Introduction to Sport Law

SECOND EDITION

John O. Spengler, JD, PhD
Paul M. Anderson, JD
Daniel P. Connaughton, EdD
Thomas A. Baker III, JD, PhD

HUMAN KINETICS

Library of Congress Cataloging-in-Publication Data

Spengler, John O. (John Otto), 1962- author.
Introduction to sport law / John O. Spengler, Paul M. Anderson, Daniel P. Connaughton, Thomas A. Baker III. -- Second edition.
pages cm
Includes bibliographical references and index.
1. Sports--Law and legislation--United States. I. Anderson, Paul M. (Paul Martin), 1969- author. II. Connaughton, Daniel, 1963- author. III. Baker, Thomas A., author. IV. Title.
KF3989.S637 2015
344.73'099--dc23

2015018859

ISBN: 978-1-4504-5700-2 (print)

The web addresses cited in this text were current as of August 2015, unless otherwise noted.

Acquisitions Editor: Myles Schrag
Developmental Editor: Ragen E. Sanner
Managing Editor: Karla Walsh
Associate Managing Editor: Shevone Myrick
Copyeditor: Bob Replinger
Indexer: Susan Danzi Hernandez
Permissions Manager: Dalene Reeder
Senior Graphic Designer: Keri Evans
Cover Designer: Keith Blomberg
Photographs (interior): © Human Kinetics, unless otherwise noted. Chapter opening collage: Junial Enterprises/Fotolia (top left), Human Kinetics (bottom left), iStockphoto/Christopher O Driscoll (right).
Photo Asset Manager: Laura Fitch
Photo Production Manager: Jason Allen
Art Manager: Kelly Hendren
Associate Art Manager: Alan L. Wilborn
Illustrations: © Human Kinetics
Printer: Sheridan Books

Printed in the United States of America 10 9 8 7 6 5 4 3 2 1

The paper in this book is certified under a sustainable forestry program.

Human Kinetics
Website: www.HumanKinetics.com

United States: Human Kinetics
P.O. Box 5076
Champaign, IL 61825-5076
800-747-4457
e-mail: info@hkusa.com

Canada: Human Kinetics
475 Devonshire Road Unit 100
Windsor, ON N8Y 2L5
800-465-7301 (in Canada only)
e-mail: info@hkcanada.com

Europe: Human Kinetics
107 Bradford Road
Stanningley
Leeds LS28 6AT, United Kingdom
+44 (0) 113 255 5665
e-mail: hk@hkeurope.com

Australia: Human Kinetics
57A Price Avenue
Lower Mitcham, South Australia 5062
08 8372 0999
e-mail: info@hkaustralia.com

New Zealand: Human Kinetics
P.O. Box 80
Mitcham Shopping Centre, South Australia 5062
0800 222 062
e-mail: info@hknewzealand.com

E5971

Contents

Preface

Given the importance of law in our society and the increasing amount of litigation encountered in sport, the study of law in sport management programs has become a standard part of required coursework. This book is intended to serve as the text for undergraduate students in an introductory sport law class. Prior legal knowledge or experience is not required of students who use this book.

Introduction to Sport Law provides undergraduate sport management students with information in a way that is both approachable and interesting. The purpose of this text is to help undergraduate students learn the common legal concepts taught in sport management curricula. (Please note that the contents of this book are for educational purposes only and do not constitute legal advice.) This book was developed because of a common feeling among sport management students and faculty that available sport law texts were too lengthy, contained too much legalese, were more suited for law students than undergraduate students, lacked relevance for sport management professionals, or failed to cover the topics of most interest to undergraduate sport management students. *Introduction to Sport Law* was written to address these issues and provide a book well suited for undergraduate students interested in the study of sport law.

How to Use This Book

The legal topics presented in the text are covered in most sport law courses and are intended to introduce students to the legal issues that are most critical to the management of sport. The authors' approach to this text is to begin with topics that are most fundamental to faculty and students, as well as those subjects that are most practical and relevant, and to follow with subjects that are commonly taught in sport law courses but that might have greater theoretical value than practical application.

Chapter 1 presents an overview of the U.S. legal system, including different types of law and the U.S. court system. Chapter 2 looks at tort law and product liability, and chapter 3 focuses on risk management. Chapter 4 looks at agency law, and chapter 5 covers contract law. Chapter 6 looks at employment law, including types of employment discrimination. Chapter 7 introduces the reader to constitutional law, and chapter 8 covers gender equity issues. Chapter 9 looks at intellectual property law, including trademarks, patents, and copyrights. Chapter 10 focuses on antitrust laws. Finally, chapter 11 addresses labor law in the context of sport.

The chapters are organized to provide the student with unique perspectives on the topic, the importance of the topic from the perspective of both sport managers and lawyers, a clear and concise description of the law related to the topic, and legal cases and real-world examples designed to tie concepts together and provide a clear picture and understanding of how the material is applied. The organization of the chapters is designed to enhance learning. Each chapter begins with chapter objectives and a short introduction to the topic to place the topic into context for the reader. The topic is addressed from a legal perspective, written with enough technical language to state the legal concepts accurately and clearly while staying away from too much legalese. After the legal topics have been described, the legal concepts are brought to life through myriad case law examples. Unique case law examples are highlighted in the In the Courtroom sidebars. Next, important points and topics are summarized, and discussion questions provide opportunities to engage students in in-class discussions. Finally, chapters 2 through 11 include moot court cases, which are hypothetical sport law scenarios that students can use as the basis for a classroom mock trial in which hypothetical witnesses are called and students form teams to argue different sides of a case.

Accompanying Ancillaries

This book comes with a full array of ancillaries. The ancillaries are available at www.HumanKinetics.com/IntroductionToSportLaw. The Presentation Package contains 298 slides that present the content of the chapters in convenient PowerPoint form, making it easier for instructors to prepare for and present lectures. The Test Package has 173 questions, making it easy for the instructor to prepare tests and quizzes based on the content of the book. The Instructor Guide contains a sample syllabus, suggestions for group projects and topics for papers, suggested readings, and a complete explanation of how to use the moot court cases in class.

Also included is access to the e-book of the companion text *Case Studies in Sport Law, Second Edition*. That text contains case studies that will allow students to see how concepts discussed in this book have been applied in real-life cases. At the beginning of each chapter in this book, you will find a *Case Studies in Sport Law* Connection feature, which lists the cases in the companion text that relate to the chapter's topic. Using the casebook will help to add meaning and context to the concepts discussed in this book.

Summary

Introduction to Sport Law will challenge the sport law undergraduate student to think about sport law concepts and apply them to the practical world of sport management. This book will serve the needs of undergraduate sport management students in terms of both learning and practice.

Introduction

All sport management students and practitioners need a basic understanding of the law, although for different reasons. Some students may wish to study law after completing undergraduate studies, so an introduction to legal issues is the first step in a long journey of learning. For most students, however, this area of study applies to their careers in sport.

Sport law affects sport at every level, from Little League teams to the highest levels of professional sports. If you plan to work in the sport industry at any level, you must understand legal principles relevant to sport. This book addresses major legal issues that you might face as a sport manager. It also introduces you to legal concepts and applications to prepare you for further study and on-the-job learning. In this introduction, you will see how various areas of law are applicable to specific levels of sport.

Tort law applies to situations in which a civil wrong has been committed. Tort law does not involve criminal conduct, but rather addresses conduct that is either careless or intentional and results in harm or injury to a person or property. Unlike criminal law cases, when a penalty or jail time might be imposed, a tort law case might result in an award of money (damages) from the person or organization (the defendant) that caused harm or injury. Types of torts include negligence and intentional torts, which are highly relevant to sport managers given the frequency with which these torts occur.

For those who work in recreational sports, tort law might be at issue when a counselor, coach, or supervisor fails to provide adequate instruction or supervision of players under his care. Another situation that gives rise to tort law claims is player and participant violence. Player-to-player incidents might involve negligence such as reckless conduct in a pickup basketball game. Players or participants might cause an intentional tort such as battery (e.g., an angry parent hits a volunteer coach). Tort law cases at the high school level often involve students injured in a physical education class or athletes injured in games or practices. In sport law cases in the high school setting, supervision is often at issue. Also, high schools commonly transport student athletes, coaches, and fans in connection with their athletic programs. Transportation is a liability exposure for any institution or school district, and it creates unique risk management issues that administrators must address.

For those who work in universities, tort law cases (negligence and intentional torts) often center on the provision of safe programs and facilities for students and a safe environment for spectators who attend collegiate athletic events. Also in the university setting, students often take sport and fitness courses for credit as part of their curriculum. When injury in a sport and fitness class results in a tort claim, supervision is often the issue. Another issue that universities must address is the provision of emergency care for athletes who are injured in practices or games and the duty owed to intercollegiate athletes by institutions for which they play.

In professional sports, tort law cases often involve alleged negligent or intentional conduct that harms another person. The parties involved on either side (plaintiff or defendant) may include managers, coaches, players, or spectators. Allegations of negligent conduct on the part of management generally result from conditions or situations at arenas or stadiums. Lawsuits have been brought, for example, when a spectator is hit by a foul ball at a baseball game while being distracted by a mascot. Another example in professional sport is an allegation that management is negligent because they fail to provide adequate security at a game (we are all familiar with recent, well-publicized incidents of players who engage in violent behavior with fans). Examples are becoming numerous, from incidents in professional basketball (e.g., the aggressive acts of players who entered the stands at an Indiana Pacers game) to professional baseball (e.g., players who throw objects into the stands). Incidents of fan violence or misconduct (e.g., storming the field after a victory) also may give rise to negligence claims against management for failing to take proper security measures.

Risk management is a process or course of action that is designed to reduce the risk (probability or likelihood) of injury and loss to sport participants, spectators, employees, management, and organizations. The key terms in this definition are *reduction of risk* and *injury and loss*. Risk management often emphasizes risk reduction, given that the prevention or elimination of all risk is often not feasible. Sport often involves some element of physical risk, from competitive sports such as football and ice hockey to recreational sports such as swimming and jogging.

Some students may wish to become risk managers for sport organizations—managing risk, improving safety, and striving to limit the liability of their organization. Others will be motivated to reduce the organization's risk of liability through their roles as managers and leaders in organizations. Think about the many examples of risk in sport:

- A basketball player hits her head on an unpadded wall.
- A racquetball player injures his ankle on a slick floor.
- A tennis player is injured after tripping on a defect in the court surface.
- A golf spectator is struck by lightning.
- A baseball spectator is struck by a foul ball after being distracted by a mascot.
- A swimmer is paralyzed after diving into shallow water.
- A baseball player is injured after sliding into an immovable base.

A risk manager would be responsible for safety in a multitude of situations and the prevention or reduction of loss through potential litigation.

Contract law is relevant to everyone who wishes to work in sport management, and sport agents and upper-level managers of sport organizations must have in-depth knowledge of contract law. A contract is an agreement between people that is enforceable by law if certain conditions are met. Contracts are common in sport. For example, an arena or stadium might have contracts with food and beverage providers, security companies, and employees. Player contracts (agreements to play for a particular team), scholarships, and coaching contracts (employment contracts) are common types of agreements. Additionally, sport managers will be involved in drafting (for review and approval by legal counsel and management) and administering waivers (a type of contract).

Agency law often brings up images of sport agents who represent big-time ath-

letes and enjoy all the perceived perks of the profession. The 1990s film *Jerry Maguire* continues to intrigue people and romanticize the profession. The concept of agency, however, involves more than just sport agents. Employees within a sport organization are considered agents and act on behalf of the organization in executing contracts and performing other essential tasks. Therefore, the law of agency applies to the sport manager in numerous situations and in everyday business matters, such as when employees execute contracts on behalf of a sport business. Agency law affects all areas of sport management because the agency relationship is a key part of business operations in sport.

Employment law applies to all sport managers who are involved in personnel issues, and it encompasses an extremely wide range of issues. Issues of employment are issues about people, and people are different from one another. We differ in age, race and ethnic background, gender, the way we look, our physical abilities, our minds and emotions, and our beliefs, opinions, and outlooks on life. This uniqueness, and the interaction of personnel with management, can result in an efficient, effective work environment or something quite the opposite. When employee relations fall apart, the legal issues involved are diverse, often overlap, and sometimes become complex. Common situations in which lawsuits arise in the employment context include the following:

- A person is fired from her job.
- A qualified female personal trainer is not hired for a job.
- A qualified minority assistant athletic director is not promoted.
- A coach leaves his job before his contract expires.
- A woman's work situation is so uncomfortable that she must quit.
- A maintenance worker is injured on the job.

Therefore, employment law is a critical area for sport managers because it has relevance to most management positions in sport.

Constitutional law is directly applicable to sport. Sport is an integral part of a free society in which athletes and participants can learn, grow, and compete in a manner suited to their lifestyles. The preamble of the Constitution of the United States provides the citizens with a means to establish justice, ensure domestic tranquility, promote general welfare, and secure the blessings of liberty. By understanding the words found in the preamble, we start to understand the purpose of sport in a democratic society. All citizens enjoy four broad rights relevant to sport: personal freedom, civil rights, due process, and privacy. Constitutional rights are relevant in high school, university, and professional sport settings and address such as issues as school prayer (personal freedom), discrimination (civil rights), student-athlete drug testing (privacy), and employee rights (due process).

Gender equity is a legal issue of critical importance for sport managers, particularly those who work in schools. The primary focus of case law dealing with gender discrimination in athletics is whether educational institutions have complied with Title IX. The key compliance issues are whether institutions or organizations fall within the court's recommended proportionality range of percentage of opportunities versus percentage of total enrollment for a given gender. An understanding of gender equity issues is essential to coaches and school officials in selecting which sports will be made available.

Intellectual property law encompasses copyright, trademark, the right of publicity, and patent issues. The purpose of this area of law is to protect the creative endeavors of individuals and organizations.

Copyright laws provide protection to authors of written works, musical works and performances, movies, and other audiovisual works. Television and radio broadcasts of live sporting events are also covered under copyright law. Intellectual property law is applicable to many who work in the sport industry, including such areas as university and professional sports, sports media, marketing, and sports equipment manufacturing and sales.

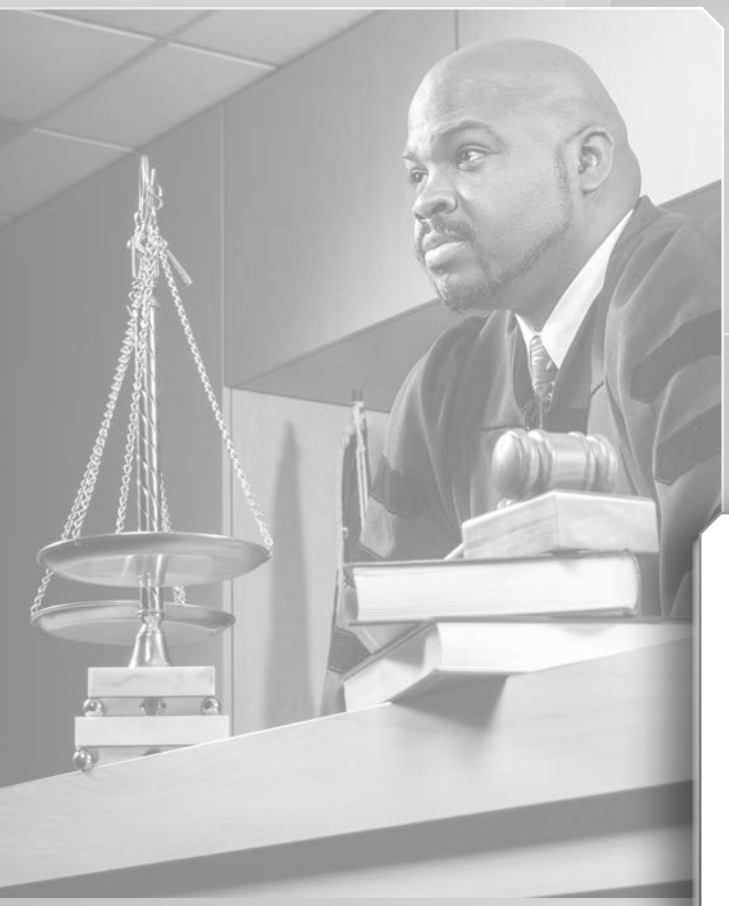
Antitrust law centers on the issue of competitive markets. Although this area of law is complex, the premise is easy to comprehend: Markets should be competitive and free of restraints. To this end, state and federal laws have been enacted to protect markets from unlawful restraints on trade and from activities such as price fixing and the formation of monopolies (in which a market has only one provider of a product or service). The primary federal laws that govern antitrust issues are the Sherman Act, Clayton Act, Sports Broadcasting Act, and Curt Flood Act. Antitrust issues are more common than you might suspect and have been at the forefront of several highly publicized media events involving player salaries, the movement of professional teams to new cities, draft and eligibility issues, broadcasting rights, and sponsorships. Thus, those who work in professional and collegiate sports, sports media and broadcasting, and a variety of other areas need to understand antitrust law.

