Learning from the Past: An Analysis of Case Law Impacting Campus Recreational Sport Programs

SARAH K. FIELDS
Ohio State University

&

SARAH J. YOUNG
Indiana University

Americans love sport! From age six years all the way to active adults in their retirement, people participate in sport. The Sporting Goods Manufacturers Association (2007) sports participation in America report stated over three-fourths of Americans participate either occasionally or frequently in sports, fitness and outdoor activities. On United States (U.S.) college campuses, student participation in recreational sport activities is equally popular.The National Intramural-Recreational Sports Association (NIRSA) estimates that 11 million college students use recreational facilities annually, more than 1.1 million intramural contests occur, and more than 2 million college students play clubs sports (NIRSA, 2007). Additionally, an estimated $1.5 billion has been appropriated or expended to renovate or build new campus recreational facilities (NIRSA, 2007). The participation numbers are staggering, and because of the importance of recreational facilities and the programs that occur there, universities and colleges spend vast sums on them.

One byproduct of the large numbers of participants and the large sums of money involved in facilities and programs is the risk of lawsuits against the college or university because of some aspect of its campus recreation program. Risk management in campus recreational sport programs has long been a topic of discussion in scholarly journals (Cooper, 1997; Mulrooney & Green, 1997; Mulrooney, Styles & Green, 2002) and a focus of research (Young & Jamieson, 1999; Young & Ross, 2000). Mulrooney and Styles (2005) found risk management practices in campus recreational sport programs have advanced since the 1990s and that the administrators responsible for these programs are very aware of importance of good risk management practices. Yet, the findings of a study by Young, Fields, and Powell (2007) revealed that directors of campus recreation programs worry frequently about issues related to tort law. Like other settings providing sport programs, lawsuits occur in

campus recreational sports. What can be learned from the case law occurring in campus recreation? Are there legal principles or theories that can provide guidance to campus administrators resulting in a reduction of litigation in this setting? What types of cases occur most frequently in campus recreational sport programs? Is there a high volume of cases? Is there a specific area of law that impacts campus recreation programs more than others? In an attempt to answer these questions, a content analysis of case law involving campus recreational sports from 1979-2009 was completed.

The purpose of this article is: (1) to describe lawsuits affecting campus recreation programs published over the last 30 years; (2) to analyze and describe the trends in the lawsuits to determine the areas of law where campus recreation programs seem most vulnerable; and (3) to share implications of what can be learned from these lawsuits with school administrators. The results of this study can help establish the legal trends and variances of the application of law in campus recreation programs in the United States.

METHOD

The authors searched the legal databases of Westlaw and Lexis-Nexis and found 51 published decisions since 1979 involving campus recreation programs in the United States (see Appendix A). To be sure all appropriate cases were captured, multiple search terms were used. In both databases search terms included "recreation intramural club /p sport /p college university," "college or university and 'campus recreation,'" and "recreation /p college university." Note that connectors varied to meet database requirements. Next, all cases were read to determine if they met the criteria for inclusion in the study, that the facts of the case fell under the purview and control of the campus recreation department. Lawsuits involving intercollegiate varsity athletes, coaches, camps, and facilities were only included if the facts of the lawsuit directly involved the campus recreation program as well. A case was counted only once, regardless of the number of times it was published during the various stages of appeal; however, if a lower court was overruled, then only the appellate holding was evaluated.

Determining exactly the number of lawsuits that have been filed against campus recreation programs is, unfortunately, impossible. Large numbers of lawsuits are filed and then they are dropped either by the participants or dismissed by the courts. Furthermore, of the lawsuits that do go to trial, only a fraction of the decisions are published. This study limited itself to studying cases which were available through Lexis-Nexis and Westlaw, and, therefore, it is under-representative of the number of lawsuits actually filed and even of

the number of lawsuits resolved at the trial court level. That disclaimer aside, exploring the areas of law in which decisions have been published can give a broad idea of the most significant legal issues facing campus recreation programs today

Case Law Analysis

The search of cases revealed a total of 51 cases since 1979. Of these cases, the most frequently occurring involved tort law (n=32, 62.7%). The 32 tort claims fell into several different subtypes of which the largest number (n=26, 51% of all cases, or 81.3% of all tort cases) involved personal injury. The second largest category of cases involved employment law with cases involving discrimination (n=4, 7.84% of all cases) and constitutional issues (n=3, 5.88% of all cases). Four cases dealt with tax issues, three cases involved criminal charges, and two cases were about property zoning. Three cases involved a variety of issues and were placed in a miscellaneous category.

Of the states where the cases originated, New York had eight, followed by Illinois with five, and both California and Connecticut with four. In terms of volume, cases were found to be most prevalent in 2000-2009 and in 1980-1989 with totals of 18 cases in both decades. Based upon the cases found in this study, seven cases occurred in 2003 followed by four cases occurring in 1989. What follows is an analysis of the tort law occurring in campus recreation programs over the past 30 years.

The rationale for focusing only upon tort lawsuits is three-fold and allude to the impact that tort law cases can have upon the sustainability of a campus recreation program. First, nearly two-thirds (62.7%) of the cases found in this study were tort law cases making this an area of law that campus administrators must confront. Second, tort lawsuits can be exceedingly time consuming and expensive in terms of legal fees and judgments. Third and finally, the negative publicity from tort lawsuits, for both the campus recreation program and its institution, can be overwhelming.

Campus recreation departments have varied responsibilities; however, large programs are typically responsible for supervising or minimally organizing intramural sport programs, club sports, instructional sport classes, as well as monitoring and maintaining recreational space for the campus community (e.g., gymnasiums, rock climbing walls, and aquatic centers) recognized by Mull, Bayless, and Jamieson (2005) as informal sport. The result of offering these programs and participation in them can be physical injuries. Not surprisingly, most of the published lawsuits over the last three decades centered on personal injury tort claims. Because of the breadth of the

case law and the scope of the responsibilities of the campus recreation program, these tort law cases are broken down by the area of programming most commonly provided by campus recreation (i.e., intramural, club, instructional, and informal sports).

