Legal Liability for Cheerleading Injuries: Implications for Universities and Coaches

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I. INTRODUCTION*

At the Missouri Valley Conference men's basketball championship game in the spring of 2006, a cheerleader fell from a three-level pyramid stunt when she lost her balance during the dismount. The cheerleader, Kristi Yamaoka, struck her head on the basketball court suffering a concussion and a cracked vertebra in her neck. As the school band started the fight song, television cameras broadcast the cheerleader strapped to a backboard doing the arm motions for the fight song routine. Yamaoka received national media attention following her release from the hospital and was lauded for her school spirit.

The Missouri Valley Conference responded to the incident by barring cheerleaders in its member schools from being "launched or tossed and from taking part in formations higher than two levels" during the women's basketball conference tournament the following week.[1] Later that week the American Association of Cheerleading Coaches and Administrators (AACCA) issued a recommendation that conferences and tournaments prohibit pyramids two and one half levels high or higher, as well as stunts called basket tosses, for the remainder of the men's and women's basketball season.[2] This incident highlights the risk of injury from cheerleading and the corresponding responses from the media, sports conferences, and the professional organization for cheerleading coaches.

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1. Jim Suhr, *MVC Bans Some Cheerleader Stunts at Women's Tournament*, SOUTHEAST MISSOURIAN, Mar. 8, 2006, http://www.semissourian.com/story/print/1143012.html.

2. *Cheerleading Skills at Basketball Games*. AACCA NEWS RELEASE (Mar. 7, 2006), http://www.aacca.org/news20060307.asp.

Over the years, college cheerleading has incorporated higher degrees of difficulty in cheering and sideline routines, gymnastics, and partner stunts.[3] As college cheerleading has become more competitive, the number of cheerleaders has increased, and so too have the injuries.[4] As practitioners are made aware of cheerleaders' risk of injury, the question arises as to which individuals or what entities are liable, if at all, for collegiate cheerleading injuries.

A. Purpose

The purpose of this paper is to examine the legal liability for college cheerleading injuries and the implications for universities and administrators. Current literature has examined the number, severity, and causes of cheerleading injuries.[5] Some have discussed the issue of whether cheerleaders should be considered athletes[6] and their activity a sport.[7] Individual cases involving high school cheerleaders have been reported.[8] Yet statistics have shown that college cheerleaders are more likely to have a catastrophic injury than are high school cheerleaders.[9] This paper examines relevant case law involving liability for college cheerleading injuries and discusses the implications for those who organize and govern the activity of collegiate cheerleading.

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3. Carolyn Feibel, *Cheerleading Becomes the Main Event; As Squads Compete, Injuries Multiply*, THE RECORD, Apr. 17, 2005.

4. *Id.*

5. *See* Barry P. Boden et al., *Catastrophic Cheerleading Injuries*, 31 THE AM. J. OF SPORTS MED. 881 (2003); Philip Hage, *Cheerleaders Suffer Few Serious Injuries,* 11 PHYSICIAN & SPORTSMEDICINE J. 25 (1983); Mark R. Hutchinson, *Cheerleading Injuries: Patterns, Prevention, Case Reports,* 25 PHYSICIAN & SPORTSMEDICINE J. 83 (Sept. 1997); Bert H. Jacobson et al., *An Assessment of Injuries in College Cheerleading: Distribution, Frequency and Associated Factors,* 39 BRITISH J. OF SPORTS MED. 237 (2005); Brenda J. Shields & Gary A. Smith, *Cheerleading-related Injuries to Children 5 to 18 Years of Age: United States, 1990-2002,* 117 PEDIATRICS 122 (2006), http://www.pediatrics.org/cgi/content/ full/117/1/122.

6. *See* Robert C. Cantu & Frederick O. Mueller, *Cheerleading,* 4 CLINICAL J. OF SPORT MED. 75-76 (1994); Valerie DeBenedette, *Are Cheerleaders Athletes?* 15 PHYSICIAN & SPORTSMEDICINE J. 214 (1987).

7. *See Cheerleading – Cheerleading, Drill Team, Danceline and Band as Varsity Sports: The Foundation Position*, WOMEN'S SPORTS FOUNDATION ISSUES & ACTION (Sept. 2000), http:/// www.womenssportsfoundation.org/cgi-bin/iowa/issues/rights/article.html?record=95 (last modified Sept. 2003); *Cheerleading Skills at Basketball Games, supra* note 2.

8. *See* Thomas H. Sawyer, *Cheerleading and Liability,* 74 THE J. OF PHYSICAL EDUC., RECREATION & DANCE 10 (2003); Carolyn Lehr & Doyice J. Cotten, *Cheerleading: Organizations Do Have a Duty to Supervise,* 11 SPORTS, PARKS & RECREATION L. REP. 24 (1997).

9. Boden et al., *supra* note 5, at 881.

B. Scope and Limitations

Over the last decade, cheerleading has become one of the hottest female "sports" in the country.[10] As cheerleading has moved from the sidelines to center court, it has become a leading cause of major injuries among women and girls.[11] Because cheerleading is not classified as a sport by the NCAA,[12] when compared to other sports, cheerleading injury reports are not equally monitored.[13] Therefore, the statistics available on cheerleading injuries are sometimes vague or not as accurate as other sports' injury statistics.

The legal research for this paper is limited to the court cases brought against colleges and universities by cheerleaders. Cases against school districts involving minors or cases involving collegiate sports are not included in this analysis and are only cited in passing. The contents of this paper contain an analysis of the available literature and college cheerleading case law. We acknowledge, under agency law, that the Doctrine of *Respondeat Superior* creates vicarious liability for employers. However, *Respondeat Superior* was not an issue in the cases involving cheerleader injuries nor was governmental immunity.[14] Therefore, the scope of the paper is limited in the legal liability section, part IV, to the issues discussed in the cases.

II. COLLEGE CHEERLEADING

College cheerleading is an activity that has changed rapidly in recent years. A brief look at the history of the activity will be followed by a discussion of its classification by school administrators.

A. Cheerleading: Definition & History

A cheerleader is defined in Webster's II New Riverside Dictionary as "[s]omeone who directs the cheering of spectators, as at a football game."[15] But today, cheerleading entails more than that. It is a recreational activity

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10. Feibel, *supra* note 3, at F01.

11. Jennifer Warner, *Cheerleading Injuries on the Rise*, WEBMD MED. NEWS (Oct. 22, 2002), http://my.webmd.com/content/article/52/50334.htm.

12. *See* NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, *Sports & Championship Administration*, *available at* http://www2.ncaa.org/portal/sports/ (last visited June 11, 2007).

13. Jacobson et al, *supra* note 5, at 237-40.

14. For examples of state governmental immunity statutes, *see* ARK. CODE ANN. § 21-9-301 (Michie 2007); ALASKA STAT. § 09.50.250 (Michie 2007); CAL. GOV. CODE § 815 (Deering 2007); MICH. COMP. LAWS ANN. § 691.1407 (2007).

15. WEBSTER'S II NEW RIVERSIDE DICTIONARY 122 (1st ed. 1984).

involving dance routines, partner stunts and gymnastics that is often competitive.[16]

Cheerleading began at the turn of the 19th century when a University of Minnesota football fan, Johnny Campbell, stood in his seat and led the crowd in a verse in support of their team.[17] He was able to recruit five male "yell leaders" to rally the team,[18] and thus cheerleading began in 1898. By the 1960s, cheerleading was common in schools across America.[19] Cheerleaders began incorporating more difficult moves, including gymnastic tumbling, pyramids, and partner stunts in the 1970s, without corresponding safety guidelines.[20] Over the past 20 years, cheerleading has evolved into an activity that demands high levels of skill and athleticism.[21]

B. Cheerleading: Sport or Entertainment?

The line between sport and entertainment is often blurred, especially in spectator sports. On the sidelines and during breaks in the action, cheerleaders entertain the crowd. Yet the same cheerleaders also compete for national recognition of their athletic prowess and skill in performing stunts at competitions sponsored by national cheerleading organizations.

In 2003, the University of Maryland allowed their competitive cheerleading program to become a varsity sport and offered athletic scholarships to participating students.[22] Although some colleges offer partial financial aid to cheerleaders, the federal Office for Civil Rights says the University of Maryland's program is the first seeking to use cheerleading scholarships toward Title IX[23] compliance.[24] University of Maryland officials claim that offering a varsity sport status to cheerleading keeps the university in

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16. *See* American Association of Cheerleading Coaches and Advisors, *2006-2007 AACCCA College Cheerleading Safety Rules*, *available at* http://www.aacca.org/0607AACCACollege.pdf (last visited May 14, 2007).

17. Feibel, *supra* note 3, at F01; *See also* Hutchinson, *supra* note 5, at 83.

18. Feibel, *supra* note 3, at F01.

19. *Id.*

20. *Id.*

21. Boden et al, *supra* note 5, at 881-88.

22. Alyssa Roenigk, *Maryland Trailblazers: A Tale of Two Teams*, AM. CHEERLEADER MAG. (Oct. 2004), http://www.americancheerleader.com/backissues/oct04/trailblazers.php.

23. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2007). The United States Code states: "Title IX is a comprehensive federal law that prohibits discrimination on the basis of sex in any federally funded education program or activity." *Id.*

24. *Critics Contend Move Sidesteps Title IX*, ESPN COLLEGE SPORTS (Sept. 27, 2003), http://espn.go.com/ncaa/news/2003/0927/1624684.html.

compliance with Title IX.[25] Skeptics argue that offering cheerleading scholarships only increase opportunities for men's sports and decrease women's opportunities for other women's sports, which defeats the legislative intent behind Title IX.[26] However, despite the position taken by the University of Maryland, cheerleading is not sponsored as a sport by the NCAA, and the United States Education Department's position is that drill teams and cheerleaders cannot be considered athletic programs for the purpose of complying with Title IX.[27] These opposing views raise the question as to whether cheerleading should be classified as a sport.

The Women's Sports Foundation's position on cheerleading includes analysis of the activity using aspects common in widely accepted scholarly definitions of sport, and concludes that cheerleading could be considered a sport if the primary purpose of the teams was to compete against other cheerleaders in a regular season and postseason competition.[28] Occasional exhibitions at other athletic events could still be included. However, since that is not the purpose of the activity and since competitions are not structured like school sport competitions, the position of the Women's Sports Foundation is that cheerleading is not a sport.[29]

Contrary to the Women's Sports Foundation's position, the American Association of Cheerleading Coaches and Administrators (AACCA)[30] succeeded in getting cheerleading recognized as a high school sport.[31]

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25. *Id.*

26. *Id.*

27. *Id.*

28. *Cheerleading – Cheerleading, Drill Team, Danceline and Band as Varsity Sports*, *supra* note 7. Scholarly definitions of sport include the following aspects: a physical activity which involves propelling a mass through space or overcoming the resistance of a mass, a contest or competition against or with an opponent, activity governed by rules which explicitly define the time, space and purpose of the contest and the conditions under which a winner is declared, the acknowledged primary purpose of the competition is a comparison of the relative skills of the participants. *Id.*

29. *Id.*

30. The American Association of Cheerleading Coaches and Administrators (AACCA) is formerly known as the American Association of Cheerleading Coaches and Advisors. *See* American Association of Cheerleading Coaches and Administrators, *About the AACCA*, *available at* http://www.aacca.com/about.asp (last visited June 11, 2007). The AACCA is a nonprofit affiliate of Varsity Spirit Corporation. Varsity Spirit Corporation is the parent company for the Universal Cheerleaders Association, the largest organization providing training for cheerleaders in the United States. J. Copeland, *Future Cheerleader Coverage Adds Supervision Component*, NCAA NEWS ONLINE (July 18, 2005), http://www.ncaa.org/wps/wcm/connect/NCAA/NCAA+News/NCAA+News+Online/2005/Associationwide/Future+cheerleader+coverage+adds+supervision+component+-+7-18-05+NCAA+News?pageDesign=Printer+Friendly+NCAA+News+And+Updates.

31. American Association of Cheerleading Coaches and Advisors, *An American Association of Cheerleading Coaches and Advisors Position Paper Addressing the Issue of Cheerleading as a Sport,*

However, the AACCA now recommends classifying cheerleading as an "athletic activity."[32] The AACCA's position paper explains that some state activities associations have classified cheerleading as a sport. Cheerleading coaches and advocates found that this classification included limitations and restrictions on cheerleading similar to those for other school activities, including adding more competitive events and fewer cheerleading exhibition events. At the same time advocates believe that in order to encourage use of qualified supervisors, they must emphasize the athletic nature of the activity and so have chosen to label cheerleading an "athletic activity." Thus, the question remains unanswered as to how to classify cheerleading and to what extent the classification would have on legal liability.

III. CHEERLEADING INJURIES

Just as those involved in other types of physical activities sometimes are injured while participating in those activities, cheerleaders are also injured sometimes. Recognizing the types of injuries and how they take place is helpful in understanding liability for college cheerleading injuries. This section reviews studies on the types of cheerleading injuries and the causes of cheerleading injuries.

A. Types of Injuries

Regardless of the classification, cheerleading activities have resulted in various types of injuries. From a sample of 30 NCAA Division I A colleges, Jacobson, Redus, and Palmer found that most female college cheerleaders (78%) reported having had at least one injury in their cheerleading careers.[33] According to the National Center for Catastrophic Sport Injury Research (NCCSIR), in 1982–1983 there was one reported female catastrophic injury;[34] whereas 22 years later during the 2003-2004 academic year, there were 6

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available at http://www.aacca.org/sportposition.html (last visited Sept. 30, 2005). As a result of the AACCA's position, the State High School Activities Associations began requiring numerous school sponsored competitions and dictating all the eligibility requirements of high school athletics. *Id.* According to the AACCA's position paper, high school cheerleaders in states where the activity of cheering was given status as a sport found that the funding did not increase and there were more restrictions and regulations, so the association recommends calling cheerleading an "athletic activity." *Id.*

32. *Id.*

33. Jacobson, et al., *supra* note 5, at 237.

34. Frederick O. Mueller & Robert C. Cantu, *Fall 1982 – spring 2004 Twenty-Second Annual Report, Female Catastrophic Injuries*, National Center for Catastrophic Sport Injury Research (2004).

female catastrophic injuries caused by cheerleading.[35] Research by the Consumer Product Safety Commission estimates that in 1980 cheerleading injuries accounted for 4,954 hospital emergency room visits.[36] Data indicate that there has been a dramatic increase in the number of reported cheerleading injuries such that "[b]y 1994, the number of emergency visits increased to about 16,000 and by 2002, the number was estimated at 22,603."[37] Alarmingly, according to research on catastrophic cheerleading injuries, the rate of injury to collegiate cheerleaders per 100,000 was five times greater than the rate of injury for high school cheerleaders, although the raw number of injured high school cheerleaders was higher.[38] Most of these injuries take place in practice at school.[39]

Another concern is the severity of cheerleading injuries. According to the NCCSIR glossary a catastrophic injury is defined as "sport injury that resulted in a brain or spinal cord injury or skull or spinal fracture."[40] From 1982 to 2002, NCCSIR statistics show that cheerleading was the cause of more catastrophic injuries to girls than any other athletic activity.[41] During this time, the NCCSIR reported 39 catastrophic cheerleading injuries, 16 of which occurred at the college level (Table 1).[42]

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35. *Id.*

36. Boden et al., *supra* note 5, at 886.

37. Jacobson, *supra* note 34, at 237-40.

38. Boden et al., *supra* note 5, at 886.

39. *Id.* at 884; Shields & Smith, *supra* note 5, at 122-29.

40. Frederick O. Mueller, *National Center for Catastrophic Sport Injury Research., Glossary of Injury Terms*, *available at* http://www.unc.edu/depts/nccsi/InjuryTerms.htm (last visited July 12, 2005).

41. Ellen Kuwana, *Nothing to Cheer About: Head and Neck Injuries in Cheerleading*, 2004 NEUROSCIENCE FOR KIDS, *available at* http://faculty.Washington.edu/chudler/cheer.html (last visited Jan. 23, 2007).

42. Boden et al., *supra* note 5, at 881.

TABLE 1

DESCRIPTION OF ALL 16 COLLEGE CHEERLEADING INJURIES REPORTED 1982-2002[43]

Number	Age	Sex	Level	Diagnosis	Severity Level	Disability	Stunt
1	22	F	College	Head injury, Skull Fracture	Serious	None, unable to return to contact sports	Pyramid
2	19	F	College	Head injury, Skull Fracture, coma	Nonfatal	Loss partial hearing, dizzy spells, nausea and headaches	Pyramid
3	22	F	College	Head injury, Skull Fracture	Serious	None	Pyramid
4	18.5	F	Junior College	Head injury, Skull Fracture	Nonfatal	Memory	Basket Toss
5	20	F	College	Head injury, Skull Fracture, coma	Nonfatal	Loss of hearing in left ear, complete loss of taste and smell, personality changes	Basket Toss
6	18	F	College	Spinal cord injury, C3 complete	Nonfatal	Quadriplegia, died 3.5 years later from asphyxiation	Basket Toss
7	18	F	College	Head injury	Serious	None	Basket Toss
8	20	F	College	Spinal cord injury, C2 incomplete	Nonfatal	Partial quadriplegia C2, 20% use of upper extremities; 40% use of lower extremities, depression, eating disorder	Floor Routine
9	22	M	College	C1 bust fracture, C6 neurapraxia	Nonfatal	Paresthesia in hand, loss of neck motion	Floor Routine

43. *Id.* at 888.

10	22	F	College	Head injury, Skull Fracture	Nonfatal	Partial hearing loss	Mount
11	22	M	College	Spinal cord injury, C5 complete	Nonfatal	Quadriplegia	Mini-trampoline
12	20	F	College	Head injury	Nonfatal	Unknown	Pyramid
13	?	F	College	Vertebral fracture	Unknown	Unknown	Pyramid
14	20	F	College	Cervical fracture	Serious	None	Floor Routine
15	21	M	College	Head injury	Serious	None	Mount
16	20	M	College	Cervical fracture	Nonfatal	Quadriplegia	Mini-trampoline

In Table 1, a nonfatal severity level refers to permanent severe functional disability resulting from the injury, and a serious severity level refers to an injury with no permanent functional disability, but severe injury.[44] Ten of the sixteen injuries are determined to be nonfatal, while five are classified as serious and one is unknown.[45]

44. *Id.* at 883. *See also* Mueller, *supra* note 40.

