THIRD EDITION

INTRODUCTION TO SPORT LAW

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HUMAN KINETICS

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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 students who are taking a sport law class for the first time or who need a refresher on legal issues. A strong foundation or understanding of legal issues is not required of students who use this book.

Introduction to Sport Law provides sport management students with information in a way that is both approachable and interesting. The purpose of this text is to help students learn the common legal concepts taught in sport management curricula. (Please note that the content in this book is for educational purposes only and does 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 or graduate students, lacked relevance for sport management professionals, or failed to cover the topics of most interest to sport management students. *Introduction to Sport Law* was written to address these issues and provide a book well suited for 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 and have both theoretical value and practical application.

Chapter 1 provides the reader with foundational knowledge of the U.S. legal system, introducing the reader to different types of law and the U.S. court system. Chapter 2 addresses tort law and product liability from a management perspective, and chapter 3 provides the reader with practical knowledge of safety and risk management. Chapter 4 addresses agency law, and chapter 5 covers contract law, subjects with practical value. Chapter 6 looks at employment law from a management perspective, including types of employment discrimination. Chapter 7 introduces the reader to constitutional law as it relates to sport in current times, and chapter 8 covers gender equity issues in sport, a timely and relevant area of law. Chapter 9 addresses intellectual property law, including trademarks, patents, and copyrights, and chapter 10 focuses on antitrust law, topics with both practical and theoretical interest. 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 topics are addressed from a management 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.

Companion Case Studies

Purchase of this book includes access to the ebook of the companion text *Case Studies in Sport Law, Third 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 that lists the cases in the companion text that relate to the chapter's topic. Using the casebook will help add meaning and context to the concepts discussed in this book.

Instructor Resources in HK*Propel*

A variety of instructor resources are available online within the instructor pack in HK*Propel:*

- Presentation package—The presentation package includes more than 300 slides that cover the key points from the text. Instructors can easily add new slides to the presentation package to suit their needs.
- Instructor guide—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 are the answers to the chapter discussion questions and moot court case questions that appear in the text.
- Test package—The test package contains more than 200 questions in multiple-choice, true-false, multiple response, fill-in-the-blank, and essay and short-answer formats. The files may be downloaded for integration with a learning management system or printed for use as paper-based tests.

Instructor ancillaries are free to adopting instructors, including an ebook version of the text that allows instructors to add highlights, annotations, and bookmarks. Please contact your sales manager for details about how to access instructor resources in HK*Propel*.

Summary

Introduction to Sport Law will challenge sport law students to think about sport law concepts and apply them to the practical world of sport management. This book will serve the needs of 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 or graduate 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 areas 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 a person's 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 types of lawsuits occur. Negligence claims occur at all levels of sport and often involve an allegation of carelessness in supervision, instruction, maintenance of facilities and equipment, inadequate warnings, and failure to provide appropriate emergency medical care. Examples are numerous and include lawsuits that are brought subsequent to injuries from foul balls at baseball games, insufficient padding on gym walls, failure to provide adequate supervision of a dangerous activity, putting players back in the game too soon after a concussion, and not calling 911 or not providing care for a victim of sudden cardiac arrest. Besides negligence, another common type of tort for managers to understand is the intentional tort. Injuries that occur because of intentional acts include brawls at competitive sport events, illegal tackling, and the spread of rumors that harm a person's reputation.

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. Whether competitive or recreational in nature, sport often involves some element of physical risk, from team sports such as football and ice hockey to individual sports such as snow skiing and water sports.

Some students may wish to become risk managers for sport organizations—man-

aging 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.
- 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 adequate 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 athletes 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 and gender identity, appearance, physical abilities, minds and emotions, and 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 claims of discrimination in hiring and promotion, early termination of coaching contracts, claims of sexual harassment, and injury on the job.

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 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 begin 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 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 primary and secondary education. A common issue in case law addressing 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 at their school.

