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Taking One for the Team: Should Colleges be Liable for Injuries Occurring During Student Participation in Club Sports?

By Nick White*

EUGENE, Ore. — An Idaho State rugby player suffered a fatal head injury on a play that contained no excessive violence, a University of Oregon official said.

Michael Sims, 21, a junior, collapsed late in Saturday's second match at Oregon and was taken to Sacred Heart Medical Center in critical condition. He was taken off life support Monday afternoon and died a short time later.

Sandy Vaughn, the University of Oregon's club sports coordinator, said she was told by players who were present that Sims may have been injured earlier in the day, possibly in the first of the two Saturday games.

Late in the second game, Sims was playing defense during a routine play. He apparently collapsed during the play and could not be revived.¹

Background

In 1913, the Kentucky Supreme Court decided *Gott v. Berea College*, holding

that colleges and universities stand *in loco parentis* concerning the moral welfare, physical well-being, and mental training of their pupils.² This decision stood as a testament to the nature of the student-college relationship that existed for several decades before and after the ruling. The doctrine of *in loco parentis* gave colleges an expansive array of powers. They could govern their students much like parents govern their children. Accordingly, students could violate the school's rules, which regulated everything from attendance to basic manners and social etiquette. Furthermore, the doctrine insulated colleges from liability since a student could not sue his college any more than a child could sue his parents.³ The college had substantial liberty to govern its students and was immune from claims stemming from its regulations or its failure to enforce them.⁴ As the following suggests, it was the golden age for colleges with respect to liability:

While courts hinted at possible judicial intervention in some disciplinary matters, colleges typically won cases even when rules were vague, imprecise, and salutary, and when enforcement of rules was so

procedurally casual that it bordered upon arbitrariness and capriciousness. Expelling a student summarily for “offensive habits,” for example, was permissible.⁵

It is important to clarify that, though *in loco parentis* entrusted a college with extensive powers and responsibilities, it was originally a source of legal immunity, not legal duty.⁶ Two trends have evolved since the zenith of *in loco parentis*: the increase in autonomy and independence of the American college student and the demise of insular theories for colleges and universities. These trends, outlined below, are not exemplary of *in loco parentis* as it stood in the early 20th century, as it was then an insular theory. They do, however, signal a return of certain *in loco parentis* principles—replacing the generous allowances of power and immunity for the university with duties to protect students and enforce the regulations that govern them.

I. The Rise of the Autonomous College Student

The first chink in the armor of *in loco parentis* was the shift towards the German system of higher education in the late nineteenth century.⁷ This system focused on large educational institutions that paid little or no attention to students’ private lives or affairs.⁸ Though at first the idea caught on slowly, by

“The first chink in the armor of *in loco parentis* was the shift towards German system of higher education in late nineteenth century America.”

the early 20th century colleges were seeking larger student bodies. After World War II, the influx of soldiers serving under the G.I. Bill forced colleges to grow.⁹ The number of college students increased again with the maturation

of the baby-boom generation.¹⁰ By the time the 1960s came around, the student-college relationship was ripe for change.

The dynamic social and political atmosphere of the 1960s created the perfect backdrop for a shift in the student-college relationship. The Vietnam War (and the popularity of its protests amongst college students) and the Civil Rights Movement revolutionized the way that society viewed its young adults.¹¹ On July 4, 1971, President Nixon signed the 26th Amendment to the Constitution into law.¹² This Amendment clearly set the voting age at eighteen and was the capstone of a shift in policy towards treating college students as responsible adults.¹³ The progeny of case law that followed this amendment soon began to reflect this change. The Third Circuit summarized the new view in *Bradshaw v. Rawlings*, stating that the “modern American college is not an insurer of the safety of its students.”¹⁴

In *Bradshaw*, a college sophomore sued his college after he was a passenger in a car accident with a driver who was intoxicated from alcohol consumed at a college event.¹⁵ The district court in *Bradshaw*, recognizing that the college had a regulation prohibiting alcohol at its events, held that a college owes a duty of reasonable care when it serves alcohol notwithstanding the regulation.¹⁶ The Third Circuit later reversed and instead balanced the interests of the plaintiff and the college. It found that, although the plaintiff had an interest

in not being injured, the college had an interest in maintaining a mature relationship with its adult students and in avoiding responsibilities that may be impossible to

perform.¹⁷ The college’s interest thus trumped those of the plaintiff, as the court based its opinion on this balancing and noted the clear societal trend towards treating adult students like adults.¹⁸

The *Bradshaw* opinion probably contained the most poignant characterization of the common law development of the student-college relationship. It clearly refuted the argument that colleges should be responsible for their adult students. Colleges undoubtedly saw it as a major victory in the battle against liability. As opinions like *Bradshaw* began to dot the common law landscape, colleges seemed bulletproof; courts began to realize that colleges had had it too good for too long.

II. The Fall of Insulatory Theories for Colleges and Universities

With the fall of *in loco parentis*, colleges found themselves not only having less authority over their students, but also fearing the potential for tort liability. Though colleges suspected they may have a duty to protect their students, they did not know the exact scope of the duty. Furthermore, courts were initially hesitant to apply liability in a sphere that had not yet experienced such exposure. Over time, however, case law began to establish some degree of liability on the part of the college.¹⁹ Oddly, the *in loco parentis* theory that insulated schools from liability continued to insulate them in its non-existence. Rather than basing immunity on the presence of *in loco parentis*, courts instead shielded them from liability since no affirmative responsibility existed.¹⁹ *Bradshaw* became a reversal of the attempt to establish liability. The court stated that the demise of *in loco parentis* limited a college's duty to protect its students.²⁰ Thus, the post-*Bradshaw* era at the beginning of the 1980s is a crucial point in the analysis.

In the 1980s, on-campus crime led courts to begin to recognize a duty to protect students based on a premises liability theory.²¹ Courts found that colleges had status as landowners and that students were invitees. Under this theory, courts could hold colleges liable for criminal acts that were reasonably foreseeable.²² *Relyea v. State* was the first case to recognize this duty on the part of the college. Strangely, the court spent little time addressing how colleges assume the role of landowner, but it clearly applied this theory.²³ Policy factors also contributed to college liability. In *Mullins*

v. Pine Manor College, the Massachusetts Supreme Court held that a duty to protect college students arises from several policy factors.²⁴ *Mullins* involved the rape of a female student after an intruder broke into her dormitory.²⁵ The court explained that the expectations of the students, parents, and society lead to a duty on the part of the college to protect its students.²⁶ Juxtaposing case law from only a decade before it, the court stated that college students needed protection due to their inexperience.²⁷

Nero v. Kansas State University also helps to understand a college's duty to protect its students. In *Nero*, a college moved for summary judgment when a student sued after she was raped by another student who lived in the same dormitory and had been accused of rape approximately one month earlier.²⁸ The court found that a college could be liable if the attack was foreseeable; thus, it imposed a duty on the college to protect students from the foreseeable acts of dangerous persons under their control.²⁹ The court did this, however, while explicitly dismissing *in loco parentis* as a theory of liability.³⁰ According to *Nero*, a college's discretion to allow students to live in a certain place or, presumably, to partake in certain activities, may lead to liability for the college.³¹

