Duquesne Law Review

Volume 29 | Number 2 Article 8

1991

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Barbara J. Lorence

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Recommended Citation
Barbara J. Lorence, *The University's Role toward Student-Athletes: A Moral or Legal Obligation*, 29 Duq. L. Rev. 343 (1991).
Available at: https://dsc.duq.edu/dlr/vol29/iss2/8

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The University's Role Toward Student-Athletes: A Moral or Legal Obligation?

INTRODUCTION

In the first half of Loyola Marymount's semifinals game against Portland in the West Coast Conference tournament in the spring of 1990, Hank Gathers, arguably one of the best college basketball players in the country,[1] made a two-handed slam dunk that had become emblematic of his style at Loyola.[2] Moments later Gathers collapsed on the court, stunning a horrified crowd that included his mother, Lucille, and two of his brothers.[3] Two doctors appeared from the bleachers to perform cardiopulmonary resuscitation but failed to produce a heartbeat.[4] Gathers was carried to an ambulance where paramedics tried to stimulate his heart with electric shock.[5] Gathers was pronounced dead just one hour and forty-one minutes after dazzling the crowd with his slam dunk.[6]

This was not the first time Hank Gathers had collapsed during a Loyola basketball game. Just three months earlier, in December of 1989, while playing against the University of California at Santa Barbara, the Loyola basketball star crumbled to the floor.[7] Tests performed after this first collapse indicated that Gathers had a cardiac arrhythmia—an irregular heartbeat.[8] A beta-blocker, Inderal, was prescribed for Gathers, along with weekly treadmill testing.[9] After beginning to take Inderal, Gathers discovered he was no

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1. Shelley Smith, *Hank Gathers*, 72 Sports Illustrated 16 (March 12, 1990). In the 1988-89 basketball season, Gathers was the NCAA's leading scorer and rebounder. Smith, 72 Sports Illustrated at 16 (cited in this note above).

2. Id. Noting that Hank smiled after making the play, Don Ott, assistant commissioner of the West Coast Conference, remarked "[i]t was typical Hank Gathers. Id.

3. Id. Thousands of basketball fans also watched Gathers' collapse on television. Philip Elmer-DeWitt, *Death on the Basketball Court*, 135 TIME 56 (March 19, 1990).

4. Smith, 72 Sports Illustrated at 16 (cited in note 1).

5. Id.

6. Id. Gathers was pronounced dead at 6:55 p.m. on March 4, 1990. Id.

7. Shelley Smith, *The Death of a Dream*, Sports Illustrated 11 (March 19, 1990). In the locker room later, Gathers cried. When a friend tried to comfort him, Gathers replied, "[y]ou don't understand. I just blew the NBA." Id.

8. Elmer-DeWitt, 135 TIME at 56 (cited in note 3).

9. Id. Beta blockers regulate the heart's rhythm and minimize the impact adrenaline has on the body. Id.

longer a dazzling scorer and rebounder and he complained that the "dosage was too high."[10] It has been reported that Gathers prevailed upon his doctors to reduce the dosage.[11] There is also a rumor that Gathers completely quit taking Inderal[12] as the time of the NBA draft approached, dismayed by the news that he might not be one of the top nine picks.[13] In a Los Angeles Times interview, an unidentified cardiologist claimed Gathers was warned by his doctors that exercise could be dangerous, but "[i]t didn't matter what some doctor told him. Hank Gathers was going to play basketball."[14] Gathers' teammate at Loyola and childhood friend from Philadelphia, Bo Kimble, disputes this, contending that Gathers would not have played against the advice of his doctors.[15]

The university denies any responsibility for Gathers' death. Loyola's athletic director, Brian Quinn, claims that, "[w]e had a clearance for him to play from outstanding physicians." [16] Despite this assurance, however, after Hank's first collapse in December, a defibrillator was purchased and kept by the team's bench.[17]

Gathers' family has announced their intention to file a suit "against those . . . responsible for his death."[18]

At a children's Halloween Party on the evening of October 30, 1988, a Long Beach State University football player was wounded by a gang member in a drive-by shooting.[19] Mark Seay, the team's leading receiver so far that season, was at his sister's house in Long Beach when a group of teenage gangmembers called the Crips

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10. Id. Fatigue and sluggishness are two of Inderal's side effects. Id.