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 in the sport industry, including coaches and players engaged in university and professional sports, and those working in 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 actions 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 under-

standing 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

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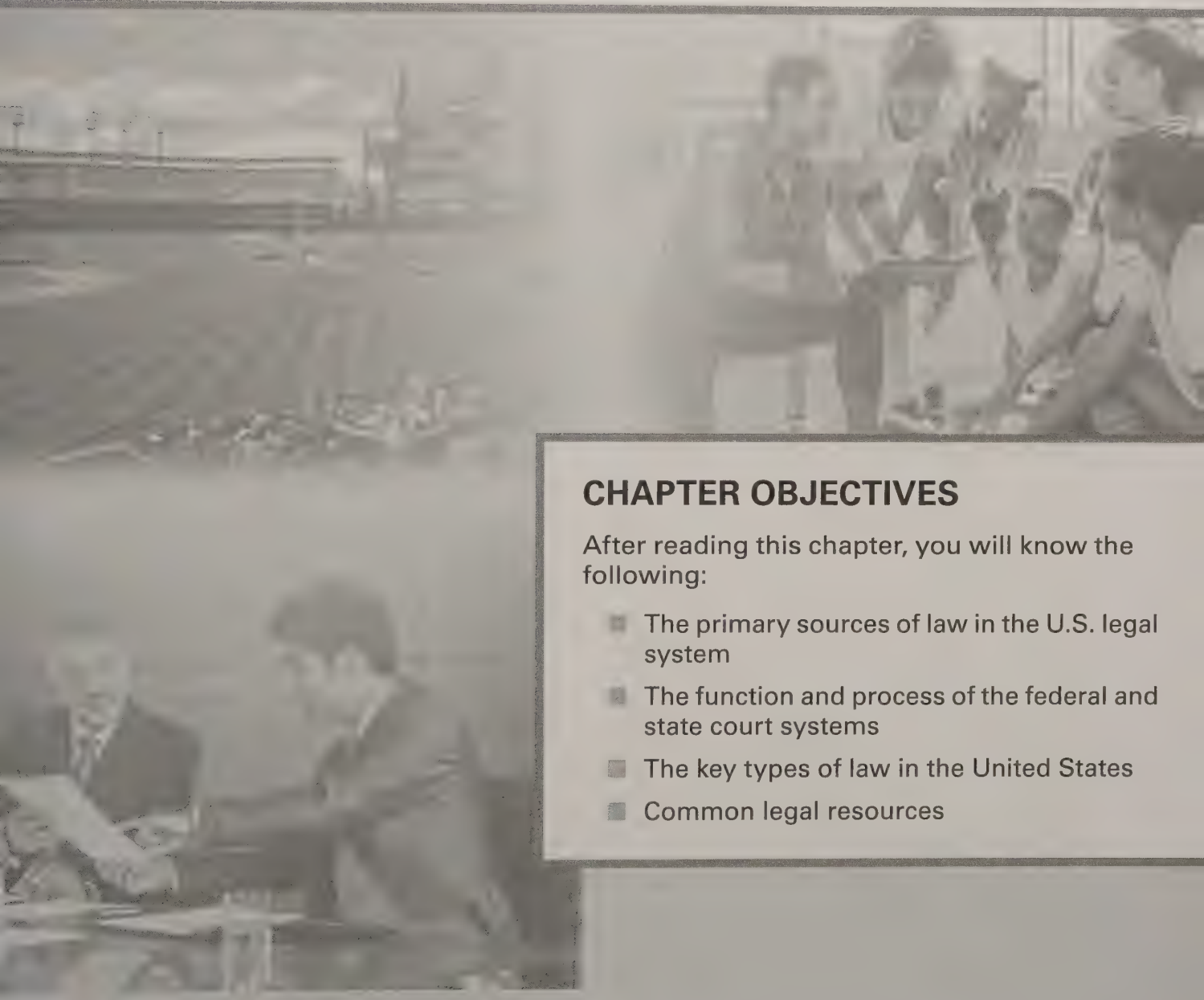


CHAPTER OBJECTIVES

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 ebook, *Case Studies in Sport Law, Third Edition* (Pittman, Spengler, & Young, 2022):

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, spectators or fans, 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 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, Occupational Safety and Health Administration, 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 commonly 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 legislatures enact laws termed *statutes*. Local governments, such as municipalities and counties, create laws termed *ordinances* to address matters not addressed by state or federal laws. Together, these statutes and ordinances are known as statutory law or legislation. **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. For instance, Florida statutes are only valid in Florida. 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 (McKinsey & Burke, 2015). 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, Amateur Sports Act, Equal Pay Act, Sports Broadcasting Act, and the Volunteer Immunity Act. State statutes vary from state to state and include laws that involve hazing; concussion safety; sport agents; sports betting; the use of automated external defibrillators; the use of name, image, and likeness; 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), Consumer Product Safety Commission, and Occupational Safety and Health Administration (OSHA), as well as a number of local and state agencies—enact and enforce numerous legislative rules, which have the same force as statutory law, 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. Most criminal laws are statutes, enacted by the U.S. Congress or a state or local 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 (public or society) are represented by a governmental representative (district attorney). To convict a criminal, the district attorney must show beyond a reasonable doubt that