Labor law governs the workplace relationship in professional sports. Employees and employers have certain rights and responsibilities. Likewise, they are prohibited from taking certain action under the law. The history and framework of federal labor law in the United States provides a useful background to the study of sport law. Employee athletes are provided specific rights under labor law, and those rights have been and continue to be used in the sport landscape. Further, employers and labor organizations are prohibited from engaging in various actions, but they can use several legal strategies, called economic weapons, in workplace-related negotiations.

The implications and importance of law to sport management are clear. If you are involved directly with a lawsuit, an understanding of legal issues and implications may help you handle the legal process and the subsequent stresses. More important, an understanding of law might help you avoid liability in the first place by knowing how to plan and prepare for potential problems.

U.S. Legal System

1



Chapter Objectives

After reading this chapter, you will know the following:

- The primary sources of law in the U.S. legal system
- The function and process of the federal and state court systems
- The key types of law in the United States
- Common legal resources

Case Studies in Sport Law Connection

Check out the following case studies related to this chapter in the accompanying e-book, *Case Studies in Sport Law, Second Edition* (Pittman, Spengler, & Young, 2016):

Cook v. Colgate University

Sandison v. Michigan High School Athletic Association, Inc.

An understanding of the U.S. legal system is important for all sport managers. In today's litigious society, sport managers can benefit from understanding and operating within the law. Sport managers also should know how to obtain legal and risk management information—such as statutes, case law, and published standards and guidelines—that can be used to demonstrate the standard of care owed to clients, athletes, and participants. This chapter introduces the U.S. legal system by discussing sources of law, the court system, common legal resources, and types of law.

Sources of U.S. Law

A primary source of U.S. law is the common law tradition that began in medieval England. Another important source is constitutional law, which incorporates the U.S. Constitution and all of the 50 state constitutions. Statutory law includes statutes enacted by Congress and state legislatures as well as ordinances passed by city and county governments. Another source of U.S. law is administrative law, created by the many administrative agencies (such as the Federal Trade Commission, National Labor Relations Board, Internal Revenue Service, and Food and Drug Administration). These important sources of law are briefly described in the following sections.

Common Law

The English common law system forms the basis of many countries' legal systems, including the U.S. legal system. This system of laws was derived from centuries of general rules, customs, and experience. Courts developed common law rules based on decisions of actual legal disputes. In an effort to be consistent, judges based their decisions on the principles of previously decided cases. Using former cases, or precedents, to assist in deciding new cases is the basis of the American and English judicial systems. The doctrine of **stare decisis** supports the use of precedent. It is typically used to require equal and lower-level courts to follow the legal precedents (prior decisions) that have been established by higher-level courts in their jurisdiction. When deciding a case with similar facts and issues of law, lower state courts are normally bound to the decisions established by the appellate courts within the same state. Likewise, lower federal courts are bound by the decisions previously made by higher-level appellate courts within their jurisdiction. Today, this source of law is referred to as common law, judge-made law, or case law.

Constitutional Law

The U.S. federal government and every state have separate written constitutions that set forth the organization, powers, and limits of their respective governments. **Constitutional law** is the law expressed in those constitutions. State constitutions vary; some are modeled closely after the U.S. Constitution, and others provide even greater rights to their citizens. The U.S. Constitution, the supreme

law of the United States, was adopted in 1787 by representatives of the 13 newly formed states. Initially, people expressed fear that the federal government might abuse its power. To alleviate such concerns, the first Congress approved 10 amendments to the U.S. Constitution, commonly known as the Bill of Rights, which were adopted in 1791. The Bill of Rights limits the powers and authority of the federal government and guarantees many civil (individual) rights and protections.

Although the Bill of Rights does not directly apply to the states, the U.S. Supreme Court has held that the Fourteenth Amendment includes many of the principal guarantees of the Bill of Rights, thereby making them applicable to the individual states. So, neither the federal government nor state governments can deprive individuals of those rights and protections. The rights provided by the Bill of Rights, however, are not absolute. Many of the rights guaranteed by the Bill of Rights are described in very broad terms. For instance, the Fourth Amendment prohibits unreasonable search and seizure but does not define what this concept entails. Ultimately, the U.S. Supreme Court interprets the Constitution, thereby defining our rights and the government's boundaries. More information about how constitutional law affects the field of sport management is provided in chapter 7.

Statutory Law

State and federal legislators enact laws termed *statutes*. Local governments, such as cities and counties, create laws termed *ordinances*. Together, these statutes and ordinances are known as statutory law. **Statutory law** covers a myriad of subjects, such as crime, civil rights, housing, and all matters that the legislative branch has constitutional power to legislate. Statutory law is limited to matters of jurisdiction. For example, federal statutory law is limited to matters of federal jurisdiction; similar limitations hold for local and state ordinances and statutes. When jurisdictions overlap (e.g., when two levels of governments have jurisdiction), conflicts may arise. When this happens, the **doctrine of supremacy** applies; federal law prevails over state law, and state law prevails over local law (Carper & McKinsey, 2012). Statutory law also cannot violate the U.S. Constitution or the relevant state constitution.

Several federal statutes apply to sport management, including the Amateur Sports Act, Americans with Disabilities Act (ADA), Title IX, and the Volunteer Immunity Act. State statutes vary from state to state and include laws that involve concussion safety, sport agents, the use of automated external defibrillators, as well as various immunity provisions such as good Samaritan and recreational user statutes.

Administrative Law

Thousands of local, state, and federal **administrative agencies**, which are specialized bodies created by legislation at all three (local, state, and federal) governmental levels, are granted lawmaking authority to regulate certain activities. These agencies investigate problems within their own jurisdictions, create laws termed **rules and regulations**, and conduct hearings, similar to court trials, to decide whether their rules have been violated and, if so, what sanctions should be levied. Federal administrative agencies—including the National Labor Relations Board (NLRB), Internal Revenue Service (IRS), and Occupational Safety and Health Administration (OSHA), as well as a number of local and state agencies—enact and enforce numerous laws every year that affect sport management.

Types of U.S. Law

U.S. law may be classified into criminal and civil law. Both criminal and civil law attempt to persuade citizens to act in ways that are not harmful to others. Nevertheless, these types of law differ in their means of doing so.

Criminal Law

Criminal law is the body of law that identifies what behavior is criminal and stipulates penalties for violations. The majority of criminal laws are statutes, enacted by the U.S. Congress or a state legislature. The statutory law of individual states regarding criminal law is found in books typically termed *penal codes*.

In a criminal court, which hears only cases involving the alleged commission of misdemeanors and felonies, the people (general public) are represented by a governmental representative (district attorney). To convict a criminal, the district attorney must show beyond a reasonable doubt that the accused person committed the crime. A convicted criminal may be punished by fines, community service, probation, imprisonment, or any combination of these. Although the courts have the power to order restitution to a victim of a crime, the victim usually leaves the courtroom empty handed. Athletes and sport managers may face criminal charges if they violate criminal statutes on theft; stalking; illegal sports wagering or point shaving; robbery; use, sale, or possession of performance-enhancing drugs; or assault and battery.

Civil Law

Civil law is the body of state and federal law that pertains to civil, or private, rights that are enforced by civil actions. The vast major-

People who commit a crime may face a jury of their peers during sentencing in a federal court under criminal law.

ity of lawsuits involving sport management involve civil law. Civil courts hear noncriminal matters between individuals, organizations, businesses, and governmental units and agencies. The two parties involved in a civil lawsuit are the plaintiff, which is the person, group, or organization bringing the lawsuit (e.g., a participant injured in a sport event), and the defendant, which is the person, group, or organization being sued (e.g., the coaches and athletic director). Several defendants are commonly named in a civil suit. In a civil trial, a plaintiff only has to show by a preponderance (a greater amount) of evidence that the defendant is liable. The burden of proof in a criminal trial requires that a court find the criminal guilty beyond a reasonable doubt, whereas the civil standard only requires finding the defendant 51% responsible (preponderance of the evidence). Unlike in a criminal trial, the plaintiff may leave the courtroom with a verdict that will require the defendant to provide financial compensation to the plaintiff. The overwhelming majority of lawsuits that involve sport managers and programs focus on civil law and claims.

Anatomy of a Civil Lawsuit

When a person decides to seek compensation through the civil court system, her attorney typically files a **complaint**. This document, which begins a lawsuit, details the facts that the plaintiff believes justify the claim and requests damages that the plaintiff is seeking from the defendant. The complaint is often served by a **summons**, typically delivered by a court officer, that notifies the defendant that a lawsuit has been filed against her and provides a certain amount of time for her to respond to the complaint.

On receiving a complaint, a defendant typically hires an attorney to represent the defendant's interests. The defendant's attorney usually files an **answer**, which normally denies some or all the allegations listed in the complaint. In lieu of an answer, the defendant's attorney may seek a dismissal of the complaint. This action, referred to as a *motion to dismiss*, is used when a complaint is legally insufficient to justify an answer. The complaint and answer combined are known as **pleadings**. After the pleading stage, either party can move to dismiss the case as a matter of law. In this motion, the court can rely only on the pleadings in determining whether any question of law needs to be answered through trial. If no questions of law are present, the case may be dismissed at this early stage of litigation. Cases may also be determined through default judgments. Default judgments occur when defendants do not answer complaints.

After these initial pleadings, the case enters what is commonly known as the **discovery** phase. The discovery phase begins with the filing of the answer and ceases at the beginning of the trial. During this pretrial time both parties obtain facts and information regarding the case, including information from the other parties, to assist in preparing for trial. Common discovery procedures include requests to produce physical evidence and the use of interrogatories and depositions. A request to produce evidence occurs when one party asks the other to produce, and provide for the inspection of, any designated physical evidence that the second party controls or possesses and that the first party believes to be relevant to the case. For example, attorneys may request to inspect equipment (e.g., football helmet, treadmill, bicycle) or facilities (e.g., swimming pool, bleachers, gymnasium, softball field) that were used by a plaintiff at the time of injury. Furthermore, documents such as preseason medical records, staff training records, parental permission forms, accident or incident report forms, facility and equipment maintenance

records, membership agreements, and waivers can be requested. **Interrogatories** are written questions sent by an attorney from one party in the lawsuit to another party named in the suit. These questions must be answered within a specified time, and they can be used as evidence in a trial. A **deposition** is a pretrial questioning of a witness. Attorneys representing both parties are typically present at depositions, when a witness answers questions, under oath, that are recorded by a court stenographer. Like interrogatories, deposition transcripts can be used as evidence at a trial.

If the facts of a case are not in dispute, the case may be decided without going to trial. In a motion for **summary judgment**, the moving party (the one making the request) argues that there is no question of fact (the facts are agreed on) and that the relevant law requires that he be awarded judgment. This motion can be requested at any time, but it is typically sought after discovery, when a party believes that discovery demonstrates that the facts are not in dispute. If the motion is awarded, no trial will take place.

Either party or the court can request a pretrial conference or hearing, which usually takes place after the discovery phase is complete. The main purpose of such informal conferences is to identify the matters in dispute and to plan the course of the trial. At such hearings, a judge may encourage the parties to reach an out-of-court settlement. If a settlement cannot be achieved, the case typically proceeds to trial. Most cases result in settlements.

In a civil trial, the plaintiff usually has to decide whether she wants the case to be heard by a jury. The plaintiff gives the opening statement, which may be followed by the defendant's opening statements and is designed to inform the triers of fact (the judge or the jury) about the matter and the types of evidence that will be presented during the case. Following opening statements, the plaintiff presents her case. The plaintiff then calls and examines her witnesses. Usually, witnesses are then cross-examined by the defendant, redirected by the plaintiff, and then recrossed by the defendant. The defendant then repeats the process with his witnesses.

During trial, two types of witnesses may be called. Fact witnesses are used because they have specific facts (perhaps something they saw or heard) regarding the matter. **Expert witnesses** (also referred to as *forensic experts*) are used to help educate the judge and jury by sharing their expertise and knowledge. Expert witnesses are typically asked to provide testimony regarding the professional standards that apply to the incident and the degree to which the defendant met, or did not meet, those standards.

After both parties have completed their questioning, final closing statements are made. After these final statements, the judge in a jury trial provides the jury instructions regarding the options the jury has in reaching a decision based on the applicable laws. After deliberating, the jury renders a verdict. In a trial without a jury, a judge can either recess the court while making a decision or render a decision shortly after closing statements.

After the trial court's decision, verdicts can be appealed. The party that lost the case can make a request (an appeal) to have the court proceedings reviewed by a higher court in the hope that the lower court's decision will be reversed. The appellate court can agree with (affirm) the lower court's decision, disagree with (reverse) it, send the case back to the lower court (remand) with instructions for a new trial, or modify the lower court's judgment.

U.S. Court System

The U.S. court system is hierarchical in nature (see figure 1.1) and consists of a variety of courts at both the state and federal levels as well as some specialized administrative courts. In addition, specific courts are designed to hear only certain types of legal disputes, such as bankruptcy and small claims courts. The vast majority of legal disputes are resolved before trial. If they do proceed to trial, federal and state judges preside in these courts to settle cases brought before them. The various types and levels of courts are described in the following sections.

Trial Courts

The U.S. court system is hierarchical in nature. The lowest level, or entry-level court, typically termed a *trial court* or *district court*, is followed by an intermediate appellate court; the highest court typically is a supreme court. Trial courts carry out the initial proceedings (trials) in lawsuits. These trials have three distinct purposes (Carper, McKinsey, & West, 2008):

1. To determine the facts of the dispute (What happened between the parties?)
2. To decide what rules of law should be applied to the facts
3. To administer those rules

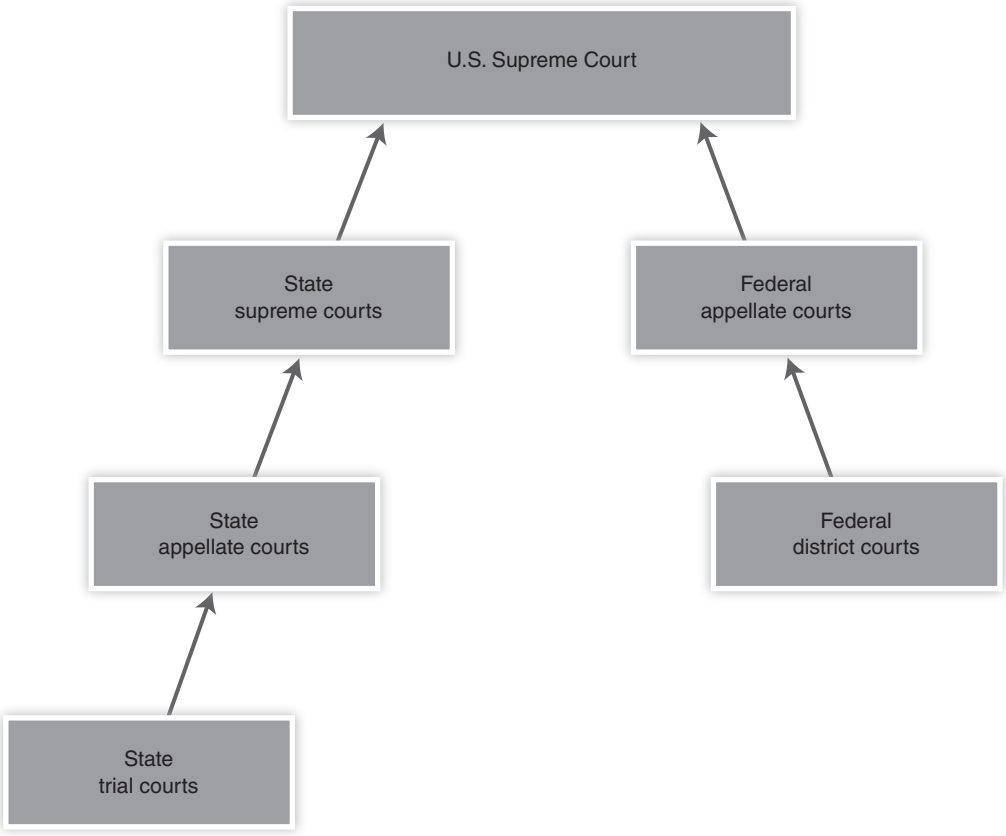


Figure 1.1 Hierarchy of the U.S. court system.