III. The College's Duty to Supervise

The 1990s saw a continuation in the legal trend giving colleges increased responsibility for safeguarding their students from injury.³² *In loco parentis*, or elements thereof, seemed to be making a comeback, but as a theory for tort liability for colleges and not as an insulatory device.³³ As the nineties saw a rise in fraternity related deaths involving alcohol and hazing, attention also focused increasingly on sexual assault on college campuses.³⁴

Courts have been more willing to find schools liable for students' injuries; further, legislatures passed several laws instituting dram shop liability.³⁵ Media attention to fraternity deaths, sex crimes on campus, and student-faculty sexual relationships, has pushed college liability for students' actions and injuries to the forefront of the national media and legal system.³⁶ For the most part, colleges are losing the policy battle, as they are being

held liable now more than ever. In response, colleges have assumed the responsibility for controlling many aspects of its students' lives that were previously the responsibility of the student.

“Intercollegiate competition and university involvement in the governance of such clubs... show that club sports are not exactly the *laissez faire* entities that they appear to be.”

IV. The Special Nature of Collegiate Athletics

The benefits of athletic programs to colleges and universities are obvious and substantial. There are clear monetary benefits. For example, CBS paid the NCAA \$1 billion dollars to broadcast the NCAA basketball tournament for seven years; the athletic programs at the University of Michigan, generated over \$18.5 million in 1989 alone.³⁷ Club sports, however, are not revenue generating enterprises. As a result, they do not improve the respective university in this regard. Still, athletic programs bring much more to a college or university than revenue. They are helpful in boosting school spirit in the athletes and spectators and are an extremely effective marketing tool for attracting prospective students.³⁸ Since many activities and sports, such as rugby, are almost entirely relegated to club status nationwide, a student interested in playing the sport would rely largely on the existence and quality of the school's club program.

Courts have recognized these non-economic benefits in determining whether liability exists in a given athlete-college relationship.³⁹ In many cases, courts based their finding of a duty on two facts: whether a college actively recruited a student to play a certain sport and whether the injury took place at a regularly scheduled event.⁴⁰ These elements of duty are not necessarily present in all club activities, but they are certainly inherent in some. There is an issue as to whether a court might find *active* recruitment legally equivalent to the more passive recruitment of simply supporting and advertising their programs.

V. The Current Status of Club Sports on the American College Campus

As stated, colleges reap non-economic benefits from club sports, especially by advertising them to prospective students.⁴¹ Because colleges across the country almost universally accept club sports, definitions have emerged as to what qualifies an activity as a “club.” Franklin and Marshall College, for example, defines club sports as “a variety of traditional and non-traditional activities that compete in leagues and tournaments against other club teams from colleges and universities from around the region and country.”⁴² Other schools are more exact in their wording and clearly distinguish club programs from college sponsored varsity sports. The University of Michigan states that a club sport is “a student organization composed primarily of students, faculty, and staff. Each club is formed, developed, governed, and administered by the student membership of that particular club, working with the Club Sports Program staff.”⁴³

The University of Michigan definition suggests that a club sports team is simply a group of students who want to get together every so often to perform a certain activity or play a certain sport, like rugby. However, a careful reading of the two schools' definitions makes clear certain aspects of club sports that make them similar to varsity programs. Intercollegiate competition and university involvement in the governance of such clubs, such as the involvement of the “Club Sports Program staff” at Michigan,⁴⁴ indicate that club

Taking One for the Team

sports are not exactly the *laissez faire* entities they appear to be.

Perhaps most importantly, almost all colleges have some regime to approve or recognize club programs. The twenty-one page University of Michigan Club Sports Program Manual states, "The Club Sports Program reserves the right to refuse recognition to any club requiring extensive funding or resources, any club involving high liability or risk factors, or any club which does not properly represent the University of Michigan."⁴⁵ Most colleges reserve this right in some way.⁴⁶ The Manual further states:

To retain membership in the Club Sports Program the following requirements must have been met:

1. All appropriate forms were filed as directed...
2. Student interest in the club was demonstrated by a membership of at least ten active members.
3. The club was represented at all Club Sports President/Representatives Meetings.
4. All club equipment was maintained, issued, accounted for, and stored adequately.

“Courts have found liability through theories of a “special relationship” between a college and its students, and the theory of *respondeat superior* has also become relevant in this situation.”

5. The guidelines outlined in this Manual were followed.
6. The club’s purpose and activity continued to be consistent with the Department of Recreational Sports’ purpose and philosophy.

7. Suitable facilities continue to be available for the club to meet and practice.

8. The Club Sports Program staff continues to have the necessary resources to supervise the club and its activities.⁴⁷

Most colleges and universities have some version of the above rules, though not all are as far reaching. Such rules clarify that colleges are clearly involved in the regulation of club sports. They establish the criteria for recognition and reserve the right not to recognize any given club.

Such criteria may be intended to keep wholly absurd clubs from representing the college or partaking in their designated activities. For example, a “vandalism club” or “cannibalism club” would obviously be disallowed under the above rules. The rules seem to go further than that. They speak of funding, insofar as clubs might not be able to receive “extensive funding,” implying that a reasonable amount of funding is permissible.⁴⁸ They reference the correlation of the philosophy of the club program with that of a facet of the University.⁴⁹ The rules also reference the use of University equipment and facilities, insofar as they condition the recognition of a club on its using these facilities and their availability.⁵⁰

Perhaps most importantly, the University of Michigan states that a club cannot be recognized unless the University can adequately supervise its activities.⁵¹

Granted, such a rule is not commonplace among schools nationwide, but they do exist. The exact legal implications of such a rule have not been tested in the context of a club sports program, but the language certainly sparks curiosity, if not amongst students participating

in club sports, then certainly amongst the plaintiff's bar.

Though the movements leading up to the 26th Amendment and its progeny of case law effectively dismantled the doctrine of *in loco parentis*, several theories of liability have

emerged that establish an affirmative duty on the part of a college to protect students from injury. Courts have found liability through the theory that there is a "special relationship" between a college and its students and through the *respondeat superior* doctrine. The issue is whether a college has any duty to protect students engaged in club sports, i.e., whether their nonfeasance, or failure to affirmatively protect a student, is justifiable under the law.

The following will address whether a college may be liable for a student's injuries or for injuries caused by a student, either on or off the field, while participating in a club activity. Though the popular conception of club sports is that, as an alternative to varsity programs, they are different with respect to college regulation, funding, and supervision, this is often not the case—at least, not entirely. Club sports teams must be recognized by the college, can be denied such recognition by the college, often use college facilities and transportation, can receive funding from the college either directly or through a student governing body, and, as in the case of the University of Michigan, can be subject to college supervision.