Image Source/Vetta/Getty Images

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

the accused person committed the crime. A convicted criminal may be punished, in an attempt to deter others from making the same or similar acts, 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; sexual abuse or misconduct; illegal sports wagering or point shaving; assault or harassment against sport officials; 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. Most often, in a civil lawsuit, one private party sues another private party who, they allege, failed to comply with a duty. Most 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, athletic trainer, 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 and includes the defenses and counterclaims the defendant will utilize. 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, video or photographic evidence and documents such as preparticipation questionnaires, medical records, staff training records, parental permission forms, accident or incident report forms, facility and equipment maintenance records, membership agreements, informed consents, 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 and may be cross-examined, under oath. Depositions are recorded by a court stenographer and may be videotaped. 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 and before a court renders a decision.

In a civil trial, the plaintiff usually must 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 and assessing the facts as they perceive them considering the law as instructed by the judge, 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

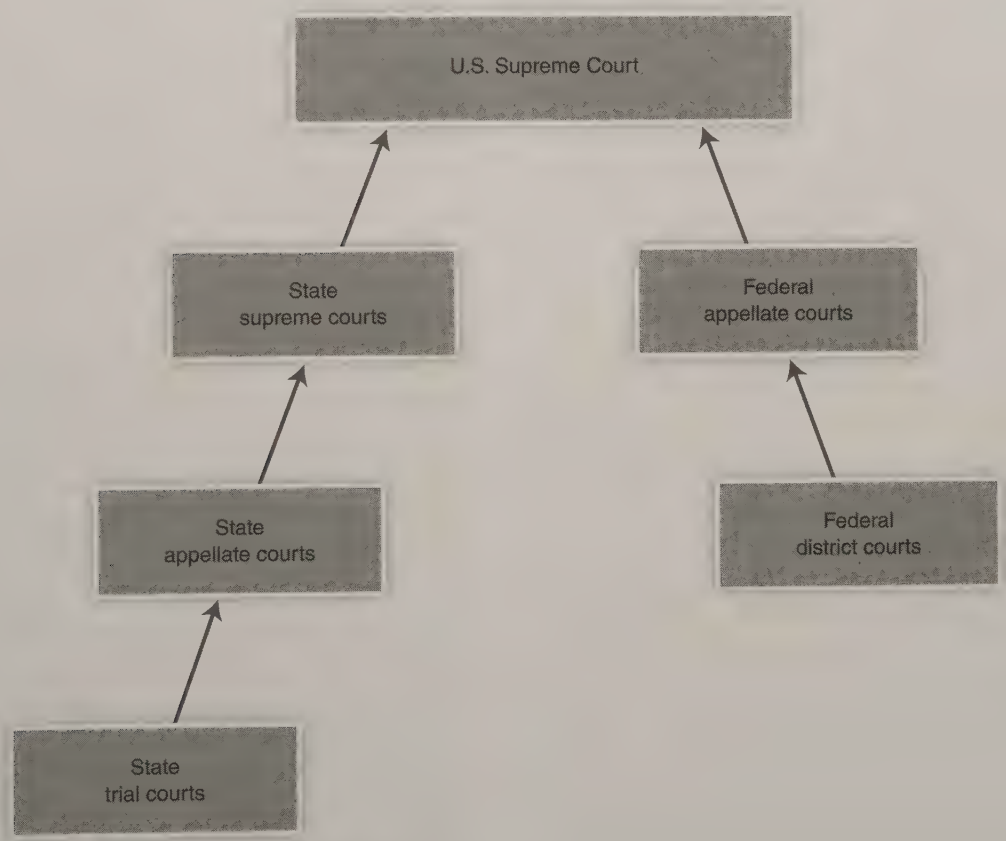


FIGURE 1.1 Hierarchy of the U.S. court system.

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. Most 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

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 that adversely affected the trial's outcome. 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, hear new 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 there was an error in procedure or the law was incorrectly 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 or admiralty, 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), or when a case deals with the constitutionality of a law, the case will likely be held in 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 (fan) and the organization (stadium owner or management) are from different states. Another diversity jurisdiction issue occurs when a dispute arises between two state governments (e.g., use of water resources, water rights, diversion of pollution). State courts, however, have exclusive jurisdiction over most cases.

