness of his heart condition and of the dangers of continuing to play competitive basketball.

⁷⁵ *See* KEETON ET AL., *supra* note 8, § 31, at 173.

⁷⁶ *See* Cathy J. Jones, *College Athletes: Illness or Injury and the Decision to Return to Play*, 40 BUFF. L. REV. 113, 135 (1992).

⁷⁷ *See* KEETON ET AL., *supra* note 8, § 31, at 173.

In *Classen v. Izquierdo*,⁷⁸ the court ruled that a ringside physician's refusal to stop a boxing match in which a participant received several blows to the head from which he ultimately died, may constitute malpractice.⁷⁹ The court held that physicians have a duty to conform to "good and accepted" standards of medical care in determining whether an athlete should continue participating in a sport.⁸⁰

In *Mikkelsen v. Haslam*,⁸¹ the plaintiff alleged that a physician negligently provided her with medical clearance to snow ski after hip replacement surgery.⁸² The jury found the physician negligent based on undisputed testimony that advising a total hip replacement patient that skiing is permissible "is a departure from orthopedic medical profession standards."⁸³

Marc Buoniconti, a linebacker for The Citadel, was permanently paralyzed while making a tackle during a 1985 college football game.⁸⁴ Thereafter, Buoniconti filed a negligence action against Dr. Wallace, the school's team physician.⁸⁵ Buoniconti asserted that Dr. Wallace failed to inform him of his spinal abnormality and permitted him to play with a serious neck injury and to use equipment that placed his neck in a position making it vulnerable to being broken.⁸⁶ Dr. Wallace contended that Buoniconti's dangerous and illegal tackling technique caused his injury, not any improper medical clearance or treatment.⁸⁷ In a 1988 trial, the jury found Dr. Wallace not liable for Buoniconti's injuries.

Some commentators argue that professional custom should not control medical clearance recommendations because a uniform custom may not exist in the diverse field of sports

⁷⁸ 520 N.Y.S.2d 999 (Sup. Ct. N.Y. County 1987).

⁷⁹ *Id.* at 1002. In a related case, the New York Court of Claims held that the physician who had examined the decedent before the fight had followed accepted medical procedures in clearing him to box and was not liable for his death. See *Classen v. State*, 500 N.Y.S.2d 460 (Ct. Cl. 1985).

⁸⁰ *Classen*, 520 N.Y.S.2d at 1002.

⁸¹ 764 P.2d 1384 (Utah Ct. App. 1988).

⁸² *Id.* at 1386.

⁸³ *Id.*

⁸⁴ See *Doctor Says Paralyzed Linebacker Should Have Sat Out Game*, CHI. TRIB., June 19, 1988, at 9C.

⁸⁵ *Id.*

⁸⁶ A doctor testified during the course of the trial that Buoniconti should not have been on the field. *Id.*

⁸⁷ *Id.*

medicine and, moreover, an existing custom may reflect non-medical factors derived from the competing loyalties faced by team physicians.⁸⁸ Medical clearance recommendations should be within the bounds of accepted or reasonable sports medicine practice and governed by the team physician's paramount obligation to protect the competitive athlete from medically unreasonable risks of harm. To avoid potential legal liability, the team physician should refuse clearance of an athlete if she believes there is a significant medical risk of harm from participation, irrespective of the team's need for the player or the player's personal motivations.

In making a participation recommendation, the team physician should only consider the athlete's medical best interests. The physician may appropriately consider the following factors: the intensity and physical demands of a sport; the athlete's unique physiology; whether the athlete has previously participated in the sport with his physical condition; available clinical evidence; medical organization and conference guidelines; the probability and severity of harm from athletic participation with the subject condition; and whether medication, monitoring or protective equipment will minimize the potential health risks of participation and enable safe athletic participation.

To enhance the quality and consistency of sports medicine practice, medical societies and specialty boards have promulgated medical clearance guidelines for use by physicians making athletic participation recommendations.⁸⁹ Courts have recognized standards and guidelines established by national medical associations as evidence of good medical practice.⁹⁰ This author has argued that consensus sports medicine guidelines for athletic participation should be given substantial weight by courts as a means of encouraging objective physician

⁸⁸ See King, *supra* note 4, at 690-91; Mitten, *supra* note 25, at 153.

⁸⁹ AMERICAN ACADEMY OF FAMILY PHYSICIANS ET AL., *supra* note 36.

⁹⁰ See James v. Woolley, 523 So. 2d 110, 112 (Ala. 1988); Cornfeld v. Tongen, 262 N.W.2d 684, 703-04 (Minn. 1977); Darling v. Charleston Cmty. Mem'l Hosp., 211 N.E.2d 253, 256-57 (Ill. 1965); Stone v. Proctor, 131 S.E.2d 297, 299 (N.C. 1963); Davenport v. Ephraim McDowell Mem'l Hosp., 769 S.W.2d 56, 61-62 (Ky. Ct. App. 1988); Pollard v. Goldsmith, 572 P.2d 1201, 1203 (Ariz. Ct. App. 1977). *But see* Swank v. Halivopoulos, 260 A.2d 240, 242-43 (N.J. Super. Ct. App. Div. 1969) (holding that generalized medical society recommendations that leave individual treatment decisions to a physician's own judgment are not admissible evidence).

participation recommendations consistent with an athlete's physical health and safety.⁹¹

b. Refusal to Clear to Play

Some athletes have sued physicians for refusing to provide them with medical clearance to play a sport. In *Sitomer v. Half Hollow Hills Central School District*,⁹² a junior high school student asserted that a school physician negligently evaluated his level of physiological maturity.⁹³ The physician had determined that the plaintiff was not sufficiently physically mature to play on the high school tennis team.⁹⁴ The court dismissed this claim after finding that the physician's sole duty was to properly administer a state education department screening test designed to measure physical maturity to play high school sports, which had been given.⁹⁵

In *Penny v. Sands*,⁹⁶ Anthony Penny alleged that a cardiologist was negligent for withholding medical clearance to play college basketball with a potentially life-threatening heart condition. The defendant cardiologist diagnosed Penny as having hypertrophic cardiomyopathy and recommended against his continued participation in college basketball. Two other cardiologists concurred with this opinion, and Central Connecticut State University refused to allow Penny to participate in its basketball program for two seasons. Penny ultimately obtained medical clearance to play competitive basketball from two other cardiologists. Penny claimed economic harm to his anticipated professional basketball career by virtue of his temporary forced exclusion from intercollegiate basketball. Penny subsequently collapsed and died suddenly while playing in a 1990 professional basketball game in England. Penny had voluntarily dismissed his malpractice suit prior to his death, and the court did not consider the merits of his suit.

A team physician should not be held liable for economic loss to an athlete resulting from medical disqualification to

⁹¹ See Mitten, *supra* note 25, at 150-52.

⁹² 520 N.Y.S.2d 37 (Sup. Ct. N.Y. County 1987).

⁹³ *Id.* at 37-38.

⁹⁴ *Id.*

⁹⁵ *Id.* at 38.

⁹⁶ See Complaint, *Penny v. Sands* (D. Conn. Filed May 3, 1989) (No. H89-280) (voluntarily dismissed by plaintiff prior to decision on the merits).

participate in a sport if his or her injury, physical disability, or medical condition is properly diagnosed. Legal recognition of such claims would unduly impair the team physician's professional judgment and might cause a doctor to assign greater weight to legal, rather than medical considerations. This would not further the law's objective of ensuring that athletes receive quality sports medicine care.

6. Informed Consent Issues

The team physician must have an athlete's informed consent before providing any medical treatment.⁹⁷ This requirement is based on the principle of individual autonomy, namely that a competent adult has the legal right to determine what to do with his body, including accepting or refusing medical treatment.⁹⁸ A competent adult athlete can provide consent to medical care, but consent for treatment of athletes who are minors generally must be obtained from a parent or guardian.⁹⁹

Consent may be implied under the circumstances, such as when an athlete has been rendered unconscious during play and needs emergency medical treatment.¹⁰⁰ In these cases, the law generally assumes that if the injured athlete had been aware of his condition and was competent mentally, then he would have authorized appropriate treatment.

In addition to following accepted or reasonable sports medicine practices in providing diagnosis and treatment of athletic injuries and in making medical eligibility recommendations, the team physician must fully inform an athlete of any material risks of playing a sport in light of his physical condition.¹⁰¹ Failure to do so may expose the team physician to liability based on intentional tort or negligence principles.¹⁰²

The extent of a physician's duty to disclose medical risks traditionally has been determined by prevailing practices in the

⁹⁷ See Keim, *supra* note 7, at 204-05; see also MARSHALL S. SHAPO, BASIC PRINCIPLES OF TORT LAW 103-04 (1999); Richard A. Heinemann, *Pushing the Limits of Informed Consent: Johnson v. Kokemoor and Physician-Specific Disclosure*, 5 WIS. L. REV. 1079, 1081 (1997).

⁹⁸ See KEETON ET AL., *supra* note 8, § 32, at 190.

⁹⁹ See WEISTART & LOWELL, *supra* note 13, § 8.08(b), at 988.

¹⁰⁰ See KEETON ET AL., *supra* note 8, § 32, at 193.

¹⁰¹ See Jones, *supra* note 76, at 141; see also SHAPO, *supra* note 97, at 105.

¹⁰² See Heinemann, *supra* note 97, at 1083.

medical profession. Physician custom or what a reasonable physician would disclose to a patient under similar circumstances generally has been the controlling legal standard.¹⁰³ The recent judicial trend is to move away from this standard and instead require physicians to disclose all material information necessary to enable the patient to make an informed decision.¹⁰⁴

In the leading case representing the current trend in the law, *Canterbury v. Spence*,¹⁰⁵ the court stated: "[A] risk is thus material when a reasonable person, in what the physician knows or should know to be the patient's position, would be likely to attach significance to the risk or cluster of risks in deciding whether or not to forego the proposed therapy."¹⁰⁶ This standard focuses on the patient's informational needs rather than physician custom, regarding disclosure of medical information.

General informed consent principles apply in the sports medicine context and govern the required disclosure of information by the team physician to a competitive athlete. The *Canterbury*, patient-based, standard of disclosure should be applied because of the competing loyalties faced by the team physician. There may be an undesirable custom of not disclosing or minimizing certain medical risks to encourage an athlete to play.¹⁰⁷ Moreover, the focus should be on the factors that would be important to a reasonable athlete in making an informed sports participation or medical treatment decision.

A team physician or consulting specialist should fully disclose to an athlete the material medical risks of playing with an injury, illness, or physical abnormality, and the potential health consequences of a given medication or treatment. To enable the athlete to make an informed decision, a physician

¹⁰³ See KEETON ET AL., *supra* note 8, § 32, at 191.

¹⁰⁴ *Id.*

¹⁰⁵ 464 F.2d 772, 787 (D.C. Cir. 1972).

¹⁰⁶ *Id.* at 787.

¹⁰⁷ See, e.g., *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1174 (N.D.N.Y. 1990). There are also several media accounts of player allegations that team physicians misled them regarding the nature of an injury or did not inform them of potential adverse consequences of taking medication in order to keep them playing. See Elliott Almond, *How Medication Can Be Bitter Pill*, L.A. TIMES, Aug. 12, 1990, at C1 (discussing a complaint alleging insufficient disclosure of risk about over-the-counter drugs); William Nack, *Playing Hurt—The Doctor's Dilemma*, SPORTS ILLUSTRATED, June 11, 1979, at 30 (discussing baseball physicians' bowing to pressures to keep ballplayers in play).

should clearly warn of all material short and long-term medical risks of continued athletic participation and medical treatment under the circumstances, including any potentially life-threatening or permanently disabling health consequences.

The team physician has a legal duty to disclose material medical risks to the athlete in plain and simple language.¹⁰⁸ Courts generally do not require physicians to determine whether patients understand disclosed medical information.¹⁰⁹ The law, however, should impose a duty on health care providers, including team physicians, to take affirmative steps to ensure patient understanding of medical information and assist them in making medical treatment decisions.¹¹⁰ Such a duty appears necessary to enable competitive athletes to make an informed and responsible decision regarding whether to participate in a sport with a medical condition or injury, or whether to accept treatment enabling a return to competition with knowledge of accompanying potential adverse health consequences.

It is advisable for the team physician to take affirmative steps to ensure that an athlete understands the potential consequences of playing with his other medical condition.¹¹¹ To minimize potential legal liability, information concerning the athlete's medical condition; proposed treatment and alternatives; probability of injury or re-injury; and severity of harm and potential long-term health effects should be tape recorded when provided verbally and also should be given in writing.¹¹² The team physician should discuss any conflicting second opinions rendered by other physicians with the athlete, particularly those that advise against playing. It is important not to downplay other physicians' advice and recommendations concerning the

¹⁰⁸ See, e.g., *Natanson v. Kline*, 350 P.2d 1093, 1106 (Kan. 1960).

¹⁰⁹ *Canterbury*, 464 F.2d at 780 n.15 (stating that the "physician discharges the duty [to disclose] when he makes a reasonable effort to convey sufficient information although the patient, without fault of the physician, may not fully grasp it").

¹¹⁰ See Jones, *supra* note 76, at 127-28. See generally Cathy J. Jones, *Autonomy and Informed Consent in Medical Decisionmaking: Toward a New Self-Fulfilling Prophecy*, 47 WASH. & LEE L. REV. 379 (1990).

¹¹¹ Athletes should be encouraged to ask questions and be permitted to bring family members, attorneys, or trusted friends to disclosure sessions for support and assistance. It also may be appropriate to test an athlete's comprehension of the information, perhaps by requiring the athlete to write down his or her understanding of the pertinent risks of playing or undergoing the proposed treatment.

¹¹² See Jones, *supra* note 76, at 145.

athlete's medical condition and potential consequences of playing.

Courts have held that a team physician's intentional or negligent failure to provide an athlete with full disclosure of material information about playing with his medical condition or the potential consequences of proposed treatment is actionable. In *Krueger v. San Francisco Forty Niners*,¹¹³ a California intermediate appellate court held that a professional football team's conscious failure to inform a player that he risked a permanent knee injury by continuing to play was fraudulent concealment.¹¹⁴ The court found that the plaintiff was not informed by team physicians of the true nature and extent of his knee injuries, the consequences of steroid injection treatment, or the long-term dangers associated with playing professional football with his medical condition.¹¹⁵ The court found that the purpose of this nondisclosure was to induce plaintiff to continue playing football despite his injuries, thereby constituting fraud.¹¹⁶

Former Chicago Bears player Merril Hoge recently was awarded \$1.55 million in damages by a jury in his lawsuit against a former Bears' team physician.¹¹⁷ Hoge alleged that the team physician failed to fully warn him about the medical risks of returning to play only one week after suffering a Grade II concussion with memory loss in a preseason National Football League (NFL) football game. Thereafter, while playing football, Hoge suffered other low grade concussions and another Grade II concussion (with accompanying memory loss for several months), which ultimately ended his NFL career. Hoge asserted that he

¹¹³ 234 Cal. Rptr. 579 (Cal. Ct. App. 1987). In denying review, the California Supreme Court ordered that this opinion not be officially published, thereby negating its precedential value. *Id.* at 579. Krueger ultimately was awarded \$2.36 million in damages by a trial court but settled his claim for between \$1 million and \$1.5 million. See Jennifer L. Woodlief, *The Trouble With Charlie—Fraudulent Concealment of Medical Information in Professional Football*, 9 ENT. & SPORTS LAW 3, 3 (1991).

¹¹⁴ *Krueger*, 234 Cal. Rptr. at 584.

¹¹⁵ *Id.* at 583–84.

¹¹⁶ *Id.* at 579; cf. *Martin v. Casagrande*, 559 N.Y.S.2d 68 (4th Dep't 1990) (finding no fraud because initial x-rays and arthrograms did not reveal ligament damage to player's knee, and the team physician did not order or suggest player's return to competition).

¹¹⁷ See David L. Herbert, *Team Physician Loses \$1.55 Million Suit by NFL Player*, in 12 SPORTS MED. STANDARDS & MALPRACTICE REP. 49 (2000).

would have delayed his return to football for more than one week if he had been properly informed about the need to do so, thus enabling him to continue playing NFL football for a longer period and earning more money during his playing career.

The jury found sufficient evidence to support Hoge's contentions and awarded him \$1.45 million for loss of income caused by his premature retirement from football and \$100,000 for pain and suffering caused by his subsequent concussions. The trial judge, however, ordered a new trial because Hoge did not produce a letter from a medical expert to his counsel stating that physicians routinely returned players in his condition to competition without providing an extensive neurological exam.¹¹⁸

In other cases, athletes have been unable to prove that a physician violated the informed consent doctrine. In *Martin v Casagrande*,¹¹⁹ a New York appellate court rejected a professional hockey player's claim that a physician intentionally concealed the condition of his knee to induce him to continue playing hockey.¹²⁰ Because x-rays and tests performed by the physician did not indicate ligament or meniscal damage to the player's knee, the court held there was no basis for finding that the physician fraudulently withheld this information.¹²¹ The court observed that, at most, the player may have had a possible negligence claim against the physician for failing to properly diagnose the condition of his knee.¹²²

To prevail against a team physician for negligent or fraudulent failure to disclose medical information, an athlete must prove he would not have played or undergone the medical treatment that caused his harm if he had been properly informed of the material risks.¹²³ Most courts require a plaintiff to prove that a reasonable person in his position would have refused to participate in an activity or would have rejected the proposed medical treatment if the material risks were disclosed.¹²⁴ Other courts have applied a subjective standard and held that what the plaintiff individually would have done after full disclosure of the

¹¹⁸ *\$1.55 Million Verdict Against a Football Doctor Reversed*, NAT'L L. J., Apr. 2, 2001, at A12.

¹¹⁹ 559 N.Y.S.2d 68 (4th Dep't 1990).

¹²⁰ *Id.* at 71.

¹²¹ *Id.*

¹²² *Id.*

¹²³ See KEETON ET AL., *supra* note 8, § 32, at 191-92.

¹²⁴ *Id.* at 191.

material risks is controlling.¹²⁵ In *Krueger*,¹²⁶ the court found evidence that the plaintiff would have followed physician recommendations to discontinue playing football to be undisputed,¹²⁷ thereby establishing the necessary causal link between the nondisclosure of material risks and the harm.¹²⁸

7. Medical Confidentiality Issues

Unauthorized disclosure of information about an athlete's medical condition to third parties violates a physician's ethical obligation to maintain patient confidences.¹²⁹ In addition, such unauthorized disclosure may expose the physician to legal liability for invasion of privacy,¹³⁰ for the independent tort of unprivileged revelation of medical information to third parties,¹³¹ and for defamation or intentional infliction of emotional distress if the information is false.¹³²

Before examination or treatment, the team physician should disclose to the athlete that he or she is acting on behalf of the team as well as caring for the athlete's health.¹³³ The physician must obtain the athlete's permission to disclose any relevant medical information regarding his physical or medical condition

¹²⁵ *Id.* at 191-92.