At the end of every trial, the court renders judgment in favor of one of the parties. Usually, when well-established existing law is applied, these disputes are resolved at the trial court level, and most are not appealed.

Appellate Courts

Within a certain time following a trial court's final decision, the losing party can appeal the decision. An appeal is a formal request to a higher court to review the lower court's decision. These review courts are known as *appellate courts*. Having three or more judges, these courts review lower court decisions for substantive and procedural correctness. In other words, they attempt to determine whether the proper law was correctly applied to the issue at hand.

Appellate courts must work from a court transcript of what was said and what evidence was used in the lower court, such as contracts, photographs, business records, waivers, and leases. State appellate courts do not review new evidence, listen to witnesses, make different or new determinations of fact, or use a jury. Instead, these courts review written briefs prepared by attorneys that include legal arguments about how the law was incorrectly stated or applied to the facts that were presented to the lower court. The appellate court determines whether the lower court correctly applied the law.

If an appellate court determines that a lower court incorrectly applied or interpreted the law, it will modify or reverse the lower court's decision and either provide a new revised judgment or **remand** (send back) the case to the trial court for a new trial to be conducted using the appellate court's instructions. Even if an appellate court determines that an error occurred at the trial court, it may not be sufficient to overturn the trial court's decision. A slight or insignificant error, or one that is not prejudicial to the interests of the appellant, is unlikely to affect the original ruling of a case.

If an appeals court decides a case, the judges typically write and publish a written opinion. In such an opinion, the appellate court states the rules of law applied as well as the rationale for reaching its decision. When reaching decisions, appellate courts interpret and apply relevant statutory law along with appropriate common law derived from precedent. On occasion, when no controlling statute or precedent applies to a case, an appellate court may create a new rule or extend an existing principle to the case at hand. Thus, new law is created and is termed **judge-made law** or **case law**.

Moot cases are outside the court's power because there is no case or controversy. U.S. courts will not decide moot cases. In other words, litigating a case is unnecessary unless there has been some direct negative effect on a party. A controversy must exist not only at the time the case was filed but also at the appellate stage. If the original issues in the case have substantially changed since it was filed or they no longer exist, rendering a decision would be pointless and of no practical value. A classic example of a moot case is the U.S. Supreme Court case *DeFunis v. Odegaard*, 416 U.S. 312 (1974). The plaintiff, Marco DeFunis, was a potential student who was denied admission to law school but was later admitted when the case was pending. Because DeFunis was scheduled to graduate within a few months at the time when a decision would have been rendered and the law school could take no action to prevent his graduation, the court determined that deciding the case would have no effect on DeFunis' rights. The court, therefore, dismissed the case as moot.

U.S. Federal Court System

The federal court system is a three-level model consisting of (1) trial courts known as *district courts*, (2) intermediate courts of appeal, and (3) the U.S. Supreme Court. The federal court system also includes some special courts such as maritime, military, and bankruptcy courts. The federal court system conducts trials involving federal matters, such as the enforcement of federal laws. Therefore, when a federal question arises (when a federal law is at issue in a case), the case will likely be held in federal court. Even where a federal law is at issue, however, the damages (i.e., money sought) in a case must be at least $75,000 for the case to go to federal court. Another way for a case to be brought to federal court, as opposed to state court, is when diversity jurisdiction is present. **Diversity jurisdiction** occurs when parties (individuals or organizations) to the lawsuit are from different states. For example, a fan from Tennessee might be injured at a stadium in Alabama; a subsequent lawsuit might be held in federal court, given that the person and the organization (stadium management) are from different states.

The United States is divided into 96 federal judicial districts, and at least one U.S. district court is located in each state and territory. The number of district courts per state varies depending on population changes and caseloads. The U.S. courts of appeal consist of 13 federal judicial circuits (see figure 1.2), which hear cases appealed from the U.S. district courts. The highest

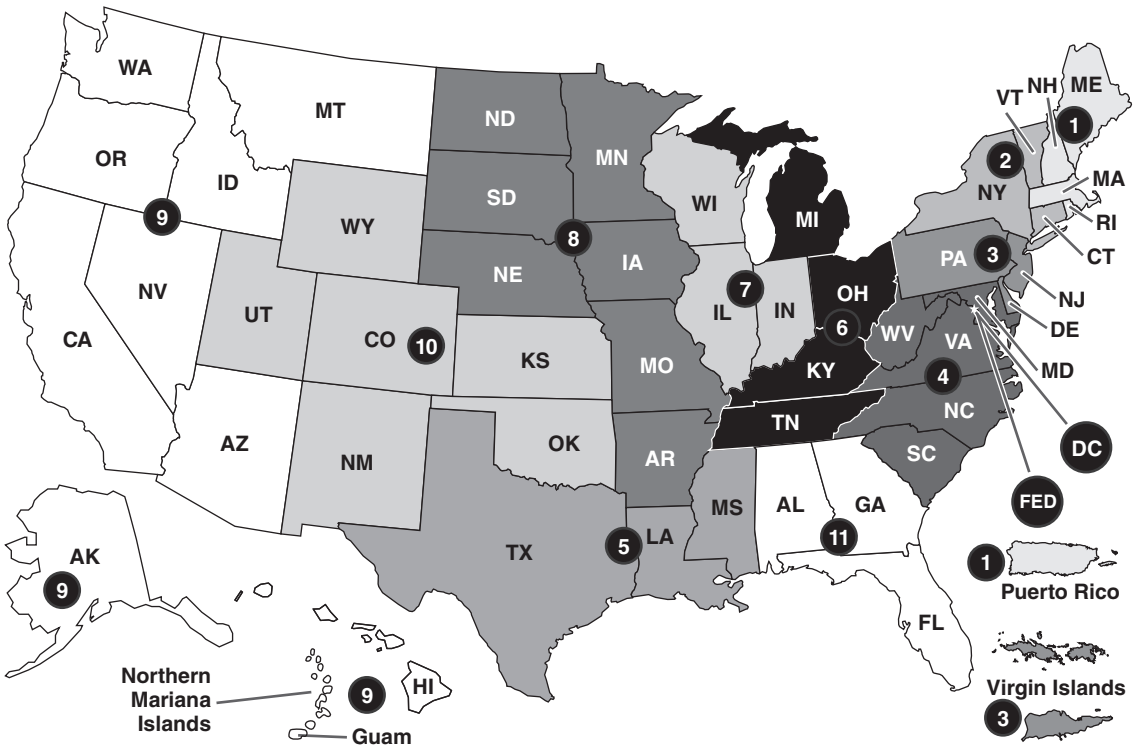


Figure 1.2 Federal judicial circuits.

level of the federal court system is the U.S. Supreme Court. Nine justices, appointed by the U.S. president for lifetime appointments, sit on the U.S. Supreme Court. The Supreme Court acts as the final appeal for the federal courts of appeals. Further information on U.S. federal courts may be found at www.uscourts.gov.

State Court System

The state court system parallels the federal system, although the states may give their courts different names than those used in the federal system. All states have entry-level (trial) courts, but they may be called a *circuit court* in one state, a *supreme court* in another, and something else in a third. Trial court decisions are made by judges or juries. These decisions, made at the local level, are not published. Therefore, the full case decisions that are publicly available for you to read come only from the upper-level state courts (courts of appeal and supreme courts), not the trial courts. Every state also has some form of an appellate system and specialized courts for specific legal matters. The typical hierarchy of the state court system is the trial court, the court of appeals, and the state supreme court. Further information about state court systems can be found at the National Center for State Courts website at www.ncsc.org.

Legal Resources

Sport managers and practitioners should study aspects of the law that relate to the field, although at times they may have to obtain specific legal information. Legal resources can be grouped into primary and secondary sources. **Primary sources** consist of court decisions (case law), U.S. and state constitutions, statutes, and administrative agency regulations. Primary sources are the actual law and therefore are the primary legal sources relied on in determining what the law requires. In contrast, **secondary sources** examine, inform, or review various legal topics and issues. Examples of secondary sources include law review articles and legal encyclopedias, textbooks, dictionaries, and journals (e.g., *The Sport & Recreation Law Reporter*, *Journal of Legal Aspects of Sport*, *Marquette Sports Law Review*). Although secondary sources should never be relied on as legal authority, they can be useful to the sport manager by providing information about a specific legal issue.

Case law (also referred to as *court opinions*) is published in a series of books known as reporters. At the federal level, all reported U.S. district court cases are published in the reporter known as the *Federal Supplement*. U.S. circuit court cases (courts of appeal) are reported in the *Federal Reporter*. U.S. Supreme Court cases are typically reported in three major sets of reporters: the *Supreme Court Reporter*, the *United States Reports*, and the *United States Supreme Court Reports Lawyers' Edition*.

Most state court opinions are published by the West Publishing Company in a set of reporters referred to as *regional reporters*. Every regional reporter prints opinions from courts in a specific geographical region. Each of seven regional reporters prints decisions for a number of states (Southern [So.], Southeastern [S.E.], Southwestern [S.W.], Northeastern [N.E.], Northwestern [N.W.], Pacific [P.], and Atlantic [A.] reporters), and California and New York each has its own official reporter for publishing decisions from its courts. Additionally, reporters are grouped according to series, starting with a first series and moving to additional series designated as "2d," "3d," and so on.

Although reports and the cases they contain are typically found in law libraries, case decisions can also be obtained from the Internet. Although some legal search

engines and databases, such as *Lexis* and *Westlaw*, may only be accessed for a fee and therefore are primarily used only by members of the legal profession, the *Lexis/Nexis Academic Universe* database is available through many academic institutions. This database permits students and researchers to obtain primary and secondary sources and offers keyword search engines for law reviews, legal news, statutes (i.e., codes), and case law. Contact your local or institutional library to see whether you have access to *Lexis/Nexis Academic Universe*.

LEARNING AIDS

Summary

A challenge for sport managers is to recognize and understand legal issues, effectively manage such issues, and reduce the possibility that legal problems will occur. A sport manager can best manage such issues by understanding the sources of law, the U.S. court system, types of legal resources, and the steps in a lawsuit. By being familiar with these legal topics, as well as the relevant laws and legal issues that affect the sport industry, a sport manager can reduce or eliminate many legal problems.

Knowledge and understanding of key aspects of the law have become increasingly important for sport managers in today's litigious environment. Sport managers should know how to obtain legal information, such as statutes, case law, and published standards and guidelines. Likewise, understanding when it is best to obtain legal assistance is important. Because the law is constantly changing, a wise professional will stay abreast by attending relevant conferences, reading the professional literature, and seeking advice from legal professionals.

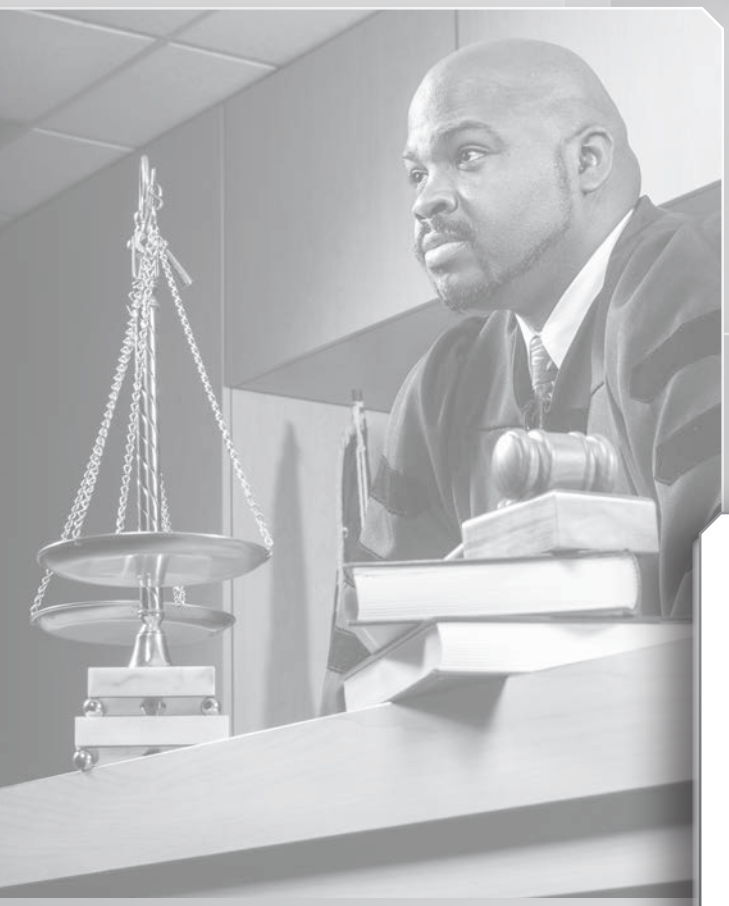
Discussion Questions

1. Identify and describe the major sources of U.S. law. Provide a sport-related example of each.
2. Explain the primary differences between criminal and civil law.
3. Describe the names and structure of your state's court system. Where is your state's supreme court located? How many justices serve on the state supreme court?
4. What is the location of the U.S. district court closest to you? What federal regional circuit court of appeals does your state belong to?
5. Identify and explain the steps in a civil trial.
6. Identify which reporter publishes your state's court opinions.
7. Locate and read a sport management–related case opinion from a reporter or from the Internet. Outline the key facts and legal issues. What was the court's decision, and why did they decide that way? Do you agree with the decision? Why or why not?
8. Obtain, read, and summarize a sport law–related article from a sport-related secondary source (journal, law review, blog, etc.).
9. Identify two specific, sport-related primary legal sources as well as two secondary legal sources. What is the major difference between primary and secondary sources?
10. Using the Internet, identify three expert witnesses who focus on sport and physical activity cases.

This page intentionally left blank.

Tort Law and Product Liability

2



Chapter Objectives

After reading this chapter, you will know the following:

- The elements of negligence liability and how it applies to sport
- The defenses to the tort of negligence and the application to sport management
- Intentional torts and their application to sport settings
- Product liability and its application to sport management

Case Studies in Sport Law Connection

Check out the following case studies related to this chapter in the accompanying e-book, *Case Studies in Sport Law, Second Edition* (Pittman, Spengler, & Young, 2016):

Averill, Jr. v. Luttrell
Baugh v. Redmond
Benjamin v. State
Byrns v. Riddell, Inc.
Crawn v. Campo
DeMauro v. Tusculum College, Inc.
Dilger v. Moyles
Dotzler v. Tuttle
Dudley Sports Co. v. Schmitt
Eddy v. Syracuse University
Everett v. Bucky Warren, Inc.
Filler v. Rayex Corp.
Foster v. Board of Trustees of Butler County Community College
Friedman v. Houston Sports Association
Gehling v. St. George's University School of Medicine, Ltd.
Gillespie v. Southern Utah State College
Hanson v. Kynast
Hauter v. Zogarts
Hayden v. University of Notre Dame
Hemphill v. Sayers
Jaworski v. Kiernan
Knight v. Jewett
Lofy v. Joint Union School Dist. No. 2, City of Cumberland
Lowe v. California League of Professional Baseball
Miller v. United States
Nabozny v. Barnhill
Pell v. Victor J. Andrew High School
Rawlings Sporting Goods Company, Inc. v. Daniels
Rispone v. Louisiana State University and Agricultural and Mechanical College
Sallis v. City of Bossier City
Schiffman v. Spring
Vargo v. Svitchan

This chapter addresses a topic with important practical implications for sport managers: tort law. A **tort** is a category of law that encompasses situations in which a civil wrong has been committed. A tort does not involve criminal conduct but rather conduct that is either careless or intentional that results in harm or injury to a person or property. Unlike criminal law, in which a penalty or jail time might be imposed, a tort might result in an award of money (**damages**) from the person or organization (the defendant) that caused injury or harm. Types of torts include negligence and intentional torts, which are discussed in this chapter and are of critical importance to sport managers, given the frequency in which they occur. This chapter discusses negligence, intentional torts, and product liability as they apply to sport management.