The United States is divided into 94 federal judicial districts that are organized into 12 regional circuits, 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. In U.S. district court cases, one judge sits individually to hear cases. 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. A panel of three judges hears appeals from the district courts. The highest level of the federal court system is the U.S. Supreme Court. Nine justices, appointed by the U.S. president for lifetime appointments, sit together on the U.S. Supreme Court to hear cases. The Supreme Court acts as the final appeal for the federal courts of appeals. They may also hear appeals from state courts that involve federal law including the U.S. Constitution. Further information on U.S. federal courts may be found at www.uscourts.gov and www.supremecourt.gov.

State Court System

The state court system typically parallels the federal system, although the states may give their courts names different from those used in the federal system. All states have

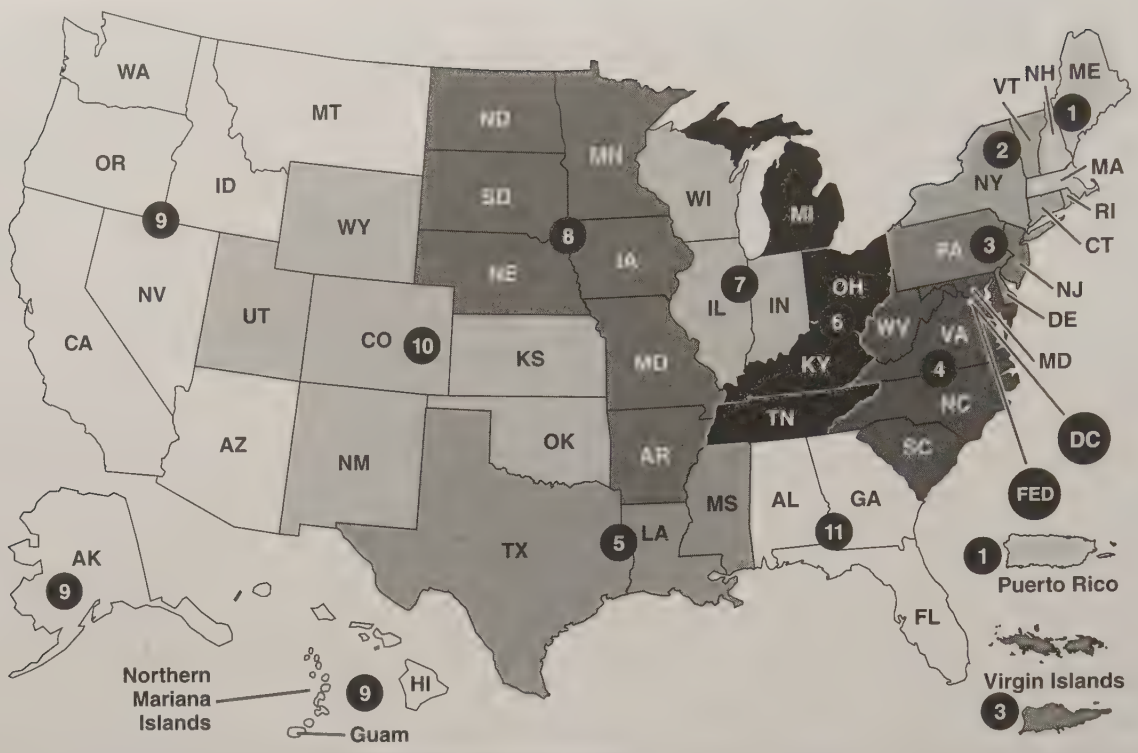


FIGURE 1.2 Federal judicial circuits.

entry-level (trial) courts, but they may be called a *circuit court* in one state, a *district court* in another, and something else in a third. Trial court decisions are made by a judge or jury. 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 (intermediate appellate courts and the courts of last resort, often known as supreme courts), not the trial or entry-level courts. Every state also has some form of an appellate system, and most have specialized courts for addressing specific legal matters. For example, the state of Massachusetts has several types of specialty courts such as adult drug, mental health, veterans' treatment, homeless, and probate and family courts (Mass.gov, 2021). The typical hierarchy of the state court system is a trial court, 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. Although a secondary source is not law itself and therefore is never binding or mandatory on a court, courts may consider secondary sources of law for guidance on how to resolve a specific issue. Examples of secondary sources include law review articles and legal encyclopedias, textbooks, dictionaries, and journals (e.g., *Sports Litigation Alert*, *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 (trial) court cases are published in the reporter known as the *Federal Supplement* 3d Series (1993–present). U.S. circuit court cases (courts of appeal) are reported in the *Federal Reporter* 2d Series (1998–present). U.S. Supreme Court cases are typically reported in three major sets of reporters: the *United States Reports* (the official reporter), the *Supreme Court Reporter*, 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 reporters and the cases they contain are typically found in law libraries, case decisions can also be obtained online. Although some legal search engines and databases, such as *LexisNexis* and *Westlaw*, may only be accessed for a fee and therefore are primarily used by members of the legal profession, the *Nexis Uni* database is often available for free through 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 *Nexis Uni* (formerly *Lexis/Nexis Academic Universe)*.