Intramural Sports

Intramural sports are traditionally the responsibility of campus recreation departments. Many institutions laud their intramural programs as enhancing student life (Astin, 1984; 1993; Kuh, 1995; Pascerella & Terenzini, 2005), with large numbers of students participating. Campus recreation departments usually organize and supervise intramural events, providing schedules, facilities, equipment, and officials. Although a number of lawsuits reached the appellate court level involving intramural sports, the majority resulted in holdings favorable to the institution, not the injured plaintiff.

Field conditions were a frequent complaint involving intramural sports, yet in two of the three cases illustrating this complaint, the institutions were absolved of liability. In two of the cases the defendant institutions argued the student plaintiffs had assumed the risk of participating in intramurals and that risk included the field conditions. In the first case (*Breheny v. Catholic University of America*, 1989) the student, who broke her leg slipping on a wet and muddy field playing flag football, lost her argument when she stated she had no idea of the risk of playing in such conditions and that the school was negligent in not postponing the game. The court noted that she was not a child (i.e., she was of legal age), that she was not coerced into playing, and that her own testimony indicated she had concerns about the safety of the field prior to the game. Therefore, because she did go ahead and play, she assumed the risk of participating in the game under the field conditions (*Breheny*, 1989, p. *20). Similarly, the Court of Appeals of New York concluded that the defendant university was not negligent in providing a soccer field as the setting for a softball game. The plaintiff was injured running into an unmarked drainage ditch at the bottom of a slope at the side of the field while he was trying to catch a foul ball. The court ruled that the ditch was a necessary part of the sports field and that it was not an inherently dangerous condition of which the plaintiff could not have been aware (*Scaduto v. New York*, 1982, p. 530).

Cases involving field conditions did not always result favorably for defendant institutions. In *Henig v. Hofstra University* (1990) the plaintiff argued that the university had negligently provided an uneven intramural field with various holes for his flag football game. The appellate court ruled that it was a matter of fact for the jury to decide whether or not the condition of the

field was typical of flag football games, and therefore whether or not the plaintiff could have reasonably foreseen the conditions and the potential for injury (*Henig*, 1990, p. 481).

Another type of case found in intramural sports involved player-to-player injuries during the game. In the three cases of this type, the respective institutions won using three different defense strategies. A player who was hurt by a slide tackle during a soccer game was ruled to have assumed the risk of playing soccer (*Nganga v. College of Wooster*, 1989); in the second case, the school had no duty to the plaintiff who was injured during a fight that broke out during an intramural soccer game (*Ochoa v. California State University, Sacramento*, 1999), and in the third case, state law prohibited the player who was injured during an ice hockey game by an illegal check into the boards from bringing suit anywhere except the state Court of Claims (*Rembis v. Board of Trustees of the University of Illinois*, 1993).

Analysis. In five of the six cases involving intramural sports, the appellate courts ruled in favor of the institution. Although clearly the institution has a duty to maintain reasonably safe fields or playing conditions, the courts have noted that the college students playing on these fields are adults who voluntarily choose to play. As adults who are not coerced into intramural competitions, the schools do not have any duty beyond providing reasonable, but not necessarily perfect, playing surfaces for intramural sport activities. Further, for those students injured from player-to-player contact during the course of intramural contests, the courts have consistently shielded the institution from liability. Players assume the risk for injuries inherent to the sport activity, and schools are not obligated to protect athletes from fights beyond the game. Finally, sometimes institutions of higher education seek immunity from lawsuits under state laws. The most common state statutes providing immunity include sovereign/governmental immunity applicable to public educational institutions, tort claims acts, recreational user statutes, and shared responsibility statutes (Cotten, 2007a).

Club Sports

Although theoretically organized and supervised by the campus recreation program, club sports are a risk management concern because these teams are usually student run (Mull et al., 2005)[1]. Rugby, a hard-hitting contact sport played with little or no protective equipment, is one of the most physically

1. Note that lawsuits alleging gender equity violations of Title IX and demanding that certain women's club sports be elevated to varsity status were not included in this analysis.

dangerous club sports (Comstock, Fields, & Knox, 2005). Because of its physical nature, only lawsuits resulting in injuries from rugby were found in this study at the appellate court level.

In *Fox v. Louisiana State University et al.* (1990), plaintiff Tim Fox, a student at St. Olaf College in Minnesota, traveled with his rugby team to a Mardi Gras tournament hosted by LSU. In the second match of the day, after a night of drinking, Fox broke his neck and was paralyzed attempting to tackle an opponent. The Louisiana State Supreme Court affirmed the First Circuit Court of Appeals' decision that neither LSU nor St. Olaf had a duty to the plaintiff (*Fox*, 1990, p. 982). Fox had claimed that the host institution had a duty to screen visiting teams for coaching and playing competence as well as to prevent the host team from throwing a party before the games. The courts disagreed. Further, both the appellate and state supreme courts concluded that St. Olaf could not be held liable because the team was not in any way officially recognized, supported, or sanctioned by the school (*Fox*, p. 985).

An appellate court in New York likewise rejected the plaintiff's negligence claim, holding that the young man had assumed the risk of playing rugby (*Regan v. New York*, 1997). The court particularly emphasized that even though it was the first day of practice, the player was a veteran of three prior seasons, and despite the fact the player was practicing in a position other than his normal one, he was well aware of the dangers of the sport (*Regan*, 1997, p. 490).

