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# Negligence Liability of Public High School Districts for Athletic Injuries

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# NEGLIGENCE LIABILITY OF PUBLIC HIGH SCHOOL DISTRICTS FOR ATHLETIC INJURIES

## I. INTRODUCTION

The imposition of negligence liability on public school districts for injuries sustained by high school athletes has become more common in recent years. A major reason for this phenomenon has been the gradual abrogation of sovereign immunity in many states.[1] Under the traditional doctrine of sovereign immunity, a state was absolutely free from tort liability because of its sovereign nature, unless it expressly agreed to suit.[2] School districts were likewise protected from tort suits.[3] The theory behind this extended protection is that school districts serve as agents of their respective states in their governmental functions and promote their states' welfare by educating the young.[4] As sovereign immunity has eroded over the past few decades, public schools have been forced to accept a broader scope of responsibility with regard to the students enrolled in their institutions. In general, simply by providing educational instruction in the classroom, a school district can no longer claim that it has satisfied all of its obligations to its students. In many instances it must now attempt to safeguard its students as they participate in athletic competitions held under the auspices of the district. This article will discuss the facets of negligence liability of public school districts for injuries incurred by high school athletes.[5] The article will also examine some defenses which are still available for school districts to avoid liabili-

1. J. Barton Goplerud, *Liability of Schools and Coaches: the Current Status of Sovereign Immunity and Assumption of Risk,* 39 DRAKE L. REV. 759, 766 (1989-90). The notion of sovereign immunity as applied to school districts and its current, less esteemed status will be discussed later, in conjunction with other defenses to tort suits.

2. *Id.*

3. *Id.*

4. *Id.*

5. In comparison to elementary and junior high schools, high schools tend to have organized athletic teams in more areas of sport. Due to this distinction, this article will only focus on the high school context, where negligence suits can cover a wider spectrum of interscholastic athletics. While this article discusses negligence liability of public school districts, that is not to suggest that private schools do not ever encounter such liability. Rather, "where the liability of the private school is sought to be predicated on alleged negligence of teachers or other employees or agents of the school, it is generally recognized that liability on the part of the school may be established under the doctrine of respondeat superior if negligence within the scope of their employment is shown." Leger v. Stockton Unified School Dist., 202 Cal. App. 3d 1448, 1460 (1988). *See also,* Stehn v. Bernarr, 434 F.2d 811(6th Cir. 1970)(stating that a private school assumes the duty of exercising reasonable care in providing supervision, instruction and in the conducting of its activities). It should also be noted that successful negligence actions have been brought in the university context. *See e.g.,* Kirk v. Washington State University, 740 P.2d 285(1987). Because this article analyzes negligence liability of school districts, private schools and universities will not be the focus.

ty under certain circumstances.

## II. THE FOUR-PRONGED APPROACH UNDER TORT LAW FOR NEGLIGENCE AND ITS CONNECTION TO SCHOOL DISTRICT LIABILITY FOR STUDENT ATHLETIC INJURIES

Under the law of torts, a four-pronged test must be satisfied before negligence liability will be imposed on a defendant. The four components are: (1) duty; (2)breach of duty; (3)injury; and (4)causation in fact and proximate causation.[6] As the first three elements are interrelated, they will be discussed together. The causation prong will be examined separately.

### *DUTY, BREACH, AND INJURY*

Before a defendant will be held liable for an injury suffered by a plaintiff, the former must have owed a legal duty to the latter which it did not fulfill. With respect to high school students participating in interscholastic athletics, school districts have the "duty to anticipate reasonably foreseeable dangers and to take precautions against their occurrence."[7] The standard is one of ordinary care under the circumstances.[8] A school district may owe duties to its students on two levels: one pertaining to its own direct actions, and another pertaining to the conduct of its coaches, athletic directors and other athletic personnel. This framework has been labeled the "two tiered approach for analyzing sports injuries and damage claims."[9] This approach is important because it indicates two distinct ways in which a school system may be held liable for negligence. The notion of duty, as well as breach of the duty and injury will be examined under each of these two tiers.

#### *Tier One: Direct Acts of School Districts*

The major duties for which a public school district may be directly responsible include: hiring appropriate athletic personnel,[10] providing suitable sports equipment,[11] making proper medical treatment available,[12] and making and enforcing rules or guidelines for school athletics.[13]

The first duty, hiring appropriate athletic personnel, largely relates to selecting qualified coaches and athletic supervisors. According to the Restatement (Second) of Agency, "a person conducting an activity through servants or other

6. James D. Harty, *School Liability for Athletic Injuries: Duty, Causation and Defense*, 21 WASHBURN L.J. 315, 316 (1982).

7. Mark S. Northcraft, *Sports Torts: A New Approach to Minimizing Sports Injuries and Damage Claims Arising Out of High School Athletics*, SCHOOL LAW IN REV., 114(1985).

8. Harty, *supra* note 6, at 317.

9. Northcraft, *supra* note 7.

10. *Id.* at 116.