Additionally, federal court (appellate, district, and bankruptcy court) case records and opinions are also available through PACER (Public Access to Court Electronic Records), which is a fee-based system that provides public access to federal case information (see pacer.uscourts.gov).

A comprehensive guide titled "Free Legal Resources—United States" published by the Harvard Law School Library is available at https://guides.library.harvard.edu/free. This list includes links to free sites that provide information regarding, but not limited to, state and federal governments, courts, constitutions, statutes and regulations, court decisions and opinions, law-related journal articles, legal encyclopedias and dictionaries, and so on. Finally, the National Sports Law Institute's Sports Law Research website https://law.marquette.edu/national-sports-law-institute/sports-law-research-website offers a collection of websites intended to provide links to useful information for sport lawyers, sport law students and faculty, sport journalists, and sport management industry professionals.

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.

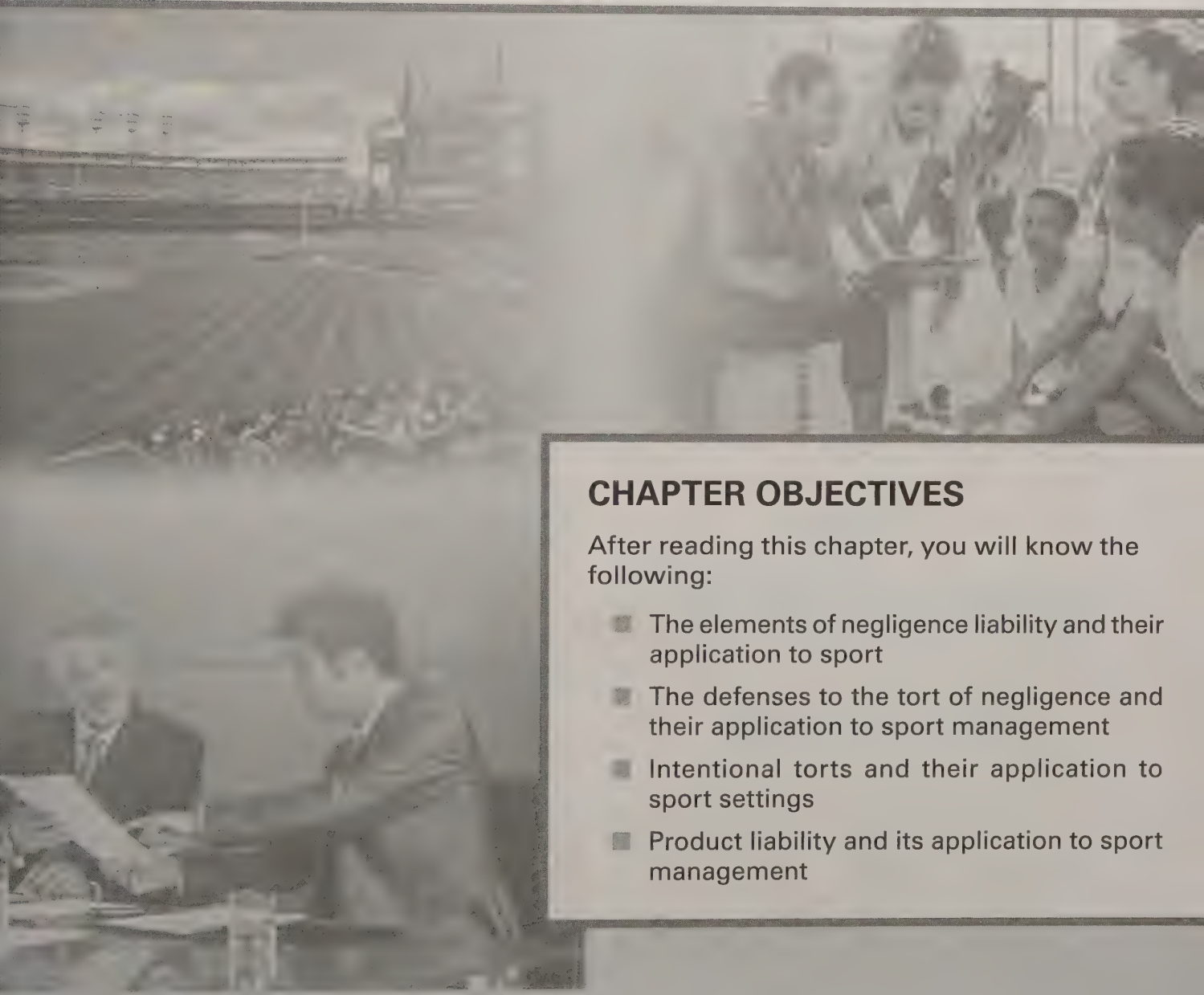
Knowledge and understanding of key aspects of the law have become increasingly important for sport managers in today's litigious environment. Sport managers should know how to obtain legal information, such as statutes, case law, and relevant published standards and guidelines. Likewise, understanding when it is best to obtain legal assistance is important. Because the law is constantly changing, a wise professional will stay abreast by attending appropriate 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 three 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. Provide two examples of ways that the law has an effect on your life.
6. How does administrative law affect the sport management industry? Provide two examples.
7. Identify and explain the steps in a civil trial.
8. Explain the role of precedent in the U.S. legal system. How do you think things may change if the courts didn't use precedent?
9. Identify which regional reporter publishes your state's court opinions.
10. 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?
11. Obtain, read, and summarize a sport law–related article from a sport-related secondary source (journal, law review, blog, and so on).
12. What is the major difference between primary and secondary legal sources?
13. Identify two specific, sport-related primary legal sources as well as two sport-related secondary legal sources.
14. Identify and briefly explain two specific sport law–related issues that occurred in your state within the past five years.
15. Using the Internet, identify three expert witnesses who focus on sport, recreation, or physical activity cases.