Finally in *Gilbert v. Seton Hall University* (2003), the defendant's motion for summary judgment was successful after the Second Circuit Court of Appeals affirmed the District Court ruling that Seton Hall (the plaintiff's home institution) was immune from tort litigation under New Jersey's law of charitable immunity. A legal resident of Connecticut, the plaintiff was playing for Seton Hall in New York City when he was injured. He argued that because the injury occurred outside of New Jersey, New York state law applied (*Gilbert*, 2003, p. 109). The courts disagreed rejecting plaintiff's argument by stating that plaintiff "benefited from the charitable immunity law of New Jersey by virtue of his voluntary decision to attend a university in that state" (*Gilbert*, p. 110).

In the fourth and final club sport case found, the Supreme Court of Appeals of West Virginia ruled that the waiver of liability the plaintiff had signed prior to joining the rugby club did not provide immunity from liability for the school (*Kyriazis v. University of West Virginia, et al*, 1994). The plaintiff argued the release was void under public policy because he had no choice but to sign if he wanted to play. Additionally, the plaintiff argued that because of unequal bargaining strength between the parties (i.e., the university

had legal counsel to draft the waiver and the plaintiff had no such counsel) public policy was violated. The court not only agreed with plaintiff's argument, but also ruled the waiver was void because of equal protection concerns (*Kyriazis*, 1994, p. 657). Although the university's campus recreational sports program managed both club and intramural sports, no intramural sports participants were required to sign waivers. Additionally, and potentially damning for the university, the court concluded that it was unsure if the plaintiff really understood the risk of playing rugby, noting that the rugby coach had testified he did not believe injuries were inherent to the game (*Kyriazis*, p.658). The case was remanded back to the trial court.

Analysis. The club sport tort cases are instructive in part for their common subject matter. Rugby is clearly a club sport with potential for injury and litigation, as are ice hockey, soccer, and others; however, the inherent roughness of these contact sports does not necessarily make the institution liable for those injuries. If the club team is not officially sanctioned, the institution bears no responsibility for the players. In other words, just putting the school name in front of the club sport team name does not make it an official team. As with intramural sports, assumption of the risk can be a viable defense along with the doctrine of sovereign immunity. Finally, even though the waiver defense did not succeed in immunizing the institution in the *Kyriazis* case, the specific problem lay in the implementation of the waiver and not in using the waiver as a defense. If the campus recreation administrators at WVU had required all participants to sign a waiver, it would have helped the institution's defense. Cotten (2007b) supported this notion by stating "the waiver is an important tool in the risk management arsenal of the service provider" (p. 85).

Instructional Sport

Campus recreation programs sometimes offer instructional sport sessions to students, faculty, and staff, as well as to the community as a whole. Injuries can occur during these sessions, and the defenses used by the institutions vary given the circumstances.

In two cases dealing with waivers, the defendant institution argued that the waiver the injured plaintiff signed prior to the incident absolved the institution of any legal liability. This argument had mixed results. In the case of a young woman who sued the school after she fell from a climbing wall in the first week of an eight-week course, the court held that her signature on a release of liability was valid (*Lemoine v. Cornell University*, 2003). The plaintiff had argued that a New York statute concluding waivers were against public policy

when they were printed on admission or membership documents also included the university climbing wall because the facilities were open for recreational climbing. The court disagreed, noting that she fell during a class, not during a recreational session, and that places of instruction and training were exempt from that piece of legislation (*Lemoine*, 2003, p. 316).

In another case dealing with waivers, a California court concluded that waivers of liability did not apply to the heirs of the signatory (*Scroggs v. Coast Community College*, 1987). After her husband drowned during a scuba diving class at the local community college, the widow filed a wrongful death suit. The school argued the waiver of liability her husband signed provided it immunity from the plaintiff. The court disagreed concluding that the deceased had not and could not waive the rights of his heirs, and that the waiver could only be used as a defense to the lawsuit, not as a way to avoid the lawsuit entirely (*Scroggs*, 1987, p. 919).

When offering instructional sport sessions, campus recreation programs frequently rely upon students to teach other students. In two cases, the institution tried to argue that the student employee was not really an agent of the institution or otherwise was not responsible for the injuries the plaintiff-student sustained. In *DeMauro v. Tusculum College* (1980), the Tennessee state supreme court overruled the court of appeals decision that the college was not responsible when a golf class instructor struck a student with a ball. The plaintiff was a freshman in the golf class, and the instructor was a senior physical education major who was assisting the instructor of record for credit as a teaching assistant. While playing the first practice round of golf, the teaching assistant miss-hit a drive, striking the plaintiff in the face with the ball. The college argued that the student employee was not really instructing the class, but was simply a fellow student playing golf. The court of appeals found the incident to be an accident, but its decision was overruled by the supreme court which believed a jury might have concluded the college breached its duty of supervision and instruction to the plaintiff by not providing a more competent instructor (*DeMauro*, 1980, p. 118-119). Thus, the case was remanded to the trial court level (*DeMauro*, p. 121).

Similarly, Brigham Young University tried to argue that a young woman who had been injured skiing had voluntarily assumed the risk of injury (*Meese v. Brigham Young University*, 1981). The plaintiff had enrolled in an introductory skiing class, and upon the suggestion of her teacher, she rented skis from the university bookstore where another student who was a part-time employee of the store made slight adjustments to the bindings on her rental skis. Several days later plaintiff was injured while skiing, and evidence showed the injury occurred in part because the bindings did not release as they

should have. Further evidence indicated the employee had not tested the bindings upon renting the skis. Although the trial court found the plaintiff partly contributed (25%) to her injury through failure to alert the instructor during a drill designed to test the binding release, the supreme court refused to find her completely responsible given the duty of the renting agent to test, adjust, and explain the release mechanism of the bindings to the customer/student (*Meese*, 1981, p. 724).