45. Robert C. Cantu & Frederick O. Mueller, *Fatalities and Catastrophic Injuries in High School and College Sports, 1982-1997*, 27 THE PHYSICIAN & SPORTSMEDICINE 35-47 (1999).

TABLE 2

FATALITIES AND CATASTROPHIC AND SERIOUS INJURIES IN US FEMALE STUDENT-ATHLETES, 1982-1997[46]

Level	Direct Fatalities & Catastrophic Injuries	NUMBER OF INJURIES	Indirect Fatalities	NUMBER OF INJURIES
High School	Cheerleading	18	Basketball	8
	Gymnastics	9	Swimming	5
	Track	3	Track	4
	Swimming	2	Cheerleading	3
	Basketball	2	Soccer	1
	Softball	2	Cross Country	1
	Field Hockey	2	Volleyball	1
	Volleyball	1		
	Total	*39*	*Total*	*23*
College	Cheerleading	16	Basketball	1
	Gymnastics	2	Tennis	1
	Field Hockey	1		
	Downhill Skiing	1		
	Lacrosse	1		
	Total	*21*	*Total*	*2*

From 1982 through 1997, sixty "direct fatalities and catastrophic injuries" occurred among high school and college female athletes, including cheerleaders, as shown in Table 2.[47] In column two of Table 2, "direct fatalities" refers to an injury which resulted directly from participation in the skills of the sport, and "catastrophic injuries" indicates a severe, permanent spinal cord disability.[48] In column four of Table 2, "indirect fatalities" are those "caused by systemic failure as a result of exertion while participating in a sport activity or by a complication which was secondary to a non-fatal

46. *Id.*
47. *Id.*
48. *Id.*

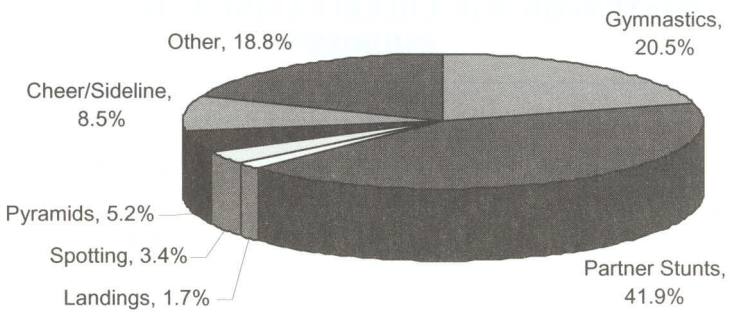
injury."[49] Cheerleading, both high school and college, accounts for thirty-four (57%) of the catastrophic injuries and direct fatalities.[50]

B. Causes of Injuries

The growth in the number of cheerleaders is one factor contributing to increased cheerleading injuries.[51] Data from the Sporting Goods Manufacturers Association reveals that the number of cheerleading participants has increased 17.6% since 1987, growing faster than soccer, football or other team sports.[52]

FIGURE 1

COLLEGE CHEERLEADING INJURIES FROM 1982-1992[53]



In figure 1, Hutchinson simply illustrates how cheerleading injuries occur without reference to gender. From 1982 to 1992 partner stunts caused the largest number of college cheerleading injuries, accounting for 41.9%, as shown in Figure 1.[54] Gymnastic routines account for 20.5% of college

49. Mueller, *supra* note 40.

50. Cantu & Mueller, *supra* note 45, at 47.

51. Jacobson, *supra* note 5, at 237.

52. Feibel, *supra* note 3. There is not single, national governing body for collegiate cheerleading which collects data on the number of participants.

53. Hutchinson, *supra* note 5.

54. *Id.* at 83.

cheerleader injuries.[55] With televised national championships in college cheerleading and numerous cheerleading competitions at all levels, there is greater demand for gymnastics and partner stunts; thus, the number of injuries during these types of moves will likely continue to increase.[56]

According to Hutchinson, "[o]ther factors that contribute to injuries in cheerleading include lack of experience, inadequate conditioning, poor supervision, noncushioned playing surfaces, poor nutrition, and poor shoes."[57] Experience may also play a part in cheerleading injuries. The probability is higher that experienced cheerleaders will take greater risks by attempting more difficult stunts.[58] Injuries for less experienced cheerleaders are more frequent, but less severe. Contributing factors to these injuries include poor conditioning, little or no supervision, or attempting difficult stunts prematurely.[59]

TABLE 3

INFORMATION ON AGE, CHEERLEADING EXPERIENCE, AND INJURIES[60]

Category	Frequency**
Age (years)	20.2 (1.8)
Cheerleading experience (years)	6.6 (2.2)
1–3 years (%)	0.0
4–6 years (%)	42.4
7–9 years (%)	46.6
10+ years (%)	11.0
Ever injured, yes (%)	78.0
Total career injuries	3.5 (3.1)
Number of injuries last year	1.0 (0.91)
0 injuries (%)	54.5
1–2 injuries (%)	24.4
3–4 injuries (%)	18.8

55. *Id.*
56. *Id.* at 87.
57. *Id.*
58. *Id.*
59. *Id.*
60. Jacobson, et al., *supra* note 5, at 237-240.

5+ injuries (%)	16.7
Days missed last year	1.8 (2.2)
0 days (%)	54.5
1–2 days (%)	26.7
3–4 days (%)	3.3
5+ days (%)	16.7
Treated by doctor (%)	86.7
Required surgery (%)	40.0
Annual practice days	205 (61.5)
120–160 days (%)	19.4
161–252 days (%)	54.8
252+ days (%)	25.8
Practice length (hours)	2.8 (0.70)
0–1 hours (%)	0.0
1–1.5 hours (%)	1.2
1.5–2 hours (%)	26.5
2–2.5 hours (%)	18.1
2.5+ hours (%)	54.2

**Where applicable, the values are mean and/or (SD).

As Table 3 indicates, colleges may face increased risks because their cheerleaders are more experienced than high school cheerleaders.[61] According to research conducted by Jacobson, Redus and Palmer, of the 440 collegiate cheerleader survey participants, 57.6% had seven or more years of cheerleading experience and 42.4% had 4 to 6 years of experience.[62]

Although some colleges and universities keep records on cheerleading squads in terms of injury cause and treatment, comprehensive and accurate injury data can only be attained through a national tracking system similar to ones currently used for NCAA sports.[63] Nevertheless, the ever increasing frequency and severity of cheerleader injuries and the corresponding causes give rise to potential liability for colleges, universities and coaches.

61. Cantu & Mueller, *supra* note 6, at 75-76.
62. Jacobson, et al., *supra* note 5, at 237-40.
63. *Id.*

IV. LEGAL LIABILITY

Given the potential for serious injury associated with cheerleading, it is not surprising that negligence lawsuits have been filed against universities and coaches. As a result of the increasing numbers of direct fatalities and catastrophic injuries, higher education institutions, athletic conferences and governing bodies, such as the AACAA, the National Cheerleading Association (NCA), the Universal Cheerleaders Association, and the NCAA are beginning to respond.[64] Even legislatures are beginning to restrict cheerleaders by banning certain stunts.[65] Colleges and universities often find themselves defendants in negligence lawsuits when cheerleading injuries occur at their schools. Cheerleading injuries may be a result of negligence if a duty of care exists. Negligence is "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."[66] The plaintiff may recover damages only when the plaintiff proves each of the following: "(1) a duty or obligation, recognized by law, requiring the actor to conform to a certain standard of conduct; (2) a failure to conform to the standard required; (3) a causal connection between the conduct and the resulting injury; and (4) actual loss and damage resulting to the interests of another."[67]

It would appear, then, that legal duty of care would require coaches and universities to take steps to prevent unreasonable risks of harm to the cheerleaders, and as the risk of harm increases, based on the probability and gravity of injury, so would the burden of taking precautions.[68] Likewise, as the risk of harm decreases, the burden would decrease.[69] But not all courts agree with what constitutes legal duty of care owed to cheerleaders. Courts are

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64. *See* Suhr, *supra* note 1; *Cheerleading Skills at Basketball Games, supra* note 2; Jacobson, et al., *supra* note 5, at 237-40.

65. After the death of a cheerleader in a pyramid stunt, the North Dakota and Minnesota legislatures banned pyramids at the high school and college levels, and Illinois banned the use of basket tosses at the high school level after a similar catastrophic event. *See* Hutchinson, *supra* note 5, at 83.

66. BLACK'S LAW DICTIONARY 716 (6th ed. 1991).

67. Kleinknecht v. Gettysburg C., 989 F.2d 1360, 1366 (3rd Cir. 1993). *See* Robinson v. The May Dep't Stores, 246 F. Supp. 2d 440, 445 (E.D. Pa. 2003); Costa v. Boston Red Sox Baseball Club, 809 N.E. 2d 1090 (Mass. App. Ct. 2004); Nichols v. Lowe's Home Center, 407 F. Supp. 2d 979 (S.D. Ill. 2006). *See also* RONALD A. KAISER, LIABILITY & LAW IN RECREATION, PARKS & SPORTS 52 (1986); Roya R. Hekmat, Comment, *Malpractice During Practice: Should NCAA Coaches Be Liable for Negligence?,* 22 LOY. L.A. ENT. L.J. 613, 616 (2002).

68. *See* KAISER, *supra* note 67.

69. *Id.*

also split as to what role assumption of the risk plays in negligence lawsuits filed by cheerleaders.