Since the 1970s, colleges have not been liable for their adult students' actions or injuries, but courts have since delineated many exceptions to this rule. This Note will analyze the effect of college involvement in club sports as to whether it creates a duty for a college to protect its club athletes and those they might injure. This Note will also examine whether such a duty might exist in the future if the current trends in the law and college policy

continue unchecked. Finally, this Note will address the effectiveness of the current defenses

"Cases like Ochoa stand in the way of any proposition that colleges are liable for a club athletes' injuries, as college involvement in club sports likely falls far short of 'organizing and sponsoring.'"

to liability and the effect of college regulation in the context of a college student's desire to participate in club sports. The exculpatory agreement, or assumption of risk form, has become the modern day answer to countless liability issues. As with most legal defense mechanisms for liability, however, there are exceptions to its applicability—this Note will determine whether a student who becomes injured or causes injury to another individual while participating in a club activity calls for such an exception.

Analysis

I. Introduction

(1) I am fully informed or otherwise aware of, and fully assume, all risks to person or property in connection with my participation in the Club Sport...

(2) I fully and forever RELEASE, WAIVE AND DISCHARGE and COVENANT NOT TO SUE, the University...

(3) I shall INDEMNIFY AND HOLD HARMLESS the University...⁵²

The above clauses come directly from a waiver that all students at Rice University must sign prior to participating in club sports. Countless colleges and universities have similar

forms that say virtually the same thing. Why are these forms necessary? The doctrine of *in loco parentis* was reportedly slain for good in the 70s. Has this doctrine been resurrected as a theory of liability, or are universities simply putting a few more nails in Lazarus' coffin as another example of the "belt and suspenders" approach to modern tort liability? The answer to this question is not yet clear, but universities and the plaintiff's bar are both standing watch over the grave of *in loco parentis* principles. Neither is standing idly. Colleges have been liable for student injuries under several theories, including the "special relationship" and *respondeat superior* doctrines. Even though they are not as extreme as *in loco parentis*, they do represent a return to principles inherent in the aged doctrine.

Club sports can be dangerous. In many instances, the fundamental reason a sport or activity is designated as a "club" activity is that it is much too dangerous for university sponsorship. For example, Michigan State University has clubs for martial arts, archery, fencing, hockey, rugby, SCUBA diving, and skydiving.⁵³ In designating these activities as "clubs," Michigan State found a convenient solution to the potential liability problem if, say, a parachute fails to open or an archer's arrow should fly errant. Colleges and universities presumably did not foresee, however, the overwhelming popularity of club programs, as they are now a significant and popular aspect of campus life throughout the country. Colleges market themselves as having strong club sports programs to high school applicants, and further, devote many resources so these programs can flourish.⁵⁴ Colleges often allow club programs access to facilities such as playing fields, equipment, and transportation.⁵⁵ In many instances, colleges fund club programs either directly or through a student governing body charged with delegating funds, usually through an activity fee paid by students.⁵⁶ Most importantly, colleges have recently been more willing to govern club programs by specific regulations.⁵⁷ This Note will address whether this involvement in club activities subjects a college to liability for injuries to, or caused by, students engaged in club activities. It advances the thesis that, though colleges may not presently be liable, increased involvement in

club sports and the pending revivification of certain *in loco parentis* principles may change everything. This Note concludes by proposing that colleges that attempt to prevent liability by intensely regulating club athletics are hurting, rather than helping, the matter. Archery, Rugby, SCUBA, skydiving, and college students—this combination begs the sharks on the plaintiff's bar to begin circling; it may be that a college is just chumming the water when it affirmatively tries to protect itself from tort claims.

II. Theories of Liability

A. Special Relationship

As collegiate athletics have grown in scope, popularity, and importance, Courts have begun to treat the relationship between a college and one of its athletes as distinguishable from the relationship between a college and one of its ordinary students. Courts many times view the relationship between a college and one of its athletes as "special," and thus subject to a different legal standard.

Courts might find that club athletes' "special relationship" with a college gives rise to liability for injuries. As one court explains, "In nonfeasance cases the existence of a duty has been recognized only during the last century in situations involving a limited group of special relationships between parties."⁵⁸ Furthermore, "special relationships are most often premised upon the existence of mutual dependence."⁵⁹ *Davidson* involved a junior varsity cheerleader at the University of North Carolina.⁶⁰ The J.V. cheerleading squad had no coach, leaving the students to teach themselves various stunts and routines.⁶¹ The university provided the J.V. team with uniforms, transportation, the use of facilities, and physical education credit for the athletes.⁶² The University only made the J.V. team perform for donors to the University and at trade shows, and required a minimum grade point average.⁶³ The court managed to find a special relationship between the state university and cheerleader based upon the facts that (1) she was a member of a "school-sponsored, intercollegiate team," (2) there was a relationship of mutual dependence between the cheerleader and the

university, insofar as the school utilized the teams service at many sporting events and the cheerleaders received uniforms and the use of facilities from the school, and (3) the school “exerted a high degree of control over its cheerleaders.”⁶⁴ This three-prong test marked a shift from *Bradshaw* and its ilk, as it blurred the once bright line between NCAA-sanctioned athletics and other forms of athletic activity.

The court also found a special relationship in *Kleinecht v. Gettysburg College*, in which a lacrosse player who was “actively recruited” suffered an injury at a “scheduled athletic practice for an intercollegiate team sponsored by the College under the supervision of College employees.”⁶⁵ The court based its holding on the fact that the student was “not engaged in his private affairs as a student.”⁶⁶ The court held this notwithstanding the fact that the lacrosse practice at which the plaintiff was injured occurred in the fall, whereas lacrosse is a spring sport.⁶⁷ These off-season practices were held primarily to enable the team to get to know each other.⁶⁸ No trainers were present at this practice. Furthermore, contact or impact injuries, which are normally associated with lacrosse, were highly unlikely given the level of practice that was occurring.⁶⁹ In fact, the plaintiff in *Kleinecht* dropped dead of a cardiac arrest, an injury that had never occurred in any sporting event or practice at the defendant college. Nonetheless, the court saw the injury as foreseeable and found a duty on the part of the college.⁷⁰ It explained:

Although the *Hanson* court did not specify the theory on which it predicated this duty, we think it reached the correct result, and we predict that

“Perhaps what distinguishes club sports from varsity programs more than anything is the third facet of the Davidson test – control.”

the Supreme Court of Pennsylvania would conclude that a similar duty exists on the facts of this case. Like the lacrosse student in *Hanson*, Drew chose to attend Gettysburg College because he was persuaded it had a good lacrosse program, a sport in which he wanted to participate at the intercollegiate level. Head Trainer Donolli actively recruited Drew to play lacrosse at the College. At the time he was stricken, Drew was not engaged in his own private affairs as a student at Gettysburg College. Instead, he was participating in a scheduled athletic practice for an intercollegiate team sponsored by the College under the supervision of College employees. On these facts we believe that the Supreme Court of Pennsylvania would hold that a special relationship existed between the College and Drew that was sufficient to impose a duty of reasonable care on the College.⁷¹