¹²⁶ *Krueger v. S.F. Forty Niners*, 234 Cal. Rptr. 579 (Cal. Ct. App. 1987); see *supra* notes 113-16 and accompanying text.

¹²⁷ *Id.* at 584-85.

¹²⁸ *Id.* at 582.

¹²⁹ See *Horne v. Patton*, 287 So. 2d 824 (Ala. 1973); *Biddle v. Warren*, 715 N.E.2d 518 (Ohio 1999).

¹³⁰ See *Horne*, 287 So. 2d at 829-30 (asserting that a medical doctor has a general obligation to refrain from "extra-judicial disclosures" of doctor-patient information and that such disclosure will result in liability).

¹³¹ See *Biddle*, 715 N.E.2d at 523 (describing various attempts by courts to fit unauthorized physician disclosures into already established categories of tort and concluding that an independent tort must be recognized).

¹³² See *Chuy v. Phila. Eagles Football Club*, 595 F.2d 1265, 1273-81 (3d Cir. 1979) (describing the standards for proving defamation and intentional infliction of emotional distress).

¹³³ See *Shea v. Esensten*, 208 F.3d 712, 716-17 (8th Cir. 2000) (explaining that professional ethical standards require physicians to disclose conflicts of interest and that under Minnesota law, failure to do so gives rise to a medical malpractice claim); *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 483 (Cal. 1990) (recognizing a cause of action for a physician's failure to disclose a material conflict of interest); see also Laurel R. Hanson, Note, *Informed Consent and the Scope of a Physician's Duty of Disclosure*, 77 N.D. L. REV. 71, 92-94 (2001) (summarizing recent developments in the law regarding a physician's duty to disclose information to her patients, including the duty of team physicians).

to team officials.¹³⁴ Otherwise, even accurate disclosure may subject the team physician to liability for breach of the common law duty of confidentiality that is owed to the athlete.¹³⁵

In *Chuy v. Philadelphia Eagles Football Club*,¹³⁶ a football player alleged that the team physician defamed him by falsely informing the media that he had a potentially fatal blood disease and also caused him to suffer severe emotional distress.¹³⁷ The Third Circuit held that the physician's knowing misrepresentation of plaintiff's medical condition was "intolerable professional conduct" establishing liability for intentional infliction of emotional distress.¹³⁸ The court, however, upheld a jury finding of no defamation because there was no evidence plaintiff's reputation had been harmed by the physician's statement.¹³⁹

8. Athlete's Contributory Negligence

Contributory negligence involves voluntarily exposing one's self to an unreasonable risk of harm.¹⁴⁰ One court has defined a patient's duties when receiving medical care as follows:

A patient is required to cooperate in a reasonable manner with his treatment. This means that a patient has a duty to listen to his doctor, truthfully provide information to his doctor upon request, follow reasonable advice given by his doctor, and cooperate in a reasonable manner with his treatment. A patient also has a duty to disclose material and significant information about his condition or habits when requested to do so by his physician.¹⁴¹

An athlete must satisfy the above obligations to comply with his duty to reasonably protect his own health. He must exercise due care for his own safety by truthfully relating his medical history to the team physician.¹⁴² An athlete has no general duty to diagnose his own condition or to divulge information, but he should volunteer information if he knows the team physician has

¹³⁴ See *Biddle*, 715 N.E.2d at 523.

¹³⁵ See *id.*; *Horne*, 287 So. 2d at 829-30.

¹³⁶ 595 F.2d 1265 (3d Cir. 1979).

¹³⁷ *Id.* at 1270.

¹³⁸ *Id.* at 1274, 1276.

¹³⁹ *Id.* at 1282.

¹⁴⁰ See KEETON ET AL., *supra* note 8, § 65, at 453.

¹⁴¹ See *Benedict v. St. Luke's Hosp.*, 365 N.W.2d 499, 505 (N.D. 1985).

¹⁴² See *id.* at 254-56; *Brown v. Dibble*, 595 N.W.2d 358, 368-69 (Wis. 1999).

failed to ascertain an aspect of his medical history known to involve a risk of future harm.¹⁴³ In turn, the team physician has a duty to obtain a complete and accurate medical history from an athlete.¹⁴⁴

An athlete generally may rely upon the recommendations of the team physician or his designated consulting specialists without seeking a second medical opinion.¹⁴⁵ An athlete's reliance on the team physician's recommendations ordinarily is reasonable because of the doctor's sports medicine expertise.¹⁴⁶ An athlete is not contributorily negligent if he engages in an athletic activity based on physician approval, even if he does not pursue any other source of information.¹⁴⁷

An athlete does not assume the risk of injury from negligent medical care rendered by physicians providing medical services to participants in a sporting event. In *Classen v. Izquierdo*,¹⁴⁸ the court denied a summary judgment motion by a ring-side physician who allegedly was negligent in allowing a boxer to continue fighting and thereby receive injuries that caused his death.¹⁴⁹

On the other hand, an athlete's failure to follow his physician's instructions constitutes contributory negligence. In *Gillespie v. Southern Utah State College*,¹⁵⁰ a college basketball player was found to be solely responsible for aggravating an ankle injury by not following physician instructions concerning its proper treatment and rehabilitation.¹⁵¹

¹⁴³ See *Mackey*, 587 S.W.2d at 255.

¹⁴⁴ See *Mackey v. Greenview Hosp., Inc.*, 587 S.W.2d 249, 255 (Ky. Ct. App. 1979).

¹⁴⁵ See *Mikkelsen v. Haslam*, 764 P.2d 1384, 1388 (Utah Ct. App. 1988); see also *Krueger v. S.F. Forty Niners*, 234 Cal. Rptr. 579, 584 (Cal. Ct. App. 1987).

¹⁴⁶ See *Truman v. Thomas*, 611 P.2d 902, 905 (Cal. 1980); *Morrison v. MacNamara*, 407 A.2d 555, 567-68 (D.C. 1979); *Keomaka v. Zakaib*, 811 P.2d 478, 486 (Haw. Ct. App. 1991).

¹⁴⁷ See *Krueger*, 234 Cal. Rptr. at 584; *Mikkelsen*, 764 P.2d at 1388.

¹⁴⁸ 520 N.Y.S.2d 999 (Sup. Ct. N.Y. County 1987).

¹⁴⁹ *Id.* at 1000.

¹⁵⁰ 669 P.2d 861 (Utah 1983).

¹⁵¹ *Id.* at 864; see also *Starnes v. Caddo Parish Sch. Bd.*, 598 So. 2d 472 (La. Ct. App. 1992) (playing volleyball without wearing knee brace against doctor's advice); *Holtman v. Reese*, 460 S.E.2d 338 (N.C. Ct. App. 1995) (engaging in high impact aerobics, snow skiing, and water skiing contrary to chiropractor's advice); *Rusoff v. O'Brien*, 206 A.2d 209 (R.I. 1965) (engaging in strenuous activities against physician's advice).

To successfully establish an athlete's contributory negligence, all of the elements of this defense must be proven. In *Pascal v. Carter*,¹⁵² the court held that a high school football player's delay in obtaining medical treatment for his wrist injury was not contributory negligence. The court found that plaintiff's delay was not the proximate cause of his harm and instead resulted solely from a physician's negligent failure to diagnose his wrist fracture.¹⁵³ If a correct diagnosis had been made in a timely manner, the need for a subsequent surgery on plaintiff's wrist, which formed the basis of plaintiff's claimed damages, would have been avoided.¹⁵⁴

9. Validity of Liability Waivers

Parties to a consensual arrangement generally may allocate their respective legal responsibility to each other by contract. A person may prospectively agree to knowingly and voluntarily waive his legal right to recover for future harm attributable to another's wrongful conduct unless such an agreement violates public policy.¹⁵⁵ Some courts uphold releases of liability from future negligence, but not more culpable conduct such as intentional, reckless, or grossly negligent torts.¹⁵⁶

Generally, courts have invalidated contracts releasing physicians from liability for negligent medical care of their patients.¹⁵⁷ Such contracts have been held to violate public policy because medical services are essential public services,¹⁵⁸ the physician holds himself out as willing and able to provide such services,¹⁵⁹ the patient places himself under the physician's control but remains subject to the risks of his carelessness,¹⁶⁰ and the physician has the bargaining power to require a release from negligence liability as a condition of providing medical treatment.¹⁶¹

¹⁵² 647 A.2d 231, 232 (Pa. Super. Ct. 1994).

¹⁵³ *Id.* at 233.

¹⁵⁴ *Id.*

¹⁵⁵ See KEETON ET AL., *supra* note 8, § 68, at 482-484.

¹⁵⁶ *Id.*

¹⁵⁷ See generally A.M. Swarthout, Annotation, *Validity and Construction of Contract Exempting Hospital or Doctor from Liability for Negligence to Patient*, 6 A.L.R. 3d 704, 705 (1966 & Supp. 2001).

¹⁵⁸ See, e.g., *Tunkl v. Regents of the Univ. of Cal.*, 383 P.2d 441, 447 (Cal. 1963).

¹⁵⁹ See, e.g., *Belshaw v. Feinstein*, 65 Cal. Rptr. 788, 798 (Cal. Ct. App. 1968).

¹⁶⁰ See, e.g., *Olson v. Molzen*, 558 S.W.2d 429, 432 (Tenn. 1977).

¹⁶¹ See, e.g., *Meiman v. Rehab. Ctr., Inc.*, 444 S.W.2d 78, 80 (Ky. Ct. App. 1969).

A waiver of legal rights by an athlete who is a minor is usually not enforceable, even if a waiver is also given by a parent or guardian (or entered into with their approval), because minors have only a limited legal capacity to enter into contracts.¹⁶² It is arguable, however, that an adult athlete—particularly a professional one—and a team physician should be permitted to establish the bounds of their relationship by contract. For example, an adult athlete who has been fully informed of the risks of playing with an injury, or who desires a physician to utilize innovative therapy in treating an injury, may be willing to release a physician from potential negligence liability for medically clearing him to play or providing desired treatment.

Because the team physician-adult athlete relationship is different from the ordinary physician-patient relationship, it could be argued that courts should uphold liability waivers in some circumstances. Doing so, however, may contravene a team physician's obligation to protect an athlete's health and discourage athletic participation that exposes that athlete to a risk of serious harm. This issue has not yet been resolved, and a court might invalidate a waiver that purports to release a team physician from liability for negligent medical care rendered to an athlete on public policy grounds.¹⁶³

10. Immunity Issues

In some instances, physicians may be immune, as a matter of law, from legal liability for malpractice claims brought by athletes.¹⁶⁴ Several states have enacted statutes immunizing volunteer team physicians from negligence liability arising from the rendering of emergency medical care to athletes.¹⁶⁵ Some states have expanded their Good Samaritan laws to include

¹⁶² See, e.g., *Childress v Madison County*, 777 S.W.2d 1, 8 (Tenn. Ct. App. 1989).

¹⁶³ This author has argued that such a waiver should not be upheld and that comparative negligence principles should be used to apportion legal responsibility for harm caused by a team physician's deviation from good sports medicine practice and an athlete's failure to use reasonable care to protect his health. See Mitten, *supra* note 25, at 165-68.

¹⁶⁴ See generally Matthew J. Mitten, Annotation, *Medical Malpractice Liability of Sports Medicine Care Providers for Injury to, or Death of, Athlete*, 33 A.L.R. 5TH 619 (1995) (listing state statutes immunizing physicians from malpractice liability in the sports medicine context).

¹⁶⁵ *Id.*

physicians rendering emergency care at athletic events.¹⁶⁶ These statutes are designed to encourage physicians to volunteer their services to interscholastic and intercollegiate athletic programs. Statutory immunity generally covers only team physicians who provide emergency medical care to an athlete with an apparent life-threatening condition or serious injury in good faith and without compensation.¹⁶⁷ Willful or wanton emergency treatment or gross negligence by a physician is not immune from liability.¹⁶⁸ Pre-participation physical exams, general non-emergency medical care rendered to athletes, and physician decisions regarding whether an athlete may return to a game are not normally subject to immunity.¹⁶⁹

Team physicians employed by public universities may be protected by state law immunity covering the acts of state employees. In *Sorey v. Kellett*,¹⁷⁰ the Fifth Circuit held that a limited statutory immunity for state employees barred a suit against a team physician that alleged negligent medical treatment of a college football player.¹⁷¹ The court relied upon a Mississippi law providing immunity to state-employed physicians for discretionary aspects of administered medical care.¹⁷²

Similarly, in *Gardner v. Holifield*,¹⁷³ a Florida appellate court ruled that alleged negligent medical care provided to a college basketball player by a physician in his capacity as director of a public university's student health center was included within the scope of tort immunity under Florida law.¹⁷⁴ The court held that state employees, including physicians, were immune from liability for negligence committed within the scope and course of their employment.¹⁷⁵ The court remanded the case for determination of whether the physician had provided any

¹⁶⁶ *Id.*; see also Gerald T. Todaro, *The Volunteer Team Physician: When Are You Exempt From Civil Liability?*, THE PHYSICIAN & SPORTSMEDICINE, Feb. 1986, at 147, 150 (noting that Kansas, Missouri, and Tennessee have Good Samaritan laws that cover athletic events).

¹⁶⁷ Todaro, *supra* note 166, at 147-48.

¹⁶⁸ *Id.* at 150-52.

¹⁶⁹ *Id.* at 153.

¹⁷⁰ 849 F.2d 960 (5th Cir. 1988).

¹⁷¹ *Id.* at 964.

¹⁷² *Id.* at 963.

¹⁷³ 639 So. 2d 652 (Fla. Dist. Ct. App. 1994).

¹⁷⁴ *Id.* at 656-57.

¹⁷⁵ *Id.* at 656 n.3.

negligent medical care to the player while acting in his capacity as a private physician, because such treatment was not immunized from liability.¹⁷⁶

State workers' compensation laws may bar the claims of professional athletes against team physicians for negligent medical care.¹⁷⁷ In *Hendy v. Losse*,¹⁷⁸ a professional football player sued team physicians for negligently diagnosing and treating a knee injury suffered during a game and for advising him to continue playing football.¹⁷⁹ In dismissing these claims, the California Supreme Court held that California's workers' compensation law bars tort suits between co-employees for injuries caused within the scope of employment.¹⁸⁰ The court found that plaintiff and defendant were both employed by the San Diego Chargers and that the defendant acted within the scope of his employment in treating the plaintiff.¹⁸¹ Thus, the plaintiff's exclusive remedy for his harm was workers' compensation.¹⁸²

Some state workers' compensation laws do not bar tort claims against team physicians for work-related injuries that are aggravated by "fraudulent concealment of the existence of the injury."¹⁸³ Likewise, claims against professional team physicians for fraudulent concealment of medical information, similar to those raised in *Krueger*, are actionable.¹⁸⁴

A professional team physician may be subject to a tort suit if he is found to be an independent contractor rather than an employee of a professional sports team covered by workers'

¹⁷⁶ *Id.* at 657.

¹⁷⁷ *See, e.g., Daniels v. Seattle Seahawks*, 968 P.2d 883, 887-88 (Wash. Ct. App. 1998) (holding that team physician was football club employee, not an independent contractor).

¹⁷⁸ 819 P.2d 1 (Cal. 1991).

¹⁷⁹ *Id.* at 3.

¹⁸⁰ *See id.* at 11.

¹⁸¹ *Id.* at 12.

¹⁸² *Id.* at 13.

¹⁸³ CAL. LABOR CODE § 3602(b) (Deering 1991); *see, e.g., CAL. LABOR CODE* § 3602(b), (c) (Deering 1991) (allowing a civil action by an employee against an employer, notwithstanding the workers' compensation statute, for injuries suffered from, amongst other things, the employer's willful physical assault or defective products manufactured by the employer).

¹⁸⁴ *See Krueger v. S.F. Forty Niners*, 234 Cal. Rptr. 579 (Cal. Ct. App. 1987). In some jurisdictions, workers' compensation laws bar common law intentional tort claims against professional sports team employees. *See, e.g., Ellis v. Rocky Mountain Empire Sports, Inc.*, 602 P.2d 895, 898 (Colo. Ct. App. 1979).

compensation laws.¹⁸⁵ Team physicians who are employees of professional teams are subject to common law tort claims for medical services provided to athletes that are outside the scope of the physician's employment agreement.¹⁸⁶

B. Athletic Trainers

Athletic trainers typically provide a variety of sports medicine services to athletes such as physical conditioning, injury prevention, emergency medical care, and injury rehabilitation.¹⁸⁷ The National Athletic Trainers Association provides certification for athletic trainers. Many states require that athletic trainers be licensed, define the authorized scope of their practice, or otherwise regulate the profession.¹⁸⁸ State law may require that a physician prescribe or supervise certain medical treatment provided to an athlete by an athletic trainer.¹⁸⁹

In *Searles v. Trustees of St. Joseph's College*,¹⁹⁰ the Maine Supreme Court held that an athletic trainer "has the duty to conform to the standard of care required of an ordinary careful trainer" when providing care and treatment to athletes.¹⁹¹ The court ruled that a trainer may incur negligence liability for failing to communicate the severity of a player's injuries to the team's coach, or for failing to advise an athlete that he should

¹⁸⁵ See *Bryant v. Fox*, 515 N.E.2d 775, 778 (Ill. Ct. App. 1987); *Martin v. Casagrande*, 559 N.Y.S.2d 68, 69 (4th Dep't 1990).

¹⁸⁶ See *Hendy*, 819 P.2d at 12.

¹⁸⁷ See *Owsley v. San Antonio Indep. Sch. Dist.*, 187 F.3d 521, 525 (5th Cir. 1999) (reviewing education requirements, skills, and duties of trainers and concluding that they are members of a learned profession who exercise discretion and judgment in providing their health care services).

¹⁸⁸ See, e.g., GA. CODE ANN. § 43-5-8 (1999); ME. REV. STAT. ANN. tit. 32, § 14354 (West 1999); N.Y. EDUC. LAW § 8352 (Consol. 1985). See generally DAVID L. HERBERT, *LEGAL ASPECTS OF SPORTS MEDICINE* 20-26 (2d ed. 1995).