Negligence

Negligence occurs when someone sustains personal injury but there is no intent to cause injury. The injured person (the plaintiff) may initiate a negligence lawsuit in which she seeks money for the injury. Examples of negligence include lawsuits against fast-food chains for claims that fast food made a person overweight or obese and the famous case of the woman who sued McDonald's after she spilled hot coffee in her lap. Most negligence cases never go to trial, because the cases are settled by the attorneys and their clients.

Many examples of negligence can be found in the sport world. Within the broad category of torts, negligence is the most likely type of lawsuit a sport manager will face. We know about many of these

negligence cases from either the media or published legal decisions. Thousands of published cases involve negligence in sport. An example of a negligence case in the sport setting is *Green v. Konawa Independent School District* (2005). After participating in an elementary school track and field competition at the Konawa track and field facilities, Green, a fourth-grade student, was instructed by a teacher to sit on one of the stands outside the facility to wait until the event ended. Four students, including Green, climbed to the top level of the stands. One of the students, who weighed more than 200 pounds (91 kg), leaned over the top rail, causing the stands to collapse. Green was hurt in the fall, and his father sued the school district, alleging that the school was negligent for failing to secure the stands and adequately supervise the students.

In this section we look at the elements of negligence, gross negligence, and defenses to negligence.

Elements of Negligence

The plaintiff (injured person) has the burden of proving her case when negligence is alleged. When lawsuits are brought, the plaintiff goes on the offensive and attempts to provide reasons why she should prevail in a lawsuit, but the plaintiff must follow rules set forth by the legal system. The rules, or parts of the case, that must be proved are often called *elements*. With negligence, four key elements must be proved:

- Standard of care
- Breach of duty
- Causation
- Injury (damages)

Each element must be found to exist before a plaintiff may recover (be awarded money) in a negligence case. Figure 2.1 illustrates the elements of negligence.

Standard of Care

Negligent conduct occurs when a defendant fails to meet his duty or responsibility (standard of care) for the protection of others and, as a result, causes another to be injured or harmed. Establishing the standard of care is critical to whether a case is won or lost. The **standard of care** is the duty or responsibility owed by a defendant (this could be a person or an organization)

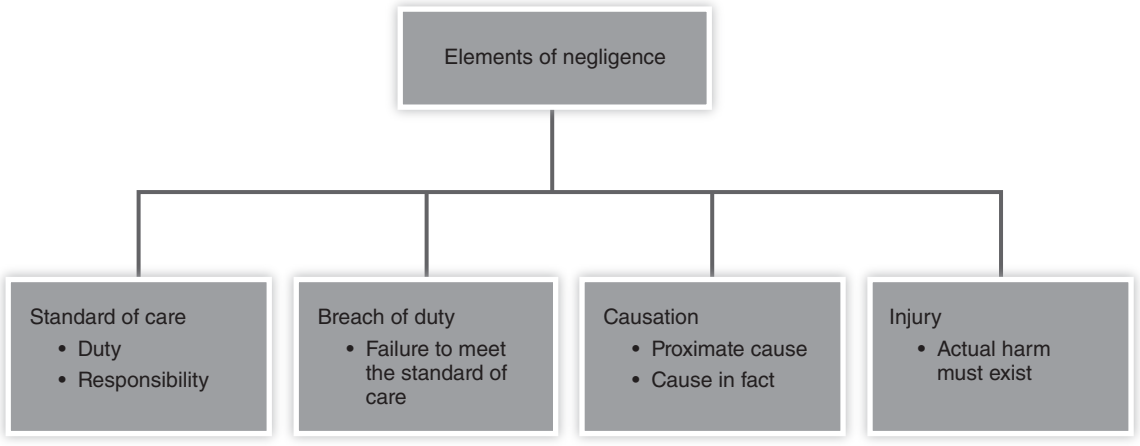


Figure 2.1 Elements of negligence.

to another. The responsibility of the sport practitioner is often viewed in the context of providing a reasonably safe sport environment for those under her care. The following list provides factors that a court might consider when determining the standard of care. Often, a combination of these factors influences the final determination of the standard of care, or responsibility, owed by a sport manager.

- *Case precedent*. Courts refer to the outcomes and facts of prior cases to determine the standard of care (the duty or responsibility of the plaintiff). The practice of using prior legal decisions with similar facts to determine the outcome of later cases is referred to as stare decisis. This doctrine, which provides stability and predictability in the law, is also flexible because some courts may overrule prior decisions in cases in which public policy or other relevant legal matters dictate the need for change.
- *Rules and regulations*. The standard of care might be written in a rule put forth by a regulatory agency. For example, rules govern sliding in high school baseball games, the number of lifeguards required for a pool of a certain size, slide tackling in soccer, and contact in college football. Certain sport-specific rules might help determine the standard of care in a sport negligence lawsuit.
- *State and federal laws*. Legislation may mandate a certain act. For example, in some states, fitness centers and high school athletic departments are required to have automated external defibrillators (AEDs) on the premises. State law dictates the standard of care for these facilities, mandating a duty to have these devices on the premises and specifying the circumstances in which they should be used.
- *Community practice or industry standard*. The standard of care might be influenced by what others in the industry (i.e., **industry standard**) or community are doing. For example, do other softball complexes in the city or state adhere to certain safety practices or have similar safety features at their facilities? If, for example, most facility supervisors in the region have lightning safety plans in place to protect players from injury, a lightning safety plan for softball complexes in that region might be considered the standard of care. Therefore, the sport manager should know what others in the community and industry are doing with regard to safety.
- *Federal regulatory agencies*. Certain federal agencies may have guidelines and recommendations relevant to sport safety with bearing on the standard of care in sport negligence cases. For example, the **Consumer Product Safety Commission (CPSC)** has guidelines regarding the safety of moveable soccer goals; these guidelines may be used by courts in determining whether the standard of care was met. The CPSC recommends that moveable soccer goals provide warnings, be anchored on level ground, and be constructed according to certain guidelines. These recommendations might be used by a court in determining the standard of care if a person is injured when a soccer goal tips over on him.
- *Professional associations*. **Position statements** are often published by organizations such as the National Collegiate Athletic Association (NCAA), the American College of Sports Medicine (ACSM), and the National Athletic Trainer's Association (NATA) that provide guidelines on subjects as diverse as lightning safety and equipment safety. Guidelines contained in association position statements might be used by the courts in determining the standard of care.

• *Agency and organization manuals*. An agency's own policies and procedures manual might be used in determining whether it met its own standards. Lawyers in negligence cases often seek out the agency policy as evidence in determining the standard of care. For example, if language in an agency policy manual states that staff members must call 911 in the event of a head injury, this guidance might be construed as the standard of care as it pertains to the emergency action plan.

• *Expert opinion*. The opinions of **forensic experts** from various fields might be used to help a court determine the standard of care. In sport, experts come from a variety of disciplines: sport management, engineering, medicine, psychology, economics, and others. Engineers might be called to consult on a sport negligence case in which structural or equipment design defects are at issue. Economists might provide testimony about lost future earnings when a young victim loses the ability to work for the remainder of his life as he had anticipated. Sport safety experts might provide testimony about supervision, instruction, emergency planning, or other issues specific to the sport setting.

A person or organization's duty (standard of care) is triggered by the relationship with the injured person (the plaintiff). Certain relationships automatically give rise to a duty to protect another person from an unreasonable risk of harm. For example, although a swimming pool patron is under no legal obligation to rescue a fellow swimmer in distress, lifeguards are responsible because of the nature of their relationship to the patron (e.g., the lifeguard's job is to render assistance). The same idea holds true for coaches (an obligation to players), sport instructors (an obligation to students), and others who provide a service with an associated obligation. Consider the case in the Duty of Care sidebar, in which the court recognized a duty owed by the school and coach to an injured student-athlete.

The duty might arise in another context, even where the types of relationships described previously don't exist. For example, although a person has no general duty to come to someone's aid, after someone voluntarily begins to render assistance, she must proceed with reasonable care. For example, a coach attending a game as a spectator sees a player collapse on the field and decides to render aid. If the player has a neck injury and the off-duty coach (spectator) moves the player and aggravates the injury, the coach may be liable for negligence even though he did not have a duty to render aid based on a player–coach relationship. Thus, the off-duty coach assumed a duty that normally he would not possess.

The final way in which a duty may be found is if it is set forth by statute. For example, state law prohibits the sale of alcohol to minors. Suppose that a 17-year-old high school student becomes intoxicated after drinking beer that was sold to him illegally by arena concessions staff. While driving home from the game, this intoxicated person runs into a pedestrian; the arena and concessionaire have likely breached a duty owed to the pedestrian. As such, the arena and concessionaire may be deemed negligent per se for selling alcohol to a minor, resulting in injury to the pedestrian. If a defendant violates a statutory duty and is deemed **negligent per se**, then the defendant is negligent as a matter of law (*Restatement [Third] of Torts* § 324, 2005). In such a case, the plaintiff need only prove the elements of causation and actual harm to prevail in court. Thus, the statute sets up both the legal duty and the standard of care for the plaintiff. Determining whether

IN THE COURTROOM

Duty of Care

Avila v. Citrus Community College District (2003)

Jose Luis Avila was a 19-year-old student at Rio Hondo Community College and played on the school's baseball team. During a game against Citrus College, Avila was hit in the head with a pitch that was thrown with such force that it cracked his helmet. He alleged that the pitch was deliberately thrown to retaliate for a Rio Honda pitch that hit a Citrus College batter.

After being hit by the pitch, Avila staggered, felt dizzy, and was in pain. The Citrus College coaching staff did not check him, provide any aid, or summon medical care. His coach told him to go to first base. After going to first base, Avila complained to the first-base coach, but the coach told him to stay in the game. After Avila reached second base, he still felt dizzy and in pain. An opposing player yelled to Rio Honda's dugout that they needed a different runner. Avila walked to his bench, but his injuries were not tended to.

Avila alleged, among other things, that Citrus College was negligent for not providing or calling for medical aid when it was obvious that he needed medical attention. He also claimed that Citrus College was negligent for failing to supervise and control the pitcher and the game, provide umpires or other supervisors to control the game and prevent retaliatory or reckless pitching, and provide an adequate helmet to protect him from serious head injury. Finally, Avila alleged that Citrus College was negligent for failing to train and supervise coaches, managers, trainers, and employees in providing medical care to injured players and for holding an illegal preseason practice game in violation of community college baseball rules. Citrus College contended that it was immune under government code (section 831.7) on recreational immunity and that it had no duty to supervise Avila. The trial court dismissed the case in favor of the defendants.

On appeal, the court ruled that extending immunity to this case based on section 831.7 was not appropriate. The court stated that "coaches and instructors owe a duty of due care to persons in their charge" and section 831.7 "was not intended to affect the relationship between schools and their students" (p. 818). Regarding the duty allegation, the court stated, "It is surely foreseeable that a student might be injured if supervision is lax (or non-existent) at a school-sponsored sports event, and if medical care is not summoned when an injury occurs" (p. 819). The trial court's decision was reversed (*Avila v. Citrus Community College District*, 2003).

a duty is owed and what standard of care is applicable is a key element of a negligence case. After the duty, or standard of care, is established, the next step for the plaintiff is to prove that the defendant failed to meet the standard of care.

Breach of Duty

The second element of negligence, **breach of duty**, requires the plaintiff to prove that the defendant breached the duty of care. The plaintiff must establish that the defendant failed to conform to the duty of care owed to the plaintiff (*Restatement [Second] of Torts* § 282, 1965). To show that the duty of care was breached, the plaintiff must prove that the defendant's conduct, viewed as of the time it occurred, imposed an unreasonable risk of harm (Keeton, 1984).

By establishing the existence of an unreasonable risk of harm, the plaintiff shows that the defendant breached the standard of care that was owed under the circumstances. A good way to conceptualize breach of duty is first to think about the standard of care and where it comes from and then think about situations when the standard of care is not met. The following example should help you understand the concept of breach.

- *Case precedent as basis for breach*. During a baseball game, a batted ball passes through a hole in the netting that was designed to protect spectators behind home plate and strikes an elderly spectator in the face, fracturing her jaw. Suppose that case precedent has determined that fans assume the risk of being struck by foul balls only when they sit outside protected areas but that stadiums have a duty to provide a safe environment behind netted areas. Based on the duty identified through case precedent, a breach of the standard of care has occurred.

- *Violation of rules and regulations as basis for breach*. A county municipal health code regulation states that pools in the county must have a minimum of six lifeguards on duty at all times for a pool of a certain size. Four lifeguards are on duty when a child drowns in the pool. If the municipal rules regulating the number of lifeguards are determined to be the standard of care, then the pool management has breached its duty (not met the standard of care) in guarding the pool.

- *Violation of state or federal law as basis for breach*. You operate a fitness facility in a state that requires all health and fitness centers in the state to have at least two AEDs on the premises. Suppose that the statute also requires staff to be trained in the use of the AED. If someone suffers sudden cardiac arrest and dies, and you had neither an AED nor anyone trained in its use, you would have violated your duty as required by state law, also possibly invoking the doctrine of negligence per se.

- *Violation of federal regulatory agency guidelines as basis for breach*. A court determines that the CPSC guidelines for moveable soccer goals are the standard of care in a negligence case. The guidelines state that goals must be constructed properly, placed on level ground, and anchored. If an injury and subsequent negligence lawsuit arose after a goal tipped over on a child, and the goal in question was top heavy and not anchored, the standard of care would have been breached.

- *Professional association position statements*. Safety guidelines relevant to lightning safety contained in a position statement from a well-recognized professional association require that sport participants wait at least 30 minutes after a lightning storm has passed to return to the field of play, and these guidelines are determined to represent the standard of care. If a coach or sport supervisor returns the team to the field 15 minutes after the storm has passed and a player is struck and killed, the supervisor has breached the duty of care.

- *Violation of agency policy as breach*. An organization has a policy that requires all staff to call 911 immediately in the event of a suspected head injury. If a staff member fails to call 911 at all, or fails to call in a timely manner, and further injury results, the staff member has breached the standard of care as contained in the organization's policy.

In all these hypothetical cases, the issue will turn on whether the defendant's actions posed an unreasonable risk of harm to the plaintiff. Consider the Causation as an Element of Negligence sidebar and evaluate whether the defendant's actions created an unreasonable risk of harm to the student-athlete.

IN THE COURTROOM

Causation as an Element of Negligence

Day v. Ouachita Parish School Board et al. (2002)

As a member of the freshman football team at West Monroe High School (WMHS), Morgan Day was required to participate in a weight-training class held during school hours. The class was supervised by WMHS' strength coach and three other coaches. Sixty football players were divided into five groups and were supervised by one of the coaches. Several senior students on the team helped the coaches supervise and instruct the class participants.

During one of the classes, Morgan injured his back while lifting weights. The next day, he played in a freshman football game even though his back was bothering him. Shortly thereafter, Morgan sought medical treatment. After an examination, the treating orthopedic surgeon provided Morgan with a written medical excuse that stated, "(1) No football for 1 week (2) No weightlifting, squats or power cleans. Diagnosis—lumbar strain and injured L-5 disc" (p. 1040).

Morgan presented the note to the freshman coach, and the note was posted in the office. The coaches testified that they believed the physician's note meant that Morgan could not participate in football or weightlifting for 1 week. Morgan and his mother claimed that they interpreted the note to mean that Morgan could not play football for 1 week and could not lift weights for an indefinite amount of time.

One day after the medical excuse was posted, Morgan was observing the class but not lifting weights when an assistant coach instructed him to perform a dumbbell power clean push press. Morgan reminded the coach that he was medically excused, but the coach insisted that the exercise would not affect his low back. After performing a few repetitions of the exercise, Morgan experienced severe pain and needed to lie down.

Morgan again saw the orthopedic surgeon and complained of back pain. Magnetic resonance imaging revealed a disc protrusion between the fourth and fifth vertebrae. The physician wrote another medical excuse that prohibited Morgan from all weightlifting and football activities until further notice. Morgan was referred to another specialist. He also went to other orthopedic surgeons and a neurosurgeon.