11. Elmer-DeWitt, 135 TIME at 56 (cited at note 3); Smith, 72 Sports Illustrated at 17 (cited at note 1). Hospital records show that Gathers' dosage was decreased from 240 mg to 40 mg. Smith, 72 Sports Illustrated at 12 (cited at note 7).

12. Elmer-DeWitt, 135 TIME at 56 (cited at note 3). The unnamed cardiologist who voiced this conjecture also asserted that Gathers had failed to report for a stress test the week before his death. Id.

13. Smith, 72 Sports Illustrated at 12 (cited at note 7). Don Casey, coach of the Los Angeles Clippers, a professional basketball team, predicted Gathers "would probably be the 10th to 15th player chosen." Id.

14. Elmer-DeWitt, 135 TIME at 56 (cited at note 3).

15. Id. The attorney retained by the Gathers family has stated that Hank was taking his medication and stress tests and had never been cautioned by his doctors to quit playing basketball. Smith, 72 Sports Illustrated at 11 (cited at note 7).

16. Elmer-DeWitt, 135 TIME at 56 (cited at note 3) One of the cardiologists who treated Gathers has said that he was "closely checked" and "cleared," that "it was safe for him to play." Smith, 72 Sports Illustrated at 17 (cited at note 1).

17. Smith, 72 Sports Illustrated at 11 (cited at note 7). A defibrillator can be used to regulate the heart's rhythm and stabilize anyone suffering a heart attack. Gathers' family has questioned why this instrument was not immediately used on Gathers. Id.

18. Id.

19. Stefanie Krasnow, *A Hero Returns*, 72 Sports Illustrated 14 (May 7, 1990).

drove past and started shooting.[20] In protecting his two year old niece from the gunfire, Seay was hit by a .38-caliber bullet that pierced his right kidney and came to rest one inch from his heart.[21] Seay lost his right kidney.[22] The teenage gang member who wounded Seay was convicted of assault with a deadly weapon and is now serving a 25-year sentence.[23]

Seay recovered in time to attend the Long Beach State 49'ers spring football camp in 1989.[24] That summer, Long Beach State informed Seay that he would not be allowed to play football in the fall because of the chance of injuring his left kidney.[25] Long Beach State's concern for Seay's health was justified. Dr. Saulo Klahr, President of the National Kidney Foundation warns, "(i)n a contact sport like football, the remaining kidney might suffer trauma and bleed. He's putting his health at serious risk."[26]

Seay filed suit against Long Beach State and sought an injunction to force the university to allow him to play for the 49'ers in the fall of 1989.[27] Seay claimed that he should be the one to decide whether or not he would play football.[28] In September, 1989, the judge denied Seay an injunction, finding that there was insufficient proof that Seay's remaining kidney was functioning adequately.[29]

In March of 1990, just before Seay's jury trial was set to begin, an out of court settlement was reached whereby Seay would be allowed to play for the 49'ers, provided he signed a waiver relieving Long Beach State of any liability should he be injured while playing.[30] Seay also must wear a flak jacket when on the field.[31]

Seay downplays the risk he is taking. "If I'm going to lose this kidney, it could happen at home. I'd rather lose it doing something

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20. Id. Seay had inadvertently insulted the gang member earlier that day when he made the passing remark, "What's happening, blood?" to the teenager. The Bloods, another West Coast gang, are rivals of the Crips. Id.

21. Shelley Smith, *Not What the Doctor Ordered*, 72 Sports Illustrated 24 (June 11, 1990). The bullet has not been removed. Id.

22. Krasnow, 72 Sports Illustrated at 14 (cited in note 19).

23. Id. Ironically, Seay is majoring in criminal justice and works with teens to keep them from joining gangs. Id.

24. Id.

25. Id.

26. Id. The Foundation also recommends that kidney donors not engage in contact sports. Id.

27. Id.

28. Id.

29. Id.

30. Smith, 72 Sports Illustrated at 24 (cited at note 21).

31. Id.

I want to do."[32]

Should Loyola Marymount have allowed Hank Gathers to play basketball after his initial collapse in December of 1989? Should Long Beach State allow Mark Seay to play football with only one kidney?