¹⁸⁹ See HERBERT, *supra* note 188, at 22. If an athletic trainer engages in the unauthorized practice of medicine and injures an athlete, he may be held to the standard of care applicable to a physician under similar circumstances. *Id.* at 22-23. Not every aspect of sports medicine care rendered by an athletic trainer, however, must be supervised or approved by a physician. See, e.g., *Ga. Physical Therapy, Inc. v. McCullough*, 466 S.E.2d 635, 637 (Ga. Ct. App. 1995) (construing state law to permit a trainer to treat football player's ingrown toenail without advice and consent of a physician).

¹⁹⁰ 695 A.2d 1206 (Me. 1997).

¹⁹¹ *Id.* at 1210; see also *Orr v. Brigham Young Univ.*, 960 F. Supp. 1522, 1527. (D. Utah 1994), *aff'd*, 108 F.3d 1388 (10th Cir. 1997).

not continue playing with his medical condition.¹⁹²

In *Jarreau v. Orleans Parish School Board*,¹⁹³ the Louisiana Court of Appeals upheld a jury finding that a high school football team's trainer negligently failed to refer a player with a wrist injury to an orthopedist until after the season ended. The athlete complained that his wrist continued to hurt and was swollen, but he was not withheld from competition although his "play was adversely affected by the injury."¹⁹⁴ The trainer's delay in referring the player for treatment of his fracture necessitated an extended period of treatment and caused a permanent disability.¹⁹⁵ Applying contributory negligence principles, the court found the player to be one-third at fault for failing to consult his own physician or requesting that he be referred to a school physician.¹⁹⁶

Marc Buoniconti, a former linebacker for The Citadel, sued the university along with its team physician and athletic trainer, seeking damages for permanent paralysis suffered while making a tackle during a football game.¹⁹⁷ Buoniconti had injured his neck during three prior games. Daily heat packs and whirlpool treatments did not improve the condition of his neck. In the game before he was paralyzed, Buoniconti suffered a sprained neck that prevented him from practicing, inhibited his sleeping, and required him to wear a soft collar for neck support.

Believing that Buoniconti had suffered an extension injury to his neck, the team's athletic trainer fixed a ten-inch elastic strap to the face guard of Buoniconti's helmet and connected it to the front of his shoulder pads. The device prevented Buoniconti's head from going back and was approved by the team physician. The athletic trainer tightened the strap downward causing Buoniconti to walk "like a robot . . . with his head down."¹⁹⁸ While making a tackle with his head constrained

¹⁹² *Id.* at 1211.

¹⁹³ 600 So. 2d 1389 (La. Ct. App. 1992).

¹⁹⁴ *Id.* at 1390; see also *Pinson v. Tennessee*, No. 02A01-9409-BC-00210, 1995 WL 739820, at *7 (Tenn. Ct. App. Dec. 12, 1995) (finding athletic trainer negligent for not disclosing injured player's symptoms of serious brain injury to treating physicians).

¹⁹⁵ *Jarreau*, 600 So. 2d at 1391.

¹⁹⁶ See *id.* at 1394.

¹⁹⁷ For general background information regarding this case see William Nack, *Was Justice Paralyzed?*, SPORTS ILLUSTRATED, July 25, 1988, at 32.

¹⁹⁸ See *id.* at 34.

by this device, Buoniconti broke his neck and was rendered a quadriplegic. Buoniconti asserted that the team trainer and physician were negligent for permitting him to play with a serious neck injury and with equipment that placed his neck in a position making it vulnerable to being broken. Before trial, Buoniconti settled his claims against the Citadel and its trainer for \$800,000.¹⁹⁹

An athletic trainer, like any other provider of sports medicine care, is not negligent merely because the treatment provided exacerbates an athlete's injury. In *Gillespie v. Southern Utah State College*,²⁰⁰ the Utah Supreme Court held that a student athletic trainer was not liable for treating a basketball player's ankle injury that ultimately would have healed by itself without medical treatment. The court ruled that the athletic trainer's liability depended upon proof of negligent treatment contributing to the athlete's enhanced injury.²⁰¹

In some instances, a negligence action against an athletic trainer employed by a public educational institution may be barred by state laws granting public employees qualified immunity. In *Lennon v. Petersen*,²⁰² the Alabama Supreme Court held that a college soccer player could not sue a university-employed athletic trainer for alleged negligent treatment of an injury. The court rejected plaintiff's contention that the athletic trainer was not entitled to immunity because she exceeded her authority by practicing medicine without a license.²⁰³ The court ruled:

As an athletic trainer, she had the responsibility to determine whether an athlete was faking or hiding an injury. She had to ascertain the source of the injury, the extent of the injury, and the treatment for the injury. She had to calculate whether the injury was adequately responding to treatment. She had the further responsibility of determining when an athlete should be restricted from play, referred to a doctor, or allowed to return to the field. Because all of these functions required the use of her judgment and discretion, she is entitled to discretionary

¹⁹⁹ See *id.* at 33.

²⁰⁰ 669 P.2d 861 (Utah 1983).

²⁰¹ *Id.* at 864-65. Expert testimony from another athletic trainer is normally necessary to establish malpractice liability. See, e.g., *Ga. Physical Therapy, Inc. v. McCullough*, 466 S.E.2d 635 (Ga. Ct. App. 1995).

²⁰² 624 So. 2d 171 (Ala. 1993).

²⁰³ *Id.* at 174.

function immunity.²⁰⁴

C. *Physical Therapists*

Physical therapists often provide sports medicine care to athletes by screening or rehabilitating injuries. State licensing laws specifically define the authorized scope of physical therapy practice. If a physical therapist engages in the unauthorized practice of medicine and thereby injures an athlete, he may be held to the standard of care required of a physician under similar circumstances.²⁰⁵

In most states, physical therapists are not licensed to diagnose an athletic injury or begin treatment without a prescription or referral from a physician. In *Lavergne v. Louisiana State Board of Medical Examiners*,²⁰⁶ a Louisiana appellate court discussed the distinction under the state's Physical Therapy Practice Act between permissible evaluation of the need for physical therapy and impermissible unauthorized medical diagnosis and treatment. While voluntarily screening injuries incurred during athletic events for local high schools, a therapist examined a basketball player's injured ankle, performed a heel strike test, and concluded his ankle was not broken.²⁰⁷ He advised the player to ice his ankle and seek treatment from a physician if he continued to experience pain.²⁰⁸ The Louisiana State Board of Medical Examiners placed the therapist on probation for two years for evaluating the athlete's injury before a physician examined the athlete.²⁰⁹ The court found that the therapist's conduct did not constitute unauthorized medical diagnosis or treatment because he did not hold himself out as a physician, prescribe medication, suggest that the athlete needed physical therapy, or bandage or x-ray his ankle.²¹⁰ The court concluded that instructing the athlete to keep ice on his ankle was permissible and appropriate advice by

²⁰⁴ *Id.* at 175; see also *Sorey v. Kellett*, 849 F.2d 960 (5th Cir. 1988) (finding a team trainer for a public university immune from suit under Mississippi law).

²⁰⁵ See *Brown v. Shyne*, 151 N.E. 197, 199 (N.Y. 1926) (holding a chiropractor to a physician's standard of care because he held himself out as able to treat and diagnose diseases despite his lack of a medical license).

²⁰⁶ 539 So. 2d 656 (La. Ct. App. 1989).

²⁰⁷ See *id.*

²⁰⁸ *Id.*

²⁰⁹ *Id.*

²¹⁰ See *id.* at 657-58.

the therapist and invalidated the Board's disciplinary sanction.²¹¹

There are no reported appellate cases specifically considering the liability of a physical therapist for providing negligent care to an athlete.²¹² The law permits physical therapists to establish the appropriate standard of care for rehabilitating injured athletes. In all areas of practice, a therapist must use the care and skill ordinarily possessed by competent members of the physical therapy profession. A therapist must provide the treatment and rehabilitation that a reasonable and prudent member of the profession would provide under similar circumstances.²¹³ A therapist is not legally considered a guarantor of good results from treatment or rehabilitation therapy unless he promises a particular outcome to an athlete.²¹⁴

The American Physical Therapy Association enables a licensed physical therapist to obtain certification as a specialist in sports physical therapy. A therapist who is certified in sports physical therapy or holds himself out as having special expertise in treating athletic injuries is held to a higher standard of care than those engaged in the general practice of physical therapy.²¹⁵ Because of their enhanced knowledge and training, therapists specializing in sports physical therapy must provide at least the minimum level of care provided by specialists in this area. It may be negligent for a physical therapist engaged in general practice to treat athletic injuries that require specialized knowledge and training.

²¹¹ *Id.* at 657.

²¹² For an overview of a physical therapist's potential liability when treating athletes see generally, Matthew J. Mitten and Robert J. Mitten, *Legal Considerations in Treating the Injured Athlete*, 21 THE J. OF ORTHOPEDIC & SPORTS PHYSICAL THERAPY 38 (1995).

²¹³ See *Wade v. John D. Archbold Mem'l Hosp.*, 311 S.E.2d 836, 837 (Ga. 1984) (rejecting a locality standard of care for physical therapists); *Flores v. Ctr. for Spinal Evaluation and Rehab.*, 865 S.W.2d 261, 264 (Tex. App. 1993) (finding that therapist malpractice is evaluated in the same way as traditional physician malpractice).

²¹⁴ See KEETON ET AL., *supra* note 8, § 32, at 186.

²¹⁵ Courts have ruled that a physician who is board certified or who holds himself out as a specialist must conform to the minimum standard of care and skill of physicians practicing that specialty. See *Buck v. St. Clair*, 702 P.2d 781, 783 (Idaho 1985); *Roberts v. Tardif*, 417 A.2d 444, 451 (Me. 1980). This same principle would logically apply to physical therapists.

II. LIABILITY OF PROFESSIONAL TEAMS AND EMPLOYEES

Professional athletes have asserted tort claims against their teams for providing inadequate medical care or causing the aggravation of an existing injury by requiring the athlete to continue playing.²¹⁶ A professional team's legal duty to provide medical care to an injured player is generally governed by the terms of the collective bargaining agreement (CBA) between the players' union and athletic league, and the provisions of the standard player contract. The parties generally agree that disputes regarding a team's compliance with these duties are subject to arbitration.²¹⁷ State workers' compensation laws may provide benefits for aggravation of a player's injury due to improper medical treatment, but typically bar tort claims against teams arising out of the medical care provided to players.

A. *Collective Bargaining Agreement Issues*

The league CBA and standard player contract generally establish a contractual right of professional athletes to receive team-provided or paid medical care and rehabilitation for injuries suffered during training and games. Major league professional athletes also have contractual injury protection guarantees and benefits for career-ending injuries and sport-related disabilities.²¹⁸ Disputes between a player and team concerning the parties' respective rights and responsibilities under these agreements generally must be submitted to arbitration.²¹⁹

In *Smith v. Houston Oilers, Inc.*,²²⁰ the Fifth Circuit affirmed the dismissal of two players' tort claims against the Oilers for requiring them to participate in an allegedly abusive injury rehabilitation program, during which one of the players

²¹⁶ In one instance, a minor league baseball pitcher unsuccessfully asserted an antitrust claim for injuries resulting from alleged overworking of his arm. See *Tepler v. Frick*, 204 F.2d 506, 507 (2d Cir. 1953).

²¹⁷ But see *In re Anaheim Angels Baseball Club, Inc.*, 993 S.W.2d 875 (Tex. App. 1999) (finding that baseball club's breach of a minor league contract was not subject to arbitration because it was not required under the parties' contract).

²¹⁸ See, e.g., *Courson v. Bert Bell NFL Player Ret. Plan*, 214 F.3d 136 (3d. Cir. 2000) (discussing the disability benefits plan for NFL players).

²¹⁹ See generally William B. Briggs, *Injury Grievances in the National Football League*, 63 L. INST. J. 164 (1989).

²²⁰ 87 F.3d 717 (5th Cir. 1996).

collapsed. After being injured, the players were placed in a routine rehabilitation program with other injured players. League rules prohibited the involuntary termination of a player's contract while he was recovering from a football-related injury. After the players refused to settle their contracts, they were forced to participate in a strenuous early morning rehabilitation program designed to coerce them into voluntarily leaving the team.

The Fifth Circuit held that resolution of the players' claims required interpretation and construction of the league CBA as governed by federal labor law.²²¹ The court observed that forcing the players to choose either the proffered contract termination pay or an excessively demanding rehabilitation program, involved a labor dispute that was subject to mandatory arbitration under the terms of the CBA.²²² Therefore, the players' state tort law claims were preempted by federal labor laws, which required the exhaustion of all arbitration remedies provided in the CBA before permitting a civil suit.²²³

In *Sherwin v. Indianapolis Colts, Inc.*,²²⁴ a former NFL player alleged that, while under contract with the Colts, he suffered an injury for which the club and its team physicians "failed to provide adequate medical care, and intentionally withheld information regarding [the] true nature of his injury."²²⁵ Plaintiff asserted several state law tort claims against the defendants. The Colts contended that plaintiff's claims were subject to mandatory arbitration and moved for their dismissal or a stay of litigation pending arbitration.²²⁶

The court found that plaintiff's claims were substantially related to provisions of the National Football League's CBA and the standard player contract that required the Colts to provide medical care to injured players; therefore, interpretation of these agreements under federal law was necessary.²²⁷ Because

²²¹ *Id.* at 720-21.

²²² *Id.*

²²³ *Id.* at 721.

²²⁴ 752 F. Supp. 1172 (N.D.N.Y. 1990).

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.* at 1179; *see also* *Ellis v. Rocky Mountain Empire Sports, Inc.*, 602 P.2d 895 (Cal. Ct. App. 1979). (finding that a claim of inadequate medical care by a team must be submitted to arbitration under the terms of the NFL standard player contract).

the CBA required that disputes concerning the effect of its provisions be submitted to arbitration, the court dismissed the plaintiff's claims for lack of subject matter jurisdiction.²²⁸

In *Hendy v. San Diego Chargers Football Co.*,²²⁹ however, the Ninth Circuit held that a former NFL player's state law tort claims against the Chargers, alleging negligent hiring and retention of the team physician and intentional and negligent withholding of the player's medical information, were not subject to mandatory arbitration under the league CBA. The court reasoned that these claims were not preempted by the arbitration requirement because they arose independently of the CBA and did not require construction of its terms for their resolution.

A professional athlete's entitlement to league-provided disability benefits depends upon the terms of the pension benefit plan and the circumstances giving rise to the player's disability.²³⁰ The plan's administrators have a significant degree of discretion to determine a former player's eligibility for benefits and to construe the plan's terms. Courts are "highly deferential" to the plan administrators' benefit decisions, and provide only limited review under an "arbitrary and capricious" standard.²³¹

B. Interaction of Workers' Compensation and Tort Law

1. Scope of Workers' Compensation Coverage

Absent a specific exclusion under state law, injured professional athletes are normally eligible to receive workers' compensation benefits.²³² Aggravation of a player's existing injury caused by a professional team's requiring him to continue playing is compensable damage under such laws.²³³

²²⁸ *Sherwin*, 752 F. Supp. at 1179.

²²⁹ 925 F.2d 1470 (9th Cir. 1991).

²³⁰ See *Brumm v. Bert Bell NFL Ret. Plan*, 995 F.2d 1433 (8th Cir. 1993).

²³¹ See *Courson v. Bert Bell NFL Player Ret. Plan*, 214 F.3d 136, 142 (3d. Cir. 2000); *Sweeney v. Bert Bell NFL Player Ret. Plan*, 156 F.3d 1238 (9th Cir. 1998) (decision without published opinion).

²³² The Florida workers' compensation statute, however, excludes professional athletes from coverage. See FLA. STAT. ANN. § 440.02(15)(c)(3) (West 2001). For a general discussion of the law of workers' compensation as it applies to professional athletes see Gerald Herz, *Professional Athletes and the Law of Workers' Compensation: Rights and Remedies*, in 2 LAW OF PROFESSIONAL AND AMATEUR SPORTS 15-1 (Gary A. Uberstine ed., West Group 2001).

²³³ See *DePiano v. Montreal Baseball Club, Ltd.*, 663 F. Supp. 116, 117-18

A professional athlete is entitled to workers' compensation benefits for aggravation of an injury caused by improper treatment by the team's medical personnel.²³⁴ Professional teams have a contractual obligation under the league CBA and standard player contracts to provide medical care to their athletes,²³⁵ under which bodily injury due to negligent medical treatment is compensable injury.²³⁶ As a federal district court explained, "Once an employer undertakes, through its physicians, to provide proper medical care for any on-the-job illnesses, any harm resulting from the failure to do so is compensable under [state workers' compensation law]."²³⁷

2. Exclusivity of Workers' Compensation Remedy

By joint operation of league CBA provisions and state workers' compensation laws, a professional team effectively has a non-delegable duty to provide medical care to its players. The team bears the costs (at least partially) of player injuries, including those caused by the negligence of its coaching staff or chosen medical personnel. These injuries are compensable under the terms of the CBA and state workers' compensation law.²³⁸ In exchange, a player whose injury is aggravated by negligent medical treatment or by a team officials' failure to use reasonable care to protect his health is barred from recovering tort damages against the team or its employees.²³⁹ A professional team that is not covered by a state workers' compensation statute may be liable under vicarious liability principles if a player receives improper medical treatment.²⁴⁰

(W.D. Pa. 1987).

²³⁴ See *Bayless v. Phila. Nat'l League Club*, 472 F. Supp. 625, 629 (E.D. Pa. 1979).

²³⁵ See *Sherwin v. Indianapolis Colts, Inc.*, 752 F. Supp. 1172, 1178 (N.D.N.Y. 1972).

²³⁶ See, e.g., *DePiano*, 663 F. Supp. at 117; *Brinkman v. Buffalo Bills Football Club*, 433 F. Supp. 699, 702 (W.D.N.Y. 1977) (holding that a claim for bodily injury due to negligent medical treatment was barred by workers' compensation laws).

²³⁷ See *Bayless*, 472 F. Supp. at 629.

²³⁸ To prevent professional athletes from receiving benefits for the same injury from two different sources, some states limit the amount of recoverable workers' compensation benefits. See, e.g., TEX. LAB. CODE ANN. § 406.095 (Vernon 2001).

²³⁹ See, e.g., *Collier v. Wagner Castings Co.*, 388 N.E.2d 265 (Ill. App. Ct. 1979), *aff'd*, 408 N.E.2d 198, (Ill. 1980) (holding that there is no cause of action in tort against an employer for providing negligent medical treatment without proof of actual intent to injure the employee).