This section of the paper discusses seven cheerleading cases, each of which are divided into one of two categories: (1) cases favoring the plaintiff cheerleader and (2) cases favoring the defendant university. These cases represent court decisions made over an eighteen-year time period and show the development over time of legal liability in negligence cases brought by cheerleaders.

A. Cases Favoring Cheerleaders

Three specific concerns arise in negligence cases involving cheerleaders: exculpatory clauses,[70] duty of care and assumption of the risk. Commonly, exculpatory clauses are used by defendants to shield against future negligence liability, as demonstrated in the case of *Gonzalez v. University System of New Hampshire*.[71] On November 16, 1999, cheerleader Emyne Gonzalez, a Connecticut resident who attended Keene State (KSC), a New Hampshire college, was injured while attempting to perform a pyramid stunt.[72] Gonzalez was a member of an extracurricular activity at KSC known as the cheerleading club.[73] Karen Wilson, a volunteer coach who followed NCA or NCAA rules, was present during each cheerleading practice.[74] The plaintiff, never having been a cheerleader before, was initially barred from participating in cheerleading stunts, but when Ms. Wilson took charge, she encouraged the plaintiff to participate.[75] On numerous occasions, the plaintiff was injured while practicing cheerleading routines.[76]

On November 1, 1999, all cheerleaders signed an exculpatory document releasing the college from liability for future cheerleading injuries.[77] On

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70. According to Black's Law Dictionary, an exculpatory clause is "[a] contract clause which releases one of the parties from liability for his or her wrongful acts. A provision in a document from which protects a party from liability arising, in the main, from negligence, such clause is common in leases, contracts and trusts." BLACK'S LAW DICTIONARY, *supra* note 66, at 392.

71. No. 451217, 2005 Conn. Super. LEXIS 288, at *1 (Conn. Super. Ct. Jan. 28, 2005).

72. *Gonzalez*, 2005 Conn. Super. LEXIS 288, at *1.

73. *Id.* The college viewed the club as a voluntary, self-governing special interest club, not a sport. *Id.* at *5. There were no tryouts; any student could join. *Id.*

74. *Id.* at *10-11. Ms. Wilson knew that proper training was important because death or serious injury was a risk of cheerleading. *Id.* at *11. However, no safety classes were held and no written safety materials were provided to the cheerleading club. *Id.* at *11-12.

75. *Id.* at *9, 12.

76. *Id.* at *14.

77. *Id.* at *15.

November 16, 1999, Ms. Wilson introduced a new stunt called the "4-2-1" pyramid whereby two bases, two middle fliers and the plaintiff at the top, assisted by spotters, would all elevate into position together.[78] The first time the stunt was attempted, the plaintiff flipped backwards as she lost her balance.[79] Gonzalez landed "on the back of her head and then her stomach as her body flipped over. . . . The plaintiff suffered a broken neck and has been rendered a quadriplegic."[80] In spite of the signed exculpatory agreement, the plaintiff sued the University System of New Hampshire alleging negligence.[81]

Using contract theory, the defendants made a motion for summary judgment claiming that the exculpatory agreement barred the plaintiff's claim.[82] The Superior Court of Connecticut, Judicial District of New Haven, addressed several issues. The first was whether the exculpatory agreement signed by the plaintiff prior to her permanent injury barred her claim.[83] The *Gonzalez* court summarized the plaintiff's reasons for asserting that the signed exculpatory waiver was invalid:

> (1) the defendants cannot establish the absence of an issue of material fact as to the existence of a special relationship between herself and KSC, (2) the defendants cannot establish that there was no disparity of bargaining power between herself and KSC, (3) she did not understand the release, and (4) she was not provided with consideration for the release.[84]

Explaining New Hampshire law,[85] the *Gonzalez* court noted that in general, exculpatory contracts are against public policy in New Hampshire, and therefore, they are prohibited because of the imbalance of bargaining power between the parties.[86] The only way a defendant can avoid this

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78. *Id.* at *15-16.

79. *Id.* at *16-17.

80. *Id.* at *17.

81. *Id.* at *1. Keene State College is located in New Hampshire and is part of the University System of New Hampshire.

82. *Id.* at *3.

83. *Id.* at *17.

84. *Id.* at *20-21. Addressing the plaintiff's testimony that she did not understand the release form she signed, the *Gonzalez* court determined that Gonzalez' understanding had no bearing on the document's validity. *Id.* at *45. Briefly addressing the consideration issue, the *Gonzalez* court found that there was sufficient consideration for the signed release in permitting the plaintiff to continue to perform cheerleading stunts after the release was signed. *Id.* at *43.

85. The *Gonzalez* court noted that the parties agreed that New Hampshire law applied in this case since the injury occurred in New Hampshire. *Id.* at *3.

86. *Id.* at *18. In the case of *Wagenblast. v. Odessa Sch. Dist.,* the California Supreme Court adopted the following six factors which are now generally used to evaluate whether exculpatory

prohibition is to prove "that no special relationship existed between the parties and that there was no other disparity in bargaining power."[87] The *Gonzalez* court pointed out that New Hampshire has adopted the *Second Restatement of Torts*, § 314A, which establishes a special relationship on the basis of a "relation of dependence *or* of mutual dependence."[88] Therefore, as the *Gonzalez* court explained, New Hampshire law independently treats "mutuality" and "dependence" factors for the purposes of establishing a "special relationship" between the parties.[89] The *Gonzalez* court found that "there is little evidence of mutual dependency between the cheerleading club and KSC."[90] However, the *Gonzalez* court did identify factors that gave rise to the cheerleading club's dependency on KSC: (1) the club was permitted to use college space; (2) the club was entitled to receive college student activity funding; (3) KSC exerted control over the club through its advisor; (4) a minimum GPA was required to join the club; and (5) by admission the club's coach was acting as the college's agent.[91] The *Gonzalez* court concluded that

> there is sufficient evidence of dependency by the cheerleading club on KSC to give rise to a special relationship. The court cannot find as a matter of law that the defendants have met their burden of proving the absence of any genuine issue of fact with respect to the existence of a

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agreements violate public policy. 758 P.2d 968 (Wash. 1988). 1. The agreement involves an endeavor that is appropriate for public regulation. *Id.* at 972. 2. When seeking exculpation the party is providing a service of great public importance. *Id.* 3. The party seeking exculpation is willing to provide the public service to anyone who seeks it, or for anyone who meets established standards. *Id.* at 973. 4. The party seeking exculpation has superior bargaining power over any member of the public who wants to obtain the party's services. *Id.* 5. The party with the superior bargaining power now seeking exculpation presents a standardized adhesion exculpation contract to the weaker party and makes no provision for the weaker party to purchase protection against negligence at a reasonable fee. *Id.* 6. The weaker party who seeks such services must be brought under the control of the party providing the services and be subject to a risk of carelessness on the part of the party providing the service. *Id.*

87. *Gonzalez*, 2005 Conn. Super. LEXIS 288, at *18. The *Gonzalez* court noted that both parties relied on *Davidson v. University of North Carolina* in which a special relationship was found to exist because of mutual dependence. *Gonzalez,* 2005 Conn. Super. LEXIS 288, at *28 (citing Davidson v. University of North Carolina, 543 S.E.2d 920, 929 (N.C. Ct. App. 2001)). The *Gonzalez* court distinguished the case before it from *Davidson* with respect to what *Davidson* suggested is mutual dependence: required standards of conduct, membership recruitment, scholarships and acting as school ambassadors. *Gonzalez*, 2005 Conn. Super. LEXIS 288, at *36.

88. *Gonzalez*, 2005 Conn. Super. LEXIS 288, at *31-32. The Restatement provides examples of instances where a special relationship exists, including a common carrier and passenger, an innkeeper and guest, and a possessor of land and invitee. *Id.* at *18, n.7 (quoting *Restatement (Second) of Torts* § 314A).

89. *Gonzalez*, 2005 Conn. Super. LEXIS 288, at *32-37.

90. *Id.* at *37.

91. *Id.* at *34-35.

> special relationship . . . Therefore, there is a question of fact as to the validity of the release signed by the plaintiff.[92]

With respect to the issue of disparity of bargaining power between Gonzalez and KSC, the *Gonzalez* court determined that the university met the burden of proving no substantial disparity because "the plaintiff was under no physical or economic compulsion to sign the release" and because cheerleading was not "an essential service or activity."[93] However, the *Gonzalez* court disagreed with the plaintiff's assertion that public policy applies in this case. The *Gonzalez* court stated that signing an exculpatory agreement as a prerequisite to engaging in cheerleading activities is not against public policy because "cheerleading is not affected with a public interest."[94]

Ultimately, using the rules of strict construction, the *Gonzalez* court held that the release was invalid because the language in it was too general and did not specifically release the defendants from their own negligence.[95] Therefore, one could construe that with different language the exculpatory contract would be a good defense.