In a final case involving instructional sport, the defendant university argued that it was not liable for injuries the plaintiff sustained during a flag football physical education class because the field upon which the injury occurred did not occur in a recreation area (*Denmark v. Colorado*, 1997). Under Colorado law at the time, if the injury occurred in an educational area, the college was immune, but if the area was recreational, no immunity existed. The court of appeals concluded that a multi-use athletic compound used for instruction and recreation was a recreational area for purposes of the statute, and the school was not immune from the negligence claim (*Denmark*, 1997, p. 627).

Analysis. In the cases involving instructional sport activities, the lawsuits inevitably arose from injuries incurred during instructional sessions, or at times the student was practicing the skills, thus emphasizing how the institution must use reasonable care in providing instruction and equipment. As with other negligence cases, waivers of liability as a defense strategy had mixed results. As long as the waiver was not over-reaching (e.g., attempting to bind the heirs of the signatory) and not overly broad, the courts were open to waivers being used as a viable defense. Institutions should also be aware that student employees who are used to instruct classes or to provide equipment are agents of the institution, and their actions or breach of duty can make the institution liable (van der Smissen, 2007).

Informal Sports

Campus recreation programs and departments may also be responsible for maintaining recreational facilities for the use of members of the university community. Physical injuries and deaths can occur at these sites during informal or self-directed sport activities. Colleges and universities have defended themselves vigorously in these situations using a variety of defenses.

One defense used is immunity under recreational user statutes. The University of Alaska argued that their ski hill, the site of a fatal sledding accident, was unimproved land under a state statute designed to encourage landowners to open their unimproved land to recreational users (*University of*

Alaska v. Shanti, 1992). The Supreme Court of Alaska disagreed, concluding that because the hill was maintained by the university and was situated next to the university gymnasium and hockey rink, it was not unimproved land and the university was not immune to negligence (*University of Alaska*, 1992, p. 1232).

An opposing decision in another sledding accident case rendered by the Supreme Court of Kansas, concluded the sled hill was a recreational site and that the university was not grossly or wantonly negligent for failing to prohibit sledding or for failing to place padding on the trees at the bottom of the hill (*Boaldin v. University of Kansas*, 1987, p. 815-816). The federal district court in Kansas broadened that decision when concluding a school was immune under the state recreational use statute when a student was injured on a water slide temporarily constructed on the school football field during an annual spring fling event (*Ward .v Bd. Of Trustees*, 1989, p. *7-8).

Recreational user statutes were enacted for the general purpose of protecting landowners from liability when their property is used for recreational activities (Young, 2007). Aquatics facilities owned by colleges and universities have relied upon recreational user statutes as a defense with varying results. After a man drowned while scuba diving in the Creighton University pool, his family sued the university for having only one lifeguard on duty. The Supreme Court of Nebraska rejected Creighton's argument that it was immune under the state's Recreational Liability Act and concluded that the act did not protect indoor swimming pools (*Cassio v. Creighton University*, 1989). Further, the court held that a jury should decide if the man was himself negligent by diving alone in the pool or had otherwise assumed the risk of diving (*Cassio*, 1989, p. 714). In contrast, a Texas school was able to successfully assert immunity under a state recreational use statute after the plaintiff claimed injury from a faulty diving board (*Howard v. East Texas Baptist University*, 2003). Likewise, a college-sponsored swimming program at a state hospital was protected when the plaintiff slipped and fell in the hallway between the pool and the locker room (*Robison v. State of Kansas*, 2002).

Institutions have also relied upon defenses of governmental or sovereign immunity for negligence cases. A Pennsylvania university was able to assert governmental immunity after a participant with a disability drowned in the institution's unguarded pool. The court concluded that although this was negligent supervision, the events did not fall into any exception for governmental immunity (*Musheno v. Lock Haven University*, 1989). Although an institution may successfully claim sovereign immunity, in Virginia state employees must establish that they are protected by sovereign

immunity. In a case where two children drowned in an Old Dominion University indoor pool, the lifeguard on duty was deemed not protected. The defendant lifeguard had told the children not to swim in the pool he was guarding, yet he drew them a map to another pool, gave them written permission to use the unguarded pool, and gave them the combination to the exterior door lock. The court found the lifeguard's conduct was likely action outside the scope of his employment and thus was beyond the scope of immunity as well (*Pentecost v. Old Dominion University*, 2003, p. 278).

Even when immunity is not a defense, recreation programs have won simply on the merits of the case. A man was injured while playing table tennis in a university facility when he slipped on the plainly visible nets around the tables to cordon off separate playing spaces. The court concluded that the institution was not negligent in hanging the nets and did not consider this a dangerous condition (*Berger v. Board of Trustees*, 1988, p. 125). Similarly an Illinois court found no evidence that defendant Northern Illinois University had actual or constructive notice of a dangerous condition in its student recreation center weight room (*Varon v. State of Illinois*, 1993). The plaintiff had been injured while he was stretching on a weight bench which was not bolted to the floor. He had 315 pounds of weight resting on the bench when it tipped over on him and injured his wrist. The court noted that stretching while on a bench with a loaded weight bar was not a customary use of the bench and certainly may have contributed to the tipping (*Varon*, 1993, p. 344). Furthermore, no prior tipping incidents had occurred in the institution's weight room facility.

As was evident in the other program areas of campus recreation, waivers can also be a valid defense for informal sports. This was illustrated by *Abbassi v. Regents of the University of California* (2003). The plaintiff was injured while adjusting a weight stack on a weight training machine at the university recreation center. The California court concluded he could not sue for his injury, in part, because he had signed what was likely a valid waiver (*Abbassi*, 2003, p. *18-19).