At the opposite end of the spectrum as *Davidson* and *Kleinecht* is *Whitlock*. The *Whitlock* court found no special relationship between a university and a student who suffered an injury while jumping on a trampoline outside a fraternity house, as the student was engaging in his own “private recreational pursuits.”⁷² Here, the court said:

The extent of control actually exerted by the University over the fraternity has been minimal. The University has supervised fire drills in the fraternity house and has required the fraternity to place a grid over one of its window wells because of an accident that had occurred. Also, a University representative once advised the Betas to take the trampoline down when not in use. Other than the suggestion made

Taking One for the Team

by the university official, which appears to have been only advisory as the fraternity failed to comply, the

of an organized, school sponsored athletic event involving children, like that found in *Beckett*, this case involves

“There is obviously a sliding scale in determining whether the three *Davidson* factors are satisfied.”

a group of college students who get together to practice baseball for various reasons in the city park. While Taylor did notify the school of his intentions and secured money for baseballs from

University’s supervision has related primarily to fire protection, maintenance and repairs. We conclude that the lease, and the University’s actions pursuant to its rights under the lease, provide no basis of dependence by the fraternity members upon which a special relationship can be found to exist between the University and the fraternity members that would give rise to a duty upon the University to take affirmative action to assure that recreational equipment such as a trampoline is not used under unsafe conditions.⁷³

the Dean of Men this does not raise these baseball practices to the level of a college sponsored event or even bring them into question.⁷⁵

Though *Swanson* does not specifically address club sports, it seems that the court’s reasoning may still apply.

An Indiana court, in *Swanson v. Wabash College*, applies this theory in its finding that there is no duty on the part of a college when its student was injured at a student-organized, off-season practice for the college baseball team in a public park.⁷⁴ Though the facts are surprisingly similar to those in *Kleinecht*, in *Swanson*, the court found that direct funding by the college administration, the use of college equipment, and recognition of the practices by administration and the baseball coach “[did] not raise these baseball practices to the level of a college sponsored event or even bring them into question.” It elaborated as follows:

Swanson shows that college funding is but one of many factors for determining college liability. Yet, colleges do not directly fund club athletics often. There is a possibility that moneys granted to a club by a student governing body to a club are not a factor at all in establishing liability, even if the delegated money comes from a mandatory fee assessed by the college on all students. The Eighth Circuit held that the delegation of funds through the student senate of a state university was considered state action, but based this opinion on the fact that “the University did have final say over funding decisions,” as “decisions concerning financing of student organizations may be appealed to the Vice Chancellor for Student Services.”⁷⁶ There is a genuine issue, then, as to whether a grant from a student governing body would be considered in measuring a club’s relationship to the school if there is no appeal process or “final say” by the administration.

[T]he Wabash College students playing recreational baseball were well aware that there would be no professional coaching assistance or supervision, or any written guidelines for play. Instead

After cases like *Bradshaw*, a clear policy emerged in favor of sparing colleges liability for the voluntary actions of their students. Courts, absent a special relationship, will almost always treat college students as adults responsible for their own actions and do not

hold colleges liable for injuries that befall their students or others as a result. As the *Swanson* court explained, "College students...are not children. Save for a few legal exceptions, they are adult citizens ready, able, and willing to be responsible for their own actions. Colleges...are not expected to assume a role anything akin to *in loco parentis* or a general insurer."⁷⁷ Even in cases involving intramural sports, which involve a much higher level of college funding, involvement, and control, this policy usually guides courts. In *Kyriazis v. Univ. of West Virginia*, a West Virginia Court laid it out clearly:

The difference between intramural programs and sports clubs lies mainly in the degree of control the University exercises over each. Although the Board undertakes no role with the creation, organization, regulation or supervision of club sports, including the Rugby Club, it does actively control intramural programs.⁷⁸

In *Ochoa v. California State University*, the court held that a student injured during an intramural soccer game was "an adult taking part in a voluntary activity" with no special relationship with the school, and that it was "aware of no such authority...holding that a college or university forms a special relationship with its adult students, giving rise to a duty to protect them...merely by organizing and sponsoring an intramural activity."⁷⁹ Cases like *Ochoa* stand in the way of the proposition that colleges are liable for club athletes' injuries, as college involvement in club sports likely falls far short of "organizing and sponsoring." As time passes, this may change since courts have started to erode the principle set forth in *Bradshaw* and colleges extend their authority further into the realm of club athletics.

Though no court has found a college liable for injuries to a club athlete yet, such a finding may not be far from now. More courts are replacing simple principles, like the one found in *Bradshaw*, with multifaceted tests, like that of *Davidson*. The *Davidson* test states that there are three factors to determine liability.⁸⁰ They are (1) whether the team is school sponsored and involved in intercollegiate competition, (2) whether there is a relationship of mutual dependence between the athlete and the university, and (3) whether the school "exerted a high degree of control over the athlete."⁸¹ It seems that there at least exists a material issue of fact as to whether these factors are satisfied with regard to a club athlete.

The *Davidson* test provides the perfect avenue towards college liability for injuries to club athletes. There is a sliding scale to determine whether the three *Davidson* factors are satisfied. There is a wide spectrum of possible college involvement in sports. Even among NCAA-sanctioned sports, colleges treat athletes who partake in different sports distinctly. School sponsorship can entail no more than allowing a club team to use college facilities—a stadium, field, or swimming pool—

“a college will not be liable for the actions of club athletes which result in injuries to third parties under the doctrine of respondeat superior.”

or delegating funds to the team for equipment or promotion, whether the club is funded directly by the college or delegated by a student governing body. Furthermore, as club sports become more popular with current and prospective students, either as athletes or spectators, it might become tempting for colleges to allow club teams greater access to facilities, equipment, and funding. The relationship of mutual dependence could be satisfied by those factors discussed earlier in

this Note. Namely, the club athlete would depend on the college for the ability to partake in a given activity—the use of facilities and equipment, and more importantly,

“The doctrine of primary assumption of risk can perhaps be an adequate defense to those injuries associated with a club sport or activity if, for any reason, the court finds a duty on the part of the college.”

the recognition of the program. The college would depend on the club team to attract prospective students and to create a more effective sense of school spirit throughout the student body and community. Though the mutual dependence is not equivalent to that between NCAA athletes and their schools, it is still substantial. If trends continue, the line separating a club athlete and many NCAA athletes may turn out to be a distinction without a difference.

Perhaps what distinguishes club sports from varsity programs more than anything is the third facet of the *Davidson* test, control. The lack of control has historically been the cornerstone of club sports at American colleges and universities. Club sports exist either because not enough students have interest in a given activity to make it a college-sponsored team, or because the activity is such that the college or university does not have the means or desire to regulate and support it (many times because it wishes to avoid the liability that comes with sponsorship of a high-risk activity). Though club sports have traditionally been free of college control for the most part, that is changing. To look at the University of Michigan’s twenty-one page manual regulating club programs, the term *laissez faire* does not exactly spring to mind.⁸² Even without the supervisory clause, the rules present a fairly constraining regime if one wishes to be a club athlete.⁸³ They are likely comparable, or even stricter than, the rules that were in place for varsity athletes when courts discovered the first “special relationship” in the context of the college-athlete relationship.