The defendant raised the express assumption of the risk defense in the *Gonzalez* case based on the executed exculpatory document signed by the plaintiff. The *Gonzalez* court explained that

> [s]ince the court has determined that there is a genuine issue of material fact as to whether a special relationship existed between the defendants and the plaintiff with respect to her status as a member of the cheerleading club, there is a question of fact as to the validity of the release and therefore, a question of fact as to whether the plaintiff expressly assumed the risk of being injured while performing the stunts in the cheerleading club.[96]

The primary implied assumption of the risk theory, "applies when a plaintiff voluntarily and reasonably enters into some relation with a defendant, which the plaintiff reasonably knows involves certain obvious risks such that a defendant has no duty to protect the plaintiff."[97] But before the *Gonzalez* court could apply the primary implied assumption of the risk theory, it had to

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92. *Id.* at *37.
93. *Id.* at *44.
94. *Id.*
95. *Id.* at *46.
96. *Id.* at *61.
97. *Id.* at *62.

determine what duty, if any, the defendants owed Ms. Gonzalez.[98] Relying on *Allen v. Dover Co-Recreational Softball League*,[99] the *Gonzalez* court stated:

> A defendant may be held liable to the plaintiff for [unreasonably] creating or countenancing risks other than risks inherent in the sport, *or for increasing inherent risks*, and in any event will be held liable for reckless [] or intentional [] injurious conduct totally outside the range of ordinary activity involved in the sport, but liability should not place unreasonable burdens on the free and vigorous participation in the sport. . . . A defendant, however, may not be held liable for negligent, or even reckless or intentional injurious conduct that is *not* outside the range of ordinary activity involved in the sport.[100]

The *Gonzalez* court found that falling from a pyramid and sustaining an injury was an inherent risk of cheerleading.[101] The court explained, "[w]hen the plaintiff voluntarily participated in cheerleading stunts such as a pyramid, a reasonable activity that she knew involved obvious risks such as falling, Wilson, and the defendants vicariously, had no duty to protect her against injury caused by those risks."[102] However, the *Gonzalez* court pointed out that the question remained "whether the defendants breached a duty to the plaintiff that increased these inherent risks."[103]

The *Gonzalez* court held that there was an issue of material fact with respect to whether the plaintiff assumed the risk of Ms. Wilson's negligence in failing to instruct the cheerleaders to attempt the pyramid using the proper progressions, a standard of care recognized among cheerleading coaches.[104] The *Gonzalez* court explained:

> A trier could reasonably infer that if the stunt group did not follow a proper progression before attempting the pyramid, such a failure could have been a legal cause of the plaintiff's fall and resulting injuries. If Wilson did not require the group to follow proper progressions, such a failure could have created an unreasonable risk that would increase the inherent risk that the plaintiff undertook.[105]

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98. *Id.* at *64.

99. 148 N.H. 407 (2002).

100. *Gonzalez,* 2005 Conn. Super. LEXIS 288, at *66-67 (quoting Allen v. Dover Co-Recreational Softball League, 148 N.H. 407, 407 (2002)).

101. *Id*, at *67-68.

102. *Id.* at *68.

103. *Id.*

104. *Id.* at *85.

105. *Id.*

Therefore, the *Gonzalez* court found that there was a question of fact as to negligence and furthermore, the court denied the defendants' motion for summary judgment.[106]

One of the earliest cases involving cheerleader injury and assumption of the risk is *Kirk v. Washington State University*[107] a 1987 case. In *Kirk*, the plaintiff, Kathleen Kirk, was injured during a cheerleading practice session on artificial turf while attempting a shoulder stand.[108] The faculty advisor was not present.[109] Kirk sued Washington State University (WSU), its Board of Regents, and the Associated Students of WSU for negligence.[110] The jury determined that the university owed a duty to Kirk and it breached that duty by failing to provide adequate training, supervision and coaching.[111] The trial court found that faculty members knew of the potential hazards of practicing on the artificial turf, yet failed to warn cheerleaders of the hardness of the surface or to provide safety padding.[112] Moreover, the trial court found that no written materials were provided regarding the proper way to perform partner stunts.[113] In response to the assumption of the risk defense raised by the defendants, the jury found that Kirk's own negligence caused twenty-seven percent of her injuries.[114] Consequently, the jury's award to the plaintiff was reduced by that amount.[115] Both parties appealed to the Supreme Court of Washington.[116]

The questions presented to the *Kirk* court were whether the trial court erred in rejecting instructions directing the jury to adopt the assumption of the risk defense as a complete bar to recovery, and whether the trial court erred in

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106. *Id.*

107. 746 P.2d 285 (Wash. 1987).

108. *Kirk*, 746 P.2d. at 287. Evidence in *Kirk* indicated that Washington State University viewed its cheerleaders as a form of public relations, and as an approved student activity at WSU, cheerleaders were responsible for performing at games, alumni functions, and promotional functions, as well as helping to raise funds for the university. *Id.* at 286.

109. *Id.* at 286.

110. *Id.*

111. *Id.* at 287.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

including the implied reasonable assumption of the risk doctrine in the jury instructions.[117]

Washington State argued that "they were entitled to have the jury instructed on assumption of risk as a complete bar to any recovery by the plaintiff because the injury occurred during the plaintiff's participation in an athletic activity."[118] The *Kirk* court disagreed stating that assumption of the risk acts to reduce recovery if the plaintiff knew of the risks and voluntarily encountered them.[119] But if the plaintiff's injuries arose from other risks created by the defendants, then the defendant's liability is based upon the percentage of fault that remains attributable to the defendants.[120] According to the *Kirk* court, assumption of the risk is used as a "damage-reducing factor" once negligence has been proven.[121] Therefore, the *Kirk* court held that the trial court was correct in rejecting a complete bar instruction.[122]

Kirk's position was that the assumption of the risk defense should not have been allowed to go to the jury at all.[123] Her appeal was based on the implied reasonable assumption of the risk theory.[124] Kirk contended that she assumed a risk, but her assumption was reasonable, and therefore, no assumption of the

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117. The Supreme Court of Washington in *Kirk* explained the distinctions between express and implied primary, implied unreasonable and implied reasonable assumptions of the risk. 746 P.2d at 288-89. Both express and implied primary assumptions of the risk involve consent whereby the former requires a bargained-for, express agreement and the latter requires no express agreement. *Id.* at 288. The same elements apply to both: (a) the plaintiff understood the existence and nature of the specific risk, and (b) the plaintiff voluntarily encountered the risk. *Id.* The *Kirk* court stated that implied unreasonable assumption of the risk is equivalent to contributory negligence. *Id.* at 289. According to the *Kirk* court, implied reasonable assumption of the risk means that the plaintiff had assumed a risk, but was acting reasonably at the time. *Id.*

Similarly, in the *Gonzalez* case, responding to the defendants' attempt to use the assumption of the risk defense to bar the plaintiff's claim of negligence, the *Gonzalez* court described three types of assumption of the risk: (1) express, (2) secondary implied and (3) primary implied. *Gonzalez,* 2005 Conn. Super. LEXIS 288, at *60-61. The first applies when the plaintiff consents to a defendant's negligence. *Id.* at *61. Secondary implied assumption of the risk applies when both parties have a duty of care to avoid risk of harm to the plaintiff and both breach that duty. *Id.* at *61-62. Since New Hampshire is a comparative negligence state, contributory negligence is no longer an absolute bar and therefore, is not applicable in the *Gonzalez* case. *Id.* at *62.

118. *Kirk,* 749 P.2d at 289.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 290.

123. *Id.*

124. *Id.* at 291.

risk instructions should have been given and her damages should not have been reduced.[125]

Responding to Kirk's argument, the *Kirk* court declared that the implied reasonable form of assumption of the risk may be a factor in jury deliberations because the voluntary element was still necessary to be proven in order to warrant an assumption of the risk instruction.[126] Further explaining implied reasonable assumption of the risk, the *Kirk* court stated that the voluntary element is defeated if the plaintiff has no reasonable alternatives available.[127] But when a plaintiff knows of a risk and voluntarily encounters it, the jury may consider the plaintiff's assumption of the risk conduct when determining the amount of the damage award.[128] The *Kirk* court held that the trial court did not err in including the implied reasonable assumption of the risk doctrine in the jury instructions and affirmed the trial court's decision.[129]

Another case favorable to the injured cheerleader is the case of *Davidson v. University of North Carolina at Chapel Hill*,[130] in which the first element of negligence, duty of care, is addressed. In 1984, Robin Davidson, a sophomore at the University of North Carolina at Chapel Hill (UNC) and a member of the university's junior varsity cheerleading squad, fell from a "two-one-chair" pyramid during a warm up prior to a basketball game.[131] Davidson typically did not participate in the pyramid, but was chosen to do so when two other female cheerleaders were injured while practicing the same pyramid.[132] Not only did the squad perform the stunt on inadequate matting, but they also did not have supervision present.[133] Falling backwards thirteen feet while attempting the stunt, Davidson hit her head and shoulders on the hardwood floor.[134] As a result of the fall, Davidson sustained serious injuries, including permanent brain damage.[135] In 1987, Davidson filed a claim against UNC

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125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 290.

130. 543 S.E.2d 920 (N.C. Ct. App. 2001).

131. *Davidson*, 543 S.E.2d at 921. The stunt involved male cheerleader A standing on the shoulders of two other male cheerleaders, B and C. Cheerleader D, a female, is lifted up to sit on the hand of one extended arm of cheerleader A. *Id.* at 922.

132. *Id.* at 922.