Analysis. While a variety of defenses have been used by defendant institutions for cases involving informal sports programs, the defenses found to be used most often in this study were recreational user statutes and governmental immunity. Recreational user statutes work well as a defense since the nature of informal sport activities are self-directed (Mull et al., 2005) and the institution makes the facilities available for students with no direct fee. Since the primary focus of informal sport programs is providing facilities, the obligation of the institution is to provide a reasonably safe environment (Sharp, 2007). Pools were found to be the most common site for injuries

resulting in litigation at the appellate level, but because pools and swimming are integral parts of campus fitness and recreation programs, institutions cannot and should not shut them down, but rather be aware of the hazards and take reasonable care to avoid injuries and drowning deaths. Even when injuries occur in unusual situations (i.e., playing table tennis or having equipment collapse), institutions were successful in arguing that participants assumed the risk of the sport activity.

Implications of the Case Analysis

In reviewing all the tort law cases found in campus recreation over the past 30 years, the common denominator or legal theory common to all 32 cases was negligence. Defined by *Black's Law Dictionary* (2006) as "the failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation" (p. 479), in lay terms negligence is carelessness that causes harm. van der Smissen (2007) stated that of all the areas of law that impact sport, negligence liability involves the greatest number of lawsuits—a statement supported by the findings of this current analysis. Once again in focusing upon what can be learned from the case law, there are specific implications that can be culled from this analysis that can allow campus recreation administrators to learn from the past and lay the foundation for a less litigious future.

One of the key elements of a negligence claim is establishing the defendant had a duty of care. Duty of care is "an obligation, recognized by law, that requires an individual or a group to conform to a particular standard of conduct" and can be based on a "particular relationship" (Wong, 2002, p. 60-61). Since duty is one of the four essential elements needed to prove a valid negligence claim, defendants often try to show they have no duty or particular relationship to the plaintiff. In *Ochoa v. California State University, Sacramento* (1999), the court provided an interesting interpretation of the duty owed not only by the campus recreation program, specifically, but by the university generally. The court found that "plaintiff's affiliation with CSUS as a student did not create a special relationship imposing a duty of care on CSUS" (*Ochoa*, 1999, p. 771). The court explained that because college students are adults, who voluntarily enroll in college coursework, and freely choose to participate in school activities, "colleges and universities may no longer be charged with a general duty of care to supervise student activities" (*Ochoa*, p. 771).

The ruling in *Ochoa* (1999) differs from an earlier decision in *Kyriazis v. University of West Virginia* (1994) which came from the Supreme Court of

Appeals of West Virginia. In discussing public policy issues related to a waiver, the court stated "when a state university provides recreational activities to its students, it fulfills its educational mission, and performs a public service" (*Kyriazis*, 1994, p. 655). Furthermore, when a university performs a public service, it "owes a duty of care to its students when it encourages them to participate in any sport" (*Kyriazis*, p. 655). While the facts are somewhat different between the cases, both discuss duty of the institution to its students engaged in campus recreational sport activities. Yet, the two outcomes may cause confusion because of the vast difference in court opinions. Does a campus recreation program have a duty to its participants? In other words, is there a special relationship involved? van der Smissen (2007) provided that a duty does exist because of the relationship inherent in the situation. Further, she explained there is little question regarding a special relationship because it is "inherent and obvious" (p. 37) in the provision of programs and services. van der Smissen concluded that when campus recreation administrators provide their programs and services for use by students, faculty, and staff there is "a concomitant obligation not to expose the participant to unreasonable risk of harm" (p. 37). Although van der Smissen's interpretation of duty seems logical and follows the spirit of duty, it is apparent from the case law analyzed in this study that the courts have not firmly settled on this interpretation and still come to different results.

Another finding of this analysis was that sometimes institutions seek shelter from negligence liability under their state's recreational user statute, as evidenced by a number of cases in this analysis. Because the primary focus of the statute is to protect landowners from liability if they permit others to use their property for recreation at no cost to the user, many campus recreation programs and their legal counsel interpret this statute as a valid defense to a negligence claim. Young (2003) concurred that many educational institutions have more frequently looked to recreational user laws as a statutory defense. In general terms under the recreational user statute, the owner of the property owes no duty to keep the premises safe for entry or use by others for recreational purposes. According to the court in *Howard* (2003) this "lower standard of care for persons receiving the benefit of recreational access" (p. 411) is a reasonable trade-off between possessors of land and recreational users. Because there is a wide berth of variability in the language and interpretation of each state's statute, campus recreation administrators should be familiar with the specific coverage of their state's recreational use statute. For example, in Nebraska the court ruled that the law was not applicable to indoor recreational activities or swimming pools (*Cassio v. Creighton University*, 1989). In contrast, a Texas court ruled the statute was a valid

defense for a negligence claim against a university for a faulty diving board at an outdoor campus swimming pool (*Howard v. East Texas Baptist University*, 2003). In Alaska, the court ruled the state's recreational use statute only applied to unimproved land, meaning that a university ski hill fell outside the scope of immunity under the statute (*University of Alaska v. Shanti*, 1992). Yet, on similar facts, a Kansas court held that a hill on campus used for sledding was open space for recreational purposes and fell within the immunity protection of the state's recreational use statute (*Boaldin v. University of Kansas*, 1987). The lesson to be learned here is that campus recreation programs can use their state's recreational user statute if the language and the spirit of the law fit the facts of the case. However, the use of this defense is certainly not a fail-safe.

Another finding of the analysis was that some campus recreation programs implement waivers as a line of defense against liability for negligence. Based upon legal analysis of case law found using waivers, Cotten (2007b) concluded "a well-written, properly administered waiver, voluntarily signed by an adult, can be used to protect the recreation or sport business from liability for ordinary negligence by the business or its employees" (p. 85). This finding was supported in the *Lemoine* (2003) case when the court concluded the release plaintiff signed was clear and unambiguous, highlighting the inherent risks of rock climbing, and the use of the university's climbing wall. College students at the age of majority (i.e., 18 years old) and beyond can legally bind themselves to contracts.