11. *Id.* at 117.

12. *Id.* at 119.

13. *Id.* at 121.

agents is subject to liability for harm resulting from his conduct if he is negligent or reckless . . . in the employment of improper persons or instrumentalities in work involving risk of harm to others."[14] Although the Restatement uses the term "person," this concept has been applied by many courts to entities as well. Thus, a school district may be held liable for failure to hire appropriate athletic personnel. While many of the relevant precedents are not directly on point in that they pertain to students below the high school level or to those on the college level, they help demonstrate what constitutes negligent hiring.

In many of the cases where courts have held for the plaintiff, the athletic personnel clearly lacked expertise in the sport which they supervised. For example, in *Rivera v. Board of Education of the City of New York*,[15] a claim was found actionable where the school board allegedly failed to use reasonable care in the selection of supervisory personnel. There, a temporary science teacher and a noncertified assistant oversaw summer school recreation activities. One of the activities was a volleyball game called "bombardment." None of the precautions suggested by physical education experts were followed. The plaintiff was blinded in one eye when she was struck by the ball.[16] In a much earlier, though analogous case, a breach of duty was found where a school janitor was entrusted with supervising student tumbling maneuvers.[17] One student was injured while attempting a maneuver in which the janitor also took part.[18] Meanwhile, in *Morehouse College v. Russell*, a dismissal of a suit was reversed in a situation where one student drowned in a swimming class conducted by two swim team members who lacked Water Safety Instructor certification.[19]

Thus, the case law reveals that rather blatant supervisory misfeasance will lead to liability. However, there is some precedent indicating that liability may be found even where athletic personnel are not as obviously unqualified. For instance, in *Stehn v. Bernarr MacFadden Foundations,Inc.*,[20] the reviewing court refrained from making a decision as to what coaching qualifications would have been acceptable due to the "impossibility of establishing precise criteria in this regard." It stated, "we specifically refrain from decreeing . . . that to be satisfactorily qualified a wrestling coach must have had any particularly stated training and experience."[21] However, it determined that evidence of the coach's credentials were relevant to issues such as whether the school wrestling program was properly conducted.[22] The coach had previously wrestled when he attended

14. RESTATEMENT (SECOND) OF AGENCY § 213 (1957).

15. Harty, *supra* note 6, at 323, *citing* Rivera v. Board of Education of the City of New York, 11 A.D.2d 7, 201 N.Y.S.2d 372(1960).

16. *Id.*

17. *Id. citing* Garber v. Central School Dist. No.1, 251 A.D. 214, 295 N.Y.S. 850(1937).

18. *Id.* The reviewing court found that giving a janitor supervisory responsibilities was a breach of the statutory duty to "carefully select suitable supervisors to whom the safety of children was to be entrusted . . . ." *Id.* at 323.

19. *Id. citing* Morehouse College v. Russell, 109 Ga. App. 301, 136 S.E.2d 179(1964).

20. 434 F.2d 811 (1970).

21. *Id.* at 814.

22. *Id.* The court said that the evidence was "relevant to the issue as to whether defendant

the school implicated in this case, followed by one year of wrestling while he served in the 11th Airborne Division in Europe.[23] His only prior coaching experience occurred in Europe and had been for one season, seven years earlier.[24] While the court skirted the issue as to whether such experience would be sufficient, one should note that the jury's verdict for the plaintiff was affirmed.[25] The plaintiff had claimed that the school was negligent in failing to provide proper instruction and supervision in connection with wrestling and in conducting that activity.[26]

The second direct duty of school districts is to provide suitable sports equipment. It should be noted that "a district that supplies sports equipment . . . is not an insurer of the safety of those who use such equipment. Similarly, the failure of a student to wear protective equipment made available . . . may result in a finding of contributory negligence or assumption of the risk."[27] Yet, it is clear that if a school district does not provide sports equipment that is safe for a particular activity, it may be held liable for negligence.[28]

To illustrate, in *Leahy v. School Board of Hernando County*,[29] the court reversed a directed verdict in favor of the school board where it was demonstrated that some members of the football team were permitted to practice even though they were not given the protective equipment that was furnished to some of the other athletes. This protective equipment included such basics as helmets and mouthguards.[30] The student, who was given no helmet, received facial injuries when he collided with a lineman's helmet during a drill.[31] In another case, *Gerrity v. Beatty*,[32] the court reversed the granting of a motion to strike plaintiff's count alleging the school district furnished him with an ill-fitting and inadequate football helmet, which the district knew or should have known could cause plaintiff harm.[33] Similarly, in *Lynch v. Board of Education*,[34] the court affirmed a verdict in favor of a student who was injured while playing in a school-authorized "powder-puff" football competition without protective equipment. In doing so, the court rejected the defendant's argument that because no equipment whatsoever was furnished, it was not liable for furnishing defective

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breached its three pronged but single duty to provide proper wrestling instruction and supervision and to properly conduct that activity." *Id.* One should note that this case involved a private rather than a public school and thus, this case does not pertain to a school district. However, the analysis is very similar in that the school is being sued as a result of the conduct of a coach it hired.