After the disc injury, Morgan was unable to play high school football or baseball. He lost interest in school and failed his classes because of excessive absences. He withdrew from WMHS and enrolled in an alternative school. Morgan's mother sued the school board and the coach who instructed Morgan to perform the lift after the medical excuse had been delivered. The trial court found the defendants liable for Morgan's back injury (*Day v. Ouachita Parish School Board et al.*, 2002).

Causation

Causation is the third element that must be proved in a negligence case. *Causation* refers to the claim in a negligence case that the acts or inaction of the defendant brought about injury to the plaintiff. Proof of causation is often a key part of a negligence case; the outcome hinges on its resolution. A court might consider two types of causation, depending on the jurisdiction (state where the case is brought), when rendering decisions in negligence cases: cause in fact and proximate cause.

Consider this case in the context of causation. John Lowe (plaintiff) was seriously injured when struck on the left side of his face by a foul ball at a professional baseball game. The Quakes, at their home games, feature a mascot who goes by the

name of Tremor. He is a caricature of a dinosaur, standing 7 feet (2.1 m) tall and having a tail that protrudes from the costume. Tremor was performing his antics in the stands just along the left-field foul line. Tremor's tail touched the plaintiff, who was standing in front of Tremor. The plaintiff was distracted and turned toward Tremor. In the next moment, just as the plaintiff returned his attention to the playing field, he was struck by a foul ball before he could react to it. Serious injuries resulted from the impact. As a result, the underlying action was commenced against the California League of Professional Baseball and Valley Baseball Club, Inc., which does business as the Quakes (defendants) (*Lowe v. California League of Professional Baseball*, 1997).

Did the baseball club cause the injury to the spectator? Should it be liable? Consider this case in light of the types of causation described next.

Cause in Fact

Even if a breach of the duty of care owed to another occurs, it remains to be proved that the defendant's breach was the factual cause (**cause in fact**) of the plaintiff's harm. In other words, the plaintiff's **cause of action** for negligence must have some reasonable, direct connection to the defendant's action or omission (Keeton, 1984). An act or omission is not a cause of an event if the event would have occurred without it. This maxim has been used by courts to establish a "but for" or "sin qua non" rule. Simply put, causation in fact requires a finding that but for the defendant's conduct, the plaintiff would not have been hurt. In the Lowe case mentioned earlier, "but for" the distractive actions of Tremor, would the plaintiff spectator been hit by the foul ball, or would he have had greater awareness to the extent that he could have seen the ball coming and avoided it?

In some jurisdictions, causation may be found not to have occurred if it can be shown that something else caused the plaintiff's harm. But the law recognizes that there can be more than one cause for a plaintiff's harm. Accordingly, if a plaintiff can prove that any of two or more causes would have brought about the harm, then the plaintiff may recover against any or all of the actors. The substantial factor test is used to determine whether multiple causes each resulted in the plaintiff's harm (Keeton, 1984). If the defendant's conduct played a substantial factor in causing the plaintiff's harm, then the defendant's conduct factually caused the plaintiff's harm. Thus, if the actions or omissions of multiple defendants each played a substantial factor in bringing about the plaintiff's harm, then all the defendants would be deemed liable and the plaintiff may recover against any single defendant or all the defendants for compensation (*Restatement [Second] of Torts* § 432, 1965).

Proximate Causation

Proximate cause is another type of causation used in courts in various jurisdictions. Under this type of causation, the plaintiff must establish that the defendant's negligence was the proximate cause of the injuries (Wong, 2002). The concept of **proximate cause** stems from policy considerations that place manageable limits on liability caused by negligent conduct (57A American Jurisprudence 2nd § 427, 2003). The proximate cause requirement is based on the premise that defendants should not be liable for all the consequences of their actions, especially far-reaching consequences. There are two conflicting applications of the policy. The first is termed the *direct causation* view. It holds that defendants are liable for all consequences of their negligent acts if no superseding intervening causes occur. The second application, which is more popular

and is widely used, is termed the *foreseeability* or *scope of risk* view (Keeton, 1984). Jurisdictions that incorporate **foreseeability** into their proximate cause determination require plaintiffs to prove that the injury was foreseen by the defendant, or reasonably should have been foreseen, and was the natural and probable result of the negligence (57A American Jurisprudence 2nd § 429, 2005). Accordingly, the foreseeability component of proximate cause is satisfied if a person of ordinary caution and prudence could have foreseen the likelihood of injury (*Regions Bank & Trust v. Stone County Skilled Nursing Facility, Inc.*, 2001).

Injury

For any cause of action based on negligence, some **actual harm** or injury must exist (*Restatement [Second] of Torts* § 907, Comment a, 1965; Wong, 2002). Proof of damage is an essential part of the plaintiff's case in negligence because negligent conduct in and of itself does not rise to the type of interference with the interests of society as a whole to warrant a complaint (Keeton, 1984). For example, many of us experience negligent acts committed by others every day. We have all likely experienced a near miss by a car running a red light. An event like this upsets us because the other driver breached the standard of care (broke the traffic law) and caused us distress. The act of the driver was careless, if not negligent, but we have no cause of action for negligence because we suffered no physical harm and the emotional distress was minimal and of a degree that is common to most throughout a normal day. For negligence to be found, in addition to the previously mentioned elements, some real (actual) physical or emotional harm must exist.

After actual harm or injury is established, many types of damages may be recovered to compensate the plaintiff. The types of damages available depend on the circumstances but may include compensation (**compensatory damages**) for physical pain and suffering, mental distress, direct economic loss, **loss of consortium**, and wrongful death (van der Smissen, 2003). In some jurisdictions, a plaintiff may possibly recover **punitive damages** against the defendant. Punitive damages differ from compensatory damages because punitive damages are awarded to punish the defendant rather than compensate the victim (Keeton, 1984). Punitive damages, however, are awarded only to punish outrageous, reckless, willful, or wanton conduct (Wong, 2002). For example, punitive damages may be sought against a stadium concessionaire who sells alcohol to a visibly intoxicated patron who injures another in a car wreck or against a hockey player who uses his stick to hit another player, resulting in serious injury.

Gross Negligence

Thus far, this chapter has focused on what is required for ordinary negligence. But the common law recognizes that tortuous conduct may be so great that it amounts to more than just negligence, even though it falls short of being intentional (Keeton, 1984). For these situations, courts have distinguished between ordinary negligence and situations in which the defendant acts with a heightened degree of carelessness, or gross negligence (*Fidelity Leasing Corp. v. Dun & Bradstreet, Inc.*, 1980). In **gross negligence**, the defendant's responsibility is magnified so that it is at a higher degree than that found in ordinary negligence (57A American Jurisprudence § 227, 2005). Some courts have stated that gross negligence amounts to a failure to exercise even the care that a careless person would use (*Whitley v. Com.*, 2000). Other courts, however, have interpreted gross negligence to require a showing of willful, wanton, or reckless

misconduct (Keeton, 1984). The majority of jurisdictions distinguish between acts that are willful, wanton, or reckless and those that involve gross negligence (Keeton, 1984). Regardless of type, the determination is subjective.

A good case example to consider when thinking about the concept of gross negligence is one involving a professional football player who died of heat stroke, resulting in a wrongful death claim for improper medical care. After reading the Negligence Cause of Action and Heat Illness in Football sidebar, think about whether the acts of the coaching staff were grossly negligent.

IN THE COURTROOM

Negligence Cause of Action and Heat Illness in Football

Stringer v. Minnesota Vikings Football Club, LLC (2005)

In the case of *Stringer v. Minnesota Vikings Football Club, LLC* (2005), a professional football player, Korey Stringer, died from heat stroke after the second day of practice at the 2001 Minnesota Vikings training camp. In the 2 days of training camp and before his death, Stringer vomited several times and fell to his knees or the ground several times, although he stood up by himself. Because of these events, Stringer was treated by the Vikings' medical service coordinator and by an assistant trainer. Both of these practice days were hot and humid, and 11 players were treated for heat-related illness on the second day of practice.

During the morning practice of the second day, Stringer became sick and vomited again but continued to practice. Shortly after that practice ended, Stringer dropped to his knees, fell on his right side, and then lay down on his back. The assistant trainer, who thought that Stringer was doing fine, took him to an air-conditioned trailer as a preventive measure. While in the trailer, Stringer relaxed for several minutes. He was given water to drink and an iced-down towel for his forehead. After the trainer removed the player's socks and shoes, Stringer lay on the table and began humming and moving his head back and forth for 10 minutes or more. The assistant trainer eventually called the training room to request a golf cart to transport Stringer, but when the cart arrived, Stringer was unresponsive. This was the first time anyone checked any of Stringer's vital signs, including his pulse, which was steady and slow. At this point no one had called for an ambulance. A few minutes later, the medical coordinator arrived and, believing that Stringer was hyperventilating, treated him for such. Soon thereafter, those present attempted to reach a physician who provided medical services for the Vikings. A few minutes later, the physician telephoned, and a decision was made to call an ambulance. An ambulance arrived 8 minutes after it was dispatched, and the ambulance transported Stringer to a hospital. Hospital staff reported that Stringer's body temperature was 108.8 °F (42.7 °C). Despite attempts to cool and treat Stringer, his condition worsened. He died from heat stroke less than 2 hours after arriving at the hospital.

Stringer's wife filed suit, alleging that the coordinator of medical services and the assistant trainer had a personal duty to protect and care for Stringer's health and that they were grossly negligent in performing such duty. By alleging that the medical coordinator and assistant trainer were grossly negligent, the plaintiffs were saying that the actions, and inaction, taken by these people amounted to extremely careless conduct. Whether actions amount to gross negligence is a subjective determination based on the facts of a case. A key issue here was whether the time delay in getting emergency medical services on site amounted to gross negligence. The Supreme Court of Minnesota upheld the lower court's ruling in favor of summary judgment for the respondents.

As previously stated, some jurisdictions distinguish between gross negligence and willful, wanton, and reckless conduct. These jurisdictions recognize situations in which a defendant may act with intentional indifference to the point that her actions exceed the culpability required for gross negligence (Keeton, 1984). Even though a defendant acts with intentional indifference, the defendant's actions remain negligent rather than intentional because the defendant did not intend to bring about the harm. In these situations, the risk of harm is so great that the defendant probably knows that the harm will follow (*Restatement [Second] of Torts* § 500, 1965). Some courts have tried to differentiate willful, wanton, and reckless conduct (*Neary v. Northern Pacific Railway*, 1910). For most jurisdictions, however, these terms can be used collectively or interchangeably (*Mania v. Kaminski*, 1980). A defendant who is found liable for willful, wanton, and reckless conduct may incur civil sanction through punitive damages (*Hackbart v. Cincinnati Bengals, Inc.*, 1979).

In *Hackbart v. Cincinnati Bengals*, a professional football player was struck in the head by an opposing player after a play had ended. The plaintiff (Hackbart) was seriously injured as a result. The reckless nature of the act was considered in light of the fact that it was committed after a play had ended and in light of the manner in which the incident occurred. Also, consider the case of *Nabozny v. Barnhill* (1975), in which a soccer player was seriously injured after being kicked in the head by an opposing player. The plaintiff (Nabozny) was kicked during a game after he had dropped to one knee, caught the soccer ball, and held it to his chest while in the penalty area. The defendant (Barnhill) continued to run in the plaintiff's direction and kicked the side of his head in the penalty area. The court held that a player is liable for an injury in tort if the conduct of the defendant was either deliberate, willful, or with reckless disregard for the safety of another. The case was remanded to the trial court for a factual determination of the issue.

Legal Protections

Sport managers can use several defenses when defending against negligence claims. Most of these defenses focus on the plaintiff's conduct. Plaintiffs must show all the elements of negligence to prevail in court. Sport managers who are defendants in negligence actions can prevail against a plaintiff's negligence suit if they show that not all the required elements have been met. If a plaintiff has established each of the required negligence elements, then the defendant's case will rest on whether one of the following defenses to negligence exists.

Assumption of Risk

Assumption of risk is a legal defense by which plaintiffs may not recover for injuries in negligence when they have voluntarily exposed themselves to known and appreciated dangers (Keeton, 1984). Three elements to assumption of risk must be established (*Leakas v. Columbia Country Club*, 1993):

- The risk must be inherent to the sport.
- The participant must voluntarily consent to be exposed to the risk.
- The participant must know, understand, and appreciate the inherent risks of the activity.

Inherent Risks

Inherent risks are those that cannot be removed from an activity without fundamentally altering the nature of the activity. For example, risks are associated with tackling in football. Football would be a much safer activity if players simply pulled

flags off other players to stop their progress rather than hit them with their bodies in a manner that causes them to fall to the ground. But removing the skill of tackling, and all the risks associated with tackling, would fundamentally alter the game of football. Thus, risks associated with tackling are inherent to the sport.

Voluntary Consent

Certain aspects of a sport, such as physical contact, are accepted (consented to) as part of the sport. Obvious examples of situations in which there is **voluntary consent** to contact and potential injury are legal tackles in football and legal checking in hockey. Even some sports that are technically considered noncontact, such as basketball, involve physical contact that is a known and accepted part of the game (e.g., setting picks). When physical contact resulting in injury goes outside the rules of the game (e.g., helmet-to-helmet contact in football) or when unnecessary physical contact resulting in injury occurs between plays or outside game time, consent fails to be a valid defense. The participant must voluntarily consent to be exposed to the risk for a successful defense to be raised.

Young athletes may not be able to understand all the inherent risks associated with a sport.

Knowledge, Understanding, and Appreciation

After the defendant establishes that the risk leading to injury was inherent and voluntary, it must be shown that the plaintiff knew, understood, and appreciated the risk. The knowledge aspect of assumption of risk requires the defendant to show that the plaintiff knew the nature of the activity and the risks associated with that activity. Continuing with the football example, let's say that a child wishes to play football in a youth sport league but has no knowledge of the game or the way in which it is played. If the child is thrown into a scrimmage game on the first day of practice and is injured when tackled for the first time, the league would likely be unable to establish that the child had knowledge of the risks associated with tackling in football.

Similarly, defendants must show that plaintiffs understood the activity in terms of their own condition and skill. To show that a plaintiff legally volunteered to risk exposure, the defendant must show that the plaintiff understood his own abilities and physical condition in relation to the risks associated with the activity. If someone knows that he has a specific health condition that should prevent him from playing tackle football but that person does so anyway, it could be shown that he had the requisite understanding of the risks associated with the activity.

Finally, it must be shown that the plaintiff appreciated the type of injuries that

are associated with the activity. Sport activity leaders have a legal duty to warn participants of the dangers inherent in the activities and the types of injuries that participants could sustain. Someone might know of risks associated with an activity and have a general understanding of her own condition and skill in relation to those risks, but if she does not appreciate the injuries associated with that activity, then there is no assumption of risk. How can it be shown that a person has made an informed decision to expose herself voluntarily to risks associated with an activity when she doesn't even appreciate the injuries that could possibly occur through participation? The common theme running through the knowledge, understanding, and appreciation requirements of assumption of risk is information. To assume a risk, a person must make an informed decision to expose herself to that risk.

Express and Implied Assumption of Risk

The two types of assumption of risk are express and implied. Express assumption of risk occurs when the participant uses language to evidence that he has assumed the risks of an activity (Keeton, 1984). The language used by the participant can be either oral or written. For example, after a sport activity leader informs a participant of risks associated with an activity, the participant may verbally inform the sport activity leader that he knows, understands, and appreciates the risks of the activity but would like to participate anyway. An example of a written expression of assumption of risk is a participation agreement, a document that sport managers often require sport participants to sign before participation. If the participant is a minor, parental signatures are also required. These participation agreements contain language expressing the dangers associated with an activity and state that the participant assumes the risks associated with the activity.

Implied assumption of risk exists when the participant's conduct or actions show that he voluntarily assumed the risks by taking part in the activity (Keeton, 1984). For example, Paul played organized football throughout childhood and high school, and now he decides to play in a recreational adult football league. Simply by playing in the league, Paul assumes risks that he has known, understood, and appreciated for many years.

Typically, the courts have found that spectators assume the risk of injuries that might be caused by implements flying into the spectators' seats (e.g., foul balls being hit into the stands along the first- or third-base line) when the person is sitting outside a protected area, as the Assumption of Risk sidebar illustrates.