²⁴⁰ See *Bryant v. Fox*, 515 N.E.2d 775 (Ill. App. Ct. 1987).

The exclusive remedy provisions of workers' compensation laws will not bar a tort action against an employer for harm caused by conduct that is intended to injure an employee.²⁴¹ If the requisite intent is established, an employee may elect to either receive workers' compensation benefits or bring a tort claim.²⁴² The recovery of workers' compensation benefits based on a finding that an employee's injury was accidental, however, will bar, on res judicata grounds, a subsequent intentional tort claim against the employer.²⁴³

Courts generally have not been receptive to a professional athlete's claim that his team "intended" to aggravate an injury when requiring him to continue playing. In *DePiano v. Montreal Baseball Club, Ltd.*,²⁴⁴ a federal district court noted that the intentional injury exception to the exclusive remedy provision of New York's workers' compensation law was "very narrow."²⁴⁵ The court held that a baseball team's knowledge that a player risked further injury, or was substantially certain to be harmed by being forced to continue playing with an injury, was insufficient to trigger the exception.²⁴⁶ The court determined that requiring the athlete to continue playing was a decision based on the team's personnel needs and not on any intention to injure him.²⁴⁷ Finding no evidence that the team desired to injure the player, the court granted the summary judgment for the team.²⁴⁸ Even if a team does not intend to cause a player injury, it may still be subject to tort liability for fraudulent concealment of material medical information concerning a player's fitness to play. In *Krueger*,²⁴⁹ a California appellate court held that a professional football team fraudulently failed to disclose that a player risked permanent disability by continuing to play with a chronic knee condition. Evidence established that the team "consciously failed" to disclose that the player's knee

²⁴¹ See ARTHUR LARSON, WORKMEN'S COMPENSATION LAW § 68.13 (1993).

²⁴² *Id.* at § 68.12.

²⁴³ See *Martin v. Casagrande*, 559 N.Y.S.2d 68 (4th Dep't 1990).

²⁴⁴ 663 F. Supp. 116 (W.D. Pa. 1987).

²⁴⁵ *Id.* at 117.

²⁴⁶ *Id.*

²⁴⁷ *Id.*

²⁴⁸ *Id.* at 118.

²⁴⁹ *Krueger v. S.F. Forty Niners*, 234 Cal. Rptr. 579 (Cal. Ct. App. 1987). In denying review, the California Supreme Court ordered that this opinion not be officially published, thereby negating its precedential value. *Id.*

lacked the anterior cruciate ligament, that steroid injection treatments might have adverse effects, and that he risked permanent injury by continuing to play without surgery.²⁵⁰ The exclusivity provisions of the California workers' compensation statute were inapplicable because they expressly permitted the recovery of tort damages if the employee's injury was aggravated by the employer's fraudulent concealment of the existence of the injury.²⁵¹

Absent a statutory exception to the workers' compensation bar to employee tort claims, courts have refused to allow a player to bring a fraud action against a team for misrepresenting or failing to disclose material information about a physical condition that increased the risk of harm from continued play. In *Gambrell v. Kansas City Chiefs Football Club, Inc.*,²⁵² a professional football player sued his former team and its physicians for fraud and deceit.²⁵³ The player alleged that the team and two of its physicians conspired to falsely represent that he was medically fit to play football based on the results of his physical examination.²⁵⁴ He allegedly was unfit to play because of pre-existing back, neck, and spine injuries.²⁵⁵ After receiving medical clearance to play, plaintiff severely aggravated an existing injury during a game and was permanently disabled. The court observed that the alleged fraud preceded, and helped to produce, the aggravation of plaintiff's injury; therefore, the subsequent aggravation merged into the preexisting injury, for which plaintiff had previously received workers' compensation benefits.²⁵⁶ Concluding that the player was entitled to only one recovery for his injury, the court found his tort claim barred by the exclusivity provision of the Missouri workers' compensation law.²⁵⁷

C. Canadian Cases

National Hockey League players have asserted tort claims against Canadian teams for negligently failing to provide proper

²⁵⁰ *Id.* at 584.

²⁵¹ See CAL. LAB. CODE § 3602(a), (b) (Deering 2001).

²⁵² 562 S.W.2d 163 (Mo. Ct. App. 1978).

²⁵³ *Id.* at 166.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ See *id.*

²⁵⁷ See *id.* at 167.

medical care or to protect their health. In *Robitaille v. Vancouver Hockey Club, Ltd.*,²⁵⁸ a Canadian appellate court upheld a damages award against a hockey team for requiring a player to continue playing with a neck and shoulder injury that ultimately resulted in a disabling spinal cord injury. The team's coach and general manager accused the plaintiff of faking his injury and threatened to suspend him unless he played.²⁵⁹ The team was found vicariously liable for the negligence of its team physician and trainer because it exercised substantial control over the medical treatment provided to plaintiff.²⁶⁰ The court upheld the awarding of punitive damages against the team for the reckless disregard for plaintiff's health exhibited by its management officials.²⁶¹ The court also upheld the finding that plaintiff was twenty percent contributorily negligent for continuing to play and for failing to take independent action to protect his health.²⁶²

On the other hand, in *Wilson v. Vancouver Hockey Club*,²⁶³ the British Columbia Supreme Court held that a hockey team was not liable for negligent treatment provided by a team physician to a player. The team physician failed to promptly refer a player suspected of having cancer to a specialist or to arrange for a biopsy.²⁶⁴ The court found no basis for holding the team vicariously liable because its management did not exercise any influence or control over the physician's treatment of the plaintiff.²⁶⁵

III. LIABILITY OF HIGH SCHOOLS AND THEIR EMPLOYEES

A. *Duty of Care*

To recover for an injury, a high school athlete is required to prove tortious conduct on the part of a school district or its employees.²⁶⁶ Although a high school is not an insurer of

²⁵⁸ [1981] 124 D.L.R. (3d) 228.

²⁵⁹ *Id.* at 230.

²⁶⁰ *See id.* at 248-50.

²⁶¹ *Id.* at 250-51.

²⁶² *Id.* at 253.

²⁶³ [1983] 5 D.L.R. (4th) 282.

²⁶⁴ *Id.* at 284.

²⁶⁵ *Id.* at 290.

²⁶⁶ *See Hale v. Davies*, 70 S.E.2d 926, 927 (Ga. Ct. App. 1952) (finding no employment relationship between a high school player and coach). High school

students' safety and is not strictly liable for students' injuries, it must use reasonable care to protect student health and safety in school-sponsored interscholastic athletic activities.²⁶⁷ A school may be liable, under vicarious liability principles, for the negligent conduct of employees, such as coaches, trainers, and administrative personnel, unless there is state law immunity from tort liability. More specifically, courts have held that "[t]he duty owed an athlete takes the form of *giving adequate instruction* in the activity, *supplying proper equipment*, making a reasonable selection or matching of participants, *providing nonnegligent supervision* of the particular contest, and taking proper post-injury procedures to protect against aggravation of the injury."²⁶⁸

Absent a statutory requirement or contractual obligation, courts have held that neither a public school district nor private high school has a legal duty to provide insurance coverage for injuries occurring during interscholastic sports.²⁶⁹ The reasoning of these cases suggests that the provision of insurance coverage for medical expenses necessitated by an athlete's injury is within the school's discretion, rather than a common law legal obligation. One court has held that, even where a high school required members of its athletic teams to obtain medical insurance at their own expense as a prerequisite to participation in a sport, the school had no legal duty to require proof of such coverage before it allowed the student to participate.²⁷⁰

athletes are not employees of the educational institutions that sponsor athletics and are, therefore, not entitled to workers' compensation benefits for injuries. *See Marcy v. Town of Saugus*, 495 N.E.2d 569, 570 (Mass. App. Ct. 1986).

²⁶⁷ *See Stehn v. Bernarr MacFadden Founds., Inc.*, 434 F.2d 811, 813 (6th Cir. 1970); *Benitez v. N.Y. City Bd. of Educ.*, 541 N.E.2d 29, 32 (N.Y. 1989); *Tri-Cent. High Sch. v. Mason*, 738 N.E.2d 341, 344 (Ind. Ct. App. 2000); *Wissel v. Ohio High Sch. Athletic Ass'n*, 605 N.E.2d 458, 466 (Ohio Ct. App. 1992) (holding that national and state high school athletic associations assume a legal duty of care to athletes by promulgating safety rules and establishing safety policies).

²⁶⁸ *Leahy v. Sch. Bd.*, 450 So. 2d 883, 885 (Fla. Dist. Ct. App. 1984) (quoting Annotation, 35 A.L.R. 3d 725, 734 (1971)). *See generally* Elizabeth Walker, *Negligence Liability of Public High School Districts for Athletic Injuries*, 4 DEPAUL-LCA J. ART. & ENT. L. & POL'Y 287 (1994).

²⁶⁹ *See Wicina v. Strecker*, 747 P.2d 167, 173 (Kan. 1987); *Mason*, 738 N.E.2d at 344; *Marcy* 495 N.E.2d at 570; *Friederich v. Bd. of Educ.*, 375 N.E.2d 141, 143 (Ill. App. Ct. 1978).

²⁷⁰ *See Limerick v. Euclid Bd. of Educ.*, 591 N.E.2d 1299, 1301 (Ohio Ct. App. 1990).

Nonetheless, a school that chooses to provide insurance to its student-athletes has a legal duty to ensure that all of them have insurance coverage before permitting them to participate. In *Williams v. East Baton Rouge Parish School Board*,²⁷¹ a Louisiana appellate court explained:

Because of the nature of contact sports, students are exposed to situations where they can and/or will be harmed. Coaches should not *knowingly* allow a student who has neither applied for the school's insurance nor completed the insurance-waiver form to play and be put in harm's way. Therefore, defendants did have a duty to ensure plaintiff had insurance or completed the waiver form before allowing him to play. This duty was breached when plaintiff was permitted to participate in the game even after plaintiff told his coach he had not completed the form.²⁷²

A school is not liable for a player's injury resulting from the inherent risks of a sport if it has used reasonable care in conducting the activity. In *Vendrell v. School District No. 26C*,²⁷³ the Oregon Supreme Court held that a school district was not legally responsible for a football player's neck injury suffered while making a tackle. The school had required physician certification of the player's physical fitness to participate.²⁷⁴ Team members were required to participate in extensive calisthenics, running, and other exercises to enable them to meet the physical demands of football.²⁷⁵ Finding that the school had provided extensive training, as well as competent instruction and supervision, the court concluded that the plaintiff assumed the risk of injury under these circumstances.²⁷⁶

Courts have held that a school district is not liable for an injury to an apparently healthy athlete resulting from a latent medical condition. In *Kerby v. Elk Grove Union High School District*,²⁷⁷ a sixteen year old student was struck in the forehead by a thrown basketball, causing the rupture of an arterial aneurysm and his death. Because the existence of his latent aneurysm was unknown to school officials, the court held that

²⁷¹ 723 So. 2d 1093, 1098 (La. Ct. App. 1998).

²⁷² *Id.*

²⁷³ 376 P.2d 406 (Or. 1962).

²⁷⁴ *See id.* at 409.

²⁷⁵ *See id.* at 410.

²⁷⁶ *See id.* at 414.

²⁷⁷ 36 P.2d 431 (Cal. Ct. App. 1934).

the school was not negligent for permitting him to play sports.²⁷⁸

A high school may be negligent for permitting an athlete to participate in sports contrary to a state high school athletic association's health and safety requirements.²⁷⁹ For example, many state high school athletics governing bodies require physician certification of students' physical fitness before participation in interscholastic sports is permitted.²⁸⁰ Although this issue is legally unresolved, compliance with these requirements would appear to be a prerequisite part of a school's duty to use reasonable care in conducting its athletic program.

In *Benitez v. New York City Board of Education*,²⁸¹ the New York Court of Appeals held that students participating in interscholastic sports assumes the risk of injury inherent in athletics, but not "unreasonably increased or concealed" risks.²⁸² Observing that injury from fatigue is inherent in strenuous competitive sports, the court dismissed plaintiff's negligence suit against the school board and its athletic league which sought compensation for a paralyzing injury suffered during a football game.²⁸³ The court found that the coach had not negligently subjected plaintiff to any unreasonably enhanced risks by having him play both offense and defense for almost the entire first half of the game, while knowing that his team's players were tired and overmatched by their opponents.²⁸⁴ The court's decision is based on its finding that plaintiff customarily played most of the game, had not informed a coach of his fatigue or asked to be removed from the game in which his injury occurred, and was not directed to disregard a risk he would not have otherwise assumed.²⁸⁵

²⁷⁸ See *id.* at 434.

²⁷⁹ See *Serrell v. Connetquot Cent. High Sch. Dist.*, 721 N.Y.S.2d 107, 108 (2d Dep't 2001) (noting that a high school athletics governing body may not have a legal duty to promulgate rules regarding an injured athlete's return to play).

²⁸⁰ See *Edwards v. Ruedlinger, Inc.*, 669 So. 2d 541 (La. Ct. App. 1996) (holding that requiring an athlete to obtain a certification of medical fitness, based on a detailed form provided by an athletic association, creates a legal duty on the part of the association to use reasonable care to ensure that the physician's examination includes appropriate means to discover abnormalities relating to the form's listed body organs and systems).

²⁸¹ 541 N.E.2d 29 (N.Y. 1989).

²⁸² *Id.* at 33.

²⁸³ See *id.* at 30.

²⁸⁴ See *id.* at 31-32.

²⁸⁵ See *id.* at 34.

On the other hand, exposing high school athletes to an unreasonably enhanced risk of injury during competition is actionable.²⁸⁶ In *Vargo v. Switchan*,²⁸⁷ a Michigan appellate court held that urging a high school football player to push "himself to and beyond his limits" with resulting injury may establish negligence liability.²⁸⁸ In another case, the same court held that coaches may be liable for ordering their players to perform unreasonably strenuous exercises during a practice that caused the death of one player and serious injury to another.²⁸⁹

High school personnel have a duty to promptly obtain emergency medical care for an injured athlete.²⁹⁰ Although lay athletic personnel are not charged with the knowledge of medical experts, they must recognize a medical emergency and act reasonably under the circumstances.²⁹¹ Courts have held that coaches may be liable for improperly providing first aid that worsens an injured athlete's condition.²⁹²

Requiring a high school athlete to continue playing with a known injury may create tort liability for aggravation of the injury. In *Morris v. Union High School District*,²⁹³ the Washington Supreme Court held that a school district was liable for a coach's negligence in inducing a student to continue playing football with a back injury. The court ruled, "[If] the coach knew that a student in the school was physically unable to play

²⁸⁶ See *Joseph E.G. v. E. Irondequoit Cent. Sch. Dist.*, 708 N.Y.S.2d 537, 538 (4th Dep't 2000) (explaining that a school may be liable for negligence in failing to properly clean mats after a wrestler's bloody nose, which allegedly caused transmission of herpes to another wrestler).

²⁸⁷ 301 N.W.2d 1 (Mich. Ct. App. 1980).

²⁸⁸ *Id.* at 3.

²⁸⁹ See *Lovitt v. Concord Sch. Dist.*, 228 N.W.2d 479 (Mich. Ct. App. 1975); see also *Waechter v. Sch. Dist. No. 14-030*, 773 F. Supp. 1005, 1007-08 (W.D. Mich. 1991) (holding that forcing a disabled thirteen-year-old with a congenital heart defect to run a 350-yard sprint as punishment was actionable under tort and constitutional law theories).

²⁹⁰ See *Mogabgab v. Orleans Parish Sch. Bd.*, 239 So. 2d 456, 460-61 (La. Ct. App. 1970) (noting that when coaches did not seek medical attention for an injured athlete until two hours after his symptoms appeared, they were negligent in causing his death).

²⁹¹ See *Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.*, 628 N.W.2d 697, 705-06 (Neb. 2001); *Pirkel v. Oakdale Union Grammar Sch. Dist.*, 253 P.2d 1, 4 (Cal. 1953); *Kersey v. Harbin*, 531 S.W.2d 76, 80-81 (Mo. Ct. App. 1975); *Duda v. Gaines*, 79 A.2d 695, 696 (N.J. Super. Ct. App. Div. 1951).

²⁹² See *Halper v. Vayo*, 568 N.E.2d 914 (Ill. App. Ct. 1991); *Gahan v. Mineola Union Free Sch. Dist.*, 660 N.Y.S.2d 144 (2d Dep't 1997).

²⁹³ 294 P. 998 (Wash. 1931).

football, or in the exercise of reasonable care should have known it, but nevertheless permitted, persuaded, and coerced such student to play, with the result that he sustained injuries, the district would be liable."²⁹⁴

Courts generally have rejected athletes' efforts to avoid the application of state law tort immunity by seeking recovery for negligent injury treatment rendered by public school personnel under the guise of federal constitutional rights violations. In *Burden v. Wilkes-Barre Area School District*,²⁹⁵ a federal district court rejected plaintiff's contention that an educational institution's decision not to hire a certified athletic trainer to protect the health and safety of students participating in competitive sports violated an athlete's constitutional right to life and liberty.

In *Myers v. Troup Independent School District*,²⁹⁶ the court dismissed a high school football player's claims arising out of the school district's alleged failure to ensure that he received proper medical care after a head injury rendered him unconscious. Plaintiff asserted that his coaches permitted him to return to the game without first being examined by a physician, and that this resulted in further serious bodily injury. The court found that plaintiff's claims were grounded in negligence and did not raise actionable constitutional issues.²⁹⁷

B. Athlete's Contributory Negligence

Under comparative responsibility principles, a high school athlete's recovery against a school district or its employees may

²⁹⁴ *Id.* at 999; accord *Jarreau v. Orleans Parish Sch. Bd.*, 600 So. 2d 1389 (La. Ct. App. 1992); *Summers v. Milwaukie Union High Sch. Dist. No. 5*, 481 P.2d 369 (Or. Ct. App. 1971) (holding that the school district was negligent in requiring a student with a back abnormality to perform in a physical education class exercise without providing the student's physician with requested information about required exercises). *But see Hale v. Davies*, 70 S.E.2d 923 (Ga. Ct. App. 1952) (dismissing complaint alleging that a coach negligently ordered a student to practice with an injury).

²⁹⁵ 16 F. Supp. 2d 569 (M.D. Pa. 1998). *But see Roventini v. Pasadena Indep. Sch. Dist.*, 981 F. Supp. 1013 (S.D. Tex. 1997) (holding that allegations of a high school football player's death caused by heat stroke, suffered during a practice in which no certified athletic trainer was present and where the only persons providing medical assistance were untrained teenage team managers, stated a claim for violation of the decedent's federal constitutional rights), *vacated*, 183 F.R.D. 500 (S.D. Tex. 1998).