23. *Id.* at 812.
24. *Id.*
25. *Id.* at 813.
26. *Id.*
27. Northcraft, *supra* note 7, at 117.
28. *Id.*
29. 450 So.2d 883(1984).
30. *Id.*
31. *Id.*
32. 373 N.E.2d 1323(1978).
33. *Id.* at 1326. Plaintiff suffered serious injuries while making a tackle during a school football game. *Id.* at 1324.
34. 412 N.E.2d 447(1980).

equipment. The court said:

> We do not think that because the defendant did not furnish any equipment to the students, it is absolved from liability for failing to provide effective equipment . . . Instead, we think that a school district has an affirmative duty, where students are engaging in school activities, to furnish equipment to prevent serious injuries. At least, a school district should furnish helmets and face guards in a game such as football, where head injuries are common and severe.[35]

The provision of appropriate medical treatment to injured student-athletes is the third direct duty of school districts. This duty "arises from the general rule that a district must exercise ordinary care commensurate with the circumstances for the safety of others under its supervision or control."[36] In *O'Brien v. Township High School District 214*,[37] the court determined that the school district was not immune from liability in having an "untrained student provide medical and surgical care to plaintiff instead of seeking competent medical assistance."[38] In this sense, the breach of duty is related to that of failing to provide appropriate athletic supervisors.[39] As will be noted later, a school district may also be liable for the negligent handling of injuries and provision of medical treatment by coaches or trainers employed by the school district.

The last duty can be summarized as follows: "A school board has the duty to establish rules for student safety. Failure to establish such rules altogether can result in liability as can establishing rules but failing to enforce them."[40] As an illustration, in *Thompson v. Seattle School District*,[41] the jury found the school district negligent for not thinking of and using something akin to the sports safety "curriculum" presented by plaintiff. In this case the plaintiff became a quadriplegic after he used his head as the main point of contact when running with the football.[42] The proposed guidelines indicated that the district should have: 1)expressly and repeatedly told plaintiff "that he might become a quadriplegic while playing football"; 2)used visual aids such as movies to emphasize this point; 3)used additional drills to teach the player to hold his head up; and 4)"established a 'curriculum' for football, as it had for academic subjects or for

35. *Id.* at 459.

36. Northcraft, *supra* note 7, at 119.

37. *Id.* at 120, *citing* O'Brien v. Township High School District, 415 N.E.2d 1015 (1980).

38. *Id.*

39. The breach of duty in selecting acceptable athletic supervisors has several facets such as having certain students supervise other students, assignment of supervisory duties to uncertified personnel, and incompetent officiating resulting in injuries to athletes. Harty, *supra* note 6, at 322. It should also be noted that in some instances liability may be imposed even where competent supervision *is* provided, but the supervising party is absent when a student-athlete is injured. In such a case, liability turns on the foreseeability of the accident: "If the supervisor's presence at the time of the accident would not have prevented the injury there is no liability, but if the accident was foreseeable and the teacher's presence would have prevented the injury, the teacher and possibly the school district are subject to suit." *Id.* at 323-4. Even if the supervising party is present when the injury occurs, liability may still result if the supervision was done in a negligent manner. *Id.* at 324.

40. *Id.* at 321.

41. Cause No. 851225 (King County, Wash. 1982).

42. *Id.* at 130.

physical education."[43] *Thompson* indicates that school districts may be held to a rather stringent standard in implementing guidelines. The jury in this case felt that because the district could have instilled the above measures to better teach someone such as plaintiff how to play football more safely, it therefore *should have* done so.[44]

*Tier Two: Acts of School Athletic Personnel and Respondeat Superior*

The second tier relates to instances where the school district has not breached a duty directly but is nonetheless responsible for negligent acts of its employees, such as coaches, managers, trainers, and officials.[45] This is the notion of respondeat superior.[46] The three main bases for liability under this concept are:

> . . . coach's failure to supervise the conduct of a particular sports activity; a coach's failure to instruct and/or warn regarding the activity involved and any risk inherent therein; and/or a coach's failure to implement guidelines and/or safety policies which are appropriate for the circumstances involved.[47]

The duty of athletic personnel to supervise entails monitoring the conduct of the participants while the particular game is being played, as well as noting when an athlete is injured and securing treatment for him/her.

*Carabba v. Anacortes School District No. 103*[48] focuses on the first part of the duty to supervise, that of monitoring the conduct of the game participants. There, the court reversed a judgment in favor of the school district in a suit brought by a wrestler paralyzed by an illegal hold.[49] Plaintiff alleged negligent supervision on the part of the referee. The court stated that the jury could have found that while the referee's attention was momentarily diverted away from the wrestling match, the opposing wrestler placed plaintiff in a full nelson.[50] When he was released, the plaintiff could not move.[51] The court also emphasized that although the referee was selected by an independent referees' association instead of by the school district, if he acted negligently, "the school district must, as a matter of law, respond in damages."[52] In other words, the school district remains ultimately responsible, as its duty to provide its athletes with proper supervision was not delegable to another party or entity.[53] The reasoning behind

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43. *Id.*

44. *Id.* at 131. Although the jury may have viewed the notion of being able to do something as meaning that the action would be reasonable, this theory would not be correct in many instances: If a task, though not impossible, was extremely burdensome for the school district, it seems difficult to argue that performing such task would nonetheless be reasonable.