The implications for campus recreation administrators regarding the use of waivers are numerous. First, it is advantageous to implement waivers in campus recreation programs. In a study by Miller, Young, and Martin (2009) looking at use of waivers by intramural sports programs on college campuses, 60% of the administrators responding did not believe waivers provided protection from legal action. Miller et al. concluded "the use of waivers is prudent because it can be effective in both deterring and winning litigation brought against an organization" (p. 136). The lesson to be learned is that waivers can work as an effective defense, and campus recreation administrators should work with their legal counsel in drafting clear, concise language for waivers used in their programs. Additionally, administrators must be cognizant of how waivers are presented to participants. Cotten and Cotten (2010) concurred by stating "even well-written agreements have been overturned in court when they are not administered properly" (p. 99). Providing ample time to read the agreement or providing an oral explanation of the contents of the waiver prior to students signing can help to ensure participants know, appreciate, and understand the effect of the contract.

Finally, as was illustrated in *Kyriazis v. University of West Virginia* (1994), it is important that participants in a particular program area are not singled out for signing waivers. Consistent use of waivers across all program areas will avoid discriminatory claims under the Equal Protection Clause of the United States Constitution.

SUMMARY AND CONCLUSION

Over the past 30 years, recreational sports programs have been involved in a number of lawsuits that have proceeded to the appellate level. The majority of these cases have involved physical injuries resulting in tort cases. While tort cases, specifically alleging negligence, seemed to be the most prominent area of law impacting campus recreation programs, it is also an area over which those professionals providing the programs have some control with a solid risk management plan (Ammon & Brown, 2007; Seidler, 2007). In general, educational institutions have been reasonably successful in defending these cases at the appellate level, relying upon defenses of assumption of risk, waivers, and statutory immunity. Generally speaking, in cases where the institution displayed reasonable behavior in its duty of care towards patrons, the institution was successful in avoiding liability. Likewise, in cases where the duty of care was, or might have been breached, the institution was more likely to be found liable.

The cases, patterns, and trends described in this content analysis, however, are simply published decisions. The success rate for the institution at the appellate level may or may not be reflected at the trial court level, nor does it give any indications of pre-trial settlements that may have been made by institutions to complainants. The simple fact is that campus recreation programs and their institutions will face lawsuits; yet, these lawsuits can effectively be defended with appropriately selected defenses.

Lawsuits and legal claims against campus recreational sport service providers are a reality. Because American society has evolved over the past three decades into a litigious society (Hronek & Spengler, 2002), campus recreational sport administrators must step up to the challenges created by lawsuits and create different ways to manage the risks and deliver programs. A primary strategy for campus recreation administrators and their staff to effectively deal with this phenomenon is to be proactive. Studying the campus recreation cases that are litigated can certainly help administrators to gain insight by learning from the past and in turn, implement policies to reduce the occurrence of future litigation.

ABOUT THE AUTHORS

SARAH K. FIELDS, J.D., Ph.D., is an Associate Professor in the Sport Humanities Program at the Ohio State University. Her research interests include exploring the intersection of sport, law, and American culture as well as the cultural construction and legal implications of injury.

SARAH J. YOUNG, Ph. D., is an Associate Professor in the Department of Recreation, Park and Tourism Studies within the School of Health, Physical Education and Recreation at Indiana University. Her research interests include legal aspects of recreation and sport, risk management, and scholarship of teaching.

REFERENCES

Abbassi v. Regents of the University of California, No. B14106, 2003 Cal. App. Unpub. LEXIS 1991 (Ct. App. Feb. 28, 2003).

Ammon, R., & Brown, M. T. (2007). Risk management process. In D. J. Cotten & J. T. Wolohan (Eds.), *Law for recreation and sport managers* (4th ed., pp. 288-300). Dubuque, IA: Kendall/Hunt.

Astin, A. W. (1984). Student involvement: A development theory for higher education. *Journal of College Student Personnel, 25*(4), 297-308.

Astin, A. W. (1993). *What matters in college? Four critical years revisited.* San Francisco, CA: Jossey-Bass.

Berger v. Bd. of Trustees of the University of Illinois, 40 Ill. Ct. Cl. 120 (Ct. Cl. 1988).

Black's Law Dictionary, 3rd pocket ed. (2006). Negligence (pp. 479-480). St. Paul, MN: West Publishing.

Boaldin v. University of Kansas, 747 P.2d 811 (Kan. 1987).

Bd. of Trustees v. County of Santa Clara, 150 Cal. Rptr. 109 (Ct. App. 1978).

Breheny v. Catholic University of America, No. 88-3328-OG, 1989 U.S. Dist. LEXIS 14029 (D. D.C. Nov. 22, 1989).

Cassio v. Creighton University, 446 N.W. 2d 704 (Neb. 1989).

Comstock, R. D., Fields, S.K., & Knox, C.L. (2005). Protective equipment use among female rugby players. *Clinical Journal of Sport Medicine*,15, 241-245.

Cooper, N. L. (1997). Will the defendant please rise: How effective is your risk management plan? *NIRSA Journal, 21*, 34-41.

Cotten, D. J. (2007a). Immunity. In D. J. Cotten & J. T. Wolohan (Eds.), *Law for recreation and sport managers* (4th ed., pp. 71-84). Dubuque, IA: Kendall/Hunt.

Cotten, D. J. (2007b). Waivers and releases. In D. J. Cotten & J. T. Wolohan (Eds.), *Law for recreation and sport managers* (4th ed., pp. 85-94). Dubuque, IA: Kendall/Hunt.

Cotten, D. J., & Cotten, M. B. (2010). *Waivers & Releases of Liability* (7th ed.). Statesboro, GA: Sport Risk Consulting.

DeMauro v. Tusculum College, 603 S.W.2d 115 (Tenn. 1980).

Denmark v. Colorado, 954 P.2d 624 (Colo. 1997).

Fox v. Bd. of Supervisors of Louisiana State University, 559 So. 2d 850 (La. Ct. App. 1990), *aff'd in part, rev'd in part*, 576 So. 2d 978 (La. 1991).