²⁹⁶ 895 F. Supp. 127 (E.D. Tex. 1995)

²⁹⁷ *See id.* at 130.

be barred or reduced by his failure to use reasonable care to protect his own health and safety. In *Jarreau v. Orleans Parish School Board*,²⁹⁸ a Louisiana court of appeals held that an eighteen-year-old high school football player should bear one-third of the fault for failing to seek medical treatment for, and continuing to play with, a painful wrist injury that resulted in permanently impaired function. The school was liable for the negligence of its coach and athletic trainer who permitted the plaintiff to continue playing with his injury without referring him to a physician for examination and treatment.

In *Hale v. Davies*,²⁹⁹ a Georgia court of appeals dismissed a sixteen-year-old football player's negligence claim against his coach for directing him to play with an arm and shoulder injury. The athlete was seeking recovery for additional injury to his arm and shoulder. The court ruled that the plaintiff had voluntarily continued to play football and assumed all risk of any enhanced injury.

The *Davies* case was decided in 1952, and courts considering this issue today may rule differently under the principles of comparative responsibility that most states have subsequently adopted. Absent statutory immunity, courts generally permit a negligence claim against a coach for subjecting a player to an unreasonably enhanced risk of harm. If an athlete has also acted unreasonably by continuing to play a sport, a court may reduce his recoverable damages, as demonstrated by the court in *Jarreau*.

C. *Validity of Liability Waivers*

Courts may refuse to enforce pre-injury waivers that seek to release a school district or its employees from liability for negligent failure to use reasonable care to protect the health and safety of students during athletic activities. Such a waiver may be found to violate public policy and deemed unenforceable against either a high school athlete, or his parents or guardian. Alternatively, the waiver may be enforceable against a parent or guardian who signs it, but not against a minor.³⁰⁰

²⁹⁸ 600 So. 2d 1389 (La. Ct. App. 1992).

²⁹⁹ 70 S.E.2d 923 (Ga. Ct. App. 1952).

³⁰⁰ See generally Richard B. Malamud & John E. Karayan, *Contractual Waivers for Minors in Sports-Related Activities*, 2 MARQ. SPORTS L.J. 151 (1992).

In *Wagenblast v. Odessa School District*,³⁰¹ the Washington Supreme Court held that requiring a student and his parents or guardian to sign a standard form releasing the school district from liability for negligence in connection with the student's participation in interscholastic athletics violated public policy. The court reached its conclusion by applying a six-factor test previously developed by the California Supreme Court in *Tunkl v. Regents of the University of California*.³⁰² The *Wagenblast* court ruled that the existence of the following factors invalidated the waiver: interscholastic sports were extensively regulated in Washington; interscholastic sports were "a matter of public importance"; participation in interscholastic sports was open to all students with the requisite skills and eligibility; there was "no alternative program of organized competition" for interscholastic sports; no sports participation was allowed unless the waiver was signed; and the student was under the coach's "considerable" control and subject to the risk that reasonable care would not be used to protect him from harm.³⁰³

In *Childress v. Madison County*,³⁰⁴ the mother of a mentally retarded twenty year old boy signed a standard waiver as a precondition to his training for the Special Olympics at a YMCA swimming pool. In a subsequent suit asserting that an instructor provided negligent supervision causing the child to drown, a Tennessee appellate court found the release enforceable against the mother's claims, but unenforceable against the claims of the child's estate. The court explained, "Minors can waive nothing. In law they are helpless, so much so that their representatives can waive nothing for them."³⁰⁵

D. Immunity Issues

Under the doctrine of sovereign immunity, a public school district, as a subsidiary agency of the state, may be immune from tort liability for negligent medical care provided to an injured high school athlete.³⁰⁶ The scope of this immunity varies

³⁰¹ 758 P.2d 968 (Wash. 1988).

³⁰² 383 P.2d 441 (Cal. 1963).

³⁰³ See *Wagenblast*, 758 P.2d at 972-73. See Recent Case, *Wagenblast v. Odessa Sch. Dist.*, *Wash. 1988*, 102 HARV. L. REV. 729 (1989) for a critical analysis of the court's decision.

³⁰⁴ 777 S.W.2d 1 (Tenn. Ct. App. 1989).

³⁰⁵ *Id.* at 7.

³⁰⁶ See *Prince v. Louisville Mun. Sch. Dist.*, 741 So. 2d 207 (Miss. 1999); Evans

on a state-by-state basis.³⁰⁷

Courts generally hold that the operation of an interscholastic athletics program is a governmental function, rather than a proprietary one, and is therefore within the scope of a state's sovereign immunity.³⁰⁸ In *Lovitt v. Concord School District*,³⁰⁹ a Michigan court of appeals held that a public high school football program was a physical education activity included within the governmental function of providing education. Finding that the district's athletic program had been operating at a deficit for five years, the court rejected plaintiff's claim that the football program was a proprietary function solely because an admission fee was charged to games.

In some states, a statute may provide for a waiver of sovereign immunity if a school district obtains liability insurance for athletic injuries, allowing tort suits against the school district up to the limits of the policy.³¹⁰

In some jurisdictions, school district employees are immune from negligence liability if they are performing discretionary acts in connection with athletic activities—namely, acts that require the exercise of personal deliberation, decision, and judgment. Courts have held that the conduct of coaches and teachers in connection with providing emergency medical care to injured athletes involves the exercise of discretion and judgment that immunizes them from negligence liability.³¹¹ Other states, however, permit tort suits for willful and wanton misconduct by school employees in connection with the care provided to injured athletes.³¹²

v. Oaks Mission Pub. Sch., 945 P.2d 492 (Okla. 1997) *Grandalski v. Lyons Township High Sch. Dist.*, 711 N.E.2d 372 (Ill. App. Ct. 1999).

³⁰⁷ See William H. Baker, *Injuries to College Athletes: Rights and Responsibilities*, 97 DICK. L. REV. 655, 656–60 (1993); J. Barton Goplerud, Note, *Liability of Schools and Coaches: The Current Status of Sovereign Immunity and Assumption of the Risk*, 39 DRAKE L. REV. 759, 766–69 (1990).

³⁰⁸ See *Limerick v. Euclid Bd. of Educ.*, 591 N.E.2d 1299 (Ohio Ct. App. 1990); *Marcy v. Town of Saugus*, 495 N.E.2d 569 (Mass. App. Ct. 1986); *Hale v. Davies*, 70 S.E.2d 923 (Ga. Ct. App. 1952); *Garza v. Edinburg Consol. Indep. Sch. Dist.*, 576 S.W.2d 916 (Tex. Civ. App. 1979); *Martini v. Olyphant Borough Sch. Dist.*, 83 Pa. D. & C. 206 (C.P. Lackawanna County 1952).

³⁰⁹ 228 N.W.2d 479 (Mich. Ct. App. 1975).

³¹⁰ See *Clary v. Alexander County Bd. of Educ.*, 212 S.E.2d 160 (N.C. 1975); *Overcash v. Statesville City Bd. of Educ.*, 384 S.E.2d 524 (N.C. Ct. App. 1986).

³¹¹ See *Montgomery v. City of Detroit*, 448 N.W.2d 822 (Mich. Ct. App. 1989); *Prince*, 741 So. 2d at 207.

³¹² See *Halper v. Vayo*, 568 N.E.2d 914 (Ill. App. Ct. 1991).

In some jurisdictions, the doctrine of charitable immunity may bar or limit a tort suit against a private high school. The continuing validity and application of this doctrine varies from state to state.³¹³

IV. LIABILITY OF UNIVERSITIES AND THEIR EMPLOYEES

A. *Workers' Compensation*

Some jurisdictions expressly exclude, by statute, scholarship athletes from receiving workers' compensation benefits.³¹⁴ Other states have established an administrative system for providing medical and disability benefits to injured university athletes.³¹⁵ Most states, however, do not expressly include or exclude scholarship athletes from coverage under their respective workers' compensation statutes nor provide a system of compensation for injured university athletes. Thus, courts must determine whether scholarship athletes are covered "employees."

Courts generally hold that athletes who suffer injuries while participating in intercollegiate athletics are not entitled to workers' compensation benefits.³¹⁶ Courts have refused to find that a student's receipt of an athletic scholarship establishes an employment relationship with a university, which is a prerequisite for workers' compensation coverage. These courts usually reach this conclusion for policy reasons, mainly based on a reluctance to characterize college athletes as professionals who are paid to play sports.³¹⁷

³¹³ See Baker, *supra* note 307, at 660-63.

³¹⁴ See, e.g., CAL. LAB. CODE § 3352(k) (Deering Supp. 2001); HAW. REV. STAT. ANN. § 386-1 (Michie Supp. 2000).

³¹⁵ See, e.g., NEV. REV. STAT. ANN. 616B.182 (Michie 2000); NEB. REV. STAT. § 85-106.05 (1999).

³¹⁶ See *Rensing v. Ind. State Univ. Bd. of Trs.*, 444 N.E.2d 1170 (Ind. 1983); *Waldrep v. Tex. Employers Ins. Ass'n*, 21 S.W.3d 692 (Tex. App. 2000); *Coleman v. W. Mich. Univ.*, 336 N.W.2d 224 (Mich. Ct. App. 1983). Some early cases held that an injured intercollegiate athlete could recover workers' compensation benefits if he held a university job unrelated to athletics. See, e.g., *Univ. of Denver v. Nemeth*, 257 P.2d 423 (Colo. 1953), *Van Horn v. Indus. Accident Comm'n*, 33 Cal. Rptr. 169 (Cal. Ct. App. 1963). In *State Compensation Insurance Fund v. Industrial Commission*, 314 P.2d 288 (Colo. 1957), the Colorado Supreme Court narrowly applied its *Nemeth* holding to deny workers' compensation benefits to a scholarship athlete. After *Van Horn*, the California legislature amended its workers' compensation statute to expressly exclude student athletes from coverage. See CAL. LAB. CODE § 3352(k) (Deering Supp. 2001).

³¹⁷ Several legal commentators have criticized courts' refusals to include

In *Rensing v. Indiana State University Board of Trustees*,³¹⁸ the Indiana Supreme Court held that a football player could not recover workers' compensation benefits for an injury suffered during spring football practice that left him a quadriplegic.³¹⁹ The court found no employer-employee relationship because the university and injured student had not intended to create a contract of employment.³²⁰ The four year financial aid package received by plaintiff was not considered "pay" by either the parties or the Internal Revenue Service.³²¹ Rather, plaintiff was "still first and foremost a student,"³²² and the scholarship benefits were awarded, based on previously demonstrated athletic ability, to enable him to receive a college education.³²³ The court found that plaintiff's participation in football did not place him in the service of the university even though it benefited the school.³²⁴ Another factor relied on by the court was that the university did not have the ordinary employer's right to discharge plaintiff on the basis of performance.³²⁵

Following *Rensing*, a Texas appellate court, in *Waldrep v. Texas Employers Insurance Association*,³²⁶ affirmed a jury finding that a college football player was not a university employee when he suffered a permanently disabling injury during a game.³²⁷ Although the student-athlete received an athletic scholarship for participating in university-sponsored athletics, it was not the expectation of the parties that he thereby became a paid university employee.³²⁸ Rather, it was

injured scholarship athletes within the coverage of workers' compensation statutes. See LARSON, *supra* note 241, § 22.21(c); Ray Yasser, *Are Scholarship Athletes at Big-Time Programs Really University Employees?—You Bet They Are!*, 9 BLACK L.J. 65 (1984); Sean Alan Roberts, Comment, *College Athletes, Universities, and Workers' Compensation: Placing the Relationship in the Proper Context by Recognizing Scholarship Athletes as Employees*, 37 S. TEX. L. REV. 1315 (1996); Mark R. Whitmore, Note, *Denying Scholarship Athletes Worker's Compensation: Do Courts Punt Away a Statutory Right?*, 76 IOWA L. REV. 763 (1991).

³¹⁸ 444 N.E.2d 1170 (Ind. 1983).

³¹⁹ *Id.* at 1175.

³²⁰ *Id.* at 1173.

³²¹ *Id.*

³²² *Id.*

³²³ *Id.* at 1174.

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ 21 S.W.3d 692 (Tex. App. 2000).

³²⁷ *Id.* at 695.

³²⁸ *Id.* at 699-700.

understood that his participation in football would be as a student, not a professional athlete, so as to retain his amateur status under National Collegiate Athletic Association (NCAA) rules.³²⁹ Even though the university had the right to control all of his activities while he was in attendance, it had less control than existed in the typical employment relationship and his participation in football “did not subject him to any extraordinary degree of control over his academic activities.”³³⁰

In *Coleman v. Western Michigan University*,³³¹ a Michigan court of appeals applied an “economic reality” test to determine whether an employment relationship existed and concluded that a football player who suffered a disabling injury was not covered by the state’s workers’ compensation statute. Although plaintiff’s athletic scholarship constituted “wages,” and the university had a limited right to control plaintiff’s activities and discipline him, the court found that conducting a football program was not an integral part of the university’s business, which was to provide an academic education.³³² Relying primarily on this finding, the court concluded that plaintiff was not an “employee” of the university.³³³

B. Gratuitous or Contractual Scholarship, Medical, or Disability Benefits

NCAA by-laws provide that athletic scholarships may not be awarded for more than one year and prohibit a member school from promising an athlete that his scholarship will be automatically renewed if he sustains an injury that prevents him from participating in intercollegiate athletics.³³⁴ If an injury prevents a student-athlete from participating in intercollegiate athletics, however, a university may continue his scholarship in order to enable the student to complete his education.

Courts have held that a public university’s gratuitous payment of medical expenses for athletes injured in intercollegiate sports, made out of a fund generated by athletic department revenue, is a proper expenditure furthering a

³²⁹ *Id.* at 699.

³³⁰ *Id.* at 702.

³³¹ 336 N.W.2d 224 (Mich. Ct. App. 1983).

³³² *Id.* at 226–27.

³³³ *Id.* at 228.

³³⁴ See NCAA, 2000–01 NCAA Division I Manual § 15.3.3.1, at 186.

legitimate public purpose.³³⁵ Absent a valid contract, a university has no obligation to pay for an injured athlete's medical expenses.³³⁶ An athlete's past service to a university as an intercollegiate athlete is not valid consideration for the university's agreement to pay for medical expenses arising out of an athletic injury.³³⁷ A university's verbal agreement with an athlete to provide all necessary medical treatment for future sustained injuries, as an inducement to play a sport, may be enforceable.³³⁸

Since August 1, 1992, the NCAA has provided catastrophic athletic injury insurance covering student-athletes who suffer serious injuries while participating in intercollegiate athletics at member institutions.³³⁹ This plan provides for educational benefits and lost earnings, as well as lifetime rehabilitation, medical and dental expenses. The NCAA also has established a program that enables qualified "exceptional" student athletes to obtain a pre-approved loan to purchase disability insurance.³⁴⁰ This policy is designed to protect talented student athletes against the loss of expected future earnings in certain designated sports should they suffer a disabling injury or illness while in college.

C. Duty of Care

In *Kleinknecht v. Gettysburg College*,³⁴¹ the Third Circuit held that a special relationship existed between a university and its recruited athletes. The court found that the defendant had recruited the plaintiff lacrosse player for its own benefit, hoping

³³⁵ See *State Bd. of Governors of W. Va. Univ. v. Sims*, 59 S.E.2d 705, 710-11 (W.Va. 1950).

³³⁶ See *Reed v. Univ. of N.D.*, 589 N.W.2d 880, 884 (N.D. 1999); *Searles v. Trs. of St. Joseph's Coll.*, 695 A.2d 1206, 1211-12 (Me. 1997); *Reed v. Univ. of N.D.*, 543 N.W.2d 106, 110 (Minn. Ct. App. 1996); *Cardamone v. Univ. of Pittsburgh*, 384 A.2d 1228, 1232-33 (Pa. Super. Ct. 1978).

³³⁷ See *Cardamone*, 384 A.2d. at 1232-33.

³³⁸ See *Waldrep v. Tex. Employers Ins. Ass'n*, 21 S.W.3d 692, 706-07 (Tex. App. 2000); *Eberhart v. Morris Brown Coll.*, 352 S.E.2d 832, 834 (Ga. Ct. App. 1987) (limiting recovery to only those medical expenses incurred in connection with an athletic injury); *Barile v. Univ. of Va.*, 441 N.E.2d 608, 615 (Ohio Ct. App. 1981).

³³⁹ See *Baker*, *supra* note 307, at 663-64; see also PAUL C. WEILER & GARY R. ROBERTS, *SPORTS AND THE LAW: CASES, MATERIALS AND PROBLEMS* 737-40 (1993).

³⁴⁰ See WEILER & ROBERTS, *supra* note 339, at 739-40; *Baker*, *supra* note 307, at 664-65.

³⁴¹ 989 F.2d 1360 (3d Cir. 1993).

that the success of its intercollegiate athletic program would result in favorable publicity and increased applications from potential students.³⁴²

Applying Pennsylvania law, the court concluded, "The College owed Drew a duty of care in his capacity as an intercollegiate athlete engaged in school-sponsored intercollegiate athletic activity for which he had been recruited."³⁴³ Thus, a university has an affirmative obligation to use reasonable care to protect its recruited athletes from foreseeable harm and may be liable for negligent action or inaction in connection with the operation of its intercollegiate athletics program.³⁴⁴

The *Kleinknecht* case involved allegations of negligent emergency medical assistance procedures and first aid treatment administered to an athlete who collapsed and died from cardiac arrest during a varsity lacrosse practice. The decedent had no medical history of heart problems and had been medically cleared to play lacrosse by both a team physician and his family physician. An autopsy failed to discover any heart abnormality. The decedent collapsed while participating in a drill, but his cardiac arrest was not caused by contact with another player or any playing equipment.³⁴⁵

Although decedent's heart attack was unforeseeable under the circumstances, the court held that the possibility of severe and life-threatening injury is reasonably foreseeable during contact sports.³⁴⁶ As a result, the reasonableness of the college's emergency response plan and first aid treatment were questions of fact for consideration by a jury. The team's coaches were present during the practice but were not certified in cardiopulmonary resuscitation (CPR). No trainer attended practice, and the nearest telephone was approximately 200 to 250 yards away from the practice field. The facts were disputed regarding the time lapse between decedent's collapse and the beginning of CPR as well as whether reasonable measures would

³⁴² *Id.* at 1368.

³⁴³ *Id.* at 1369.