1. *Respondeat Superior*

Presently, in almost all circumstances, a college will not be liable for the actions of club athletes that result in injuries to third parties under the doctrine of *respondeat superior*, as the relationship is not one which constitutes any sort of employment. As one court explains, “the doctrine of *respondeat superior* imposes liability upon a master for the torts of his servants committed while acting within the scope of the servant’s employment.”⁸⁴ The “general test” for *respondeat superior* liability is whether the master had “the right to direct and control the conduct of the alleged servant at the time the negligent act occurred.”⁸⁵

Colleges can exercise a certain degree of control over the conduct of their students, but *respondeat superior* liability requires an “employer-employee” relationship to exist and that the tortious actor acts “within the scope of the servant’s employment.”⁸⁶ It is unlikely that a court will recognize a club athlete as an employee or servant of the college. In *Swanson*, the court held that no employment relationship existed between the college and a *varsity* athlete when that athlete organized off-season practices with funding and permission directly from the administration.⁸⁷ Colleges claim they do not request or require anything of club athletes in regard to their club activities. A college does not benefit from nor depend on club athletes’ actions to further any goal or purpose of the institution. Thus, it would seem that a club athlete is likely not acting “within the scope of his employment” while participating in club activities. As the *Campbell* principle fades away and colleges exercise more control over their

students to avoid liability, this issue will likely be revisited.

that are associated with a club sport or activity if the court finds that the college has a duty.

“colleges likely are not liable for injuries affecting or caused by club athletes, but as the threat becomes more real, colleges and universities are developing regimes to insulate them from liability.”

There are two elements to this defense. The defendant must show “that (1) the plaintiff had full subjective understanding of the nature and presence of a specific risk; and (2) the plaintiff voluntarily

Certain college involvement in club sports will certainly give rise to *respondeat superior* liability. Drivers of college vans who are appointed or approved by the college (and almost certainly its insurance company) are acting as employees and give rise to *respondeat superior* liability. Colleges assume this in regulating and insuring the driver’s actions. The college would not be liable, however, for an approved and insured driver’s actions if the driver was not acting “within the scope of his employment.” In *Smith v. Gardner*, a Mississippi District Court held that a college was not liable for an accident caused when a college basketball coach, appointed by the college to drive the team van, was intoxicated when he was alone and running an errand in the team van.⁸⁸ The *Gardner* court held that there was no liability based on the fact that, “at the time of the accident [the coach] was on a personal errand which constituted a distinct deviation from the responsibilities of his employment.”⁸⁹ There are likely exceptions, then, to the college’s liability, even for its appointed and approved drivers. These exceptions are very limited; negligent and criminal acts, even acts that are expressly forbidden by the employer, can still fall within the scope of one’s employment.⁹⁰

III. Defenses to Liability: Assumption of Risk and Charitable Immunity

The doctrine of primary assumption of risk can be an adequate defense to those injuries

chose to encounter the risk. If a court finds that the primary implied assumption of risk doctrine is applicable, then the defendant owes no legal duty to protect the plaintiff from the particular risk that caused the injury.⁹¹ This defense is likely limited to on-the-field injuries, as there must be a “subjective analysis to determine actual knowledge [of the risk] of a plaintiff charged with the defense of [assumed] risk.”⁹² This defense is entirely fact-dependent. If, for example, a rugby club member suffers a broken leg in a rugby match, the court will find he assumed the risk if the defendant can show he knew that playing rugby created the risk of such an injury.

The courts may be willing to stretch the assumption of risk rule in favor of the defendant if the plaintiff is involved in sports and the injury occurs as a result thereof. In regard to the liability of participants in sporting events, some courts hold that “as a matter of law, participants in sporting events will not be permitted to recover against the co-participants for injuries sustained as the result of *inherent or foreseeable* dangers of the sport.”⁹³ While this rule shows the court’s view of liability for injuries in sports, it applies only to the liability of co-participants in sports. Certain states, such as Ohio, have applied a foreseeability standard to cases involving colleges and students, but it is unclear if other states are willing to extend the standard this far.⁹⁴ In *Nganga*, the court found the college was not liable simply because the student assumed the risk of injury when he suffered an injury while playing intramural soccer. It states that, “[t]he injury sustained by

Taking One for the Team

Nganga was a reasonably foreseeable consequence of his decision to assume the risks of the game and continue his participation in the high-contact sport of soccer.”⁹⁵

Colleges and universities are non-profit entities. Thus, the doctrine of charitable immunity has also been used effectively to insulate schools when a club athlete is injured. Although several states have recently abolished such immunity, it remains an effective option for those that have not. The case of *Gilbert v. Seton Hall University* is an example of this defense.⁹⁶ In *Gilbert*, the plaintiff was a student who was injured while playing for Seton Hall’s club rugby program in a private league organized for the competition of similar club programs at other colleges and universities.⁹⁷ The student had filled out a liability waiver provided by Seton Hall.⁹⁸ Seton Hall regulated its club programs through its Department of Recreational Services and imposed certain regulations upon them. It specifically said there should be no alcohol at the club’s events and frequently mentioned faculty advisors and coaches.⁹⁹

The incident at the heart of this case took place in New York against a team from St. John’s University. Unbeknownst to the plaintiff or any member of the Seton Hall team, the opponent team was banned by its respective university and suspended by the private league.¹⁰⁰ There was a keg of beer present at the game and the field was in notable disrepair; no faculty advisor or certified referee were present at the game.¹⁰¹ The injured student eventually became a quadriplegic and sued in New York federal court the universities involved and the private rugby league for damages under diversity jurisdiction.¹⁰² The central

question for the court was whether to apply New Jersey law, which would shield the defendant universities of liability under the doctrine of charitable immunity.

The doctrine of charitable immunity is one “whereby non-profit corporations and associations organized exclusively for religious, charitable, or educational purposes are immune from negligence liability for injuries caused to a beneficiary of the charitable institution.”¹⁰³ Though very few states still have the charitable immunity doctrine, and many do not apply such a theory to colleges and universities, the court in *Gilbert* gives it some weight in the federal courts. It states that, regardless of where the injury occurs or the plaintiff is domiciled, the defendant university is immune if the state in which it is located maintains the doctrine.¹⁰⁴ This is because both the plaintiff and the university benefit from immunity from tort actions.¹⁰⁵ The court explained:

Charitable immunity reduces the cost at which an institution can provide its services, and, because the institution has no profit motive, these savings are presumably passed on to some extent to the institution’s beneficiaries; in return, individuals who choose to take advantage of the institution’s services bear the risk that any injury they suffer due to the negligence of the charitable institution will not be compensated by the institution. By electing to attend an institution that is protected by and benefits from New Jersey charitable immunity laws, Gilbert has presumably obtained a better value for his (or his parents’) money than he would have

obtained if Seton Hall did not enjoy charitable immunity. Because Gilbert has indirectly availed himself of the charitable law of New Jersey and benefited from it, New Jersey has a strong

“If colleges are able to see the above distinction between the natural reaction to injuries during a school-sanctioned NCAA event and those during club sports, they should shape their policy accordingly.”

interest in having him bear a related burden.¹⁰⁶

The charitable immunity defense effectively shielded Seton Hall from liability, but the tone throughout the opinion reflects the importance of the court's decision as to which state's law should apply. Though it was never expressly said in the opinion, the court did not use the same language that earlier courts did regarding the plaintiff's "private affairs." Luckily for the university, however, the court did reference his voluntary choice to attend a New Jersey university, and this proved to be enough.