45. *Id.* at 126-7.

46. *Id.* at 127.

47. *Id.*

48. 435 P.2d 936 (1967).

49. *Id.* at 939.

50. *Id.* at 943.

51. *Id.*

52. *Id.* at 958.

53. *Id.* at 957. *But see*, Kennel v. Carson City School Dist., 738 F. Supp. 376, 379 (D.Nev. 1990). The *Kennel* court held that Nevada school districts do not owe a non-delegable duty of care to

this notion is that, "a school district may be liable for negligent supervision by a person who is not an employee of the district, where the school district encourages the athletic activity and has a duty to student participants to provide non-negligent supervision."[54]

In *Leahy*, the first aspect of the duty to supervise was likewise examined. The court stated that there "was a sufficient basis upon which a jury could conclude that the school (through its employees) failed to exercise reasonable care under the circumstances for the protection of appellant."[55] The court noted that the coach allowed plaintiff to participate without a helmet in a football drill which became "progressively more aggressive" and made no effort to lessen the drill's intensity.[56]

The second aspect of the duty to supervise relates to providing medical treatment to an injured player. In *Welch v. Dunsmuir*,[57] the court affirmed a judgment in favor of a student who became a quadriplegic after suffering injuries during a football game.[58] The coach believed that the plaintiff had sustained a neck injury after an opponent tackled him. But after seeing that the plaintiff could move his hands, the coach allowed eight team members to lift the plaintiff off the field, without directing the moving.[59] Subsequently, the plaintiff could no longer move his hands, indicating (as a doctor testified) that his spinal cord had been further damaged after he was tackled.[60] The court stated that the jury reasonably could have inferred negligence on the part of the coach in failing to wait for a doctor and in allowing plaintiff to be lifted off the field.[61] The school district would in turn be liable under respondeat superior.

As one commentator emphasizes, "reasonable care in obtaining medical assistance for an injured athlete means reasonable care under the circumstances."[62] The phrase "under the circumstances" is of key importance when one discusses the negligent moving of an injured player. As *Welch* illustrates, where a team member cannot rise to his feet after being knocked down and a coach suspects

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student-athletes. It distinguished *Carabba* by stating that there, the school district exercised more control over the referees than in the case at hand.

54. 35 A.L.R. 725.

55. 450 So.2d at 886.

56. *Id.*

57. 326 P.2d 633 (1958).

58. *Id.* at 635.

59. *Id.* Even if the coach had directed the moving, negligence probably still would have been found. The court noted that the undisputed medical testimony was "that the removal of the plaintiff from the field without the use of a stretcher was an improper medical practice in view of the symptoms." *Id.*

Hence, it would be negligent for the coach to guide the team members in lifting and transporting the plaintiff off the field so long as no stretcher was used.

60. *Id.*

61. *Id.* at 639. The court also said that the jury could have found negligence on the part of the doctor attending the game due to his failure to act promptly after plaintiff's accident. However, it also emphasized that no agency relationship between the doctor and the defendant school district was pleaded or revealed through evidence. *Id.*

62. Goplerud, *supra* note 1, at 764.

any type of spinal injury, it is the circumstances which become more compelling: "The standard was still one of ordinary care . . . .There was evidence in the case that the moving of a person with suspected grave injuries is inherently a hazardous activity."[63] Therefore, one should not be misled into thinking that the duty imposed on coaches, and on a school district, itself, has been elevated beyond one of reasonableness. Rather, with an already injured player, the context in which a coach must act, may be more critical. Accordingly, what is reasonable under such circumstances can perhaps be nothing less than refusing to allow the moving of the player until immediate and proper care by a doctor is obtained.[64]

Schools also owe a duty to instruct and/or warn. School districts owe a standard of care to students taking part in athletic activities which includes giving proper instruction and where appropriate, a warning as to the sport's risks.[65] The exact nature of the duty turns on the *age and experience* of the student, and the danger involved.[66] It may require instruction and a warning as to the *inherent* risks of the particular sport.[67] Because high school students are nearing adulthood and many have played the same sport over several years (such as a high school baseball player who began playing the sport in Little League) instruction and/or warning of less apparent risks would be the more aptly stated standard for coaches with regard to most high school students. However, if the player is truly inexperienced with regard to the particular sport he or she is engaging in, more instruction and warning may be required.[68]

In ruling in favor of the plaintiff, the *Leahy* court noted that "the coach did not issue any warnings or statements regarding contact during drills, even though several of the players . . . had not been issued helmets and mouth guards due to the school's lack of sufficient number of sizes." The plaintiff, an inexperienced freshman player, was one of those without protective equipment. Hence, while he perhaps was aware that he might sustain a few bumps and bruises, plaintiff argu-

63. 326 P.2d at 639.