Gilbert v. Seton Hall University, 332 F.3d 105 (2nd Cir. 2003).

Henig v. Hofstra University, 553 N.Y.S.2d 479 (App. Div. 1990).

Howard v. East Texas Baptist University, 122 S.W.3d 407 (Tex. App. 2003).

Hronek, B. B., & Spengler, J. O. (2002). *Legal liability in recreation and sports* (2nd ed.). Champaign, IL: Sagamore Publishing Company.

Kuh, G. (1995). The other curriculum: Out of class experiences associated with student learning and personal development. *Journal of Higher Education, 66*(2), 123-155.

Kyriazis v. University of West Virginia, 450 S.E.2d 649 (W.Va. 1994).

Lemoine v. Cornell University, 769 N.Y.S.2d 313 (App. Div. 2003).

Meese v. Brigham Young University, 639 P.2d 720 (Utah 1981).

Miller, J. J., Young, S. J., & Martin, N. (2009). To use or not to use? The status of waivers in intramural sports. *Recreational Sport Journal, 33*(2), 129-138.

Mull, R. F., Bayless, K. G., & Jamieson, L. M. (2005). *Recreational sport management* (4th ed.). Champaign, IL: Human Kinetics.

Mulrooney, A. L., & Green, E. (1997). Risk management has its price. *NIRSA Journal, 21*, 42-45.

Mulrooney, A. L., Styles, A., & Green, E. (2002). Risk management practices at higher educational sport and recreation centers. *Recreational Sports Journal, 26*(2), 41-49.

Mulrooney, A. L., & Styles, A. E. (2005). Directors of public and private state-of-the-art multimillion dollar recreational facilities lead the way in risk management practices. *Recreational Sports Journal, 29*(2), 92-107.

Musheno v. Lock Haven University, 574 A.2d 129 (Pa. Commw. Ct. 1990).

National Intramural-Recreational Sports Association. (2007). *NIRSA's rich history.* Retrieved on January 29, 2010, from http://www.nirsa.org/Content/NavigationMenu/AboutUs/History/History.htm

Nganga v. College of Wooster, 557 N.E.2d 152 (Ohio Ct. App. 1989).

Ochoa v. California State University, Sacramento, 85 Cal. Rptr. 2d 768 (Ct. App. 1999).

Pascerella, E. T., & Terenzini, P. T. (2005). *How college affects students: Findings and insights from twenty years of research* (2nd ed.). San Francisco, CA: Jossey-Bass.

Pentecost v. Old Dominion University, 61 Va. Cir. 270 (Cir. Ct. 2003).

Rembis v. Bd. of Trustees of the University of Illinois, 618 N.E.2d 797 (Ill. App. Ct. 1993).

Regan v. New York, 654 N.Y.S.2d 488 (App. Div. 1997).

Robison v. Kansas, 43 P.3d 821 (Kan. Ct. App. 2002).

Scaduto v. New York, 446 N.Y.S.2d 529 (N.Y. App. Div., 1982), *aff'd*, 437 N.E.2d 281 (N.Y. 1982).

Scroggs v. Coast Community College, 239 Cal. Reptr. 916 (Ct. App. 1987).

Seidler, T. L. (2007). Audits in risk management. In D. J. Cotten & J. T. Wolohan (Eds.), *Law for recreation and sport managers* (4th ed., pp. 310-321). Dubuque, IA: Kendall/Hunt.

Sharp, L. A. (2007). Premises liability. In D. J. Cotten & J. T. Wolohan (Eds.), *Law for recreation and sport managers* (4th ed., pp. 193-204). Dubuque, IA: Kendall/Hunt.

Sporting Goods Manufacturers Association (2007). *Sports participation in America 2007.* Retrieved on December 31, 2009, from http://www.sgma.com/reports/3_Sports-Participation-in-America-2007

University of Alaska v. Shanti, 835 P.2d 1225 (Alaska, 1992).

van der Smissen, B. (2007). Elements of negligence. In D. J. Cotten & J. T. Wolohan (Eds.), *Law for recreation and sport managers* (4th ed., pp. 36-45). Dubuque, IA: Kendall/Hunt.

Varon v. Illinois, 46 Ill. Ct. Cl. 339 (Ct. Cl. 1993).

Ward v. Bd. of Trustees, Hutchinson Community College, No. 88-1600-K, 1989 U.S. Dist. LEXIS 6011 (D. Kan. May 10, 1989).

Wong, G.M. (2002). *Essentials of sports law.* Westport, CT: Praeger.

Young, S. J. (2003). Property law. In D. J. Cotten & J. T. Wolohan (Eds.), *Law for recreation and sport managers* (3rd ed., pp. 194-205). Dubuque, IA: Kendall/Hunt.

Young, S. J. (2007). Property law. In D. J. Cotten & J. T. Wolohan (Eds.), *Law for recreation and sport managers* (4th ed., pp. 182-192). Dubuque, IA: Kendall/Hunt.

Young, S. J., & Jamieson, L. M. (1999). Perceived liability and risk management trends impacting recreational sports into the 21st century. *Journal of Legal Aspects of Sport, 9*(3), 151-161.

Young, S. J., & Ross, C. M. (2000). Recreational sport trends for the 21st century: Results of a Delphi study. *NIRSA Journal, 24*(2), 24-37.

Young, S. J., Fields, S. K., & Powell, G. M. (2007). Risk perceptions v. legal realities in campus recreational sport programs. *Recreational Sports Journal, 31*, 131-145.