133. *Id.* The university provided no cheerleading coaches during the 1984-85 school year and no safety guidelines were provided. *Id.*

134. *Id.*

135. *Id.*

with the North Carolina Industrial Commission alleging negligence under the state Tort Claims Act[136]

Over ten years later, a 1998 hearing before Deputy Commissioner Richard Ford resulted in a ruling in favor of the plaintiff.[137] The university appealed to the Full Commission, which reversed Ford's decision and found that the university owed the plaintiff no duty of care, and because the university did not breach any legal duty owed to Davidson, they did not commit negligence. Therefore, Davidson had no remedy under the Tort Claims Act. [138] Davidson appealed to the Court of Appeals of North Carolina.[139]

The issue before the *Davidson* court was "whether a university has an affirmative duty of care toward a student athlete who is a member of a school-sponsored, intercollegiate team."[140] The *Davidson* court invoked two theories in reaching its conclusion, namely, the special relations theory and the voluntary undertakings theory. Addressing the first theory, the court stated that both affirmative acts and/or omissions may be considered when determining duty.[141] In cases where an omission is claimed, the *Davidson* court explained that negligence may arise from an existing "special relationship" between the plaintiff and defendant that impose a duty of care.[142] Special relationships exit where the plaintiff's welfare is under the control of the defendant who gains an economic advantage in the relationship.[143] The *Davidson* court explained, "when a school exerts significant control over

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136. *Id.* at 921.

137. *Id.* at 925.

138. *Id.*

139. *Id.* at 921.

140. *Id.* at 926. It is interesting to note the way in which the *Davidson* court framed the issue, which implies that cheerleaders are to be treated in the same manner as a student athlete. Prior to *Davidson*, courts generally have imposed upon universities a lesser duty of care owed to non-athlete students. *See* James J. Hefferan, Jr., Note, *Taking One for the Team: Davidson v. University of North Carolina and the Duty of Care Owed by Universities to Their Student-Athletes,* 37 WAKE FOREST L. REV. 589, 590 (2002). Some critics suggest that athletes need more protection. *Id.* at 590. Those who argue for a heightened duty of care for student athletes found support for that position in the *Davidson* case. However, there is still no bright line as to whether or not cheerleading is a sport.

141. *Davidson*, 543 S.E.2d at 926. The *Davidson* court listed the alleged omissions as follows:

> failure to train in safety techniques and cheerleading skills; failure to provide a coach or supervisor; failure to provide safety equipment (including but not limited to mats); failure to evaluate the skill level of the squad members each year to determine the stunts to be performed; failure to evaluate the physical condition of the squad members before practices and games; failure to institute cheerleading guidelines; and failure to specifically prohibit pyramids above a certain height.

Id. at 928.

142. *Id.* at 926.

143. *Id.* at 926-27.

students as a result of their participation in a school-sponsored athletic activity, the students may have higher expectations with regard to the protection they will receive from the school."[144] It would be reasonable, therefore, that a student would assume that an activity is safe in the absence of any warning from the school to the contrary.[145]

The *Davidson* court held that there was a special relationship between UNC and its cheerleaders based upon mutual benefits and the significant degree of control UNC had over its cheerleaders.[146] Having established a special relationship between the parties, the *Davidson* court also held that the "defendant and its employees had an affirmative duty to exercise that degree of care which a reasonable and prudent person would exercise under the same or similar circumstances."[147]

Turning to the voluntary undertakings theory, the *Davidson* court noted that UNC admitted it was responsible for teaching cheerleaders about safety and in fact, voluntarily undertook to instruct varsity cheerleaders about safety and provided a coach for varsity cheerleaders.[148] Applying the voluntary undertakings theory independent of the special relations theory, the *Davidson* court held that a duty of care existed between the parties.[149] Consequently, the Court of Appeals of North Carolina reversed the decision of the Commission and remanded the case to consider all the elements of negligence and corresponding defenses.[150]

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144. *Id.* at 927. *See also* Hefferan, *supra* note 140, at 593.

145. *Davidson*, 543 S.E.2d at 927.

146. *Id.* Focusing on mutual benefits, the *Davidson* court pointed out that UNC acquired benefits from its cheerleaders, such as providing organized cheering at basketball and wrestling events, representing UNC at trade shows, entertaining benefactors, and acting as ambassadors for the university at athletic events. *Id.* The *Davidson* court also noted that the cheerleaders received the benefit of school-provided uniforms, transportation and equipment and one hour of physical education credit. *Id.* Moreover, the *Davidson* court explained that UNC required cheerleaders to adhere to a specific standard of conduct, to refrain from drinking in public, and to maintain a minimum required grade point average. *Id.*

147. *Id.* at 928. The *Davidson* court narrowly tailored its holding by stating that it applies to plaintiffs who sustain injuries "while practicing as part of a school-sponsored, intercollegiate team" and not to every student in general. *Id.* Colleges and universities are not expected to be guarantors of safety against any and all harm, but they are required to protect against harm which is unreasonable. *Id.*

148. *Id.* at 929.

149. *Id.* at 930.

150. *Id.* The most common defenses in such cases include: consent, comparative negligence, contributory negligence, assumption of risk, and governmental immunity. *See* BRUCE B. HRONEK & JOHN O. SPENGLER, LEGAL LIABILITY IN RECREATION AND SPORTS 65 (2d ed. 2002).

In each of the three cases, *Kirk, Gonzalez* and *Davidson*, exculpatory agreements, duty of care and assumption of the risk were the primary areas of concern. Following the rules of strict construction, the exculpatory clause in the *Gonzalez* case was not enforceable because it was too general. However, new and different language in future exculpatory clauses may prove to be a good defense in subsequent cases. When special relationships exist between the cheerleaders and universities due to dependence or mutual dependence, duty of care may be created, as demonstrated in *Gonzalez* and *Davidson*. In each of the cases, assumption of the risk was not a complete bar to recovery, particularly in *Gonzalez* where the defendant unreasonably created or increased the risk of harm. Rather the defense was used as a damage reducing factor in *Kirk*, *Gonzalez* and *Davidson*. Thus, these cases, although favoring the plaintiff, did not rule out the use of exculpatory agreements and the assumption of the risk as appropriate defenses in cheerleading negligence cases against universities.

B. Cases Favoring Universities

In contrast to *Davidson*, the Court of Appeal of Louisiana, Third Circuit took a *laissez faire* approach when applying the special relationship theory in *Fisher v. Northwestern State University.*[151] In *Fisher*, the plaintiff, Jennifer Fisher, a cheerleader at Northwestern, filed a negligence claim after breaking

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Contributory negligence is defined as "[t]he act or omission amounting to want of ordinary care on part [*sic*] of complaining party, which, concurring with defendant's negligence, is proximate cause of injury." *See* BLACK'S LAW DICTIONARY, *supra* note 66, at 716. In some states, contributory negligence is a complete bar against recovery for the plaintiff. *See* Doyice J. Cotten, *Defenses against Liability, in* LAW FOR RECREATION AND SPORT MANAGERS 80-81 (Doyice J. Cotten & John T. Wolohan eds., 3d ed. 2003).

According to *Black's Law Dictionary*, "[u]nder comparative negligence statutes or doctrines, negligence is measured in terms of percentage, and any damages allowed shall be diminished in proportion to amount of negligence attributable to the person for whose injury, damage or death recovery is sought." BLACK'S LAW DICTIONARY, *supra* note 66, at 193. In a pure comparative negligence state, each party is liable for their own percentage of fault. *See* DAVID P. TWOMEY & MARIANNE MOODY JENNINGS, BUSINESS LAW: PRINCIPLES FOR TODAY'S COMMERCIAL ENVIRONMENT 199 (2004). But in a modified comparative negligence state, the defendant's fault must exceed fifty percent before the plaintiff can recover. *Id.* States recognize different defensive schemes when recognizing negligence. *See* BRUCE B. HRONEK & JOHN O. SPENGLER, LEGAL LIABILITY IN RECREATION AND SPORTS 65.

Specifically upon remand, the *Davidson* court directs the lower court to "make findings and conclusions as to proximate cause, contributory negligence, assumption of risk, and whether any omission by defendant constituted willful and wanton conduct." *Davidson*, 543 S.E.2d at 930.

151. 624 So. 2d 1308 (La. Ct. App. 1993).

her ankle when falling from an attempted "cupie" stunt.[152] The trial court found fault with both parties, assessing 35% to Fisher and 65% to Northwestern.[153] The defendant appealed to the Court of Appeal of Louisiana, Third Circuit.[154]

The issue in *Fisher* was whether Northwestern owed a duty of care to its cheerleading squad to provide adult supervision to monitor the squad's activities.[155] The *Fisher* court recognized the special relationship between Northwestern and its cheerleaders but found that this relationship required only that the university provide supervision that was "reasonable and commensurate with the age of the student and the attendant circumstances."[156] The *Fisher* court noted that the plaintiff was as experienced and trained as any college freshman cheerleader and she was aware of the risk of danger in the activity.[157] Moreover, the *Fisher* court stated that participation on the squad was voluntary and part of the educational experience of such participation was the autonomy of deciding what stunts to perform.[158] Furthermore, the plaintiff had attended summer safety training camps and spotters were used during the attempted stunt.[159] The *Fisher* court concluded that adding one more adult "would not have added any additional precautions other than those that were already in place. . . . They were young adults who had been instructed on the proper safety techniques."[160] Holding that Northwestern did not owe a duty to its cheerleaders to provide adult supervision to monitor cheerleading activities,

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152. *Fisher*, 624 So. 2d at 1308. The two-person stunt required the bottom male cheerleader to use both arms to extend the female cheerleader above his head in an upright position and then to transfer and balance both of the female cheerleader's feet on one hand while letting go with the other hand. *Id.*

153. *Id.* at 1309. Commenting on the comparative negligence defense, the *Fisher* court determined that a comparative negligence theory was inappropriate in this case. *Id.* at 1309-10. The *Fisher* court stated, "In view of the trial court's finding of fact and Jennifer's theory of liability, it is inconsistent to hold Jennifer responsible for her share of the fault, but Northwestern responsible for Scott's. Northwestern should have been held responsible for the entire damages, or none at all." *Id.* at 1310. Scott Simmons was Jennifer Fisher's cheerleading "cupie" stunt partner at the time of her fall. *Id.* at 1308.