64. *See* Goplerud, *supra* note 1, at 764. The importance of obtaining *immediate* medical care for an injured student-athlete was also emphasized in Mogabgab v. Orleans Parish School Board, 239 So.2d 456 (La. Ct. App. 1970). There, the court found two football coaches to be negligent for delaying two hours in seeking medical attention for a player suffering from heat stroke. The student-athlete later died.

65. Northcraft, *supra* note 7, at 126. "Instruction could be deemed inadequate and therefore negligent if the student is not warned of the dangers of a particular activity, not required to go through a series of stunts progressing in difficulty before attempting a more difficult stunt, or not instructed in self protection in contact sports." Harty, *supra* note 6, at 318-9.

66. *Id.*

67. *Id.*

68. This duty seems difficult to carry out properly in that a high school coach may not know the extent to which a student-athlete has been previously exposed to a sport. A particular player may master a sport quickly due to natural talent, whereas another player may be terrible despite years of practice. Hence, a coach would have to make an inquiry in order to be certain about experience levels. Since it is unlikely that a coach will ask each player about his experience and because instruction is usually given to a group of players at the same time, rather than one-on-one, a coach could simply give all the athletes the warnings that a less experienced player would need.

ably was not aware that a drill characterized by the coach as a noncontact one[69] could lead to facial injuries and shattered teeth.

In *Vendrell v. School District No. 26C*,[70] the court stated that plaintiff presented a cause of action against the school district when he alleged that he was permitted to participate in a varsity football game without proper or sufficient instruction.[71] However, in contrast to the *Leahy* holding, in this case the school district was ultimately found not liable, since its coaches were not negligent in instructing players.[72]

The facts of *Vendrell* are distinguishable from those in *Leahy*. In *Vendrell*, the plaintiff had played the sport for two years prior to his accident, that re-sulted after he used his head as a "battering ram" while being tackled.[73] The plaintiff wore protective gear and was "taught and shown how to handle himself while in play so that a blow would fall upon his protective equipment and not directly on his body."[74] All players were also shown the proper way to run while carrying the ball as well as the appropriate technique for tackling an opponent.[75] Thus, the plaintiff had learned the sport over a substantial time period and his current coaches had exercised reasonable care in giving their instructions.

A coach also has a duty to implement guidelines and/or appropriate safety policies. As one commentator has stated, "a necessary corollary to the district administration's development of rules or athletic guidelines for athletic safety is their proper implementation by district staff."[76] Thus, the district may face liability if coaches and other athletic personnel do not adhere to such rules or guidelines.[77] In *Rutter v. Northeastern Beaver County*,[78] the court emphasized that expert testimony may be used in order to aid the jury in deciding whether a coach negligently failed to follow safety guidelines. The court permitted a former coach to establish that the current coaches' summer football practices were inconsistent with safety standards followed by other schools in the state and violative of rules promulgated by a state interscholastic athletic league.[79] The practice sessions included activities such as "jungle football," a fast-paced version of football which involves tackling and body blocking, unlimited passing, and no protective equipment worn by players.[80]

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69. Leahy, 450 So.2d at 886.
70. 376 P.2d 406 (1962).
71. *Id.* at 408.
72. *Id.* at 414.
73. *Id.* at 413.
74. *Id.*
75. *Id.*
76. Northcraft, *supra* note 7, at 127.
77. *Id.*
78. 437 A.2d 1198(1981).
79. *Id.* at 1201. "It seems clear that an experienced former football coach may have knowledge of the customs and safety standards utilized by coaches of high school football teams and of the rules of W.P.I.A.L.(Western Pennsylvania Interscholastic Athletic League) to insure minimum safety, which knowledge is not within the common knowledge of the average juror." *Id.* at 1202.
80. *Id.* at 1202. Plaintiff became blind after being struck in the eye during a game of "jungle

The above analysis has focused on the inter-connected elements of duty, breach of duty, and injury, using the two-tiered framework. The fourth requisite element for negligence liability, that of causation, will now be examined.