Contributory Negligence and Comparative Fault

Contributory negligence is a defense to negligence that focuses on the negligent conduct of the plaintiff. Contributory negligence is also an absolute defense in that it precludes recovery for the plaintiff if contributory negligence is established. The **theory** provides that plaintiffs may not recover if they are negligent and their negligence contributes proximately to their injuries. Thus, the defense is a complete one. It shifts the loss totally from the defendant to the plaintiff, even if the plaintiff's failure to exercise reasonable care is much less marked than that of the defendant. Because of the harsh results for plaintiffs, only a few states have retained contributory negligence as a defense.

Most jurisdictions have adopted **comparative negligence**, a system that apportions damages according to the degree to which

IN THE COURTROOM

Assumption of Risk

Costa v. Boston Red Sox Baseball (2004)

In *Costa v. Boston Red Sox Baseball* (2004), the plaintiff was struck in the face by a batted ball while attending a baseball game at the defendant's stadium. She filed suit and claimed that the defendant owed her a duty to warn her of the danger of being hit by the batted ball.

After arriving late to the game, the plaintiff and three companions took their seats in an unscreened area in Fenway Park. Their seats were on the first baseline behind the Red Sox dugout. A player hit a line drive foul ball that struck the plaintiff's face, causing severe and permanent injuries. She had been at the game no more than 10 minutes before being injured.

The plaintiff claimed marked ignorance of the sport of baseball. She had been to a baseball game only once, when she was 8 years old. She had not seen baseball on television except when she had changed channels. Before the injury, she had no subjective understanding of the risks posed by a foul ball.

The plaintiff claimed that she was entitled to a reasonable warning of the dangers of sitting in an unprotected area so that she could have made an informed decision whether to remain sitting there. She acknowledged that a disclaimer existed on her admission ticket but claimed that she did not look at the ticket. Furthermore, she claimed that the disclaimer was inadequate to relieve the defendant's duty to warn, especially because the print was very small. After her injury, signage was installed that stated, "Be Alert. Foul Balls and Bats Hurt" (p. 301). The plaintiff claimed that the signage was necessary before the accident, and that if she had been adequately informed of the danger, she would not have accepted the risk posed by her seat.

The trial court granted the defendant's motion for summary judgment, and the appellate court affirmed, stating,

> Even someone of limited personal experience with the sport of baseball reasonably may be assumed to know that a central feature of the game is that batters will forcefully hit balls that may go astray from their intended direction. We therefore hold that the defendant had no duty to warn the plaintiff of the obvious danger of a foul ball hit into the stands. The result we reach is consistent with the vast majority of reported decisions involving injuries to spectators at baseball games. (p. 303)

each party (plaintiff and defendant) is at fault. In comparing fault, jurisdictions either go with a pure comparative fault system or modify the concept. A pure comparative fault system is one in which plaintiffs recover no matter how negligent they are. For example, if a plaintiff is 90% at fault, the plaintiff still recovers 10% of the financial award for damages incurred. Some jurisdictions require the defendant to be more at fault than the plaintiff before financial recovery is available to the plaintiff. These states are called modified rule jurisdictions because they have modified the concept of comparative fault to prevent plaintiffs from recovering if they are more at fault than the defendant is. For example, if it is determined that the plaintiff is 51% responsible for the harm, the plaintiff is barred from recovering for damages incurred.

Unforeseeable Consequences

Unforeseeable consequences are the results of actions or situations that could not have been predicted or foreseen by a reasonable person. Sometimes events occur that cause an accident but are not foreseeable by a normal, rational person. When this circumstance can be proved, it is possible that negligence liability will not be found. For example, consider the following hypothetical. A man is standing behind an L-screen in a batting cage pitching to a high school baseball player who is warming up for a game. The batting cage is supported by thin metal poles on the sides and corners of the batting cage. Imagine that a pitched ball is batted back toward the pitcher but veers toward the side, striking a pole and ricocheting off at just the right angle to fly behind the protective L-screen and strike the pitcher in the face. If considered an unforeseeable circumstance, or "freak accident," then the concept of foreseeability might act as a protection from liability for the organization responsible for either the design or use of the batting cage.

Waivers

Another type of legal protection from negligence liability in sport is a waiver. A waiver is a contract that sport organizations often use to protect themselves and their business from lawsuits that might occur when people are injured at an event or facility. Waivers should be considered in sport activities because of both the litigious nature of our society and the element of risk contained in most, if not all, sports. Contact sports, adventure sports, distance running, and others have the potential for substantial injury risk. If created and implemented properly, waivers can be used to inform the participant of the risks and potentially free the organization from liability. Waivers and releases have often been found to protect organizations from liability, though only when certain legal requirements to find a valid contract are met. The chapter on contracts in this book explains the elements of a contract that are necessary to create a valid contract. Because a waiver is a contract, those elements apply to waivers as well.

Intentional Torts

Unlike the tort of negligence, in which a careless act is committed, an **intentional tort** is what its name implies—a tort (civil wrong resulting in harm to person or property) that is committed with intent. Committing an intentional tort does not mean that a person meant harm or had an evil motivation. Instead, intent means that a person (the defendant) intended the consequences of the act or knew with substantial certainty that a particular consequence (specific outcome) would result from the act.

In sport, intentional acts are sometimes committed that result in harm to officials, athletes, and sport spectators. The business of sport places unique stressors on people working in the profession. Arena, stadium, and event managers, for example, often work extremely long hours. Sport participants (and parents of youth sport participants) can be especially abusive and hostile toward coaches and referees. Physical and emotional fatigue can take a toll on even the most well-intentioned people. Therefore, some types of intentional torts may affect the sport profession. The types of situations that might result in or be construed as intentional torts include making verbal threats, touching someone without his permission, spreading rumors, dealing with abusive patrons inappropriately, holding someone against his will, and entering

the land or taking the property of another without his permission. Intentional torts are broken into two main categories: harm to persons and harm to property. Figure 2.2 shows the categories of intentional torts that these acts encompass.

Harm to Persons

In the realm of sport, certain intentional acts result in personal harm to others. The harm can be in the form of physical injury, emotional injury, or damage to a person's reputation. The following text describes certain types of intentional torts that address this type of harm. The lawsuits dealing with personal harm are battery, assault, defamation, false imprisonment, intentional infliction of emotional distress, and invasion of the right to privacy.

Battery and Assault

Civil law often makes a technical distinction between assault and battery that differs from the common perceptions of these acts. The distinction is that battery involves touching someone, whereas assault is the threat to touch someone.

Battery is generally defined as the intentional, harmful, or offensive touching of another that is unprivileged and unpermitted. Intent comes into play in terms of the person's intent to make contact with another, either directly or indirectly (e.g., throwing a baseball at a group of spectators). You don't have to bruise or physically

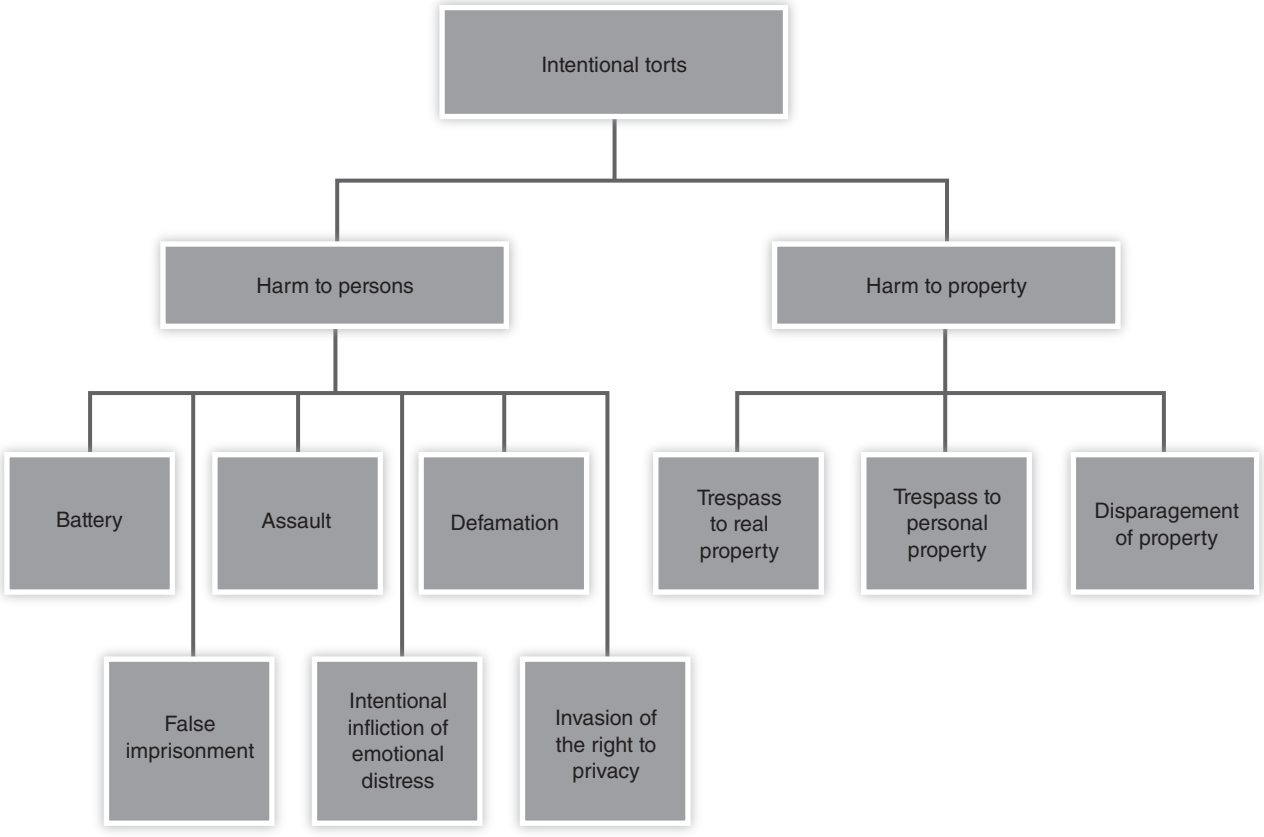


Figure 2.2 Categories of intentional torts.

hurt someone to commit battery, as battery includes both touch that is *harmful* and that which is merely *offensive*. Offensive touching may arise in conjunction with a sexual harassment claim. Harmful touching is common in sport, but often there is no liability because it is permitted (or consented to) as a part of the game. Situations that might involve battery include those in which aggressive spectators hit referees, a sport instructor or coach touches a student or player inappropriately, or a professional athlete rushes into the stands and strikes a heckler. Organizations often put rules in place to avoid situations that might lead to battery and subsequent lawsuits against the organization; such rules might apply to touching, discipline, hazing, and ways that referees should handle conflicts.

Battery can occur in sport settings if harm occurs outside the accepted rules and conduct of the game.

Assault is closely associated with battery but differs in that assault is the threat of a battery (the threat of harmful or offensive touching). The importance of assault is that an organization might be held liable for the acts of an employee who threatens to touch another in a harmful or offensive way. Employees should be instructed not to take matters into their own hands, not only by not hitting or touching another but also by not threatening another. Waiting for the proper authority to handle a heated situation is usually the best measure.

Defamation

Most people have heard about the intentional tort of **defamation**. Gossip in the workplace, untrue and harmful media reports that are made to increase sales, untrue negative remarks that are made without knowing that they were overheard, and negative untrue evaluations of work performance can all lead to defamation under the right circumstances. The two specific types of defamation are libel and slander. **Slander** is the oral form of defamation, whereas **libel** is the written form. A defamation lawsuit proposes that someone has been injured because of something written or spoken about her that was untrue or false, harmful, and made known to another person.

The law uses certain terms to describe that which is harmful and made public. The term used for harm is *defamatory*; therefore, one element of defamation is making a statement that is defamatory. The term used to describe a statement that is made public is *published to a third party*. This means that a third person, someone other than the person making the statement and the person affected by the statement, hears what is said. The rules for defamation differ by whether the affected person is a public figure or an ordinary citizen. Public figures generally have less protection for untrue

and negative statements made about them. For public figures, actual malice or a reckless disregard for the truth must be shown. Also, some categories of defamatory statements are potentially more libelous than others, such as statements about someone's moral character (e.g., falsely calling someone a child molester), statements about a person's chastity (e.g., accusations of sexual promiscuity), statements that a person has a "loathsome disease," and statements that affect a person's occupation and profession. Sport managers should discourage gossip in the workplace, back up performance evaluations with facts, and instruct staff and employees to avoid saying harmful things about others and to say nothing at all about a matter if they are unsure of the truth regarding that matter.

False Imprisonment

Another type of intentional tort is the tort of **false imprisonment**. Although the word *imprisonment* brings to mind being locked in a prison or elsewhere, in the eyes of the law confinement does not necessarily have to occur to prove false imprisonment. It may be interpreted, depending on the court and jurisdiction, that a person is "imprisoned" merely if he believes that he cannot leave a certain location (e.g., a child is told by an adult to stay in one place for an unreasonable length of time, or someone believes that she cannot leave an area without being harmed). False imprisonment may arise from seemingly innocent situations. A child might be held against her will as punishment, without the coach or supervisor realizing his error in keeping that child from leaving a certain area for an unreasonable length of time. An innocent person might be held against her will because a store manager falsely but innocently believed that the person had stolen an item from the store. Because of the potential for false imprisonment claims, the sport manager should be extremely careful in holding someone against his will. Some issues for sport managers to consider involve the reasonableness of their actions. For example, did the sport manager have reasonable suspicion to detain the person? Was the person detained for a reasonable length of time? Were the use and amount of force reasonable? Was the person brought back from a reasonable distance outside the business after leaving the premises? The sport manager should consider and discuss such issues with legal counsel before acting.

Intentional Infliction of Emotional Distress

Intentional infliction of emotional distress is a type of tort that arises when someone intentionally commits an act that represents extreme and outrageous conduct and results in severe emotional distress to another person. The person (the defendant in a lawsuit) intended to commit the outrageous act, and the injury is severe and emotional, not physical. A type of act considered extreme and outrageous enough to result in severe emotional harm to another person is sexual harassment, which sometimes includes claims for intentional infliction of emotional distress. A woman, for example, might be called, text-messaged, or e-mailed repeatedly with language that is sexual in nature and highly offensive, enough so to be considered extreme and outrageous. Additionally, the messages or the manner in which the messages are sent might be so offensive as to result in severe emotional distress or trauma to the victim.

Intentional infliction of emotional distress might also arise when someone intends to play a practical joke on another that goes well beyond the bounds of decency. Suppose that someone calls another and tells him (falsely) that a member of his family has been involved in a life-threatening accident. Upon hearing this, the person receiving the

call would likely become severely emotionally distressed. Such a message would likely be considered extreme and outrageous. In this situation, battery (touching) or assault (threat) has not occurred. The tort of intentional infliction of emotional distress therefore covers situations in which injury arises from acts that are not covered under other types of tort causes of action.

In the sport context, a coach might be sued for intentional infliction of emotional distress under certain circumstances. Suppose that a football coach tells his player, a 225-pound (102 kg) senior linebacker, to go out and intentionally injure by spearing (using the helmet as a weapon) a 140-pound (64 kg) freshman quarterback who is playing for the first time on an opposing team. The mother of the freshman player sees her son become seriously injured because of an illegal spearing by the senior player. A suit for intentional infliction of emotional distress might be brought by the mother because of the extreme and outrageous acts of the opposing coach and the resulting severe emotional injury that those acts caused her. Consider the Liability in Coaching Behavior sidebar and ask yourself whether the actions of the coach were extreme and outrageous and, more important, what a coach would need to do before his actions would rise to that level.