Should colleges and universities be impressed with a legal duty to prohibit student-athletes with recognized, grave medical problems from participating in school-sponsored athletic events or is the decision whether or not to play college sports best left solely to the discretion of the student-athlete?

The Role of The University in the 1990's

Today, colleges and universities are no longer viewed by the courts, society or students as standing in the shoes of parents.[33] The principle of in loco parentis no longer applies to institutions of higher learning.[34] Recent decisions on both the state and federal level indicate that college students are now deemed to be adults, fully capable of, and responsible for, their own decision making.[35]

The seminal decision rejecting the university's role as substitute parent to its students is *Bradshaw v Rawlings*.[36] Bradshaw, an eighteen year old student at Delaware Valley College, was a passenger in a car driven by another student, Rawlings, and was rendered a quadriplegic when the car went out of control and hit another vehicle.[37] At the time of the accident, Bradshaw and Rawlings were returning to school from the sophomore class picnic held off-campus in a nearby town. This picnic was an annual event sponsored by the college.[38] Although twenty-one years is the mini-

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32. Krasnow, 72 Sports Illustrated at 14 (cited at note 19).

33. Randall Samborn, *Campus Crime Spurs Legislation*, 13 National Law Journal 3 (October 1, 1990). In an article discussing the efforts of victims of campus crime to hold colleges and universities responsible for reporting criminal acts and for improving security, Samborn notes that "decades ago. . .courts rejected plaintiffs' claims that colleges and universities were liable for crime-related injuries because their relationship to students was in loco parentis." Samborn, 13 National Law Journal at 3 (cited in this note above). See also notes 47, 56-9.

34. See also notes 47, 56-9.

35. See also notes 47, 56-9.

36. 612 F2d 135 (3d Cir 1979).

37. *Bradshaw*, 612 F2d at 137. Bradshaw suffered a cervical fracture when Rawling's car struck a parked car while passing through a stretch of municipal road with many dips. Id.

38. Id. A faculty member, as class advisor, oversaw plans for the picnic and signed a check that was used to purchase beer for the picnic. No faculty members were present at the picnic however. Flyers distributed across the Delaware Valley campus promoting the picnic

mum legal drinking age in Pennsylvania,[39] the students at the picnic, most of whom were nineteen or twenty years old, were drinking beer.[40] Bradshaw testified that Rawlings was drinking beer, while Rawlings himself admitted that he had "no recollection of what occurred from the time he left the picnic until after the accident."[41]

Bradshaw brought a negligence action against both Rawlings and Delaware Valley College,[42] specifically alleging that the college owed him a duty of care to control the drinking of its students.[43] The breach of this duty, argued Bradshaw, and the resulting injury, subjected the college to tort liability.[44] The district court submitted the issue of the college's negligence to the jury on the premise that the college did have a duty to use due care to prevent harm to its students who attended the picnic.[45] The jury subsequently found for the plaintiff.[46] The Court of Appeals reversed, directing that judgment be entered in favor of the college.[47]

Writing for the Third Circuit, Justice Aldisert, began his analysis by noting that an action based on negligence "must fail" if the defendant has no legal duty of care toward the plaintiff.[48] He noted, "[n]egligence in the air . . . will not do."[49] Aldisert reminded that the imposition of a duty involves a balancing of "competing individual, public, and social interests."[50]

In rejecting Bradshaw's allegation that the college should be charged with a duty to exercise control over the beer drinking of

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were highlighted with drawings of beer mugs. These flyers were reproduced at the college's copier center. Id.

39. 18 Pa Cons Stat Ann § 6308 (Purdon 1978) reads as follows: "A person commits a summary offense if he, being less than 21 years of age, attempts to purchase, purchases, consumes, possesses or transports any alcohol, liquor or malt or brewed beverages."

40. *Bradshaw*, 612 F2d at 137. The seventy-five students at the picnic drank six or seven half kegs of beer. Id.