### *CAUSATION*

Even if a defendant school district does owe various duties to a student-athlete, has breached one of these duties, and the player has suffered an injury, no liability will flow to the district unless it can be said to have caused the injury.[81] This is the notion of causation in fact. Once causation in fact is found to exist, proximate causation becomes determinative with regard to any liability question. Proximate causation revolves around the question of whether a school district will be held legally responsible despite the existence of causation in fact.[82] Some courts will not impose liability if there were unforeseeable consequences in a particular situation or intervening causes.[83]

#### *Causation In Fact*

While certain jurisdictions still determine causation in fact pursuant to a "but for" test, (i.e., but for the defendant's negligent conduct, the injury would not have occurred)[84] tort scholars such as Prosser hold the view that "in recent years . . . this but-for test has been glossed to mean that if the conduct is a 'substantial factor' in bringing about the injury, the conduct is a 'cause-in-fact of the injury.'"[85] The "substantial factor" analysis evolved due to a problem inherent in the "but for" test. The problem was that under the "but for" rule, if the conduct of each of two defendants would have been enough to cause plaintiff's harm, both could avoid liability.[86] Although the "substantial factor" test is designed to widen the net of liability, the "but for" analysis still seems to be of crucial importance in certain cases. For instance, the *Welch* case does not present a situation where the conduct of the coach would have been sufficient on its own to cause the plaintiff's injury. However, one can say that but for the coach's permitting the other players to move the plaintiff, the harm would not have resulted.

#### *Proximate Causation*

As mentioned above, a defendant school district will not be held liable, despite the existence of causation in fact, if any unforeseeable consequences or

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football". *Id.*

81. Harty, *supra* note 6, at 326.

82. *Id.* at 321.

83. *Id.*

84. Harty, *supra* note 6, at 326.

85. Murray v. Fairbanks, 610 F.2d 149, 159(1979).

86. Anton P. Giedt, *Natural Resource Damage Under the Oil Pollution Act of 1990*, BAYLOR L. REV. 373, 375(Spring 1993).

intervening causes, are present.[87]

Complications arise from the case law with regard to the unforeseeable consequences element because "it is not always possible to determine whether the issue of foreseeability goes to the determination of breach of duty and therefore negligent conduct or whether the unforeseeable consequences test is being applied to legal causation."[88] Arguably, if foreseeability is present with respect to the former determination, it will likewise be present for the latter.[89] For example, in *Leahy,* the court did not place its foreseeability discussion under a clear heading of proximate cause.[90] The opinion's language first seems to hint that the coach acted negligently, since it was foreseeable that a player without protective equipment and without cautionary instructions could be harmed in a rough football drill.[91] However, the court then speaks of foreseeability more in terms of legal cause. The court stated, "all that is necessary is that the tortfeasor be able to foresee some injury likely to result in some manner as a consequence of his negligence."[92] In other words, the court seems to be using foreseeability in order to link the notion of an act already determined to be negligent to legal responsibility.

An intervening cause, like an unforeseeable consequence, may sever any legal responsibility which a school district would otherwise have for a student-athlete's injury. An intervening cause is one that "actively operates in producing harm to another after the actor's negligent act or omission has been committed."[93] The intervening cause must be superceding, meaning that it must be "an act of a third person or other force which by its intervention prevents the actor from being liable for harm to another which his antecedent negligence is a substantial factor in bringing about."[94] *Leahy* emphasizes that for a defendant school district to be relieved of liability, the intervening negligence of the third party must not be foreseeable.[95] The *Leahy* court then applied this notion. It stated that the school district could still be held liable even if the player striking plaintiff in the football drill "improperly and negligently straightened his arms and raised his head," since such actions were foreseeable to the coach.[96]

87. Harty, *supra* note 6, at 327.

88. *Id.* at 328.

89. *Id.* The author seems to be discussing situations where the fact that the consequences are foreseeable is what makes the conduct negligent. This concept seems rather circular.

90. 450 So.2d at 886.

91. *Id.* The language is as follows: "There was also testimony indicating that the injury to the appellant was a foreseeable consequence of the failure to provide the appellant with a helmet and mouth guard, of the failure to give cautionary instructions regarding contact (especially regarding the fact that some players had helmets while others did not) and of the failure to limit the progressive intensity of the drill under the circumstances."

92. *Id.*

93. Harty, *supra* note 6, at 328, *citing* RESTATEMENT(SECOND) OF TORTS § 441 (1965).

94. *Id.* at n. 111, *citing* RESTATEMENT (SECOND) OF TORTS §440 (1965).

95. 450 So.2d at 886-7.

96. *Id.* at 887.

*DEFENSES*

If the four elements of negligence are proven in a particular case, the plaintiff should recover full damages for his/her injury. Occasionally, however, a defendant will escape liability altogether or only be required to pay limited damages due to the presence of certain defenses. Three common defenses are sovereign immunity, contributory and comparative negligence, and assumption of the risk.

*Sovereign Immunity*

As noted in the Introduction, the concept of sovereign immunity is becoming increasingly disfavored. One commentator has noted that Ohio, in recently abolishing governmental immunity pursuant to judicial decree, "typifies the general legal stance in this area."[97] The Ohio court that abolished the immunity found the idea that an injured person should be inconvenienced rather than the government, to be very outdated.[98] However, while the trend has been to move away from sovereign immunity, the general approach seems to be one of chipping away at the doctrine by limiting it in particular situations, rather than eliminating it part and parcel.