154. *Id.* at 1308.

155. *Id.* at 1309. Ms. Fisher's position is that Northwestern violated its duty of care by failing to provide an adult supervisor. *Id.* She believes that had a supervisor been present, the cheerleaders would have been warned not to attempt a stunt that was beyond their skill to successfully perform. *Id.* at 1309-10.

156. *Id.* at 1311.

157. *Id.* at 1309.

158. *Id.*

159. *Id.*

160. *Id.*

the *Fisher* court reversed the decision of the Ninth Judicial Court, Parish of Rapides and dismissed the case.[161]

Although the *Davidson* and *Fisher* cases contain similar facts, the *Davidson* court reached the opposite conclusion to that in *Fisher*.[162] Both cases found that a special relationship existed between the universities and the cheerleaders, but only the *Davidson* court found that such a relationship gave rise to a duty of care owed to its cheerleaders.

Another recent case involving a negligence claim for injury to a cheerleader and specifically addressing the duty of care and assumption of the risk issues, is *Vistad v. Board of Regents of the University of Minnesota*.[163] In *Vistad*, Alysia Vistad, a cheerleader at the University of Minnesota, suffered a cervical spine fracture from a fall while practicing a pyramid stunt.[164] The cheerleading squad no longer had a coach and was unsupervised at the time of the fall.[165] Cheerleaders at the University of Minnesota are considered to be a registered student organization that does not generate income for the university.[166] However, the university does provide cheerleaders with uniforms, travel expenses and practice facilities.[167] Expressing concern, the assistant athletic trainer pointed out the inherent dangers of performing stunts to university officials, yet no safety guidelines were adopted.[168] In May 2003, Vistad sued the university on negligence grounds.[169] Asserting that it had no duty of care to protect cheerleaders, the university moved for summary judgment.[170] The district court granted summary judgment in favor of the university finding that Vistad had no special relationship with the university and that she assumed the risk when choosing to perform the stunt.[171] Vistad appealed to the Court of Appeals of Minnesota.[172]

The issue before the Court of Appeals was whether the University of Minnesota had a duty of care, as a matter of law, to protect Ms. Vistad based

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161. *Id.* at 1311.
162. *See* Hefferan, *supra* note 140, at 615.
163. No. A04-2161, 2005 Minn. App. Unpub. LEXIS 37, at *1 (Minn. Ct. App. June 28, 2005).
164. *Vistad*, 2005 Minn. App. Unpub. LEXIS 37, at *2.
165. *Id.*
166. *Id.*
167. *Id.* at *3.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.* at *1.
172. *Id.* at *4.

upon the existence of a special relationship between her and the university.[173] The *Vistad* court explicitly stated that a duty to protect the plaintiff did not exist in the absence of a special relationship.[174] According to the *Vistad* court, a special relationship arises when one is "deprived of ordinary opportunities for self-protection."[175]

Reviewing persuasive authority, the *Vistad* court noted that courts are split with respect to whether a special relationship exists between student athletes and a university.[176] The *Vistad* court explained that for a special relationship to exist in Minnesota, the "relevant factors include whether the plaintiff was vulnerable or expected some form of protection, and whether the defendant receives pecuniary gain or has some control over the plaintiff's welfare."[177] Because the University of Minnesota provided no coach, did not make a profit on cheerleading activities, and exerted little control over the squad, the *Vistad* court found that the university was not in a position to protect the plaintiff.[178] Moreover, the university, under the circumstances, could not be expected to protect Vistad from harm.[179] Therefore, the *Vistad* court held that no special relationship existed between Vistad and UMD and thus, no duty was owed the plaintiff as a matter of law.[180]

Another issue before the *Vistad* court was whether Vistad's conduct constituted primary assumption of the risk that would negate any duty the

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173. *Id.* at *5.

174. *Id.* at *5. In Minnesota, a two-prong test is used to determine whether a special relationship exists: "(1) the defendant is in a position to protect the plaintiff from harm and (2) the harm is one from which the defendant would be expected to protect others." *Id.*

175. *Id.* at *6.

176. *Id.* at *8-9. The *Vistad* court distinguishes the case at bar from the cases Vistad cites where a special relationship did exist between the students and the various schools. *Id.* at *6 n.1. *See Davidson*, 543 S.E. 2d at 922, and *Kleinknecht*, 989 F.2d 1360 (holding that a special relationship exists between a student athlete and a university). For cases holding that no special relationship exists, *see* Orr v. Brigham Young Univ., 960 F. Supp. 1522, 1526-28 (D. Utah 1994); Swanson v. Wabash C., 504 N.E.2d 327, 330-31 (Ind. Ct. App. 1987); & *Fisher*, 624 So.2d at 1309.

177. *Vistad*, 2005 Minn. App. Unpub. LEXIS 37, at *9. According to the *Vistad* court, *in loco parentis* establishes a greater duty based on a special relationship with schools and minor students, but not with adult students at the college level. *Id.* at *13. *In loco parentis* is defined as follows:

> In the place of a parent; instead of a parent; charged, factitiously, with a parent's rights, duties, and responsibilities. 'Loco parentis' exists when person undertakes care and control of another in absence of such supervision by latter's natural parents and in absence of formal legal approval, and is temporary in character and is not to be likened to an adoption which is permanent.

BLACK'S LAW DICTIONARY, *supra* note 66, at 542.

178. *Vistad*, 2005 Minn. App. Unpub. LEXIS 37, at *10

179. *Id.*

180. *Id.* at *11.

University of Minnesota may have had to protect her.[181] Explaining Minnesota law, the *Vistad* court stated that primary assumption of the risk occurs when a person voluntarily engages in a risky activity with full knowledge of the risk inherent in that activity.[182] When a plaintiff assumes the risk, the *Vistad* court explained, the defendant's duty of care is negated, unless the defendant caused risks that went beyond the inherent dangers of the sport.[183] The *Vistad* court pointed out that by her own testimony the plaintiff admitted that she knew of the risks and failed to refuse to perform the stunt.[184] Declaring that unsupervised cheerleading practice did not create an unexpected hazard,[185] the *Vistad* court stated, "[b]ecause Vistad knew of the risks inherent in performing the stunt and participated in the stunt rather than avoiding it, the district court correctly held as a matter of law that Vistad had undertaken a primary assumption of the risk."[186] Consequently, the *Vistad* court held that the university owed no duty of care to Ms. Vistad because no special relationship existed and because she assumed the risk inherent in the pyramid stunt without additional dangers being caused by the university.[187]

Another case that focuses primarily on the assumption of the risk defense is the case of *Rendine v. St. John's University*.[188] In 2001, Susan Rendine, a cheerleader at St. John's University, was injured in a fall while attempting to perform a "liberty stunt."[189] The stunt required her to stand on one leg on the joined hands of her male partner as he extended his arms over his head.[190] The plaintiff claimed she asked her coach for a spotter, but the defendant denied that the request was made.[191] In reaching its decision, the *Rendine* court drew upon the American Association of Cheerleading Coaches and Advisors guidelines, which required spotters for high school cheerleaders, but not college cheerleaders when performing the liberty stunt.[192] In a one-page opinion, the *Rendine* court stated, "[u]nder the circumstances, the plaintiff assumed the risks of the sport in which she voluntarily engaged including the

181. *Id.*
182. *Id.* at *12.
183. *Id.* at *13.
184. *Id.* at *12-13.
185. *Id.* at *14.
186. *Id.*
187. *Id.*
188. 735 N.Y.S.2d 173 (N.Y. App. Div. 2001).
189. *Rendine*, 735 N.Y.S.2d at 174.
190. *Id.*
191. *Id.*
192. *Id.*

obvious risk that she might fall onto the floor while she and her partner were performing the stunt."[193]

Therefore, the *Rendine* court held that the plaintiff's injury was not a result of a breach of duty of care on the part of St. John's University as a matter of law.[194]

The outcomes in *Fisher*, *Vistad* and *Rendine* provide some guidance, but still there is no uniform bright line as to what duty a university owes a cheerleader, particularly when contrasted with *Davidson*. No duty was found because no special relationship existed and the plaintiff assumed the risk in *Vistad*. The special relationship found in *Fisher* did not create a duty because that relationship only required reasonable supervision based on the age and experience of the participants. In *Rendine,* assumption of the risk resulted in no breach of duty as a matter of law. Assumption of the risk was used successfully as a complete bar to recovery only in *Fisher*. In the other cases assumption of risk was used to reduce the amount awarded the plaintiff.

V. IMPLICATIONS FOR COACHES & UNIVERSITIES

Based on the preceding discussion, three main implications come to the forefront for consideration by university administrators. The first implication is the determination of how cheerleading programs on campuses will be organized. The second implication deals with the degree of control the university exerts over cheerleaders' behavior through policies and procedures. The third implication concerns the exculpatory agreement and how that agreement is administered to students wishing to participate in college cheerleading. The remainder of part V discusses these implications.