41. Id. Another student testified that, in his opinion, Rawlings was intoxicated when he left the picnic. Id.

42. Id at 135, 137. Also named as defendants were the municipality, the beer distributor, the manufacturer of Rawling's car, and the owner of the vehicle, Gilbert Rawlings. The plaintiff later dismissed these last two parties. Id at 137, n.2.

43. Id at 137-38.

44. Id at 137.

45. Id.

46. Id. The jury also found for the plaintiff against the beer distributor and the municipality. The $1,108,067.00 verdict was appealed by each of the defendants. Id at 137.

47. Id at 144. The court of appeals affirmed the judgments against the other defendants. Id.

48. Id at 138.

49. Id (quoting Sir Frederick Pollock, *Law of Torts*, 468 (13th ed 1929)).

50. Id.

its students, the court of appeals used as its centerpiece the idea that "the modern American college is not an insurer of the safety of its students."[51] The court noted that the "authoritarian role" once played by college administrators has given way to "expanding rights and privileges" of students.[52] Aldisert continued, "[c]ollege students . . . are no longer minors; they are now regarded as adults in almost every phase of community life."[53] The court argued that with the attainment of adult status as a result of the student protests of the late sixties and early seventies, students have lost their right to a college's protection.[54] Pointing out the limited nature of the modern university's regulation of student life and morals, the court declared that today's students define their own lives both in the mental and physical arena.[55] For emphasis, Justice Douglas is quoted, "[s]tudents—who, by reason of the Twenty-sixth Amendment, become eligible to vote when 18 years of age—are adults who are members of the college . . . community."[56]

Citing section 320 of the Restatement (Second) of Torts,[57] the court indicated that where a school takes custody of minor students, as is the case for elementary and high schools, the law could impress a duty of care upon the school, the breach of which would constitute negligence.[58] However, where "students have reached the age of majority and are capable of protecting their own self

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51. Id.

52. Id.

53. Id at 138-39. The Court detailed the various rights and obligations of eighteen year olds in Pennsylvania, for example, to vote, marry, make a will, place bets at racetracks, work as a public accountant, practical nurse or veterinarian, be subject to criminal prosecution as an adult. In fact, the only exception to this long list is that eighteen year olds in Pennsylvania cannot purchase alcohol. Id.

54. Id at 139. In fact, these campus demonstrations were "a direct attack . . . on rigid controls by the colleges." Id.

55. Id at 139-40. Up until the turbulent sixties, colleges held strict reign over their student's personal lives under the guise of in loco parentis. Id at 140.

56. Id at 140 (quoting from *Healy v James*, 408 US 167, 197 (1972) (Douglas, concurring)).

57. Section 320 of the Restatement reads:

> One who is required by law to take or who voluntarily takes the custody of another under circumstances such as to deprive the other of his normal power of self-protection or to subject him to association with persons likely to harm him, is under a duty to exercise reasonable care so to control the conduct of third persons as to prevent them from intentionally harming the other or so conducting themselves as to create an unreasonable risk of harm to him, if the actor (a) knows or has reason to know that he has the ability to control the conduct of the third persons, and (b) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 320 (1965).

58. *Bradshaw*, 612 F2d at 140.

interests," a duty of care no longer exists.[59] Denying that the college's regulation prohibiting the drinking of alcoholic beverages by students is equivalent to an assumption by the college of a custodial duty toward its student, the *Bradshaw* court found that a prima facie duty of protection on the part of the college had not been demonstrated.[60]

Next, the court determined whether a special relationship could be shown to exist which would impose a duty of care upon the college as a matter of law. Rejecting the plaintiff's core argument that "beer-drinking by underage college students, in itself, creates the special relationship," the court declared that it was a well-known fact that college students drink beer, despite state laws to the contrary.[61] To impose a duty on the college to safeguard its students who drink would be an "impossible burden."[62] Finding as a matter of law that the college was not impressed with a duty of care for its students, the court concluded that the issue of the college's liability should not have been submitted to the jury.[63]

The *Bradshaw* opinion has become a reference point for a number of subsequent cases where plaintiffs have alleged that a college or university had a legal obligation to control and protect its students.[64] Citing the *Bradshaw* court's elaboration on the reformation of a college's role from that of watchdog over the private lives of its students to that of mere purveyor of information, these cases

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59. Id. The general rule is stated in note 27:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives to the other a right to protection.