For example, various North Carolina cases such as *Overcash v. Statesville City Board of Educ.*[99] have held that school boards may waive their immunity to the extent of their policy coverage, when they purchase liability insurance. Georgia courts have ruled in a similar fashion.[100]

Another way in which sovereign immunity has been cut back is illustrated by Illinois precedent. For instance, *Lynch* indicates that if a plaintiff is able to prove wilful and wanton misconduct rather than mere ordinary negligence, a negligence suit may be brought against an Illinois school district with regard to "matters relating to the discipline in and conduct of the schools and the school children."[101] In other words, Illinois school districts may be liable for conduct extending beyond simple failure to do what is reasonable under the circum-stances. In addition, the limited immunity that does remain is inapplicable to instances of failure to provide adequate protective equipment to student-athletes. Thus, in furnishing protective gear to players Illinois school districts must comport with the ordinary care standard.[102] The theory underlying this distinction relates to

97. MARTHA M. McCARTHY & NELDA H. CAMBRON-McCABE, PUBLIC SCHOOL LAW: TEACHERS' AND STUDENTS' RIGHTS 471 (2d ed. 1987).

98. *Id.*

99. Jennifer Turner-Egner, *Liability of North Carolina Schools for Injuries During Nonschool Hours*, SCHOOL LAW BULLETIN, 13, 15 (Winter 1988), *citing* Overcash v. Statesville City Board of Educ., 348 S.E.2d 524(N.C. 1986).

100. McCARTHY & CAMBRON-McCABE, *supra* note 90, at 472. However, it should be noted that some courts in other jurisdictions have held differently. For instance, the Supreme Court of Missouri found that school boards could still use the defense of sovereign immunity regardless of whether they purchased liability insurance. *Id.*

101. 390 N.E.2d at 531.

102. *Id.*

the fact that the state School Code[103] gives educators the status of a parent or guardian in student disciplinary matters.[104] Accordingly, since parents can only be held liable for wilful and wanton misconduct in caring for their children, educators would be held to the same standard when disciplining and supervising students.[105] This standard applies not only in the classroom, but to the playing field as well.[106] However, the Illinois Supreme Court views the furnishing of protective equipment as falling outside these parameters.[107] While teachers, like parents, should be allotted some discretion with supervisory and disciplinary functions of children, public policy considerations "argue rather strongly against any interpretation which would relax a school district's obligation to insure that equipment provided . . . is fit for the purpose."[108] The Court added that imposing an ordinary care standard in the latter situation would not be unduly burdensome.[109]

Other states have retreated from governmental immunity by allowing recovery when a plaintiff has been injured in a particular location. Michigan, for example, has a "public building" exception whereby liability can be imposed when injuries occur due to a dangerous or defective condition of a public building.[110] This exception follows the legislature's view that "governmental agencies have the obligation to repair and maintain public buildings under their control when open to members of the public."[111] Michigan courts have interpreted the exception narrowly, stating that it does not apply to dangers on school property that is adjacent to a public school building.[112] Thus, school playgrounds and playing fields where outdoor sports take place would not fall within the exception because the school building has no connection with any injuries occurring in these areas. As a great many school sports are outdoor in nature, the Michigan exception is not of much help to many injured student-athletes.

In short, several states have demonstrated a certain degree of distaste for the sovereign immunity doctrine, yet have moved away from it in a rather piecemeal and incomplete manner. Even in states that have totally abolished sovereign immunity,[113] a school district may be able to avoid liability if the plaintiff was

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103. ILL.REV.STAT. ch. 122 §24-24 & 34-84a(1973).

104. *Id.*

105. Gerrity, 373 N.E. 2d at 1325.

106. *See Id.*

107. *Id.* at 1326.

108. *Id.* The Illinois Supreme Court's justification for the distinction seems rather conclusory. The basic notion to reinforce is that the school districts have a duty of ordinary care in providing adequate equipment. Lynch, 390 N.E.2d at 532.

109. *Id.*

110. STEPHEN B. THOMAS (ed.), THE YEARBOOK OF EDUCATION LAW 1992, 149 (1992).

111. MICH. STAT. ANN. 3.996(106).

112. Eberhard v. St. Johns Public Schools, 473 N.W.2d 745(Mich. Ct. App. 1991).

113. *See e.g.* Pruett v. City of Rosedale, 421 So.2d 1046 (1982). In *Pruett*, the Supreme Court of Mississippi in abolishing state sovereign immunity noted that many other courts had already taken this step such as those in Missouri, Pennsylvania, and Minnesota. The Supreme Court of Pennsylvania stated a strong reason for abandoning this doctrine: "Under the doctrine, plaintiff's opportunity for justice depends, irrationally, not upon the nature of his injury or of the act which caused it, but

either contributorily or comparatively negligent.