³⁴⁴ It is significant that this case involved a small Division III college (which does not award athletic scholarships) conducting a non-revenue-generating sport. The court expressly limited its holding to intercollegiate athletics and refused to decide whether a university owed a similar duty of care to students participating in intramural sports. *Id.* at 1368, 1370.

³⁴⁵ *Id.* at 1363-65.

³⁴⁶ *Id.* at 1370.

have prevented his death.³⁴⁷

The *Kleinknecht* case does not hold that a university sponsoring intercollegiate athletics has a legal duty to have a certified athletic trainer present at all games, practices, and training sessions.³⁴⁸ But *Kleinknecht* does require a university to have an appropriate medical emergency response plan as well as provide reasonable emergency care to injured athletes.³⁴⁹

Consistent with *Kleinknecht*, in *Stineman v. Fontbonne College*,³⁵⁰ the Eighth Circuit held that a university has a duty to refer an injured intercollegiate athlete to a physician for medical treatment. The plaintiff was struck in the eye by a ball thrown during softball practice. The team's coaches did not recommend that plaintiff see a physician for treatment of her injury.³⁵¹ Because of a delay in obtaining medical treatment, the plaintiff lost the vision in her eye.³⁵² Without considering the plaintiff's potential contributory negligence, the court awarded her damages of \$600,000.³⁵³

Outside the context of emergency medical care, *Kleinknecht* has potentially broad implications regarding the nature and scope of a university's duty to protect the health and safety of its intercollegiate athletes.³⁵⁴ The NCAA publishes a sports medicine handbook that provides guidelines for protecting the health and safety of student athletes and for minimizing the risk of significant injury for participants in intercollegiate athletics. These guidelines may be relevant in determining the nature and scope of a university's duty to use reasonable care in connection

³⁴⁷ *Id.* at 1363-64.

³⁴⁸ This issue remains unresolved. See *Kennedy v. Syracuse Univ.*, 1995 WL 548710, at *1-3 (N.D.N.Y. 1995) (dismissing claim that the university was negligent for failing to have an athletic trainer present at gymnastics team practices, without considering university's duty to do so, because there was no proof that inadequate emergency care given by coaches or teammates caused plaintiff's injury).

³⁴⁹ See *Kleinknecht*, 989 F.2d at 1371.

³⁵⁰ 664 F.2d 1082 (8th Cir. 1981).

³⁵¹ *Id.* at 1085.

³⁵² *Id.* at 1086.

³⁵³ *Id.* at 1089; see also *Pinson v. Tennessee*, No. 02A01-9409-BC-00210, 1995 WL 739820, at *7 (Tenn. Ct. App. Dec. 12, 1995) (concluding that the university was liable for an athletic trainer's negligent failure to inform the treating physicians of the injured player's symptoms).

³⁵⁴ Courts have rejected efforts by college athletes to recover for their injuries by asserting federal constitutional law claims. See *Canada v. Thomas*, 915 F. Supp. 145, 147-49 (W.D. Mo. 1996) (upholding a state's sovereign immunity to insulate a public university from a tort claim).

with sports medicine issues affecting its athletics program.³⁵⁵

Courts are divided regarding whether a university has a legal duty not to pressure or permit an injured athlete to return to a game. In *Lamorie v. Warner Pacific College*,³⁵⁶ a scholarship basketball player asserted that his coach negligently required him to play with a nose and eye injury in violation of a physician's orders. Because the plaintiff feared losing his scholarship if he did not play, he participated in a team scrimmage and re-injured his eye. Reversing the grant of summary judgment for defendants, an Oregon appellate court ruled that a jury could reasonably find that the player's re-injury of his eye was a foreseeable risk of being directed to resume playing basketball, for which the university could be held liable.³⁵⁷

In *Searles v. Trustees of St. Joseph's College*,³⁵⁸ the Maine Supreme Court ruled that college coaches and athletic trainers have a duty to exercise reasonable care to protect the health and safety of student-athletes. The court held that a coach can be held liable for insisting that a student-athlete with knee problems play basketball contrary to the medical advice of the college's athletic trainer. The court also ruled that an athletic trainer's failure to inform the coach of the seriousness of the student's knee problems, or a failure to advise the student that he should not continue playing college basketball with his medical condition, could be negligent.

On the other hand, in *Orr v. Brigham Young University*,³⁵⁹ the Tenth Circuit, applying Utah law, refused to follow *Kleinknecht* in a case considering the duty of care that a university owes to an injured college football player. The plaintiff alleged that university officials, placing greater emphasis on winning games than on his health, pressured him to play football with a back injury, resulting in aggravation of the injury. The appellate court affirmed the district court's

³⁵⁵ See *Wallace v. Broyles*, 961 S.W.2d 712, 713-16 (Ark. 1998) (asserting that a university may be liable for negligently permitting student-athletes, in violation of NCAA guidelines, to have access to controlled substances in athletic department facilities without prescriptions, labels, instructions, or warnings regarding the dangers or side effects of usage).

³⁵⁶ 850 P.2d 401 (Or. Ct. App. 1993).

³⁵⁷ *Id.* at 402-03.

³⁵⁸ 695 A.2d 1206 (Me. 1997).

³⁵⁹ 108 F.3d 1388 (10th Cir. 1997) (unpublished opinion).

holding that the parties' legal relationship is "more of a contractual nature than a custodial nature mandating special duties of care and protection beyond those traditionally recognized under a simple negligence theory of liability."³⁶⁰

The district court rejected plaintiff's contention that "by playing football for BYU, he became in essence a ward of the university without any vestige of free will or independence."³⁶¹ Thus, it declined to find that the university "assumed the responsibility for his safety and deprived him of the normal opportunity for self protection" by recruiting him to play football.³⁶² The court held that the university would be liable only for negligent medical care provided to its athletes by its sports medicine personnel.³⁶³

D. Contributory Negligence

Like a professional or high school athlete, a college athlete may be contributorily negligent for failing to use reasonable care to protect his health. The same general principles discussed previously in sections I(A)(9) and III(B) also apply here. An athlete's decision to play a sport with a known injury,³⁶⁴ and whether such participation was compelled based on threatened loss of an athletics scholarship,³⁶⁵ are relevant factors in determining whether an athlete acted reasonably to protect his health under the circumstances.

³⁶⁰ Orr v. Brigham Young Univ., 960 F. Supp. 1522, 1528 (D. Utah 1994).

³⁶¹ *Id.*

³⁶² *Id.* at 1526; *see also* Brennan v. Bd. of Trs. for Univ. of La. Sys., 691 So. 2d 324, 331 (La. Ct. App. 1997) (holding that a university gave a student-athlete adequate information about the NCAA drug testing program and was not negligent for failing to specifically warn against taking nutrition supplements because a university "does not stand in loco parentis and Brennan is considered an adult capable of protecting his own interests").

³⁶³ Such liability would run to a university based on principles of vicarious liability. *See* Cramer v. Hoffman, 390 F.2d 19, 23 (2d Cir. 1968); *Rosensweig v. State*, 158 N.E.2d 229, 231-33 (N.Y. 1959); *see also* Robitaille v. Vancouver Hockey Club, Ltd., [1981] 124 D.L.R. (3d) 228.

³⁶⁴ *See* Gehling v. St. George Univ. Sch. of Med., 698 F. Supp. 419, 427 (E.D.N.Y. 1988) (holding that an athlete's voluntary entry in a race, when he had a known heart ailment, is a relevant factor under comparative responsibility principles).

³⁶⁵ *See* Conolly v. St. John's Univ., 575 N.Y.S.2d 68, 69 (1st Dep't 1991) (holding that condition of a scholarship that required plaintiff to participate in all of the university tennis matches raised triable issue of fact as to whether her participation was voluntary).

E. *Validity of Liability Waivers*

In recent years, some college athletes have chosen to play a sport in spite of a known medical condition, although doing so exposes them to an enhanced risk of injury. For example, Monte Williams played basketball at Notre Dame University, and Stephen Larkin played baseball at the University of Texas—both with known heart conditions that may have increased their risk of sudden death during competition. Both athletes signed waivers releasing their universities from liability for any harm that might result from playing with their medical condition. Fortunately, neither of them experienced any adverse health effects while playing their respective intercollegiate sports.

Because there is a split of authority regarding whether a university has a general legal duty to protect the health of its athletes, it is unclear whether a university has a specific legal duty to prevent a physically impaired adult from participating in its intercollegiate athletics program if his or her condition creates an increased risk of serious injury or death.³⁶⁶ Even if such a legal duty exists, a college or university may be able to eliminate or modify this tort duty by contract.

Courts generally uphold pre-injury waivers of liability for negligent acts by sponsors of recreational athletic events executed by competent adult athletes.³⁶⁷ Relying on this authority, a court might enforce a university's pre-injury liability waiver against an intercollegiate athlete for harm arising out of that athlete's informed and voluntary decision to play a sport with a known medical condition. On the other hand, a court may find that such a waiver violates public policy and is unenforceable.³⁶⁸

³⁶⁶ One commentator concludes that a university has no legal obligation "to intercede in the personal lives of 'adult' student-athletes who choose to play college sports." Barbara J. Lorence, Comment, *The University's Role Toward Student-Athletes: A Moral or Legal Obligation?*, 29 DUQ. L. REV. 343, 355-56 (1991). On the other hand, another author suggests that a university "should not allow athletes that have serious medical problems to participate." Andrew Manno, Note, *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, 869 (1990-91).

³⁶⁷ See *Reed v. Univ. of N.D.*, 589 N.W.2d 880, 887 (N.D. 1999); *Bennett v. U.S. Cycling Fed'n*, 239 Cal. Rptr. 55, 57-59 (Cal. Ct. App. 1987); *Okura v. U.S. Cycling Fed'n*, 231 Cal. Rptr. 429, 429-32 (Cal. Ct. App. 1986); *Williams v. Cox Enters., Inc.*, 283 S.E.2d 367, 369 (Ga. Ct. App. 1981).

³⁶⁸ See *Baker*, *supra* note 307, at 667-69.

F. Immunity Issues

Like a public high school system, a public university and its employees may be immune from liability for negligence in connection with the operation of its athletic program.³⁶⁹ Immunity from tort liability may be waived to the extent that negligent conduct arising out of a public university's sports program is covered by insurance.³⁷⁰ Tortious conduct more culpable than mere negligence, such as malicious acts or omissions, may not be immunized.³⁷¹

Some courts have held that sponsoring revenue-generating sports such as intercollegiate football is a proprietary function of a public university that is not protected by sovereign immunity.³⁷² Thus, sovereign immunity would not bar tort suits by athletes injured while participating in these sports.

In some jurisdictions, a public university is subject to liability only for certain limited categories of intercollegiate athlete injuries. One example would be negligently failing to provide an injured intercollegiate athlete with equipment, such as a brace or padding, necessary to protect him from the risk of aggravating an injury during competition.³⁷³

Private universities may be protected from negligence suits by intercollegiate athletes by the doctrine of charitable immunity.³⁷⁴ Application of this doctrine varies by jurisdiction.³⁷⁵

³⁶⁹ See *Sorey v. Kellett*, 849 F.2d 960, 963-64 (5th Cir. 1988); *Lennon v. Petersen*, 624 So. 2d 171, 173-75 (Ala. 1993). See generally *supra* notes 306-13 and accompanying text.

³⁷⁰ See *Shriver v. Athletic Council of Kan. State Univ.*, 564 P.2d 451, 455 (Kan. 1977); see also *Wallace v. Broyles*, 961 S.W.2d 712, 714 (Ark. 1998) (holding that an athletic trainer may be liable for negligence to the extent of his insurance coverage).

³⁷¹ See *Wallace*, 961 S.W.2d at 717.

³⁷² See *Brown v. Wichita State Univ.*, 540 P.2d 66, 86-89 (Kan. 1975). But see *Harris v. Univ. of Mich. Bd. of Regents*, 558 N.W.2d 225, 228 (Mich. Ct. App. 1997) (holding that university sponsorship of intercollegiate athletics is a governmental, not a proprietary, function of a public university, even if some sports generate revenue).

³⁷³ See *Lowe v. Tex. Tech Univ.*, 540 S.W.2d 297, 300 (Tex. 1976); see also *Smith v. Univ. of Tex.*, 664 S.W.2d 180, 188, 190 (Tex. App. 1984) (broadening statutory waiver of sovereign immunity to include negligence in connection with use of a university athletic field).

³⁷⁴ See *Baker*, *supra* note 307, at 660-63.

³⁷⁵ See *id.*

V. PHYSICALLY IMPAIRED ATHLETE'S LEGAL RIGHT TO PARTICIPATE IN SPORTS

This section discusses the legal rights of a high school, college, or professional athlete to participate in competitive sports with a physical abnormality such as a cardiovascular condition, spinal abnormality, or a non-functioning or missing paired organ that exposes themselves or others to an enhanced risk of injury or death. Athletes who have been medically disqualified by a physician selected by the team or athletic event sponsor, but who nonetheless possess the necessary physical capabilities to play, and have obtained medical clearance from another physician, have brought the most litigation. Athletic teams generally are able to successfully defend these suits if the athlete's participation in the subject sport creates a significant increased risk of substantial harm to the athlete or other players.

This section also considers the legal duty of sports governing bodies or athletic event organizers to modify playing rules, or make other accommodations to enable a physically impaired athlete to participate in a sport. It does not consider the athletic participation rights of persons with learning disabilities,³⁷⁶ or suits against teams, leagues, or sports organizations by disabled fans.³⁷⁷

³⁷⁶ The following cases consider the athletic participation rights of persons with learning disabilities: college athletes—*Bowers v. NCAA*, 130 F. Supp. 2d 610 (D.N.J. 2001); *Bowers v. NCAA*, 118 F. Supp. 2d 494 (D.N.J. 2000); *Matthews v. NCAA*, 79 F. Supp. 2d 1199 (E.D. Wash. 1999); *Bowers v. NCAA*, 9 F. Supp. 2d 460 (D.N.J. 1998); *Bowers v. NCAA*, 974 F. Supp. 459 (D.N.J. 1997); *Butler v. NCAA*, No. C96-1656L, 1996 WL 1058233 (W.D. Wash. Nov. 8, 1996); *Ganden v. NCAA*, No. 96C6953, 1996 WL 680000 (N.D. Ill. Nov. 19, 1996); high school athletes—*Washington v. Ind. High Sch. Athletic Ass'n*, 181 F.3d 840 (7th Cir. 1999); *McPherson v. Mich. High Sch. Athletic Ass'n*, 77 F.3d 883 (6th Cir. 1995); *Sandison v. Mich. High Sch. Athletic Ass'n*, 64 F.3d 1026 (6th Cir. 1995); *Pottgen v. Mo. State High Sch. Activities Ass'n*, 40 F.3d 926 (8th Cir. 1994); *Crocker v. Tenn. Secondary Sch. Athletic Ass'n*, 980 F.2d 382 (6th Cir. 1992); *Dennin v. Conn. Interscholastic Athletic Conference, Inc.*, 913 F. Supp. 663 (D. Conn. 1996); *Rhodes v. Ohio High Sch. Athletic Ass'n*, 939 F. Supp. 584 (N.D. Ohio 1996); *Johnson v. Fla. High Sch. Activities Ass'n*, 899 F. Supp. 579 (M.D. Fla. 1995); *Reaves v. Mills*, 904 F. Supp. 120 (W.D.N.Y. 1995); *Hoot ex rel. Hoot v. Milan Area Schs.*, 853 F. Supp. 243 (E.D. Mich. 1994); *M.H. v. Mont. High Sch. Ass'n*, 929 P.2d 239 (Mont. 1996); *Univ. Interscholastic League v. Buchanan*, 848 S.W.2d 298 (Tex. App. 1993).

³⁷⁷ See, e.g., *Stoutenborough v. NFL*, 59 F.3d 580 (6th Cir. 1995); *Cortez v. NBA*, 960 F. Supp. 113 (W.D. Tex. 1997).

The right-to-participation claims of athletes alleging denial of their federal constitutional rights generally have been unsuccessful.³⁷⁸ In some instances, courts have found discrimination against disabled professional,³⁷⁹ college,³⁸⁰ or interscholastic³⁸¹ athletes to be a violation of state law. Most litigation by physically impaired athletes challenging exclusion from sports or a failure to provide a requested accommodation to enable participation in a sport has been brought under federal statutes such as the Rehabilitation Act of 1973³⁸² or the Americans with Disabilities Act (ADA).³⁸³ These will be the focus of this section.

A. *Rehabilitation Act of 1973*

The Rehabilitation Act is primarily intended to provide handicapped or disabled persons with an opportunity to participate fully in activities in which they have the physical capabilities and skills to perform. Qualified handicapped athletes must be given an "equal opportunity for participation"

³⁷⁸ For a discussion of state constitutional law claims brought by disabled athletes, see Robert E. Shepherd, Jr., *Why Can't Johnny Read or Play?, The Participation Rights of Handicapped Student-Athletes*, 1 SETON HALL J. SPORT L. 163, 185-87 (1991).

³⁷⁹ In *Neeld v. American Hockey League*, 439 F. Supp. 459 (W.D.N.Y. 1977), the court enjoined enforcement of a league by-law prohibiting one-eyed athletes from playing hockey. The court found that the by-law violated New York's Human Rights Law prohibiting employees from discrimination based on a disability, unless the characteristic was a bona fide occupational qualification. *Id.* at 462. There was no evidence that blindness in one eye substantially detracted from plaintiff's ability to play hockey. *Id.* But see *Neeld v. Nat'l Hockey League*, 594 F.2d 1297, 1298 (9th Cir. 1979) (upholding league by-law that prohibits a player with one eye from playing hockey against antitrust challenge because it promotes safety).

³⁸⁰ In *Green v. Board of Regents of the University of Oklahoma*, No. CJ94-1570H (Cleveland County, Okla. Sept. 7, 1994), an Oklahoma state trial judge enjoined the University of Oklahoma from excluding a football player who had previously suffered a neck injury from its team. The university's team physician refused to medically clear plaintiff to resume playing football, although other nationally recognized medical experts had provided such clearance. Finding that the plaintiff fully understood the potential health risks he would incur by continuing to play with his neck condition and had signed a waiver absolving the university from liability, the court held that he had the legal right to decide for himself whether to bear those risks.

³⁸¹ See *Kampmeier v. Harris*, 411 N.Y.S.2d 744 (4th Dep't 1978); *Pace v. Dryden Cent. Sch. Dist.*, 574 N.Y.S.2d 142 (Sup. Ct. Tompkins County 1991).

³⁸² 29 U.S.C. §§ 701-797b (1994).