Restatement (Second) of Torts § 315 (1965).

60. *Bradshaw*, 612 F2d at 141. Speaking for the court, Aldisert wrote, "[w]e are not impressed that this regulation, in and of itself, is sufficient to place the college in a custodial relationship with its students for imposing a duty of protection in this case." Id.

61. Id at 142. The court confessed that "this panel of judges is able to bear witness to the fact the beer drinking by college students is a common experience," and lamented that reality does not always mirror state and college codes of behavior. Id.

62. Id. Pennsylvania is one of only 13 states that restricts the sale and use of alcohol to those citizens at least twenty-one years of age. The court noted that the legal drinking age in New Jersey, the home state of most of the college's students, is eighteen. Id.

63. Id at 143.

64. *Beach v University of Utah*, 726 P2d 413 (Utah 1986); *Van Mastrigt v Delta Tau Delta*, ___Pa Super___, 573 A2d 1128 (1990); *Alumni Assn v Sullivan*, ___Pa___, 572 A2d 1209 (1990); *Graham v Montana State University*, 235 Mont 284, 767 P2d 301 (1988); *Rabel v Illinois Wesleyan University*, 161 Ill App 3d 348, 514 NE2d 552 (1987); *Baldwin v Zoradi*, 123 Cal App 3d 275, 176 Cal Rptr 809 (1981); *University of Denver v Whitlock*, 744 P2d 54 (Colo 1987); *Smith v Day*, 148 Vt 595, 538 A2d 157 (1987).

uniformly find that the modern university does not have a duty of care toward its students. These cases have so held in the context of injuries suffered as a result of underage drinking,[65] recreational sports,[66] and criminal acts.[67] In addition, there are two recent cases[68] that do not cite *Bradshaw* but do use a similar analysis in order to reach the conclusion that a university is not liable for the harm sustained by a student as a result of participating in intramural softball[69] or as a result of being kidnapped from the school's campus and wounded by a spouse.[70]

Two of the decisions[71] that construct their reasoning around Justice Aldisert's analysis in *Bradshaw* of the changed responsibilities of colleges and their administrators are worth examining further. In *Baldwin v Zoradi*,[72] a state university student brought an action for damages against the university's trustees and dormitory advisors, alleging that the injuries she suffered as a result of speeding contests she participated in with fellow students proximately flowed from the university's negligence.[73] The *Baldwin* court noted that:

> [C]ollege administrators no longer control the general area of general morals. Students have insisted upon expanded rights of privacy. . . . the students had attained majority, with all rights accorded to them save the right to consume alcoholic beverages.[74]

Holding that the relationship between the trustees and the university students did not create a special relationship imposing a duty of care to prevent the injuries sustained by the plaintiff,[75] the court stated that the imposition of such a duty was impractical and unwarranted;[76]impractical because of the heavy burden of policing "a

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65. *Baldwin*, 176 Cal Rptr at 819; *Alumni Assn*, 572 A2d at 1213; *Beach*, 726 P2d at 416.

66. *University of Denver*, 744 P2d at 59-60.

67. *Van Mastrigt*, 573 A2d at 1131; *Smith*, 538 A2d at 159-60; *Rabel*, 514 NE2d at 560-61.

68. *Klobuchar v Purdue University*, 553 NE2d 169 (Ind App 1990); *Swanson v Wabash College*, 504 NE2d 327 (Ind App 1987).

69. *Swanson*, 504 NE2d at 330-31.

70. *Klobuchar*, 553 NE2d at 173-74.

71. *Baldwin*, 176 Cal Rptr at 809; *Beach*, 726 P2d at 413.

72. *Baldwin*, 176 Cal Rptr at 809.

73. Id at 811-12. The plaintiff was riding in one of the speeding vehicles when it collided with another and rolled over. The students had been drinking in their dormitory rooms. As a result of her injuries, the plaintiff is now a quadriplegic. Id at 811.