*Contributory and Comparative Negligence*

Contributory negligence and comparative negligence are defenses which focus on whether the plaintiff played a role in causing his/her own injury. The concepts, though similar, are nonetheless distinct: Contributory negligence can completely bar the plaintiff's recovery, while comparative negligence may reduce recovery to the extent the plaintiff's actions contributed to his/her damage.[114] Comparative negligence is thus more favorable to a plaintiff than a contributory negligence scheme. With comparative negligence systems, plaintiffs may recover as long as their own negligence is not equal to or greater than that of the defendant.[115] States following comparative negligence vary in terms of which approach they take in this regard.[116] Today, comparative negligence has become the majority rule with over forty states using some form of this doctrine rather than that of contributory negligence.[117]

*Assumption of the Risk*

A major difference between assumption of risk and contributory negligence is that the former involves a subjective analysis while the latter is viewed from an objective standpoint. The doctrine of assumption of risk may completely bar a plaintiff's ability to recover damages for an injury. For a defendant school district to use assumption of risk as an affimative defense, it must show that the injured student-athlete had knowledge of the danger involved, was able to appreciate the nature of it, and voluntarily accepted the risk.[118] By assuming the risk, the plaintiff in effect relieves defendant of the legal duty it would otherwise owe to him or her.[119] Because the standard is subjective, a plaintiff will not be said to have assumed a risk if, due to his or her age or lack of experience, intelligence, or information, the risk was not fully understood.[120]

Assumption of risk can be either express or implied. Express assumption of risk "occurs when the student-athlete or parent sign a waiver or release relieving coaches or schools of any liability."[121] Some courts have expressed misgivings

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upon the identity of the wrongdoer." *Id.* at 1048.

114. Northcraft, *supra* note 7, at 128.

115. Harty, *supra* note 6, at 336.

116. *Id.*

117. DAN B. DOBBS, TORTS AND COMPENSATION, 243 (1985).

118. Goplerud, *supra* note 1, at 769.

119. *Id.*

120. *Id.* at 769-70. "However, courts need not sit blind to matters of common knowledge. There are situations in which the danger is so patent or well known that, as a matter of law, a participant assumes the risk." Breheny v. Catholic University, 1989 U.S. Dist. LEXIS 14029 (1989). The court in that case presented examples such as, when wet, a diving board is slippery. *Id.*

121. *Id.* at 771-2. However, courts have not always allowed the parent's signature alone to create an assumption of risk on the child's part. *See* Childress v. Madison County, 777 S.W.2d 1 (Tenn. Ct. App. 1989)(mother's signature on release relieved the county of liability to the mother but did not

with regard to express assumption of risk. For example, in *Wagenblast v. Odessa School District*,[122] the Supreme Court of Washington held that the exculpatory releases from any future negligence on the part of the school district were invalid as contrary to public policy. The school district had conditioned participation in school sports on the signing of a form releasing the district from "liability resulting from any ordinary negligence that may arise in connection with . . . interscholastic activities programs."[123] The court based its opinion on the presence of certain elements suggesting that the exculpatory clause violated public policy. Some of these factors as applied in *Wagenblast* were: extensive regulation of interscholastic sports,[124] clear and disparate bargaining strength on the part of school districts,[125] and considerable control over student-athletes by the coaching staff.[126] The *Wagenblast* decision has been criticized. One commentator states:

> The importance of the service to the public should be the paramount factor in deciding whether to invalidate an exculpatory clause . . . .The *Wagenblast* court should have evaluated very carefully whether participation in inter-scholastic athletics is an important service to the public and a practical necessity. Yet, the court disposes of its discussion on the subject in just one paragraph.[127]

Instances of implied assumption of risk have also appeared in the case law. With this type of risk assumption the court must try and discern what the plaintiff's understanding of the risk was, through examining the factors of age, experience, intelligence, and information. An illustration of this analysis was presented in *Vendrell*. Based on the evidence presented, the court concluded that the plaintiff had assumed the risk attendant upon being tackled.[128] The court noted that when he entered high school, plaintiff was one year older than most other freshman; that he had played football for two years previously, while in junior high; that he was deemed a promising football player; and that he had received substantial training and instruction in both junior high and high school, regarding the proper way in which to play the game.[129]

## CONCLUSION

With sovereign immunity waning in popularity, negligence suits by high school athletes against public school districts have increased in number. While certain defenses have precluded some plaintiffs from recovering damages for injuries incurred in athletic contests, many other suits have succeeded. If a

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waive the student's rights).

122. 758 P.2d 968(1988).

123. *Id.* at 846. Students and their parents were required to sign the forms.

124. *Id.* at 972.

125. *Id.* at 973.

126. *Id.*

127. *School Districts Cannot Contract Out of Negligence Liability in Interscholastic Athletics-Wagenblast v. Odessa*, 102 HARVARD L.REV. 729, 734 (1989).

128. Vendrell, 376 P.2d at 414.

129. *Id.* at 408.

school district does not use ordinary care under the circumstances in performing the duties it owes to its players, in many cases it will be held liable. The duties owed by the school district encompass both those it must execute through its own direct acts and those its athletic personnel must carry out. A breach of the latter type of duty is imputed to the school district on the basis of respondeat superior. Hence, school districts today remain far more vulnerable to negligence liability due to interscholastic sports injuries than they did previously.

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