IV. Exculpatory Agreement

To further insulate itself from liability, a college could require students to sign an exculpatory agreement. This is because "[a] party may contract out of his duty to exercise reasonable care with respect to the other party and thereby exonerate himself of liability...without offending the public policy of the state."¹⁰⁷ In the majority of cases, these clauses are upheld; in some cases, however, exculpatory clauses are considered unconscionable.¹⁰⁸ To be unconscionable, a contract must be "one that no sensible person not under delusion, duress or in distress would make, and one that no honest and fair person would accept."¹⁰⁹ The inequality of bargaining power and whether "the transaction affects the public interest such as... types of businesses generally thought to be suitable for regulation or which are thought of as a practical necessity for some members of the public," are areas in which an exculpatory clause might be found void due to public policy or unconscionability.¹¹⁰

The inequality of the bargaining power between the student and the college likely does not make exculpatory agreements unconscionable or void for public policy, but there are cases in other jurisdictions in which courts found such clauses to be void.¹¹¹ The court in *Kyriazis* based its finding that there was inequality of bargaining power on the fact that, "[i]f appellant wished to play club rugby for the University, he had no choice but to sign the Release."¹¹² The mere fact that a student could not play if he did not sign the exculpatory agreement could be determinative, but most

jurisdictions still view mandatory exculpatory agreements as common and enforceable.¹¹³ It is presently unlikely that the court would find an exculpatory agreement between a college and a student unconscionable, but it continues to be a possibility.

Presently, it seems that colleges are likely not liable for injuries affecting or caused by club athletes. As the threat becomes more real, colleges and universities are developing regimes to insulate them from liability. There are two ways to do this. One way is the "less is more" attitude. By refusing to involve itself *at all* with club sports, a college or university might effectively place a student's involvement clearly within the realm of his private affairs. This, however, is risky, as a few bad court decisions could damage a college's budget fairly quickly.

Another way a college can insulate itself from liability is to take the approach that the University of Michigan takes with its club sports programs, insofar as it conditions club recognition on whether a university entity "continues to have the necessary resources to supervise the club and its activities."¹¹⁴ In essentially assuming the duty to supervise, the university almost certainly avails itself to some amount of liability.¹¹⁵ So long as the university is not posturing, i.e., so long as it is willing and able to supervise the club and its activities, this seems like a plausible alternative. This is a costly approach, but in the alternative, it may be more efficient than losing in court after a graduate student breaks his neck while skydiving.

Removed from the budgetary and administrative realities of running a college or university, club sports might seem like the perfect battlefield on which universities can make their last stand against the principles of *in loco parentis* as a mode of liability, since courts and legislatures have not yet set their sights on dismantling the current system. If not in the realm of club sports, then where should colleges make such a stand? Colleges and universities have already lost the battle in the dormitories, the fraternity houses, and on the NCAA-sanctioned athletic field. Why, then, should they choose club athletics as the domain to combat liability? There are several reasons to support such a tactic, and several policies which could further collegiate goals in doing so.

Taking One for the Team

It must be remembered that many of the duties that arose in the eighties and nineties came from increased media attention to on-campus sex assault, alcohol abuse, and hazing, which led to a major shift in public opinion.¹¹⁶ This widespread attention is not present in the realm of club sports. In fact, public opinion regarding club sports is likely the opposite, insofar as many Americans feel that adult students should be able to do whatever they like on their own time within the law.

There seems to be distinguishing factors between injuries in club sports and injuries in those areas where colleges have recently been found to be liable (i.e. fraternities, dormitories, and NCAA athletics). Injuries leading to increased liability are almost always one of two types. They are either (1) injuries inflicted upon an innocent student-victim, such as the rape of a female student in her dormitory, or (2) injuries to a student while they are engaging in activities organized by the college for its own benefit, such as an injury to a NCAA athlete. Club athletes who become injured while partaking in an inherently dangerous activity do not fall into either of these two groups. When a student is injured while playing rugby, a sport of virtually unparalleled violence, the natural human inference is that such an injury is the consequence of participating in such an inherently dangerous activity. Colleges need to recognize this human reaction as one inference, as opposed to the immediate emotional reaction to a young college female raped in her dorm room. Colleges should also distinguish the natural reaction when an NCAA athlete is injured during school sanctioned events as being one relative to fairness. It is hardly fair that colleges derive so much benefit from their athletes without taking steps to insure their safety.

If colleges are able to see the above distinction between the natural reaction to injuries during a school-sanctioned NCAA event and those during club sports, they should shape their policy accordingly. They should not market club sports to prospective students. They should refrain from funding, directly or indirectly, club activities. Most importantly, they should refrain from governing club athletics with regulations outside of those that apply to all students. Assumption of risk or

exculpatory agreements may not be the catch-all answer that colleges seek, but they would not hurt a college's cause. By such measures, a college could squarely place club athletics in the realm of a student's private affairs. It is unclear whether the modern college or university would be willing to partake in such a *laissez faire* policy. In the past, institutions have apparently wanted more involvement in areas of potential liability, but it would almost certainly work to their benefit to consider otherwise.

ENDNOTES

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¹ *Rugby Player Died on Standard Play*, IDAHO STATESMAN, Feb. 4, 2004.

² 161 S.W. 204, 206 (Ky. 1913).

³ *People ex rel. Pratt v. Wheaton Coll.*, 40 Ill. 186, 187 (Ill. 1866) ("A discretionary power has been given them to regulate the discipline of their college in such manner as they deem proper, and so long as their rules violate neither divine nor human law, we have no more authority to interfere than we have to control the domestic discipline of a father in his family.").

⁴ Peter F. Lake, *The Rise of Duty and the Fall of In Loco Parentis and Other Protective Tort Doctrines in Higher Education Law*, 64 MO. L. REV. 1, 5 (1999).

⁵ *Id.*

⁶ *Id.* at 6.

⁷ Phillip M. Hirshberg, *The College's Emerging Duty to Supervise Students: In Loco Parentis in the 1990's*, 46 WASH. U. J. URB. & CONTEMP. L. 189, 196 (1994).

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 197.

¹¹ Edward H. Whang, *Necessary Roughness: Imposing a Heightened Duty of Care on Colleges for Injuries of Student-Athletes*, 2 SPORTS LAW. J. 25, 30 (1995).