Invasion of the Right to Privacy

The **invasion of the right to privacy** concept encompasses several types of intentional torts, all of which are relevant to sport. The United States Supreme Court has interpreted various amendments of the U.S. Constitution to find that U.S. citizens have a fundamental right to privacy. Some states have taken this a step further by enacting legislation that specifically provides for rights to privacy. The intentional tort of the

IN THE COURTROOM

Liability in Coaching Behavior

Kavanagh v. Trustees of Boston University (2003)

In *Kavanagh v. Trustees of Boston University* (2003), Kevin Kavanagh, a member of the Manhattan College basketball team, was punched in the nose by an opposing Boston University (BU) player during an intercollegiate basketball game. The punch resulted in a broken nose, but Kavanagh later returned to play in the game. The player who threw the punch was immediately ejected from the game. Kavanagh brought suit against the trustees of BU and BU's basketball coach, alleging that the university was vicariously liable for the actions of its scholarship athlete and that the university and coach were negligent because they took no steps to prevent the act. Additionally, Kavanagh alleged that the BU coach intentionally inflicted emotional distress on him because of the actions of the player whom he coached. Kavanagh claimed that the coach incited the team's aggressiveness by shouting encouragement from the sideline, not removing from the game players who were allegedly elbowing opposing players, and praising his players, including those who were committing fouls. The court concluded that neither BU nor its coach had any reason to foresee that its student-athlete would engage in violent behavior, and Kavanagh failed to show that BU's coach engaged in reckless or intentional conduct rather than aggressive coaching. The appellate court affirmed the decision.

invasion of the right to privacy provides further recourse for those who have been harmed in any of the following four ways:

• *Appropriation*. The first category of intentional tort involving privacy is **appropriation**. Appropriation occurs when someone uses, without permission and for her own benefit, the name, likeness, or other identifying characteristic of another person. Many examples could be placed in the sport context. For example, suppose that someone puts the image of a professional football player on T-shirts and sells them to the public. This is an example of appropriation if the player did not give his permission and the sale was for the benefit of the seller. Suppose that you run a youth sport league and take photos of children playing softball. You post the photos on the Internet and distribute brochures containing the photos to promote your league. This activity is an example of appropriation if the identities of the children were made known in the pictures and the pictures were taken and made public for the benefit of the league sponsors without the permission of the children, parents, or legal guardians. Therefore, when the likeness of someone is recorded (even if for innocent purposes), permission should be obtained before making the image public.

• *Intrusion*. A second type of intentional tort with privacy implications is **intrusion** (also called *intrusion on seclusion*). This tort may arise where someone invades a person's home or searches personal belongings without permission. An example might be a coach who searches the backpack of a player on an opposing team with the hope of finding performance-enhancing drugs or something else that might embarrass or incriminate the opposing player or team. Where an action of this type is done without permission, the tort of intrusion might apply. Intrusion might also be relevant when offices, lockers, bags, or other personal belongings of players, coaches, or staff are searched without permission. Even in situations in which wrongdoing on the part of another might be suspected, a person must never invade the privacy of another by searching personal belongings without permission. In the scenario addressed here, the best approach would be to alert the proper authorities to handle a matter of suspected wrongdoing rather than take matters into one's own hands and be sued for invasion of privacy (intrusion).

• *False light*. The third type of intentional tort relevant to privacy is called **false light**. False light is similar to defamation and may be brought in tandem with a defamation lawsuit. This involves putting a person in the public spotlight over information that is untrue. Suppose that a newspaper article wrongly claims that a particular college soccer player is a strong supporter of a racist organization. This story would place the player in a false light by making the public think that the player held racist views when he did not. The story would also require the player to face the public to rebut the claims made in the story, thus interfering with his right to privacy.

• *Public disclosure of private facts*. The fourth type of intentional tort with privacy implications is **public disclosure of private facts**. This tort would arise when facts about a person's private life, which an ordinary person would find objectionable, are made public. The public is often fascinated with the personal lives of athletes. Therefore, media outlets sometimes push the limits by providing information about athletes that goes beyond their performance on the field and court. If a newspaper, for example, published a story about a star high school athlete that dealt with the athlete's sex life or finances, this action might give rise to the tort of public disclosure of private facts.

Public disclosure of private facts and the other privacy torts provide legal recourse for private citizens when someone violates their right to privacy.

Harm to Property

The intentional torts discussed to this point have all dealt with harm to people, either emotional or physical. Intentional torts, however, also involve harm committed on (or interference with) a person's property, either real or personal. **Personal property** consists of things that can be moved, such as sports equipment like soccer goals or smaller items like bats, helmets, and gloves. **Real property** is both land and objects that are permanently attached to the land, such as fields, courts, and swimming pools.

Trespass to Real Property

Trespass occurs when a person intentionally enters the land of another, or causes another person or object to enter the land of another, without permission or **necessity**. Several key points are important to your understanding of trespass. First, for the intentional tort of trespass to be found, actual physical harm to the property does not have to occur. Suppose that "No trespassing" signs are posted around a college football stadium and field to protect the turf between games during the season. Some people decide to disregard the signs and play a game of ultimate Frisbee on the field. Even if they don't harm the field in any way, they could still be found liable for the intentional tort of trespass.

The intent of this tort is not just to prevent harm to property but also to prevent people from interfering with the exclusive possession of a person's or organization's property, in this case the university. A sport organization needs to post "No trespassing" signs on their property to give notice that entry to the land is not allowed. If the trespasser has entered the property with criminal intent, however, the intruder is understood to be a trespasser even without posted signs. Conversely, trespass to land is acceptable at times. For example, entering the land of another may be necessary to protect oneself or another person from harm. Suppose that a severe thunderstorm with lightning has arisen and, to protect themselves from the weather, people enter a stadium with posted "No trespassing" signs. This action might be considered a necessity in which liability for trespass would not occur.

Trespass to Personal Property

Trespass to personal property occurs when someone takes the personal (movable) property of another without the permission of that person. For example, a person drags a movable soccer goal off the property of a sport complex and places it in her backyard. She has committed the intentional tort of trespass to personal property. The initial taking of the property constitutes trespass to personal property. If she keeps the property in her possession, then she has committed the intentional tort of **conversion**. She has deprived the owner of the possession of their personal property without a valid reason. Damages or harm might occur to the sport organization if, by virtue of not having possession of their property, they lose business. A sport organization running youth soccer leagues might lose money if they cannot effectively run their programs without necessary equipment that has been wrongfully taken from them. A catering company, for example, might lose business and profits if someone takes their delivery van and they are not able to deliver their food and provide services. Trespass to personal property and conversion mirror concepts in criminal law such as larceny and theft. Remember, however, that the discussion here centers on civil law

whereby the harmed person can seek to recover monetary damages from the wrongdoer when an intentional tort of trespass or conversion has occurred.

Disparagement of Property

The final type of intentional tort discussed in this chapter is **disparagement of property**. This tort arises when someone makes a comment about the property of another that is untrue and results in harm to the person in possession of the property. The two types of disparagement of property are slander of title and slander of quality.

Slander of title occurs when someone makes false statements about the ownership or title of someone's property. This wrongdoing amounts to a statement that someone is in possession of stolen property and does not have a valid title to the property. Suppose that someone makes public a false accusation that a certain business is selling stolen baseball trading cards. People would be unlikely to buy trading cards from this business if they believe that the cards have been stolen. A loss of business and potential profits to the store would obviously occur, potentially causing subsequent financial hardship for the store owner.

A second type of disparagement of property is **slander of quality**. This type of tort arises when someone makes false statements about the quality of someone's product or merchandise. Suppose that a business sells championship rings studded with diamonds. If a person falsely accuses the business of selling rings with fake diamonds and people believe the claim, then schools or sport franchises would be unlikely to purchase rings from this business. Subsequent financial loss and hardship would be placed on the business. Slander of quality and slander of title are similar to defamation but should not be confused with latter. The distinction is that defamation deals with untrue statements about a person, whereas disparagement of property deals with untrue statements about personal property.

Product Liability

Product liability is liability for harm caused by a consumer product. At one time, consumers who were harmed by products could recover only against those who sold them the product. Thus, manufacturers would be shielded from liability if the consumer purchased the harmful product from a distributor rather than directly from the manufacturer. Laws now extend liability down the chain of manufacture. The chain of manufacture includes any person or entity who made or distributed the good before it reached the end user. Thus, coaches and sport organizations who sell or provide equipment to athletes may be susceptible to product liability claims.

For example, Phil's parents agree to let him play youth football and purchase his helmet and pads directly from the youth sport organization. Unfortunately, the helmet sold to Phil is unreasonably designed and Phil is severely injured as a result. Phil's parents can bring a claim on his behalf against any or all of the following parties: (a) the company that made the helmet, (b) the company that distributed the helmet to the youth sport organization, and (c) the youth sport organization that sold the helmet to Phil.

Plaintiffs can use three theories when suing manufacturers under product liability: negligence, strict liability, and breach of warranty (Kiely & Ottily, 2006). The first two theories (negligence and strict liability) are found in tort law, whereas the third (breach of warranty) is a contractual remedy. Also, defenses are available to manufacturers who are sued for harm caused by their product. Most of these defenses focus on the plaintiff's actions. Defenses

include (a) improper equipment installation, (b) improper modification, (c) use of the product for unforeseeable purposes, and (d) failure to use the product in accordance with instructions (Owen, Madden, & Davis, 2000).

Negligence

The first theory that plaintiffs can use to recover is negligence. Plaintiffs using negligence as a theory in their product liability claim must establish each of the four elements of negligence (duty, breach, causation, and injury [damages]) to prevail in court. Negligence is a theory of liability that can be used in all product liability cases no matter what the type of defect. But negligence is not always easily established, because plaintiffs cannot readily show that manufacturers, distributors, or other parties in the chain of manufacture acted unreasonably in the creation or sale of the product.

The case of *Sanchez v. Hillerich & Bradsby Co.* (1992) provides a sport-related example of a product liability claim. On April 2, 1999, Andrew Sanchez, a baseball player for California State University, Northridge, was pitching against the University of Southern California (USC). During the game, he was struck on the head by a ball that was hit by Dominic Correa, a player for USC. The ball was traveling extremely fast. The bat used by Correa when the injury occurred was an aluminum bat called the Air Attack 2, which was designed and manufactured by Hillerich & Bradsby Co. (H&B). Before the 1999 season, the National Collegiate Athletic Association (NCAA) notified all athletic conferences under its umbrella, including the Pac-10, of which USC is a member, that certain new aluminum bats like the Air Attack 2 were dangerous. The hazardous nature of the bats stemmed from the fact that the bats increased the speed of batted balls, thus reducing the time that players in the field had to react to batted balls. In its notice to the conferences, the NCAA stated that it had implemented new rules to decrease the speed of batted balls and that these rules would be effective August 1, 1999.

In 2000 Sanchez filed a lawsuit against H&B and the NCAA asserting causes of action for product liability and negligence. The trial court granted summary judgment motions for H&B, USC, and Pac-10, finding that Sanchez would be unable to establish causation. Sanchez argued that the design of the bat increased his risk of injury. But the trial court held that Sanchez had to prove that the bat's design actually caused his injuries. On appeal, the case was remanded back to the trial court to determine whether the type of bat was the cause of the injury.

Strict Liability

The second theory used in product liability is called **strict liability**, a concept of liability regardless of fault. Thus, plaintiffs using this theory are not burdened with the task of showing that a party in the chain of manufacture acted unreasonably. Instead, plaintiffs using strict liability need show only that the product was defective when it left the defendant's hands and that the defect caused the plaintiff's injuries.

The policy allowing strict liability to be used in product liability cases is that between the product manufacturer and the consumer or user, the manufacturer is in the better position to anticipate hazards associated with the product and take measures to guard against said hazards. The problem with strict liability is that unlike negligence, it cannot be used in all cases. The Third **Restatement of Torts** (*Restatement [Third] of Torts,* 2005) provides that there is no strict liability for used goods, based on the idea that buyers expect a somewhat greater risk of defect when the product they are buying

is not new. Special circumstances, however, may require the use of strict liability even though the goods are used. This rule is not applicable when the goods are considered "nearly new."

For example, cars are often provided to representatives of sport organizations for use during major sporting events like the Super Bowl and the World Series. These cars are lent to league representatives and other sport dignitaries a short time before the event so that the representatives and dignitaries can travel about the community that hosts the event. When the event ends, the cars are often sold at discounted prices by the car distributors who lent the cars for league use. These cars are not new but have not experienced a lot of use. Thus, these cars may be labeled "nearly new," and some jurisdictions may be willing to allow strict liability to apply to harm caused by these cars.

Breach of Warranty

The third theory that can be used by plaintiffs is **breach of warranty**. This theory is not a tort theory of liability but instead a contractual remedy. Breach of warranty is a remedy most commonly used by those who are simply dissatisfied with their product and wish to have it repaired or replaced. This theory is used every time a product breaks or fails to work properly and the consumer returns it to the store or distributor. The theory is a contractual theory because of the contractual relationship that exists between manufacturers or distributors and those who purchase their products. These contracts are found in the purchase agreements and are called warranties.

Contractual remedies typically are not used to compensate for personal injuries. But tort theories usually must be brought within a short time after the injury is known or should have been known; otherwise, the plaintiffs are precluded from bringing a lawsuit. Conversely, plaintiffs with contract claims have a much longer time to bring their claims before they are barred. Most jurisdictions give plaintiffs 10 years to assert a breach of contract claim. Thus, plaintiffs who are harmed by a product may be barred from bringing tort actions but may still have cause to sue under breach of warranty.

The two types of warranties are express and implied. An **express warranty** arises through advertising, sales literature, product labeling, and oral statements in which the seller asserts a fact or makes a promise that relates to the quality of goods and induces the buyer to purchase the goods. Accordingly, consumers can claim a breach of an express warranty if an affirmation or promise is not satisfied. For example, if the manufacturer of a basketball shoe advertises that the shoe will improve the vertical leap of consumer athletes by 1 inch (2.5 cm) and a consumer establishes that this is not the case, the consumer might have a claim against the manufacturer for breach of an express warranty.

Implied warranties exist as a matter of law whenever consumer goods are sold. These warranties can be found in article 2 of the **Uniform Commercial Code (UCC)**. The UCC is a set of laws governing the sale of consumer goods that has been adopted by every U.S. state but Louisiana. Two types of implied warranties flow with every sale of a consumer good: the implied warranty of fitness for a particular purpose and the implied warranty of merchantability.

The **implied warranty of fitness** exists when the retailer, distributor, or manufacturer knows of a certain purpose for which the goods are required and, further, that the buyer is relying on the skill and judgment of the seller to select and furnish suitable goods. When this situation occurs, then there is an implied warranty that the

goods are fit for the purpose. For example, suppose that a consumer walks into a store looking for a golf club that improves distance and is allowed on all courses. If the golf pro who sells the club to the consumer knows of the consumer's desires and sells the consumer a club that is not legal on Professional Golf Association–regulated courses, then the consumer may have a claim for breach of the implied warranty of fitness for a particular purpose.

The **implied warranty of merchantability** is satisfied when the consumer goods (a) pass without objection in the trade under the contract description; (b) are fit for the ordinary purposes for which such goods are used; (c) are adequately contained, packaged, and labeled; and (d) conform to the promises or affirmations of fact made on the container or label (Uniform Commercial Code § 2-313). In other words, the implied warranty of merchantability states that the goods will do what they are generally supposed to do. This implied warranty of merchantability is the more commonly used implied warranty because it is relied on when products do not work.

Note that the warranty is called the warranty of merchantability rather than consumerability. It is called the warranty of merchantability because it is a derivative warranty, meaning that it derives from the warranty that manufacturers have with distributors. Accordingly, the warranty is that the product will be merchantable, meaning that it can be sold. Merchants typically buy in bulk from manufacturers, so they cannot expect perfection from all the products sold to them. Similarly, consumers claiming breach of the warranty of merchantability cannot expect perfection from their products; consumers can expect only that the products are good enough to be sold.

Because warranties are based in contract, they can be modified or disclaimed like any other contract provision if the parties agree to the modification or disclaimer warranty (Kiely & Ottily, 2006). Therefore, manufacturers can limit the application of warranties or do away with them altogether. For example, a manufacturer could limit the warranty of merchantability to only 1 year. Most manufacturers do limit the warranty of merchantability to 1 year, and this limitation can be found in the warranty given to the consumer. By law, the warranty of merchantability cannot be done away with completely, but all other warranties can be disclaimed.

Types of Defects

Three types of defects can result in legal liability. The first, called a **manufacturing defect**, exists when a product is manufactured incorrectly. Manufacturing defects do not affect the entire product line. In fact, manufacturing defects are established by comparing the harmful product with other products off the same line.

The second type of defect is called a **design defect**. These defects exist when a product is unreasonably designed. Design defects exist before the product is manufactured, and thus the entire product line is defective. The Third Restatement of Torts (*Restatement [Third] of Torts*, 2005) does not impose strict liability at all for design defects but instead requires a risk–utility approach, under which a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design (Kiely & Ottily, 2006). The omission of this alternative design is what makes the product not reasonably safe.