APPENDIX A

Campus Recreation Case Law By Year

State	Case	Citation (year omitted)	Year	Topic
VT	In re Middlebury College Sales & Use	400 A.2d 965 (Vt.)	1979	Tax
NY	Rickett v. Hackbarth	414 N.Y.S.2d 988 (Sup. Ct.)	1979	Zoning
VA	Jacobs v. College of William and Mary	517 F. Supp. 791 (E.D. Va.)	1980	Discrimination
GA	Marshall v. Georgia Southwestern College	489 F. Supp. 1322 (M.D. Ga.)	1980	Discrimination
TN	DeMauro v. Tusculum College	603 S.W.2d 115 (Tenn.)	1980	Tort
IL	People v. Schmitt	424 N.E.2d 1267 (Ill. App. Ct.)	1981	Criminal
NY	University Auxiliary Services at Albany v. Smith	430 N.E.2d 917 (N.Y. App.Div.)	1981	Tax
UT	Meese v. Brigham Young University	639 P.2d 720 (Utah)	1981	Tort
NY	Scaduto v. New York	446 N.Y.S.2d 52 (App. Div.)	1982	Tort
NY	Syracuse University v. Syracuse	459 N.Y.S.2d 645 (App. Div.)	1983	Tax

GA	Brock v. Georgia Southwestern College	765 F.2d 1026 (11th Cir.)	1985	Discrimination
CA	Scroggs v. Coast Community College	239 Cal. Rptr. 916 (Ct. App.)	1987	Tort
KS	Boaldin v. University of Kansas	747 P.2d 811 (Kan.)	1987	Tort
MN	Mueller v. Regents of University of Minnesota	855 F.2d 555 (8th Cir.)	1988	Constitutional
IL	Berg v. Hunter	854 F.2d 238 (7th Cir.)	1988	Constitutional
IL	Berger v. Board of Trustees	40 Ill. Ct. Cl. 120 (Ct. Cl.)	1988	Tort
DC	Breheny v. Catholic University of America	1989 U.S. Dist. LEXIS 14029 (D. D.C.)	1989	Tort
KS	Ward v. Board of Trustees Hutchinson Community College	1989 U.S. Dist. LEXIS 6011 (D. Kan.)	1989	Tort
NE	Cassio v. Creighton University	446 N.W. 2d 704 (Neb.)	1989	Tort
OH	Nganga v. College of Wooster	557 N.E.2d 152 (Ohio Ct. App.)	1989	Tort
NY	Henig v. Hofstra	553 N.Y.S.2d 479 (App. Div.)	1990	Tort
PA	Musheno v. Lock Haven University of PA	574 A.2d 129 (Pa. Commw. Ct.)	1990	Tort

LA	Fox v. Board of Supervisors of Louisiana State University	576 So. 2d 978 (La.)	1991	Tort
AK	University of Alaska v. Shanti	835 P.2d 1225 (Alaska)	1992	Tort
IL	Varon v. Illinois	46 Ill. Ct. Cl. 339 (Ct. Cl.)	1993	Tort
IL	Rembis v. Board of Trustees of University of Illinois	618 N.E.2d 797 (Ill. App. Ct.)	1993	Tort
WV	Kyriazis v. University of West Virginia	450 S.E.2d 649 (W.Va.)	1994	Tort
CT	Yale Corinthian Yacht Club v. Zoning Board	1996 Conn. Super. LEXIS 140	1996	Zoning
MI	Western Michigan University v. Michigan	565 N.W.2d 828 (Mich.)	1997	Prevailing Wage
CO	Denmark v. Colorado	954 P.2d 624 (Colo. Ct. App.)	1997	Tort
NY	Regan v. New York	654 N.Y.S.2d 488 (App. Div.)	1997	Tort
NY	Traub v. Cornell University	1998 U.S. Dist. LEXIS 5530 (N.D. N.Y.)	1998	Tort
CA	Ochoa v. California State University, Sacramento	85 Cal. Rptr.2d 768 (Ct. App.)	1999	Tort

CT	Rhudy v. Fairfield University	2000 Conn. Super. LEXIS 2216	2000	Tort/Property
CT	Donar v. King Associates	786 A.2d 1256 (Conn. Ct. App.)	2001	Workman's Comp
AL	Gibbons v. Alabama Ethics Commission	827 So. 2d 801 (Ala. Civ. App.)	2002	Criminal
KS	Robison v. Kansas	43 P.3d 821 (Kan. Ct. App.)	2002	Tort
MI	Pilon v. Saginaw Valley State University	298 F. Supp.2d 619 (E.D. Mich.)	2003	Discrimination
NJ	Gilbert v. Seton Hall University	332 F.3d 105 (2nd Cir.)	2003	Tort
CA	Abbassi v. Regents of University of California	2003 Cal. App. Unpub. LEXIS 1991	2003	Tort
NY	Lemoine v. Cornell University	769 N.Y.S.2d 313 (App. Div.)	2003	Tort
TX	Howard v. East Texas Baptist University	122 S.W.3d 407 (Tex. App.)	2003	Tort
VA	Pentecost v. Old Dominion University*	61 Va. Cir. 270 (Cir. Ct.)	2003	Tort
VA	Chapman v. Old Dominion University*	61 Va. Cir. 270 (Cir.Ct.)	2003	Tort
OH	In Re Simms	311 B.R. 479 (Bankr. N.D. Ohio)	2004	Bankruptcy

NC	Winbush v. Winston-Salem State University	598 S.E. 2d 619 (N.C. Ct. App.)	2004	Constitutional
OH	Ohio v. Guidugli	811 N.E.2d 567 (Ohio Ct. App.)	2004	Criminal
IN	Geiersbach v. Frieje	807 N.E.2d 114 (Ind. Ct. App.)	2004	Tort
MT	Richardson v. Montana	130 P.3d 634 (Mont.)	2006	Tort
CT	Connecticut College v. New London	2006 Conn. Super. LEXIS 1787	2006	Tax
CA	Avila v. Citrus Community College	131 P.3d 383 (Cal.)	2006	Tort

* The court heard the two ODU cases simultaneously as it involved children from two families but the same incident.