³⁸³ 42 U.S.C. §§ 12101-12213 (1994).

in interscholastic and intercollegiate athletics.³⁸⁴

To prevail under the Rehabilitation Act, an athlete with a physical impairment must establish that he or she is: (1) an "individual with handicaps"; (2) "otherwise qualified" to participate; (3) subject to exclusion solely by reason of the handicap; and (4) excluded from a program or activity receiving federal funds.³⁸⁵

The athletics programs of most colleges and high schools, including those that do not receive direct federal funding, are subject to the Act because so long as any part of a college or high school receives federal financial assistance, all of its operations and programs are covered by the Act.³⁸⁶ A public university or high school, however, may assert that it has Eleventh Amendment immunity from Rehabilitation Act claims.³⁸⁷ Professional leagues and clubs, as well as other organizations sponsoring professional sports, are not subject to the Rehabilitation Act unless they receive federal funding.³⁸⁸

An athlete is an "individual with handicaps" entitled to the Act's protection if he or she has a physical impairment that substantially limits a major life activity.³⁸⁹ It is relatively easy for an athlete to establish the existence of a permanent physical impairment such as a heart condition, congenital back or spine abnormality, or loss of a paired organ—all of which are covered under the Act.³⁹⁰

It is more difficult, however, to satisfy the requirement that the athlete's physical impairment substantially limits a major life activity. Some courts have held that exclusion of an impaired athlete from intercollegiate or interscholastic sports does not constitute a substantial limitation on a major life

³⁸⁴ See Matthew J. Mitten, *Amateur Athletes with Handicaps or Physical Abnormalities: Who Makes the Participation Decision?*, 71 NEB. L. REV. 987, 1008 (1992).

³⁸⁵ *Id.*

³⁸⁶ See *id.* at 1008–09.

³⁸⁷ Whether Congress validly abrogated states' Eleventh Amendment immunity from suit under the Rehabilitation Act pursuant to its spending clause power has generated substantial judicial disagreement. See, e.g., *Jim C. v. United States*, 235 F.3d 1079 (8th Cir. 2000) (en banc).

³⁸⁸ See Mitten, *supra* note 384 at 990 n.14. They may, however, be covered by the Americans with Disabilities Act.

³⁸⁹ 29 U.S.C. § 705(9)(B) (1994).

³⁹⁰ See Mitten, *supra* note 384, at 1010.

activity.³⁹¹ In *Knapp v. Northwestern University*,³⁹² the Seventh Circuit held that a college basketball player is not protected by the Act because “[p]laying intercollegiate basketball obviously is not in and of itself a major life activity.”³⁹³ Finding that learning was the affected major life activity, the court concluded that the plaintiff’s “inability to play intercollegiate basketball at Northwestern foreclose[d] only a small portion of his collegiate [learning] opportunities” and did not substantially limit his college education, because his athletic scholarship continued in effect.³⁹⁴

Assuming that the exclusion from athletics is deemed to impair a major life activity, the court must next consider the requirements that the athlete be “otherwise qualified” to participate in athletics, and excluded “solely by reason of handicap.”³⁹⁵

In *Southeastern Community College v. Davis*,³⁹⁶ the United States Supreme Court held that an educational institution may require a person to possess “reasonable physical qualifications” to participate in its programs and activities.³⁹⁷ Although “mere possession of a handicap is not a permissible ground for assuming an inability to function,” a school need “not lower or substantially modify its standards to accommodate a handicapped person.”³⁹⁸ An individual is “otherwise qualified” if “able to meet all of a program’s requirements *in spite of* his handicap.”³⁹⁹

Failure to select an otherwise qualified disabled athlete for a position on a competitive sports team is not necessarily a violation of the Act. In *Doe v. Eagle-Union Community School*

³⁹¹ See *Knapp v. Northwestern Univ.*, 101 F.3d 473 (7th Cir. 1996); *Doe v. Eagle-Union Cmty. Sch. Corp.*, 101 F. Supp. 2d 707 (S.D. Ind. 2000), *vacated on other grounds*, 248 F.3d 1157 (7th Cir. 2001); *Pahulu v. Univ. of Kan.*, 897 F. Supp. 1397 (D. Kan. 1995). *But see Sandison v. Mich. High Sch. Athletic Ass’n*, 863 F. Supp. 483 (E.D. Mich. 1994), *rev’d on other grounds*, 64 F.3d 1026 (6th Cir. 1995) (finding that exclusion did constitute a substantial limitation).

³⁹² 101 F.3d 473 (7th Cir. 1996).

³⁹³ *Id.* at 480.

³⁹⁴ *Id.* at 481–82.

³⁹⁵ *Id.* at 481–83.

³⁹⁶ 442 U.S. 397 (1979).

³⁹⁷ *Id.* at 414.

³⁹⁸ *Id.* at 405, 413.

³⁹⁹ *Id.* at 406, 407 n.7.

Corp.,⁴⁰⁰ a federal district court held that a coach's decision not to select a disabled student for the varsity basketball team after a tryout did not violate the Act.⁴⁰¹ The court found that the disabled student was given the same opportunity to try out for the team as students without disabilities, and was graded in a non-discriminatory manner based on the coach's same subjective and objective criteria.⁴⁰² The court explained that "the term 'otherwise qualified' did not mean that the student must be selected for the basketball team despite his handicap; it prohibited the non-selection of the student when the student had the skills to make the team but was not selected."⁴⁰³

In *School Board v. Arline*,⁴⁰⁴ the United States Supreme Court held that, in determining whether an individual is "otherwise qualified," he or she is entitled to an "opportunity to have [his or her] condition evaluated in light of medical evidence."⁴⁰⁵ The decision to exclude an individual from a particular program or activity must be based on "reasonable medical judgments given the state of medical knowledge."⁴⁰⁶ The nature, duration, probability, and severity of harm likely to result from the physically impaired individual's participation in an activity are factors to be considered.⁴⁰⁷

An educational institution must make reasonable accommodations to enable physically impaired athletes to participate in its athletic programs.⁴⁰⁸ An impaired athlete is "otherwise qualified" if able to meet a school's requirements with reasonable accommodations, such as medication, monitoring, or protective padding or braces, that effectively reduce the risk of injury to himself or others.⁴⁰⁹

A handicapped athlete is deemed to have been excluded from a sport "solely by reason of handicap" only if his ineligibility is based entirely on consideration of his physical impairment or

⁴⁰⁰ 101 F. Supp. 2d 707 (S.D. Ind. 2000), *vacated on other grounds*, 248 F.3d 1157 (7th Cir. 2001).

⁴⁰¹ *Id.* at 720.

⁴⁰² *Id.* at 716.

⁴⁰³ *Id.*

⁴⁰⁴ 480 U.S. 273 (1987).

⁴⁰⁵ *Id.* at 285.

⁴⁰⁶ *Id.* at 288 (quoting Brief of Amici Curiae American Medical Association at 19, *Sch. Bd. v. Arline*, 480 U.S. 273 (1987) (No. 85-1277)).

⁴⁰⁷ *Id.*; *see also* *Bragdon v. Abbott*, 524 U.S. 624, 662 (1998).

⁴⁰⁸ *See Alexander v. Choate*, 469 U.S. 287, 300 (1985).

⁴⁰⁹ *Id.* at 301-02.

medical condition.⁴¹⁰ Determining a disabled person's qualifications to participate also requires consideration of whether such participation creates a significant risk of harm to other participants or the athlete himself.

1. Harm to Other Participants

Preventing a significant risk of harm to the health and safety of other participants is a valid ground for refusing to permit disabled athletes to play a particular sport.⁴¹¹ Exclusion necessary to permit others' safe participation in a sport does not violate the Rehabilitation Act.⁴¹² A school need not substantially modify its standards by changing the rules of play or reducing the quality of team play merely to enable a disabled athlete to participate in a sport.⁴¹³ These valid justifications do not constitute illegal exclusion of an athlete from participation in a sport "solely by reason of handicap."

Recently there have been concerns expressed by some athletes about perceived health risks from playing contact sports with an athlete who has tested positive for Human Immunodeficiency Syndrome (HIV), which is generally believed to cause the fatal disease Acquired Immune Deficiency Syndrome (AIDS). Despite assurances from medical experts that the risk of HIV transmission during an athletic event is extremely low, it is feared that HIV infection may occur from exposure to an HIV positive athlete's blood during a game.

The law requires a sport-specific consideration of the probability of HIV transmission. Appropriate weight should also be given to the continuing risk of HIV infection posed to other participants and the apparently inevitable fatal consequences of AIDS in determining whether an HIV positive athlete may be excluded from a particular sport.⁴¹⁴

⁴¹⁰ See *Stearns v. Bd. of Educ.*, No. 99C5818, 1999 WL 1044832 (N.D. Ill. Nov. 10, 1999); *Brown v. 1995 Tenet Paraamerica Bicycle Challenge*, 959 F. Supp. 496, 499 (N.D. Ill. 1997).

⁴¹¹ See *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921 (6th Cir. 2000); *Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999).

⁴¹² See *Grube v. Bethlehem Area Sch. Dist.*, 550 F. Supp. 418, 419 (E.D. Pa. 1982).

⁴¹³ *Id.*

⁴¹⁴ For an in-depth discussion of the legality of excluding HIV positive athletes from sports under Australian law, see Roger S. Magnusson & Hayden Opie, *HIV and Hepatitis in Sport: An Australian Legal Framework for Resolving Hard Cases*, 5 SETON HALL J. SPORT L. 69 (1995).

Two federal district courts have held that the exclusion of HIV positive elementary school students from participation in school-sponsored contact sports does not violate the Rehabilitation Act.⁴¹⁵ These courts, however, failed to cite or rely upon any medical evidence finding that there is a significant risk of HIV transmission during contact sports. Because these cases appear to violate the *Arline* court's holding that medical evidence showing a significant risk of transmission of an infectious disease is required before excluding a handicapped person from an activity,⁴¹⁶ they have limited precedential value. Under the Americans with Disabilities Act, however, there is precedent, based on supporting medical evidence, for excluding HIV positive athletes from a contact sport that is likely to be followed by courts in construing the Rehabilitation Act.⁴¹⁷

In *Doe v. Woodford County Board of Education*,⁴¹⁸ the Sixth Circuit held that a public high school district's decision to place a member of its junior varsity basketball team, who suffered from hepatitis B, on "hold" status pending receipt of medical clearance from his physician, did not violate the Rehabilitation Act.⁴¹⁹ Observing that one could be excluded from athletics if one's participation posed a direct threat to the health and safety of others, the court found that the school district was attempting to determine whether there was a significant risk of transmission of hepatitis B to other athletes.⁴²⁰ The student's membership on the team was never terminated, and the school district ultimately allowed him to participate fully on the team with no medical restrictions.⁴²¹

2. Harm to Athlete

School officials often fear potential tort liability for resulting injury if they allow an athlete with a physical abnormality to

⁴¹⁵ See *Doe v. Dolton Elementary Sch. Dist. No. 148*, 694 F. Supp. 440, 449 (N.D. Ill. 1988); *Ray v. Sch. Dist.*, 666 F. Supp. 1524, 1537 (M.D. Fla. 1987).

⁴¹⁶ See *Sch. Bd. v. Arline*, 480 U.S. 273, 287 & n.16 (1987); see also *Bragdon v. Abbott*, 524 U.S. 624, 626-27 (1998) (requiring valid medical justification to exclude an HIV positive person from an activity in compliance with the Americans with Disabilities Act).

⁴¹⁷ See *infra* § V(B)(1).

⁴¹⁸ 213 F.3d 921 (6th Cir. 2000).

⁴¹⁹ See *id.* at 923.

⁴²⁰ See *id.* at 926; see also *Montalvo v. Radcliffe*, 167 F.3d 873, 874-75 (4th Cir. 1999).

⁴²¹ See *Woodford County Bd. of Educ.*, 213 F.3d at 926.

play a sport contrary to the team physician's recommendation. Furthermore, school officials may assert a paternalistic duty to protect the athlete's health that extends beyond merely protecting themselves and the school from legal liability.

Neither the Rehabilitation Act nor its implementing regulations expressly address whether enhanced risk of injury to a handicapped athlete alone is a legally valid justification for exclusion from school-sponsored athletics.⁴²² As the following discussion indicates, courts have developed a standard, applied on a case-by-case basis, which permits the exclusion of a physically impaired athlete from a sport if necessary to prevent a significant risk of substantial harm to the athlete.

One athlete has unsuccessfully asserted an absolute right to play high school football under the Rehabilitation Act, despite unanimous agreement by examining physicians that he should not continue playing interscholastic sports with a potentially life-threatening heart abnormality. In *Larkin v. Archdiocese of Cincinnati*,⁴²³ Stephen Larkin, an exceptional athlete with the physical skills to play football in spite of having hypertrophic cardiomyopathy, claimed Cincinnati Moeller High School's refusal to allow him to do so violated the Act. The Larkin family was fully aware of the risks of Stephen's participation and willing to waive any potential future tort claims against the school if Stephen were permitted to play football.

In *Larkin*, the federal district court held that the high school's acceptance of unanimous physician recommendations that Stephen not play football did not violate the Rehabilitation Act. The court reasoned that Stephen's inability to satisfy an Ohio High School Athletics Association by-law requiring "a physician certification" before participation in interscholastic athletics was a "substantial justification" for the school's decision, thereby precluding him from satisfying the requirement that he be "otherwise qualified" under the Act. The court also observed that, under Ohio law, Stephen's parents could not

⁴²² For law review commentary addressing this difficult issue, see Jones, *supra* note 76; Mitten, *supra* note 384; Matthew J. Mitten, *Enhanced Risk of Harm to One's Self as a Justification for Exclusion From Athletics*, 8 MARQ. SPORTS L.J. 189 (1998).

⁴²³ No. C-1-90-619 (S.D. Ohio, filed Aug. 31, 1990) (unreported decision) (oral findings of fact and conclusions of law supporting denial of injunctive relief and dismissal of complaint). See Mitten, *supra* note 384, at 1015-16 for a general discussion of this case.

waive their minor son's legal rights, which provided further justification for refusing to allow him to play high school football.⁴²⁴

More difficult issues arise where an athlete has the physical skill to play a particular sport with a physical abnormality or impairment, but physicians differ in their athletic participation recommendations. Courts generally agree that the Act permits an athlete to be medically disqualified, even though physicians' participation recommendations conflict, if necessary to prevent a substantial risk of serious injury to the athlete, such as permanent crippling or death.⁴²⁵

In a 1977 case, *Kampmeier v. Nyquist*,⁴²⁶ the Second Circuit ruled that a high school's refusal to permit one-eyed athletes to play contact sports complied with the Act despite conflicting physician participation recommendations. More recently, however, lower federal courts have expanded the legal rights of athletes with a missing or non-functioning paired organ, such as an eye or kidney, to participate in interscholastic and intercollegiate contact sports. The following cases appear to base their rulings on the opinion of medical specialists that the athlete's condition itself does not increase the probability of injury and that the availability of equipment can adequately protect the athlete's functioning organ.

In *Poole v. South Plainfield Board of Education*,⁴²⁷ the court declined to dismiss an athlete's complaint that his high school's refusal to permit him to wrestle with only one kidney violated the Act. The court rejected the school's argument that the athlete was not "otherwise qualified" because he was unable to pass the team physician's exam with one kidney. The court found plaintiff qualified to wrestle because he was capable of meeting the sport's training requirements and other "respectable

⁴²⁴ Court-ordered athletics participation under the Rehabilitation Act should create an implied immunity absolving a university of tort liability under state law if an athlete suffers injury during competition as a result of a known physical handicap or disability. *See, e.g., Int'l Union, UAW v. Johnson Controls, Inc.*, 499 U.S. 187, 206-08 (1990) (holding that a finding of employer tort liability for compliance with a Title VII ban on sex-specific fetal protection policies "remote at best"). Allowing a tort action against the school for such an injury would inappropriately impose liability for the same conduct the Rehabilitation Act requires (e.g., equal opportunity for athletics participation by handicapped persons).

⁴²⁵ *See generally Mitten, supra* note 422, at 195-204.

⁴²⁶ 553 F.2d 296 (2d Cir. 1977).

⁴²⁷ 490 F. Supp. 948 (D.N.J. 1980).

medical authority" cleared him for participation.⁴²⁸

Similarly, in *Grube v. Bethlehem Area School District*,⁴²⁹ the court held that a high school's decision to exclude an excellent athlete with one kidney from football based on its team physician's recommendation violated the Act. The court found no "substantial justification" for denying participation because plaintiff's personal physician concluded "there is no medical reason why [he] cannot play football."⁴³⁰

In *Wright v. Columbia University*,⁴³¹ the court held that the Act required a university to permit an outstanding athlete with sight in only one eye to play football. Accepting the testimony of plaintiff's ophthalmologist that "no substantial risk of serious eye injury related to football exists," the court rejected the school's reliance on the team physician's contrary conclusion. The court found that plaintiff was "otherwise qualified" to play and the university was not forced to "lower or . . . effect substantial modifications of its standards."⁴³²

If, however, an athlete's medical condition could create an enhanced risk of death or serious injury during athletic competition, courts have not required educational institutions to allow the athlete to participate. In *Knapp v. Northwestern University*,⁴³³ the Seventh Circuit held that Northwestern University did not violate the Rehabilitation Act by accepting its team physician's recommendation that an athlete with idiopathic ventricular fibrillation not play intercollegiate basketball.

As a high school senior, Nicholas Knapp suffered sudden cardiac arrest while playing recreational basketball, which required cardiopulmonary resuscitation and defibrillation to restart his heart. Thereafter, he had an internal cardioverter-defibrillator implanted in his abdomen. He subsequently played competitive recreational basketball without any incidents of cardiac arrest and received medical clearance to play college basketball from three cardiologists who examined him.⁴³⁴

Northwestern agreed to honor its commitment to provide Knapp with an athletic scholarship, although he was medically

⁴²⁸ *Id.* at 953.

⁴²⁹ 550 F. Supp. 418 (E.D. Pa. 1982).

⁴³⁰ *Id.* at 424.

⁴³¹ 520 F. Supp. 789 (E.D. Pa. 1981).

⁴³² *Id.* at 793.

⁴³³ 101 F.3d 473 (7th Cir. 1996).