Tort Law and Product Liability

2



CHAPTER OBJECTIVES

After reading this chapter, you will know the following:

- The elements of negligence liability and their application to sport
- The defenses to the tort of negligence and their 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 ebook, *Case Studies in Sport Law, Third Edition* (Pittman, Spengler, & Young, 2022):

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 Corporation
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 lawsuits are many and include cases involving slips and falls, automobile accidents, and work-related accidents. Some cases seem to stay in our collective memory such as the case involving the woman who sued McDonald's after she spilled hot coffee in her lap. Most negligence cases never go to trial, and we never hear about them because the cases are settled by the attorneys and their clients and there is no public record.

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 and include issues such as concussion, heat-related illness, sudden cardiac arrest, and many more. An example of a negligence case in the sport setting is *Jabo v. YMCA of San Diego County (2018)*.

Adeal Jabo was a member of the Over 40 Chaldean Soccer League of San Diego. His league played at a facility owned by the YMCA. One evening Mr. Jabo was playing in a league soccer game that was held at the YMCA. He played in the game without incident and then went to the sidelines. As he approached the bleachers, he collapsed and hit his head on a bleacher bench. League members rushed to help but were not provided support from YMCA staff. They were also not provided access to an automated external defibrillator (AED). League members who were providing aid called 911 and were told to perform CPR on Mr. Jabo. They attempted CPR, but he remained unresponsive and his skin began to turn blue. Paramedics were called. They eventually arrived but were unsuccessful in reviving Mr. Jabo. He was taken to the emergency room where he died shortly thereafter. Mr. Jabo's family later sued for negligence, claiming that the YMCA failed to follow procedures for medical emergencies, including the provision of an AED and adequate staff support.