74. Id at 816.

75. Id.

76. Id at 818.

modern university campus as to eradicate alcoholic ingestion"[77] and unwarranted because the "proper goal of post secondary education — the maturation of the students"— demands that the students make decisions for themselves.[78] In addition to absolving the university from legal blame for the plaintiff's injury, the *Baldwin* court borrowed from the *Bradshaw* opinion and emphasized that the university was not to be "morally blamed" either.[79]

The second *Bradshaw*-based decision, *Beach v University of Utah*[80] involved a university student who was injured on a school-sponsored field trip after becoming intoxicated.[81] The student sued the university and the biology professor who spearheaded the camping trip, contending that both had breached an affirmative duty to supervise and protect her.[82] Commenting that even the plaintiff admitted that the "mere relationship of student to teacher was not enough to give rise to such a duty,"[83] the Supreme Court of Utah looked for evidence of a special relationship between the parties that would obligate the university to protect and supervise the plaintiff; the court found none.[84] Like the court in *Bradshaw*, the *Beach* court dismissed the claim of the plaintiff that the university's promulgation of regulations prohibiting alcohol use by students under the legal drinking age[85] was equivalent to the university's assumption of custodial responsibility for the welfare of its students.[86]

The court adduced three fundamental policy considerations as to why the university did not have a legal duty to protect the plaintiff from the consequences of her decision to drink alcohol. First, college students, most of whom are over eighteen years old, are

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77. Id at 818.

78. Id. The court explained, "[o]nly by giving them responsibilities can students grow into responsible adulthood," and continued, "stimulating student growth is in the public interest." Id.

79. Id at 816.

80. *Beach*, 726 P2d at 413.

81. Id at 415. Donna Beach, a twenty year old student, is now a quadriplegic as a result of injuries she sustained when she fell down a cliff after wandering away from the campsite. Id.

82. Id.

83. Id at 416.

84. Id at 415-16. The plaintiff alleged that because the biology professor had knowledge of a prior incident where the plaintiff had become disoriented after drinking, the university was imbued with a special duty to oversee her conduct. Id at 416.

85. Id at 417-18. The state of Utah also proscribes the consumption of alcohol by those under twenty-one years of age. Id at 417.

86. Id at 417-18.

adults.[87] They can vote, be held to contracts, and are treated like adults in criminal prosecutions.[88] Explaining that the Twenty-sixth Amendment was crucial to its duty analysis, the court professed its amazement that the same students who had been given the "most sacred right a democracy can bestow" would in another situation be considered "so immature" that they are to be "wards of their particular institution of higher education."[89] Second, again reaching back to Bradshaw, the court emphasized that neither law nor society views the student-college relationship as one where the college assumes the rights, duties and responsibilities of a parent.[90] No longer does a university regulate the lives of its students, on or off campus.[91] Instead, the court stated that "[s]ociety considers the modern college student an adult, not a child of tender years."[92] Third, "colleges and universities are educational institutions; not custodial."[93] Their goal is to prepare students to take their place in the world.[94] Imposing upon institutions of higher education a duty to protect its adult students would render these institutions mere babysitters,[95] a result inimical to the true role of colleges and universities.[96] The court further asserted that even where a university does enact rules exacting or proscribing certain conduct,

> the student would still be an adult and responsible for his or her behavior. Neither attendance at college nor agreement to submit to certain behavior standards makes the student less an autonomous adult or the institution more a caretaker.[97]

Bradshaw, *Baldwin*, and *Beach*, as well as the many decisions that follow them,[98] unanimously refuse to impose upon a college or university a custodial duty to protect "adult" students from the consequences of their decisions, whether those decisions be to drink,[99] to commit criminal acts,[100] or to participate in recreational

87. Id at 418.
88. Id.
89. Id at 418, n.4.
90. Id at 418.
91. Id at 419.
92. Id (quoting from *Bradshaw*, 612 F2d at 140).
93. Id.
94. Id. "Their purpose is to educate in a manner which will assist the graduate to perform well in . . . civic, community, family, and professional positions he or she will undertake in the future." Id.
95. Id.
96. Id.
97. *Beach*, 726 P2d at 419, n.5.
98. See note 63.
99. *Bradshaw*, 612 F2d at 135; *Baldwin*, 176 Cal Rptr at 809; *Beach*, 726 P2d at 413.
100. *Van Mastrigt*, 573 A2d at 1128.

activities.[101] Absent a special relationship between college and student, the college has no affirmative duty to intervene to prevent injury to a student flowing from his or her decision to pursue a particular course of action. Student plaintiffs who have sought to establish the existence of a special relationship, and so the existence of a custodial duty on the part of the college, by reason of their "student" status, or even by relying on state laws and college regulations prohibiting the conduct of the student, have been unsuccessful in the courts.