⁴³⁴ *Id.* at 476.

disqualified from playing intercollegiate basketball.⁴³⁵ The team physician's recommendation was based on Knapp's medical records and history, the 26th Bethesda Conference guidelines for athletic participation with cardiovascular abnormalities, and opinions of two consulting cardiologists who concluded that Knapp would expose himself to a significant risk of ventricular fibrillation or cardiac arrest during competitive athletics.⁴³⁶

All medical experts agreed on the following facts: Knapp had suffered sudden cardiac death due to ventricular fibrillation; even with the internal defibrillator, playing college basketball placed Knapp at a higher risk of sudden cardiac death as compared to other male college basketball players; the internal defibrillator had never been tested under the conditions of intercollegiate basketball; and no person currently played or had ever played, college or professional basketball after suffering sudden cardiac death or after having a defibrillator implanted.⁴³⁷

The court held that a university could establish legitimate physical qualifications that an individual must satisfy before participating in its athletic program.⁴³⁸ An athlete can be disqualified from intercollegiate athletics if necessary to avoid a significant risk of personal physical injury to himself that cannot be eliminated through the use of reasonable medical accommodations. The court explained that Knapp's exclusion from Northwestern's basketball team was legally justified:

We do not believe that, in cases where medical experts disagree in their assessment of the extent of a real risk of serious harm or death, Congress intended that the courts—neutral arbiters but generally less skilled in medicine than the experts involved—should make the final medical decision. Instead, in the midst of conflicting expert testimony regarding the degree of serious risk of harm or death, the court's place is to ensure that the exclusion or disqualification of an individual was individualized, reasonably made, and based upon competent medical evidence. So long as these factors exist, it will be the rare case regarding participation in athletics where a court may substitute its judgment for that of the school's team physicians.

⁴³⁵ *Id.*

⁴³⁶ *Id.* at 477.

⁴³⁷ *Id.* at 478.

⁴³⁸ *See id.* at 483–84.

In closing, we wish to make clear that we are *not* saying Northwestern's decision necessarily is the right decision. We say only that it is not an illegal one under the Rehabilitation Act. On the same facts, another team physician at another university, reviewing the same medical history, physical evaluation, and medical recommendations, might reasonably decide that Knapp met the physical qualifications for playing on an intercollegiate basketball team. Simply put, all universities need not evaluate risk the same way. What we say in this case is that if substantial evidence supports the decision-maker—here Northwestern—that decision must be respected.⁴³⁹

Similarly, in *Pahulu v University of Kansas*,⁴⁴⁰ a federal district court upheld the team physician's "conservative" medical disqualification of a college football player with an abnormally narrow cervical canal after an episode of transient quadriplegia during a scrimmage. After consulting with a neurosurgeon, the team physician concluded that the athlete had an extremely high risk of sustaining permanent, severe neurologic injury, including permanent quadriplegia, if he continued playing football.⁴⁴¹ The athlete wanted to resume playing because three other medical specialists concluded that he was at no greater risk of permanent paralysis than any other player. The university agreed to honor the athlete's scholarship, although he was not allowed to play football.⁴⁴²

Although the athlete was willing to sign a waiver absolving the university of liability for any future injury resulting from playing football, the court held that the university officials' adherence to the team physician's recommendation against playing did not violate the Act. The court concluded that the university's medical disqualification decision "has a rational and reasonable basis and is supported by substantial competent evidence for which the court is unwilling to substitute its judgment."⁴⁴³

⁴³⁹ *Id.* at 484–85.

⁴⁴⁰ 897 F. Supp. 1387 (D. Kan. 1995).

⁴⁴¹ *Id.* at 1388–89.

⁴⁴² *See id.* at 1393 (noting that Pahulu's scholarship continued to give him access to all academic services even after disqualification).

⁴⁴³ *Id.* at 1394.

B. *Americans with Disabilities Act*

The ADA is patterned after the Rehabilitation Act and has similar policy objectives.⁴⁴⁴ The ADA's scope, however, is broader than that of the Rehabilitation Act because it covers entities that do not receive federal funding, such as professional sports leagues and their member teams.⁴⁴⁵ Courts generally construe the ADA in a manner consistent with interpretations of the Rehabilitation Act.⁴⁴⁶

Most ADA litigation brought by disabled athletes has been against private sports associations such as youth or recreational sports associations, or professional sports governing bodies. Depending on the particular sport, the ADA's provisions covering employers,⁴⁴⁷ public entities,⁴⁴⁸ and places of public accommodation⁴⁴⁹ may apply. The ADA applies to public entities such as public high schools, universities, and colleges;⁴⁵⁰ employers, such as professional leagues and clubs, with fifteen or more employees; and persons or entities that own, lease, or operate a place of public accommodation, such as the Professional Golfers Association (PGA) Tour,⁴⁵¹ youth sports leagues,⁴⁵² and sports instructional schools.⁴⁵³

To be protected by the ADA, an athlete must have a "disability," which requires proof that one's physical impairment

⁴⁴⁴ See Matthew J. Mitten, *AIDS and Athletics*, 3 SETON HALL J. SPORT L. 5, 35 (1993).

⁴⁴⁵ *Id.*

⁴⁴⁶ See *Bragdon v. Abbott*, 524 U.S. 624, 631-32 (1998).

⁴⁴⁷ See 42 U.S.C. § 12111(5)(A) (1994).

⁴⁴⁸ See 42 U.S.C. §§ 12131-12132 (1994).

⁴⁴⁹ See 42 U.S.C. § 12181(7)(L) (1994).

⁴⁵⁰ See, e.g., *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 924 (6th Cir. 2000).

⁴⁵¹ See, e.g., *PGA Tour, Inc. v. Martin*, 532 U.S. 661 (2001) (holding that the ADA applied to professional golfers).

⁴⁵² See, e.g., *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342 (D. Ariz. 1992) (finding that a general exclusion from dugouts of coaches in wheelchairs, without individualized assessments, violated the ADA); see also *Shultz v. Hemet Youth Pony League, Inc.*, 943 F. Supp. 1222 (C.D. Cal. 1996) (holding that a youth baseball league violated the ADA when it denied plaintiff's request to play in a league outside of his age group based on their untested assumptions regarding his risk of injury due to his cerebral palsy). But see *Elitt v. U.S.A. Hockey*, 922 F. Supp. 217 (E.D. Mo. 1996) (finding that the ADA did not apply because there was no proof local and national hockey associations owned, operated or leased places of public accommodation).

⁴⁵³ See *Montalvo v. Radcliffe*, 167 F.3d 873 (4th Cir. 1999) (applying ADA in case of a minor affected with HIV who sought admission to a martial arts academy).

substantially limits a major life activity, has a record of such impairment, or is regarded as having such an impairment.⁴⁵⁴ This requirement is similar to the corresponding one under the Rehabilitation Act.

The factors governing the legality of excluding a physically disabled athlete from a sport under the ADA are similar to those relevant under the Rehabilitation Act.⁴⁵⁵

1. Harm to Other Participants

The employment and public accommodations sections of the ADA expressly permit the exclusion of disabled persons, including athletes, from activities if their participation would pose a "direct threat to the health and safety" of others that cannot be eliminated with reasonable accommodation.⁴⁵⁶ Corresponding regulations provide that determining whether an individual poses a direct threat to the health and safety of others requires an individualized assessment based on a reasonable medical judgment relying on current medical knowledge or the best available objective evidence.⁴⁵⁷ These same principles apply to the ADA's provisions governing public services.⁴⁵⁸ The ADA's regulations adopt the factors articulated by the United States Supreme Court in *School Board v. Arline*,⁴⁵⁹ where it construed the Rehabilitation Act, and required that the nature, duration, severity of the risk, and likelihood of potential injury, as well as whether reasonable accommodations would mitigate the risk to others, be considered.⁴⁶⁰

The following case illustrates that the ADA requires a valid medical basis for excluding an athlete from competition on the ground that his physical condition exposes other participants to an increased risk of serious harm. In *Anderson v. Little League Baseball, Inc.*,⁴⁶¹ a federal district court held that a youth baseball league policy prohibiting coaches in wheelchairs from being on the field violated the ADA. The court recognized the

⁴⁵⁴ 42 U.S.C. § 12102(2) (1994).

⁴⁵⁵ See *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 924–25 (6th Cir. 2000).

⁴⁵⁶ See Mitten, *supra* note 444, at 35.

⁴⁵⁷ See *id.*

⁴⁵⁸ See *id.* at 37.

⁴⁵⁹ 480 U.S. 273, 288 (1987).

⁴⁶⁰ See *id.* at 287–88.

⁴⁶¹ 794 F. Supp. 342 (D. Ariz. 1992).

"need to balance the interests of people with disabilities against legitimate concerns for public safety."⁴⁶² Applying the *Arline* factors incorporated in the ADA's public accommodations regulations, the court found that the plaintiff's on field coaching in a wheelchair did not pose a direct threat to the health and safety of others. It then enjoined enforcement of the baseball league's policy because it unjustifiably discriminated against the plaintiff.

Two federal appellate courts have upheld the exclusion from sports competition of athletes with contagious diseases in order to prevent exposing other participants to a significant risk of disease transmission. In *Montalvo v. Radcliffe*,⁴⁶³ the Fourth Circuit ruled that a karate studio was permitted to exclude an HIV-positive 12 year old boy from full contact karate classes. The class involved frequent physical contact among students and instructors that resulted in bloody injuries. Relying on medical expert testimony that HIV can be transmitted through blood-to-blood contact and evidence that this type of contact frequently occurred in these karate classes, the court concluded that the plaintiff's participation would pose a direct threat to the health and safety of others by exposing them to the risk of HIV transmission.⁴⁶⁴ The court further found that there were no possible modifications that could effectively reduce the significance of this risk, while also maintaining the fundamental nature of the studio's "hard-style" Japanese karate.⁴⁶⁵ The studio's offer to give the plaintiff private karate lessons, which was rejected by him and his parents, was found to be a reasonable accommodation of the plaintiff's disability.⁴⁶⁶

Following *Montalvo*, the Sixth Circuit, in *Doe v. Woodford County Board of Education*,⁴⁶⁷ ruled that placing a member of a high school's junior varsity basketball team who suffered from hepatitis B on "hold" status pending receipt of medical clearance from his physician did not violate the Act. The court explained:

It is entirely reasonable for defendants to be concerned and arguably were obligated to be concerned with limiting risk of

⁴⁶² *Id.* at 345.

⁴⁶³ 167 F.3d 873 (4th Cir. 1999).

⁴⁶⁴ *Id.* at 879.

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ 213 F.3d 921 (6th Cir. 2000).

exposure of any contagion to others as well as limiting any injury that John may suffer. In an effort to ensure that John's participation in practice would not pose a threat to the safety and well being of John as well as other players, the school requested plaintiff to present some objective medical evidence to that effect. After receiving a very general letter from John Doe's doctor, defendants asked for a more definitive statement as to the safety of John's participation on the team. For purposes of liability, it does not matter that defendants eventually determined, according to its inter-office memorandum, that John should be allowed to fully participate on the basketball team. Rather, defendants, during this "hold" status period, were simply trying to balance the need of protecting the public health with John's rights not to be treated differently due to his disability.⁴⁶⁸

The *Woodford County* court observed that "defendants faced potential liability from other students and parents if they allowed John to play on the team and another student accidentally became exposed to John's contagious condition."⁴⁶⁹ This is a valid concern because some courts have held that an athletic event sponsor has a legal duty to use reasonable care to prevent the transmission of contagious diseases during competition.⁴⁷⁰

2. Harm to Athlete

Unlike the well established judicial precedent recognizing harm to one's self as a valid justification for exclusion from athletics under the Rehabilitation Act,⁴⁷¹ there is little precedent regarding whether exclusion of a disabled athlete from a sport solely because of a potentially enhanced risk of injury is a legally valid justification under the ADA. In *Devlin v. Arizona Youth Soccer Association*,⁴⁷² a federal district court refused to strike a

⁴⁶⁸ *Id.* at 926.

⁴⁶⁹ *Id.*

⁴⁷⁰ See *Joseph v. E. Irondequoit Cent. Sch. Dist.*, 708 N.Y.S.2d 537 (4th Dep't 2000) (reversing summary judgment for defendant school district because affidavits submitted by defendant did not address the claim that the school district was negligent in failing to clean wrestling mats properly after a wrestler sustained a bloody nose); *Silver v. Levittown Union Free Sch. Dist.*, 692 N.Y.S.2d 886 (Sup. Ct. Nassau County 1999) (finding that an athlete may be liable for the negligent transmission of a contagious disease during a wrestling match).

⁴⁷¹ See *supra* notes 314-33 and accompanying text.

⁴⁷² No. CIV 95-745 TUC ACM, 1996 WL 118445, (D. Ariz. Feb. 8, 1996).

sports organization's affirmative defense that its exclusion of a youth soccer player was justified because his participation would "pose a substantial risk of harm to him." The court allowed the soccer league to assert this defense and concluded, without elaboration, that there were unresolved issues of law and fact regarding this issue.

One commentator's comparison and analysis of the ADA and the Rehabilitation Act, and their corresponding regulations, indicates that the risk of harm to the athlete may not be a legitimate reason for excluding a disabled person from an athletic event under the ADA.⁴⁷³

To date, there have not been any cases in which a professional athlete with a physical abnormality has been denied an opportunity to play a sport on the ground that doing so would expose him to an enhanced risk of significant harm. Although the underlying medical issues may be the same, courts may develop a different legal framework for resolving participation disputes involving professional athletes than the one for college athletes established by the *Knapp* and *Pahulu* cases. An important distinction is that sports are a professional athlete's livelihood, rather than an extracurricular activity that is merely one component of an education.

3. Reasonable Modifications to Enable Athletic Participation

In *PGA Tour, Inc. v. Martin*,⁴⁷⁴ the United States Supreme Court held that denying the use of a golf cart to Casey Martin, a professional golfer with a circulatory disorder that inhibits his ability to walk, violated the ADA. The PGA Tour had refused to provide Martin with an exception to its rule that all golfers must walk the course during tournament play, because of its position that walking injected an element of fatigue into championship golf. This decision effectively precluded him from playing in PGA tournaments, although his demonstrated golf skills qualified him to participate.

Title III of the ADA requires covered entities (such as the PGA) to make reasonable modifications to their policies when necessary to enable individuals with disabilities to have access to their facilities and services, unless doing so would

⁴⁷³ See Jones, *supra* note 76, at 191-97. But see *Chevron U.S.A., Inc. v. Echazabal*, No. 00-1406, 2002 U.S. LEXIS 4202 (U.S. June 10, 2002).

⁴⁷⁴ 532 U.S. 661 (2001).

"fundamentally alter" their nature. It was undisputed that using a golf cart was a reasonable modification necessary to enable Martin to participate in PGA tournaments. The key issue, then, was whether allowing Martin to use a golf cart was a modification that would fundamentally alter the nature of the tournaments.

The Court ruled that waiver of the PGA's walking rule to allow Martin to use a cart did not fundamentally alter the nature of professional championship golf. The "essence of the game has been shot-making," according to the Court, and the "walking rule . . . is not an essential attribute of the game itself."⁴⁷⁵ The Court recognized that "waiver of an essential rule of competition for anyone would fundamentally alter" the PGA's tournaments, but concluded that "the walking rule is at best peripheral to the nature of petitioner's athletic events, and thus it might be waived in individual cases without working a fundamental alteration."⁴⁷⁶

Relying on undisputed trial testimony that "Martin easily endures greater fatigue even with a cart than his able-bodied competitors do by walking,"⁴⁷⁷ the Court held:

The purpose of the walking rule is therefore not compromised in the slightest by allowing Martin to use a cart. A modification that provides an exception to a peripheral tournament rule without impairing its purpose cannot be said to 'fundamentally alter' the tournament. What it can be said to do, on the other hand, is to allow Martin the chance to qualify for and compete in the athletic events petitioner offers to those members of the public who have the skill and desire to enter. That is exactly what the ADA requires. As a result, Martin's request for a waiver of the walking rule should have been granted.⁴⁷⁸

Two cases decided prior to *Martin* illustrate the nature of the individualized inquiry that must be undertaken to determine whether requested modifications by physically impaired athletes would "fundamentally alter" the nature of a particular sport.

In *Shultz v. Hemet Youth Pony League, Inc.*,⁴⁷⁹ an eleven year old boy with a medical condition that severely affected the

⁴⁷⁵ *Id.* at 683, 685.

⁴⁷⁶ *Id.* at 687-89.

⁴⁷⁷ *Id.* at 690.

⁴⁷⁸ *Id.* (citations omitted).

⁴⁷⁹ 943 F. Supp. 1222 (C.D. Cal. 1996).

functioning of his leg muscles, sought to play baseball in an age division reserved for children younger than him. The sport's governing body, however, refused to modify its rules to permit him to play outside his age division. Although the disabled boy was physically able to play baseball with the use of crutches, the governing body was concerned that permitting him to "play down" would create a possible risk of harm to himself and other players, and have adverse ramifications on its liability insurance coverage.

A federal district court found that the plaintiff's requested modification had been denied without any knowledge of the boy's ability to run or engage in reflexive action, or of what significant risks existed because he used crutches to play baseball. It held that the governing body violated the ADA by failing to attempt to determine whether the game could be modified to accommodate his ability.⁴⁸⁰

In *Elitt v. U.S.A. Hockey*,⁴⁸¹ the national governing body for amateur hockey denied the request of a youth hockey player with attention deficit disorder that his father or one of his brothers be permitted to be on the ice with him during practices and scrimmages to help keep him focused on the game. It also denied his request to "play down" to a lower age group.

The court held that the denial of the requested modifications did not violate the ADA. Allowing plaintiff's father or brother to be on the ice during scrimmages would fundamentally alter the nature of the game by disrupting the flow of play and preventing other players from experiencing actual game conditions. Permitting plaintiff to "play down" to the Squirt level was not required because:

U.S.A. Hockey's age levels are important because they group players who are roughly the same skill and size. . . . Mark has focusing problems and would generally be larger than the average Squirt level player. These two factors would increase the chances of accidental collision as well as the risk of injury to younger and smaller-sized children. In short, Mark's participation in the lower age group would be too disruptive, thus fundamentally altering the house program.⁴⁸²

⁴⁸⁰ *Id.* at 1225-26.

⁴⁸¹ 922 F. Supp. 217 (E.D. Mo. 1996).

⁴⁸² *Id.* at 225.

CONCLUSION

The "law of sports medicine" is a rapidly developing field that is establishing an important body of jurisprudence defining the legal rights and duties of all parties concerned with protecting the health and safety of athletes. The law is drawing important distinctions between the relevant duty of care owed to high school, college, and professional athletes because of the differing legal relationships that arise out of athletic participation at different levels of competition. It is important to identify and synthesize these developing legal trends in order to understand the history of the "law of sports medicine," to predict its future direction, and to critique its evolution. Hopefully this article is an initial step towards achieving these objectives.