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:

1. Standard of care
2. Breach of duty
3. Causation
4. 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.

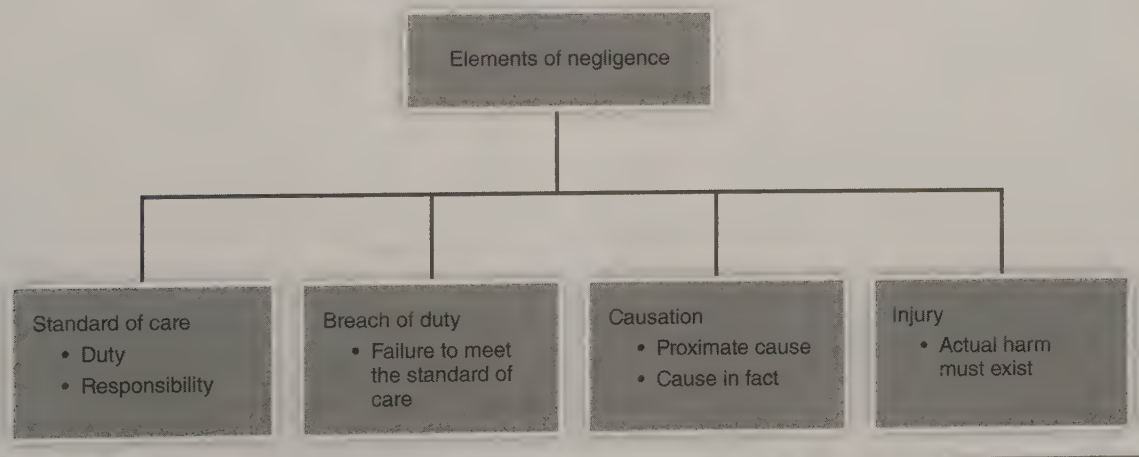


FIGURE 2.1 Elements of negligence.

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) 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. A court might use these recommendations 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. The courts might use guidelines contained in association position statements in determining the standard of care.

- *Agency and organization policy.* An agency's own policies and procedures 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 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 (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 a coparticipant in a contact sport.

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

IN THE COURTROOM

Duty of Care

Nixon v. Clay (2019)

Judd Nixon was a participant in a church-sponsored recreational basketball league. During a game against an opposing team, Nixon was injured while attempting a jump shot. During a change of possession, Nixon took the ball and dribbled down court in an attempt to score a basket for his team. When he reached the foul line, he made a sudden stop and jumped to take a shot. An opposing player, Edward Clay, was defending him. While Nixon was in the air and shooting the ball, Clay, who was contesting the shot, extended his right arm over Judd's shoulder to allegedly reach in and swipe at the basketball. Nixon perceived that Clay had wrapped his arms around him and tackled him. While in the air, Nixon felt a pop in his left knee. Both Nixon and Clay then fell to the ground. The referee for the game made the determination that the contact was unintentional, and Clay was charged with a common foul. The referee defined a common foul as a player going for the ball but missing and hitting the body of the player in control of the ball. Nixon sustained a serious knee injury as a result of the contact.

Nixon later filed a lawsuit in district court alleging that Edward Clay's negligence caused his knee injury. The district court applied the contact sports exception, which holds that a participant in a contact sport owes a duty to a coparticipant only if his conduct is willful or done with reckless disregard for the safety of another player. Applying this exception to the facts of this case, the court determined that Nixon's injury arose out of conduct that was inherent in the game of basketball and was not willful or reckless. On that basis, the district court held that Clay owed no duty to Nixon.

Nixon appealed this ruling to the Utah Supreme Court. The court, in affirming the decision of the district court on summary judgment, applied a framework to the contact sports exception that avoids the assessment of a defendant's state of mind and whether a sport qualifies as a contact sport. The framework applied by the court was that voluntary participants in sport have no duty of care to avoid contact that is inherent in the activity. The court therefore made the determination that Clay's conduct, reaching in and swiping at the ball, was inherent in the game of basketball and affirmed the district court's grant of summary judgment in favor of the defendant.

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 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 likely occurred.
- *Violation of rules and regulations as basis for breach.* A county municipal health code regulation states that pools in the county must always have a minimum of six lifeguards on duty 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 likely 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 likely 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 likely 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 likely 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 likely 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 the possibility that a sport-related injury may result from multiple causes.

IN THE COURTROOM

Causation as an Element of Negligence

Brewington v. School District of Philadelphia (2018)

Nine-year-old Jarrett Brewington was a student at Walter G. Smith Elementary School in Philadelphia. One day during gym class, Jarrett's teacher had his class run relay races in the gym. The flooring was made of hardwood, and the boundaries were concrete walls at either end of the gym. The walls did not have any protective padding on them. While running fast and approaching the wall, Jarrett tripped and fell. He slid headfirst into the concrete wall at the end of the gym and blacked out, while also suffering a cut and bloodied face. He was later medically diagnosed with a concussion. He was not able to attend school for two months after the incident and experienced headaches and memory problems beyond that time.