Is There A Special Relationship Between Colleges and Student- Athletes?

Because there is no prima facie custodial duty on the part of post-secondary educational institutions toward their "adult" students, do the circumstances of a student-athlete's relationship with her university equate to the special relation the Restatement (Second) of Torts[102] states gives rise to a right to protection as a matter of law?

Special relationships are most often demonstrated by showing that one party is dependent upon the other, or that the parties are mutually dependent.[103] Are student-athletes dependent upon their colleges or are student-athletes and their colleges mutually dependent?

Some might argue that the vast sums of money which proficient student-athletes bring into their schools and the low number of student-athletes who graduate with a four-year degree is evidence of a mutual dependence that exists between colleges and their student-athletes. Colleges depend on their student-athletes to generate ticket sales, alumni gifts, television coverage and post-season bowl bonuses while the student-athletes depend on their schools for an education.

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101. *University of Denver*, 744 P2d 54 (Colo 1987).

102. Restatement (Second) of Torts 315 (1965) proffers the general rule:

> There is no duty so to control the conduct of a third person as to prevent him from causing physical harm to another unless
>
> (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or
>
> (b) a special relation exists between the actor and the other which gives to the other a right to protection.

103. *Baldwin*, 176 Cal Rptr at 814; *Beach*, 726 P2d at 416. Quoting from *Beach*, "the essence of a special relationship is dependence by one party upon the other or mutual dependence between the parties. Id.

The dollar figures are startling. The colleges fortunate enough to send football teams to the 1989 bowl games shared revenues of $57,000,000.00.[104] Back in 1986, the Orange and Cotton Bowls alone paid $2,000,000.00 to each team.[105] Those institutions with basketball teams whose games will be televised as part of the NCAA's new seven-year exclusive deal with CBS will partake of some $1,000,000,000.00.[106] Participating colleges earned $30,000,000.00 from the 1988 NCAA basketball tournament.[107] Narrowing the focus down to what just one talented athlete can do for a school, the Washington, D.C. business magazine, Regardie's, has estimated that Patrick Ewing brought Georgetown University a net profit of $12,300,000.00 during the early 1980's when he played basketball for the Georgetown Hoyas.[108] It seems obvious that at least some universities have grown dependent upon their gifted student-athletes as a source of needed revenue.

Are student-athletes dependent upon their universities? If dependence can be established by pointing to the abysmal graduation rates of student-athletes, the case for a duty on the part of colleges toward its student-athletes is easily made. Northeastern University's Center for the Study of Sport in Society claims that more than 70% of student-athletes on full scholarship never graduate.[109] A more moderate, but still distressing, estimate is that 50% of college varsity athletes fail to earn a degree.[110] In 1985, USA Today reported that only 25% of college basketball players and 30% of college football players graduate within five years, and for black college athletes the number for both groups drops to 20%.[111] To those optimistic enough to believe these low graduation rates are the result of high numbers of student-athletes who drop out to enter professional sports, Ron Lapchick, director of the Center for the Study of Sport in Society, cautions that only one in twelve thousand college athletes ever makes it to the pros.[112] However,

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104. R. Todd Erkel, *Under The Helmet*, 5 PITT Magazine 12, 14 (August 1990).