For example, a company designs a new football helmet that is lighter than all other helmets while affording the same level of

protection. The lightweight design, however, causes the helmet to fly off users' heads when hit from a certain angle. Using the risk–utility approach, a court will have to determine whether the risk is greater than the utility (meaning benefits or usefulness). In doing so, a court will ask whether the new lightweight design is so useful that it justifies the increased danger of having the helmet fly off. Furthermore, the court will examine whether an alternative design could have been used that would manage the risk while maintaining the utility. Ultimately, the court will find that the helmet line is defective if the risk associated with the new design outweighs the utility of the new design.

Last, manufacturers have a duty to warn their consumers of the dangers that are inherent in the reasonable use of a product. But the duty does not stop there; manufacturers must also warn customers of dangers resulting from foreseeable misuses of the product. The policy behind this rule is that manufacturers have superior knowledge of the limitations of the product because they made the product. Thus, manufacturers know more about the product than the consumer does. Manufacturers also have a responsibility to warn of defects discovered after a product has been marketed. So the duty to warn continues throughout the sales life of the product.

Warnings must be reasonable. For this reason, strict liability is generally not available in failure to warn defect cases. After all, strict liability occurs regardless of fault, meaning that plaintiffs do not have to establish that the manufacturer acted unreasonably. If no warning exists, however, then strict liability may be used. In determining whether a warning is reasonable, courts will examine whether the warning is conspicuous (i.e., easy to locate on the product). Furthermore, to be considered reasonable, a warning must be easy to read and comprehend. A warning may be unreasonable if it uses complicated language that confuses the consumer.

LEARNING AIDS

Summary

Tort law has practical implications for the day-to-day management of sport facilities and programs. A sport manager will likely encounter a tort lawsuit at some time during her career; she may be involved directly in the lawsuit, or her organization may be involved in a tort lawsuit in which she is not personally involved. Although negligence is the most likely type of lawsuit a sport manager will encounter, intentional torts and product liability lawsuits also occur in the sport setting. Knowledge about these areas of law will help the sport manager handle the emotional strain that accompanies a lawsuit as well as help her prepare for the litigation process. This important area of law is also an interesting one. You should keep this text as a resource in addition to reading tort law articles and cases to keep abreast of current issues in tort law.

Discussion Questions

1. Create a hypothetical scenario about an injury and subsequent negligence lawsuit that occurs in a sport setting. Make an argument for the plaintiff in your scenario based on the four elements of negligence.

2. Create a hypothetical scenario about an injury and subsequent negligence lawsuit that occurs in a sport setting. Make an argument for the defense in your scenario based on applicable defenses to negligence.
3. Research, find, and summarize the key components of a local rule or regulation that is applicable to a sport or recreational activity.
4. Describe the tort of battery, explain how it differs from the tort of assault, and list and describe several situations or contexts in which the tort of battery might arise.
5. Explain the doctrine of assumption of risk with examples of how express and implied assumption of risk might arise in the sport context.
6. Explain how product liability might arise in the context of a lawsuit against (a) the manufacturers of sports equipment and (b) those who buy and distribute equipment to players under their care.

MOOT COURT CASE

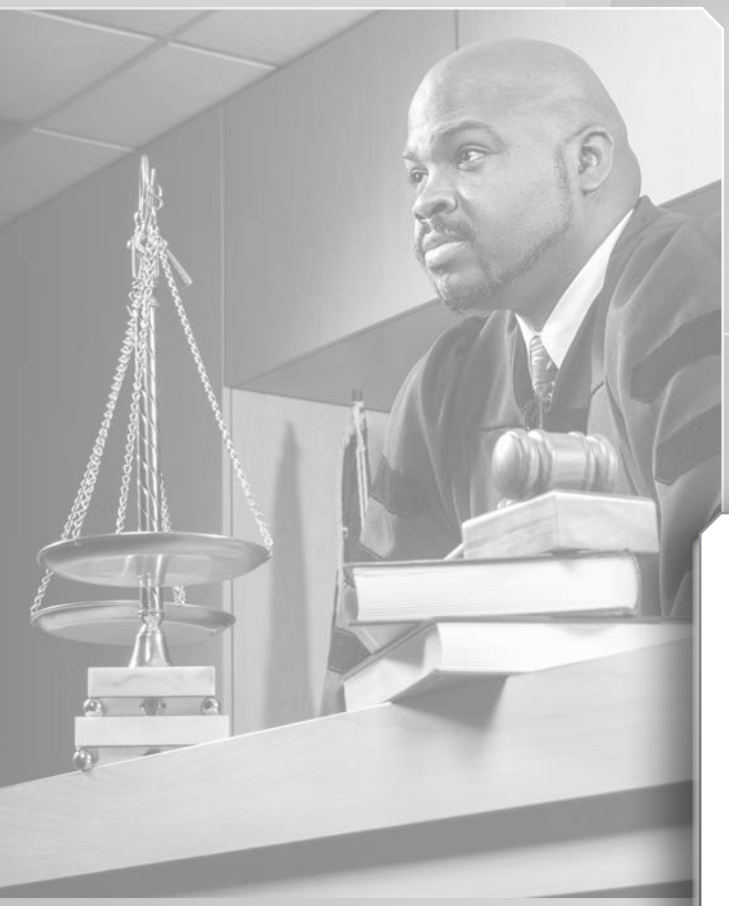
Sport Spectator Scenario

During the summer, Sammy Slugger attended a Triple A baseball game with his wife and four children. They had driven 30 miles (50 km) from their home and paid for the tickets at the gate before entering the game. Their seats were 20 rows up along the third-base line. The seats behind home plate were protected by a screen, but Sammy's seat was far enough up the third-base line that it was unprotected.

Sammy loved baseball, and he was enjoying the game with his family. Sammy also enjoyed watching the antics of the team mascot and eating and drinking the food and beverages offered at the game. The peanut vendor, a stadium employee, was a true favorite of the fans. Instead of walking along each row and distributing bags of peanuts by hand, this vendor had a unique method of selling peanuts. He would walk along the row beneath the spectators and throw bags of peanuts to whoever called for them. He would also throw a tennis ball with a carved hole in it to the hungry spectator, who would place money inside the ball and return it to the vendor. In the sixth inning of the game, the peanut vendor passed in front of Sammy and spotted a fan who wanted a bag. The fan was sitting several rows up and behind Sammy and his family. The vendor heaved the bag of peanuts as he always did, but on this occasion he slipped on a piece of ice and lost control of the throw. The bag flew through the air but fell short of its intended mark, hitting Sammy squarely in the chest. Sammy reached down to retrieve the bag and at that instant felt as if he had been struck by a sledgehammer. Unknown to Sammy, a player had fouled a ball directly in Sammy's direction. Distracted, Sammy had not seen it coming. He was rushed to the emergency room of the local hospital for treatment of his serious injury. Sammy, though still a fan of baseball, brings suit against the stadium management for his misfortune.

Risk Management

3



Chapter Objectives

After reading this chapter, you will know the following:

- The foundations of risk management and key elements of the decision-making process
- The essential components of an emergency action plan and a crisis management plan
- The key elements of a lightning safety plan
- Management issues for sport facilities and those with disabilities

Case Studies in Sport Law Connection

Check out the following case studies related to this chapter in the accompanying e-book, *Case Studies in Sport Law, Second Edition* (Pittman, Spengler, & Young, 2016):

Bearman v. University of Notre Dame	Maussner v. Atlantic City Country Club, Inc.
Kleinknecht v. Gettysburg College	Mogabgab v. Orleans Parish School Board

Sport law is about managing **risk** in sport. When you apply legal principles to the facts in sport law cases, practical implications for management (e.g., facility and program safety for sport participants, staff, employees, and spectators; employee relations; gender equity in sport) become evident. **Risk management** is a course of action designed to reduce the risk (probability or likelihood) of injury and loss to sport participants, spectators, employees, management, and organizations.

Risk management often centers on reducing the risk of harm given that the elimination of all risk is often not feasible. The very nature of sport involves some degree of risk: The only practical way to eliminate all risk is to close a facility, remove a risky piece of equipment, or eliminate the provision of a sport or service. To remove the risk completely from sport would have a potentially negative consequence to sport providers in that the sport activity likely would lose its appeal to most participants. For example, completely removing the risk of injury from hockey by eliminating contact through checking would not be reasonable. This change would destroy the very nature of the sport. A more reasonable approach would be to provide rules regarding contact and use of protective equipment, require coaches to teach those rules, and require referees to enforce the rules.

The types of risk that managers should consider include personnel issues, such as the risk of sexual harassment and discrimination, and issues concerning harm, such as the risk of physical injury to spectators, players, coaches, supervisors, and other employees. The potential physical risks in sport that might affect management through litigation are numerous. The possibilities are extensive and well covered in various texts (Appenzeller & Seidler, 1998; Dougherty, Goldberger, & Carpenter, 2002; Spengler, Connaughton, & Pittman, 2006).

Broad categories of risk, particularly in college and professional sports, include fan and player violence, terrorism (foreign and domestic), fan celebrations and storming the field, natural weather events such as lightning, food and beverage concessions, and health emergencies among players, coaches, and fans. For managers, additional general risk categories include blood-borne pathogens (e.g., the risk of disease transmitted through contact with blood or bodily fluid, as occurs in boxing, basketball, and fitness), sudden cardiac arrest (which gives rise to the need to purchase and install automated external defibrillators), child protection issues (protecting children from sexual predators through background checks and on-site safety procedures), fire, heat-related illness (including hydration issues and emergency action plans), lightning and other severe weather, security (protection from violence), sport-related trauma (commonly head and neck injuries), and vehicular accidents and injuries (harm resulting

from incidents, usually involving vehicles transporting players and participants).

This chapter addresses perspectives on approaching risk management and the risk management process and illustrates risk management applications.

Perspectives on Approaching Risk Management

As a person who is ultimately responsible for the safety and welfare of your employees, participants, and spectators, you can approach risk management from several perspectives. Put yourself in the shoes of the following people or organizations when you think about safety in sport venues.

Manager

The manager often has a great deal of latitude in decision making. Each of us has unique personal experiences that affect our decisions, such as sport injuries or near misses; education and training through sport law and risk management courses, such as the one you are currently taking; exposure to media influence, such as hearing of sport-related lawsuits in the news; on-the-job experiences with sport-related injuries and possibly lawsuits; and other factors, such as hearing stories relayed by friends and colleagues. When making decisions, a manager must sort through this information to determine what is relevant and reliable. This process requires self-evaluation. Suppose, for example, that your nephew was seriously injured in youth football because his volunteer coach did not provide him with a properly fitting helmet. This incident may have caused you to recognize the importance of providing proper safety equipment for young athletes in your program.

Besides thinking about factors that might influence individual perceptions, the manager has practical matters to consider. For example, how much will it cost to implement safety procedures and buy safety devices and equipment (e.g., lightning monitors, automated external defibrillators, wall padding for gyms)? Other practical considerations include the availability of information necessary to develop a comprehensive safety plan, support from upper management in implementing a new safety measure, and the cost of insurance. These issues are discussed later in this chapter.

Risk Manager or Director of Loss Prevention

A risk manager or loss prevention director has primary responsibility for the safety of a sport facility. This person might be responsible for alcohol service training, safety inspections, fire prevention, blood-borne pathogen protection, weather-related risk management, food service and equipment, and emergency services, including medical services planning, emergency action plans, and crisis management. If you have a risk manager on staff, that person would handle the details and day-to-day operations of managing risk, but you as a manager—the person with ultimate responsibility—would still need to understand the important safety issues at your facility and the policy and procedures for managing specific risks. If a loss prevention expert is not on your staff, you will need an even greater understanding of safety policy and procedures and risk management.

Outside Auditor

When we live in the same environment for some time, we often filter out many of the details of our surroundings. An outside

auditor would conduct a comprehensive examination of your facility or some component of your facility, taking a fresh look at the surroundings. This person is often better able to identify **hazards** because she is looking for them and seeing the facility from a different perspective. When you manage day-to-day operations of a facility, take a step back occasionally to view your surroundings as if for the first time. Make it a habit to look for actual and potential hazards. In other words, think like an outside auditor.

Insurance Company

The insurance company is interested in limiting financial loss. This type of loss often flows from damage to property or personal injury to employees, guests, or participants. The cost is often measured in terms of repair or expenses associated with litigation (either settlements or trial expenses). An insurance company considers the probability and severity of harm that might result from the program or service offered and the conditions surrounding the provision of the program or service. For example, the likelihood (probability) and severity of injury associated with having a diving board in an unguarded pool might raise the risk of financial loss to a level so high that the insurance company is not willing to insure the risk. Sometimes the potential severity of risk is great but the likelihood is relatively low (e.g., a severe weather event). The precautions that you might take in this instance are more difficult to justify. If the risk is great enough that it might result in the death of a single person, however, you must make an ethical decision (with potential legal consequences) about whether implementing a safety plan is simply the right thing to do.

Lawyer

Good lawyers think about winning cases. Personal injury cases are often won on the facts and a determination of the standard of care. The standard of care in a negligence (personal injury) case, as you learned in the previous chapter, may be determined by a number of factors. These might include (1) community or industry standard (what sort of safety measures similar organizations are putting into practice and whether these measures have themselves become accepted community or industry standards), (2) rules and regulations (whether the law requires that certain actions be taken), (3) organizational policy and procedures (your own rules), (4) prior case law, and (5) expert opinion. Therefore, you should think about your reasons for having safety plans, policies, and procedures. For example, are you keeping up with the standards that other sport organizations are meeting? Are you meeting the requirements of city codes and regulations? Are you making the same mistakes that others have made regarding safety that resulted in lawsuits and published case decisions that you have read? Thinking like a lawyer can help you avoid loss to your organization through litigation.

Jury of Your Peers

A key determination in the outcome of many legal decisions is whether a certain action was reasonable. Juries and judges in a court of law determine what is reasonable. When you are deciding whether your actions, the conditions of the facility, or other matters that might have legal consequences are legal, ask yourself what is reasonable. Ask someone you trust who has good common sense whether something that holds potential risk is unreasonably dangerous.

If you ask a lawyer, you will probably get a conservative answer. If you ask an extreme sport enthusiast, you will get an answer at the other end of the spectrum. Ask a jury of your peers, however, and you will get a good idea of what is reasonable.

A diligent and thorough assessment that incorporates some combination of the preceding ways of thinking will be a good start when you consider managing your risk and that of your sport organization.

Loss Prevention and Risk Management

Ultimately, risk management is about loss prevention. It is about providing for the safety of those to whom you owe a duty or responsibility and protecting your organization from liability through the implementation of reasonable safety measures. Losses to a sport organization because of litigation can be substantial. The following are categories of loss, some easily measured and others not.

- *Money.* Easily measured in terms of loss, money is a key concern for insurance companies. Organizations are affected if insurance rates increase or a policy is dropped after a successful lawsuit or large settlement against the sport organization. Organizations that are self-insured will also suffer financial loss.
- *Time and effort.* Lawsuits take time, some more than 10 years, to make it through the appeal process. Even with lawsuits that are settled relatively quickly, the affected parties must provide answers in the discovery process through written interrogatories and oral depositions. Preparing for depositions, traveling, and fulfilling other requirements of the discovery process can cost personnel a great deal of time and effort.
- *Stress.* The pretrial, trial, and appeals process can be stressful to both management and the affected parties. Depositions, in which a defendant can be questioned under oath and on the record for many hours, can create a great deal of stress. Picture yourself sitting across the table from an accomplished trial attorney who is questioning you about the facts surrounding an incident that holds implications for liability on the part of your organization or you personally. The goal of the questioning is to gather information from you that can potentially be used against you in court. Imagine that this attorney is aggressive in her approach toward obtaining information that supports her side of the case. This situation would likely be extremely stressful.
- *Image and good will.* An organization stands to lose its good image nationally and in the community if misdeeds and negligent acts are brought to light through media attention to the lawsuit. This incident might influence everything from ticket sales to the monetary value of an organization.

Risk Management Process

Managing risk in sport is a process. This process has three primary components that have multiple influences to each. Figure 3.1 will help you conceptualize the process and familiarize you with the components of a risk management process: recognition, analysis, and action.