A. Campus Organization of Cheerleading

How a cheerleading program is organized has bearing on establishing a duty of care. Analysis of the cases involving injuries to college cheerleaders shows that university administrators must be aware of any factors that may constitute a special relationship between the university and its cheerleaders. The *Fisher* court and the *Davidson* court found a special relationship while the *Vistad* court did not. Mutual benefit to both parties and the degree of control universities exerted over cheerleader behavior are keys to courts finding the existence of a special relationship.[195]

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193. *Id.*

194. *Id.*

195. For discussion of mutual benefit, *see supra* note 146.

Principles from the cases suggest that universities may manage the risk of liability in an all or nothing manner. Universities may take a hands-off approach by providing nothing other than the opportunity for students to organize cheerleading as a recreational club activity.[196] Or they may take a full service approach by organizing cheerleading more like an athletic team providing coaches, safety training and regulating cheerleader behavior.[197] Between the two extremes is the middle ground described in the *Davidson* case in which a special relationship imposed a duty of care based on mutual benefits and the fact that the university established policies to control cheerleader behavior, while voluntarily undertaking to provide a coach and to adopt safety standards for varsity cheerleaders, but not for junior varsity cheerleaders. The ways in which cheerleading programs are organized may also subject universities to higher probabilities of liability when universities intentionally or recklessly create risks outside the ordinary activity or increase inherent risks associated with cheerleading, both of which defeats the assumption of risk defense.

University administrators may use assumption of risk as a possible defense for cheerleader injuries caused by risks inherent to the activity of cheerleading, as *Kirk*, *Vistad* and *Gonzalez* illustrate. Falling off a pyramid and sustaining an injury is an example of an inherent risk in college cheerleading.[198] By instructing cheerleaders about the inherent risks of cheerleading and documenting the fact that students are knowingly and voluntarily accepting those risks, coaches and administrators may be able to limit their liability. However, coaches and administrators are on notice that increasing risks inherent to cheerleading may result in liability. The cases analyzed appear to show that assumption of the risk can provide a measure of protection for universities by at least reducing the amount awarded to the plaintiff in cases of cheerleader injury.

B. Control and Supervision of Cheerleading

Control and supervision is a second area of consideration once a duty of care is established by a special relationship. The *Fisher* court found that although a special relationship existed between the parties, the university had

196. At the University of Minnesota at the Duluth campus where Ms. Vistad attended, cheerleading was considered a student club activity. *Vistad*, 2005 Minn. App. Unpub. LEXIS 37, at *2.

197. The University of Maryland is an example of the other extreme where cheerleading is treated as a varsity sport. *See* Roenigk, *supra* note 22.

198. *Gonzalez*, 2005 Conn. Super. LEXIS 288, at *1.

no duty to provide adult supervision.[199] The nature of the participants and nature of the activity are two factors used in determining the number and quality of the supervisors necessary to meet the standard of care.[200] Factors considered in reaching this decision included age, knowledge of cheerleading, safety training and experience level. One could construe from the *Fisher* case that generally, the more mature and experienced the participants, the less supervision is required.[201] On the other hand, the *Gonzalez* case suggests that the more dangerous the activity, the more specific supervision is needed.[202] Providing qualified supervisors is especially difficult at universities where cheerleading is a student organization rather than a university team, or where the cheerleading club is a student organization with an advisor rather than a coach.[203] One way to improve the quality of supervision and to protect cheerleading coaches or advisors is for all parties to take a safety training course, such as the one provided by the AACCA.[204]

Universities may also protect coaches and advisors by purchasing liability insurance.[205] Universities may include a cheerleading squad in their NCAA catastrophic insurance program provided the coach or advisor has passed the AACCA Safety Certification Course.[206] This insurance coverage is not available for teams supervised by an undergraduate student or member of the squad who also acts as a coach.[207] This policy seems to create a financial incentive for universities to provide qualified coaches or advisors for cheerleading squads. A separate catastrophic insurance policy is needed to cover cheerleaders at camps and competitions and is available through the organization governing those events.[208]

Administrators may seek to reduce the risk of cheerleading injuries by regulating the activity of cheerleading through policies and procedures adopted on their campuses. Responding to increased rates and severity of

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199. *Fisher*, 624 So. 2d at 1311.

200. *See* Lynne P. Gaskin, *Supervision of Participants, in* LAW FOR RECREATION AND SPORT MANAGERS 138-44 (Doyice J. Cotten & John T. Wolohan eds., 3d ed. 2003).

201. *Fisher*, 624 So. 2d at 1311.

202. *Gonzalez*, 2005 Conn. Super. LEXIS 288, at *1.

203. Nick White, *Taking One For The Team: Should Colleges Be Liable For Injuries Occurring During Student Participation In Club Sports?* 7 VANDERBILT J OF ENT. L & PRAC. 193 (2005).

204. *See* Copeland, *supra* note 30.

205. *Id.*

206. *Id.*

207. Kam Sripada, *Policy Change Keeps Brown U. Cheerleaders 'Ground-Bound' This Season.* BROWN DAILY HERALD, Nov. 6, 2006, at 1.

208. *See* Copeland, *supra* note 30.

cheerleading injuries, institutions have established policies prohibiting specific cheerleading stunts. Decisions to abolish certain cheerleading stunts have been controversial.[209] Some politicians, administrators and others view particular stunts as unduly risky.[210] Some cheerleaders, however, view the prohibition as unfair to participants because without experience in certain stunts, cheerleaders cannot compete for college scholarships or win national events.[211] States, conferences, and the AACCA have already taken action to limit some stunts; therefore, coaches and administrators on the campus level would be wise to follow their lead.

C. Exculpatory Agreements for Cheerleading

A third implication resulting from the cases is the development of exculpatory agreements. Many institutions require that all participants in cheerleading sign exculpatory agreements.[212] Exculpatory agreements or releases of liability are instruments designed to protect the University and its employees from legal liability for injuries that may occur to students or other individuals who participate in both voluntary and required activities on and off campus, including cheerleading.[213] The *Gonzalaz* case illustrates how important it is to have clear, precise and well-written exculpatory clauses, since those that are vague may not protect from liability for negligence.[214] Coaches or advisors, who are likely to be the university employees responsible for administering exculpatory agreements, should seek legal advice regarding the language to use in drafting such agreements.

Some progress has been made to improve safety and reduce risks for collegiate cheerleaders. Yet unresolved issues remain, including the

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209. *See* Suhr *supra* note 1, at 1.

210. *See* Hutchinson, *supra* note 5, at 83.

211. *Id.*

212. *See e.g.,* Ohio University, *Cheerleading: Policies & Commitment*, *available at* http://graphics.fansonly.com/photos/schools/ohio/genrel/auto_pdf/cheer-policies.pdf (last visited Jan. 12, 2007).

> Ohio University requires cheerleaders to initial the following statement: "I hereby release Ohio University, their employees, designees and/or agents from any liability arising out of the Ohio University Cheerleading Practices and/or performances during the school year. I am also aware that my participation may subject me to minor, serious, permanent, or catastrophic injuries." *Id.*

213. *See* BLACK'S LAW DICTIONARY, *supra* note 70.

214. *Gonzalez*, 2005 Conn. Super LEXIS 288, *1. Cotten's research has found that a "well-written properly administered waiver, voluntarily signed by an adult affords protection from liability for ordinary negligence" in at least forty-five states. Doyice J. Cotten, *Waivers and Releases, in* LAW FOR RECREATION AND SPORT MANAGERS 105-113 (Doyice J. Cotten & John T. Wolohan eds., 3d ed. 2003).

governance of cheerleaders at the university level, supervision of cheerleader squads, construction and application of exculpatory agreements and policies regulating the activity of cheerleading. University administrators are likely to continue to face the issue of liability for cheerleading injuries in coming years.

VI. SUMMARY

Over the past one hundred years, cheerleading has become one of the most popular sports among female athletes, because it allows them to combine other sports—dancing and gymnastics—with basic cheerleading activities such as sideline cheers and stunts to create a competitive collegiate activity. As popularity increases, colleges and universities are faced with greater liability risks associated with increased difficulty levels of stunts performed by college cheerleaders.

With more students participating and more dangerous stunts being performed, the number of injuries is also increasing. From 1994 to 2002, the number of emergency room visits increased over 40% and cheerleading (both high school and college) accounted for 57% of the direct fatalities and catastrophic injuries among female athletes.[215]

Though safety guidelines have been established for cheerleading, not all colleges and universities follow them. This failure to follow established safety guidelines increases the possibility of legal action taken against a college or university when cheerleaders are injured due to unsafe practices. Negligence has been a common claim in lawsuits filed against colleges and universities when their cheerleaders are injured while participating in school related activities. The outcomes of these court cases have varied depending upon the courts' interpretation of (1) a special relationship and whether it creates a duty of care, (2) the use of exculpatory clauses, and (3) the application of the assumption of the risk defense. Successful assumption of the risk defenses occur when plaintiffs know of the risks and voluntarily assume the risks that are inherent and within the range of ordinary cheerleading activities. When they are properly administered, exculpatory agreements may provide some protection by reducing the plaintiffs' awards, but universities may still be liable in comparative negligence states. As is often the case, the best approach is to avoid the injuries before they happen by providing high quality supervision and written policies governing cheerleading activities.

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215. Cantu & Mueller, *supra* note 45, at 47.

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