¹² U.S. CONST. amend. XXVI. This amendment to the United States Constitution provides: "The right of citizens of the United States, who are eighteen years of age or older, to vote shall not be denied or abridged by the United States or by any State on account of age." *Id.*

¹³ *Id.*

¹⁴ *Bradshaw v. Rawlings* 612 F.2d 135, 138–39 (3d Cir. 1979) ("Our beginning point is a recognition that the modern American college is not an insurer of the safety of its students. Whatever may have been its responsibility in an earlier era, the authoritarian role of today's college administrations has been notably diluted in recent decades. Trustees, administrators, and faculties have been required to yield to the expanding rights and privileges of their students. By constitutional amendment, written and unwritten law, and through the evolution of new customs, rights formerly possessed by college administrations have been transferred to students. College students today are no longer minors; they are now regarded as adults in almost every phase of community life.").

¹⁵ *Id.* at 137.

¹⁶ *Id.* at 137–38.

¹⁷ *Id.* at 138.

¹⁸ *Id.* at 140 ("Thus, for purposes of examining fundamental relationships that underlie tort liability, the competing interests of the student and of the institution of higher learning are much different today than they were in the past. At the risk of oversimplification, the change has occurred because society considers the modern college student an adult, not a child of tender years. It could be argued, although we need not decide here, that an educational institution possesses a different pattern of rights and

responsibilities and retains more of the traditional custodial responsibilities when its students are all minors, as in an elementary school, or mostly minors, as in a high school. Under such circumstances, after weighing relevant competing interests, Pennsylvania might possibly impose on the institution certain duties of protection, for the breach of which a legal remedy would be available. But here, because the circumstances show that the students have reached the age of majority and are capable of protecting their own self interests, we believe that the rule would be different.").

¹⁹ *See Hegel v. Langsam*, 273 N.E.2d 351, 352 (Ohio Ct. App. 1971) ("In our opinion plaintiffs completely misconstrue the duties and functions of a university. A university is an institution for the advancement of knowledge and learning. It is neither a nursery school, a boarding school nor a prison. No one is required to attend. Persons who meet the required qualifications and who abide by the university's rules and regulations are permitted to attend and must be presumed to have sufficient maturity to conduct their own personal affairs. We know of no requirement of the law and none has been cited to us placing on a university or its employees any duty to regulate the private lives of their students, to control their comings and goings and to supervise their associations.").

²⁰ *See generally Bradshaw*, 612 F.2d 135.

²¹ *Hirshberg*, *supra* note 7, at 205.

²² *Id.*

²³ *See Relyea v. State*, 385 So. 2d 1378, 1382–83 (Fla. Dist. Ct. App. 1980) ("As a basic principle of law, a property owner has no duty to protect one on his premises from criminal attack by a third person. Even though one's negligence may be a cause in fact of another's loss, he will not be liable if an independent, intervening and unforeseeable criminal act also causes the loss. If, however, the criminal attack is reasonably foreseeable, a duty may arise between a landowner and his invitee. But it

Taking One for the Team

not an insurer of the safety of his invitees and is not required to take precautions against a sudden attack from a third person which he has no reason to anticipate.”).

²⁴ 449 N.E.2d 331 (Mass. 1983).

²⁵ *Id.*

²⁶ *Id.* at 335 (“We think it can be said with confidence that colleges of ordinary prudence customarily exercise care to protect the well-being of their resident students, including seeking to protect them against the criminal acts of third parties. An expert witness hired by the defendant testified that he had visited eighteen area colleges, and, not surprisingly, all took steps to provide an adequate level of security on their campus. He testified also that standards had been established for determining what precautions should be taken. Thus, the college community itself has recognized its obligation to protect resident students from the criminal acts of third parties. This recognition indicates that the imposition of a duty of care is firmly embedded in a community consensus.”).

²⁷ *Id.* (“This consensus stems from the nature of the situation. The concentration of young people, especially young women, on a college campus, creates favorable opportunities for criminal behavior. The threat of criminal acts of third parties to resident students is self-evident, and the college is the party which is in the position to take those steps which are necessary to ensure the safety of its students. No student has the ability to design and implement a security system, hire and supervise security guards, provide security at the entrance of dormitories, install proper locks, and establish a system of announcement for authorized visitors. Resident students typically live in a particular room for a mere nine months and, as a consequence, lack the incentive and capacity to take corrective measures.”).

²⁸ See generally *Nero v. Kansas State Univ.*, 861 P.2d 768 (Kan. 1993).

²⁹ *Id.* at 782–83 (“We conclude that KSU exercised its discretion to build, maintain,

and operate housing units. Once that discretionary decision was made, KSU had a legal duty to use reasonable care under the circumstances in protecting the occupants of the coed housing unit from foreseeable criminal conduct while in a common area. A factual issue remains whether KSU used reasonable care in carrying out its legal duty to Shana Nero when it placed Ramon Davenport in a coed housing unit with her. A question also exists concerning a failure to warn her and a failure to institute adequate security measures to protect female students in the same housing unit based upon KSU’s knowledge of the reported sexual attack by Ramon Davenport some three weeks earlier. Whether the second attack was foreseeable by KSU and whether KSU took adequate steps under the circumstances to prevent the second attack are questions of fact, and the trial court erred in granting summary judgment”).

³⁰ *Id.* at 778 (“We hold the university-student relationship does not in and of itself impose a duty upon universities to protect students from the actions of fellow students or third parties. The in loco parentis doctrine is outmoded and inconsistent with the reality of contemporary collegiate life.”).

³¹ *Id.*

³² Hirshberg, *supra* note 7, at 218.

³³ *Id.*

³⁴ *Id.* at 220.

³⁵ *Id.* at 220–21.

³⁶ *Id.*

³⁷ Whang, *supra* note 11, at 40.

³⁸ See *id.* at 41.

³⁹ See *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993) (“[W]e predict that the Supreme Court of Pennsylvania would conclude that a similar a [sic] duty exists on the facts of this case. Like the lacrosse student

in *Hanson*, Drew chose to attend Gettysburg College because he was persuaded it had a good lacrosse program, a sport in which he wanted to participate at the intercollegiate level. Head Trainer Donolli actively recruited Drew to play lacrosse at the College.”).

⁴⁰ *See id.*

⁴¹ For example, Yale University, on its website, states, “Student-run club sports provide an important resource for those who want to participate in a program with a flexible schedule or in sports that are not offered by most colleges. These include many noncompetitive activities such as mountaineering, fishing, and kayaking, as well as competitive sports like biking, sailing, skiing, trap and skeet, golf, rugby, ultimate frisbee, and equestrian sports. Approximately six hundred students are active in thirty-five club sports over the course of the year.” *Athletics*, Yale University Office of Undergraduate Admissions, at <http://www.yale.edu/admit/freshmen/extracurriculars/athletics.html> (2003).

⁴² Club Sports, Franklin & Marshall College, at <http://www.fandm.edu/Departments/Athletics/clubs.html> (2004).

⁴³ University of Michigan Department of Recreational Sports, *Club Sports Program Manual 2003-2004*, available at <http://www.recsports.umich.edu/clubs/clubmanual.pdf> (last visited Dec. 23, 2004) [hereinafter Michigan Club Sports Manual].