105. Harrison Donnelly, *College Sports Under Fire*, 11 Editorial Research Reports 591, 592 (August 15, 1986).

106. Erkel, 5 PITT Magazine at 14 (cited in note 104).

107. John Owen, *Jock in the Box*, Seattle Times - Post Intelligencer (May 15, 1988).

108. Donnelly, 11 Editorial Research Reports at 592 (cited at note 105).

109. Skip Myslenski, *Rookies at Reality*, Chicago Tribune (January 1, 1986).

110. Dave Joseph, *Back to School*, Ft. Lauderdale Sun-Sentinel (July 7, 1987).

111. Donnelly, 11 Editorial Research Reports at 595 (cited in note 105). Some individual schools boast much better statistics, for example, the University of Pittsburgh currently graduates 72% of its football players. Erkel, 5 PITT Magazine at 15 (cited in note 104).

112. Ian Thomsen, *Sporting Chance*, Boston Globe (January 26, 1986).

even if a legal duty on the part of universities toward student-athletes were imposed based on this special relationship of dependence, the duty would be that of ensuring that these students actually receive a higher education that prepares them for a future after college sports, not a duty to safeguard these students from the consequences of their adult decisions.

Conclusion

Are the facts that some colleges make money off their talented student-athletes and that too few student-athletes graduate from college enough to establish a special relationship between the two parties that warrants the imposition, as a matter of law, of a duty on the part of colleges to protect student-athletes from possible injury? Did Loyola Marymount have a legal obligation to stop its top scorer and rebounder, Hank Gathers, from playing basketball after his first collapse on the court? Does Long Beach State have a legal obligation to keep its leading receiver, Mark Seay, off the football field regardless of whether he wears a flak jacket and signs a waiver releasing the school from liability in the case of injury? Probably not.

There are a number of compelling public policy reasons for not imposing a custodial duty on colleges and universities to protect "adult" students, even those with known health risks, who decide to participate in school-sponsored athletic events:

> First, and most importantly, today's college students are seen as adults and must take full responsibility for their decisions and the results thereof.[113] Second, to hold the university liable for harm flowing from the independent, private decisions of its students would in turn lead universities to once again step into the personal lives of students via the enactment and enforcement of strict regulations governing conduct.[114]This would seem to directly impede "the maturation of the students," the professed goal of higher education.[115]
>
> Third, from a practical standpoint, the modern university is not in a position to monitor, and intervene in if necessary, the activities of hundreds of students.[116]

The courts should not impress upon colleges and universities a legal duty of care obligating these institutions to intercede in the personal lives of "adult" student-athletes who choose to play col-

113. *Bradshaw*, 612 F2d at 139-40; *Beach*, 726 P2d at 418.
114. *Beach*, 726 P2d at 419.
115. *Baldwin*, 176 Cal Rptr at 818.
116. *Bradshaw*, 612 F2d at 142; *Baldwin*, 176 Cal Rptr at 818; *Beach*, 726 P2d at 419.

lege sports. Those students who are eighteen and older are accorded adult status and have the recognized privilege of, as well as the responsibility for, making their own decisions.[117] The author believes the *Beach* court said it best when it opined, "[w]e do not believe that Beach should be viewed as fragile and in need of protection simply because she had the luxury of attending an institution of higher education."[118]

Student-athletes, as adults, should be allowed the same freedom of decision extended to, and expected of, other eighteen year olds who are not enrolled in colleges and universities, even if the natural result of the student-athletes' decisions to play is increased exposure to health risks.

Barbara J. Lorence

117. The situation is different where the student-athlete is a minor. Stephen Larkin, a 17 year-old high school senior, wants to play football this season for Cincinnati powerhouse, Moeller High School. Larkin has a medical condition termed hypertrophic cardiomyopathy, an abnormal thickening of the walls of the heart, which may predispose him to cardiac arrythmia, and possibly cardic arrest. Doctors believe that anyone with this conditions should not participate in strenuous activities. The high school has refused to let Larkin play without a doctor's release although Larkin's family is willing to sign a waiver of liability. Larkin's mother maintains that the decision of whether Stephen plays football should be left to the family. Echoing Mark Seay, Stephen told his mother, "if I have to die, I'd rather die playing football. That's what I love to do." Last month a federal district judge refused to issue a restraining order that would have compelled Moeller High School to allow Stephen on the field. The Larkin family has appealed. Mike Dodd, *Who decides health risk is too high?*, USA TODAY C1-C2 (October 5, 1990).

118. *Beach*, 726 P2d at 418.