⁴⁴ *Id.*

⁴⁵ *Id.* at 3.

⁴⁶ I was unable to find a college or university who did not explicitly reserve the right to deny a club program recognition as such.

⁴⁷ Michigan Club Sports Manual, *supra* note 43, at 4.

⁴⁸ *Id.* at 3.

⁴⁹ *Id.* at 4.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² *Rice University Club Sport Participation Agreement Including Assumption of Risk and Release from Liability*, available at http://www.ruf.rice.edu/~stact/travel_waivers/waiver_sports.html (last visited Dec. 23, 2004).

⁵³ Michigan Club Sports Manual, *supra* note 43.

⁵⁴ *See, e.g., Club Sports*, Stanford University at <http://www.stanford.edu/dept/pe/clubsports.html> (last modified Aug. 13, 2002) (“The Club Sports program at Stanford University represents a return to the player-oriented concept that characterized the beginning of organized sports in the United States. With emphasis on student initiative, not only in competition and performance but also in team management, the club program provides participants the opportunity to shape their own experience to a much greater degree than any other program in the department. The enthusiasm and team pride engendered by this environment are readily perceived by even the most casual observer, and are reflected by the fact that well over 1,000 participants within the Stanford community currently take part in one or more of the 16 club sports offered. The program is coeducational and exists to provide additional opportunities in competition, instruction, and recreation for undergraduate and graduate students, faculty and staff in an array of sports which are not funded through the other areas of the Stanford Athletic Department.”).

⁵⁵ *See, e.g., Princeton University Club Sports*, at <http://www.princeton.edu/~recsport/clubs.htm> (allowing club sports to use campus facilities, including sports such as riflery).

⁵⁶ Caroline Grubbs, *SBC to Fund Club Sports Again After Two-Year Hiatus*, PHOENIX, Apr. 15, 2004, at <http://phoenix.swarthmore.edu/2004-04-15/news/13962> (describing policy at Swarthmore College policy to fund club

Taking One for the Team

sports through a Student Budget Committee).

⁵⁷ Michigan Club Sports Manual, *supra* note 43.

⁵⁸ Univ. of Denver v. Whitlock, 744 P.2d 54, 58 (Colo. 1987).

⁵⁹ Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001).

⁶⁰ *Id.* at 921.

⁶¹ *Id.* at 922.

⁶² *Id.* at 923.

⁶³ *Id.*

⁶⁴ *Id.* at 926–27.

⁶⁵ 989 F.2d 1360, 1367 (3d Cir. 1993).

⁶⁶ *Id.*

⁶⁷ *Id.* at 1363.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.* at 1367.

⁷¹ *Id.*

⁷² Univ. of Denver v. Whitlock, 744 P.2d 54, 62 (Colo. 1987).

⁷³ *Id.*

⁷⁴ See generally 504 N.E.2d 327 (Ind. Ct. App. 1987).

⁷⁵ *Id.* at 331.

⁷⁶ Gay and Lesbian Students Ass'n v. Gohn, 850 F.2d 361, 365–66 (8th Cir. 1988).

⁷⁷ Campbell v. Bd. of Trs. of Wabash Coll., 495 N.E.2d 227, 232 (Ind. Ct. App. 1986). It might be noted that a high school owes a duty of reasonable care to its students and others to prevent injuries caused by students.

See Beckett v. Clinton Prairie Sch. Corp., 504 N.E.2d 552, 553 (Ind. 1987) (“The Court has clearly recognized that there exists a duty on the part of school personnel to exercise ordinary and reasonable care for the safety of the children under their authority”).

⁷⁸ Kyriazis v. Univ. of W. Va., 450 S.E.2d 649, 652 (W. Va. 1994).

⁷⁹ 85 Cal.Rptr.2d 768, 771–73 (Cal. App. 1999); see also Nganga v. Coll. of Wooster, 557 N.E.2d 152 (Ohio App. 1989); Fox v. Bd. of Supervisors of La. State Univ., 576 So.2d 978, 983 (“Part of the educational experience is responsibility gained through the autonomy of operating a club without the administration or faculty second guessing every decision.”).

⁸⁰ Davidson v. Univ. of N.C. at Chapel Hill, 543 S.E.2d 920, 926–27 (N.C. Ct. App. 2001).

⁸¹ *Id.*

⁸² Michigan Club Sports Manual, *supra* note 43.

⁸³ *Id.*

⁸⁴ Trinity Lutheran Church, Inc. of Evansville, Ind. v. Miller, 451 N.E.2d 1099, 1102 (Ind. App. 1983).

⁸⁵ *Id.*

⁸⁶ Swanson v. Wabash Coll., 504 N.E.2d at 327, 332 (Ind. Ct. App. 1987).

⁸⁷ *Id.*

⁸⁸ 998 F. Supp. 708, 708–09 (S.D. Miss. 1998).

⁸⁹ *Id.* at 711.

⁹⁰ See Infinity Products, Inc. v. Quandt, 810 N.E.2d 1028, 1034 (Ind. 2004).

⁹¹ Gyuriak v. Millice, 775 N.E.2d 391, 397 (Ind. Ct. App. 2002) (Robb, J., dissenting).

SPORTS

⁹² *Beckett v. Clinton Prairie School Corp.*, 504 N.E.2d 552, 555 (Ind. 1987). Circumstantial evidence may be used to show actual knowledge. *Id.*

⁹³ *Mark v. Moser*, 746 N.E.2d 410, 421 (Ind. Ct. App. 2001) (emphasis added).

⁹⁴ *See Nganga v. Coll. of Wooster*, 557 N.E.2d 152, 154 (Ohio Ct. App. 1989).

⁹⁵ *Id.*

⁹⁶ 332 F.3d 105 (2d Cir. 2003).

⁹⁷ *Id.* at 107–08.

⁹⁸ *Id.* at 107.

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 108.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 110.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Pinnacle Computer Servs., Inc., v. Ameritech Publ'g Inc.*, 642 N.E.2d 1011, 1014 (Ind. Ct. App. 1994).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1017.

¹¹⁰ *Id.* at 1014.

¹¹¹ *See Kyriazis v. Univ. of W. Va.*, 450 S.E.2d 649, 655 (W. Va. 1994) (“Because we believe the University qualifies as a ‘public service,’ and that it possessed a decisive bargaining advantage over the [student]...we find the anticipatory Release void as a matter of West Virginia public policy.”).

¹¹² *Id.*

¹¹³ *See Beaver v. Grand Prix Racing*, 246 F.3d 905, 910 (7th Cir. 2001) (calling a release to participate in a go-cart race “anything but unconscionable” and stating that “nothing in our record suggests that the release at issue is substantively different from the myriad other releases executed by . . . go kart enthusiasts each time they race.”).

¹¹⁴ *Michigan Club Sports Manual*, *supra* note 43.

¹¹⁵ *Id.*

¹¹⁶ *See Hirshberg*, *supra* note 7, at 220.