His mother brought a negligence lawsuit against the school and school district for creating a dangerous condition in the gym by failing to install padded safety mats to cushion the walls. She claimed that the failure to install padding was the cause of her son's injury. The lower court ruled in favor of the mother (plaintiff). The school appealed the ruling of the lower court to the supreme court of the state of Pennsylvania. The school argued that Jarrett's injury was caused not by a dangerous condition and the failure to make it safe but instead by negligent supervision: The gym teacher had instructed the students to run toward a wall during the relay race. The school also argued that it was Jarrett's own fault that he tripped and fell as he neared the wall. These arguments were made in relation to protections afforded under state governmental immunity. The supreme court agreed with the ruling of the lower court, denying summary judgment for the defendant and finding that the school may be held liable for Jarrett's damages caused by the alleged negligent failure to affix mats to the gym walls.

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. The courts have used this maxim 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 have 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). Most 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.

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

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 the 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.

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. A defendant who is found liable for willful, wanton, or reckless conduct may incur civil liability.

In *Karas v. Strevell et al.* (2006), plaintiff was bodychecked from behind in a hockey game. Bodychecking in the game of hockey

is an act whereby a player drives some portion of his body into another player in an attempt to knock the opponent into the boards or the ice and separate him from the puck. In this case, plaintiff was partially bent over and looking down with his head pointing toward the boards. The collision caused plaintiff's head to strike the boards, resulting in serious injury. The plaintiff brought suit against multiple defendants, alleging, among other claims, willful and wanton misconduct on the part of the opposing player, team, governing association of officials, and league. In rendering their decision, the court of appeals acknowledged that willful and wanton conduct is a matter of degree, is difficult to define, and is determined based on the facts. In rendering a decision in favor of the defendants, the court further considered the nature of rules and penalties related to bodychecking, the fact that hockey is a contact sport, the fact that every jersey had the warning language "STOP" displayed on the back, and the actions of the coaches and officials in enforcing penalties.

Legal Protections = Defenses

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):

1. The risk must be inherent to the sport.
2. The participant must voluntarily consent to be exposed to the risk.
3. 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.

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

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Young athletes may not be able to understand all the inherent risks associated with a 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. Other sports also contain risks that have been held to be inherent to the sport, as the Inherent 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

Inherent Risk

Mayall v. USA Water Polo, Inc. (2018)

In *Mayall v. USA Water Polo, Inc.* (2018), H.C., while playing in a water polo tournament managed by USA Water Polo, was hit in the face by a shot and suffered a concussion. Her coach, who lacked concussion management training, allowed H.C. to continue playing in the game and later tournament games, when she was also struck in the head. After the tournament, H.C. began to experience headaches, sleepiness, and fatigue, which kept her from attending school. Her condition worsened, and she no longer was able to do any schoolwork. Her symptoms included extreme sensitivity to light, headaches, excessive sleeping, dizziness, inability to tolerate movement, nausea, and decreased appetite. After visiting a doctor, she was diagnosed with postconcussion syndrome. A parent, on behalf of H.C., brought a lawsuit against USA Water Polo claiming that her daughter's injury by concussion was the result of a failure on the part of USA Water Polo to implement system-wide concussion and return-to-play guidelines for athletes who have sustained concussions, to educate and adopt rules requiring the education of coaches, staff, and athletes about the symptoms and long-term consequences of concussions, and to implement system-wide guidelines for screening and detecting head injuries.

The defendant argued that USA Water Polo was protected from liability by claiming that concussions are an inherent risk in water polo. The lower court (district court) agreed and found in favor of the defendant. The case was appealed to the Ninth Circuit Court of Appeals, which reversed the decision of the lower court. The plaintiff argued that rules should be put in place to protect athletes who suffer concussions by preventing them from returning to play until they have progressed through a widely accepted stepwise, graded exertional return-to-play protocol and are symptom free for at least 24 hours. The appellate court, in reversing the decision of the lower court, agreed with the need for the adoption and implementation of return-to-play protocol and reasoned that although the initial concussion, which occurred the first time H.C. was struck in the head, might be considered an inherent risk, the risk of subsequent concussions when returned to the pool too soon would not merit such protection given that USA Water Polo increased the risk of secondary concussions to players who were inappropriately returned to play.

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 hurt someone to commit battery, because battery includes both touch that is *harmful* and touch that 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.

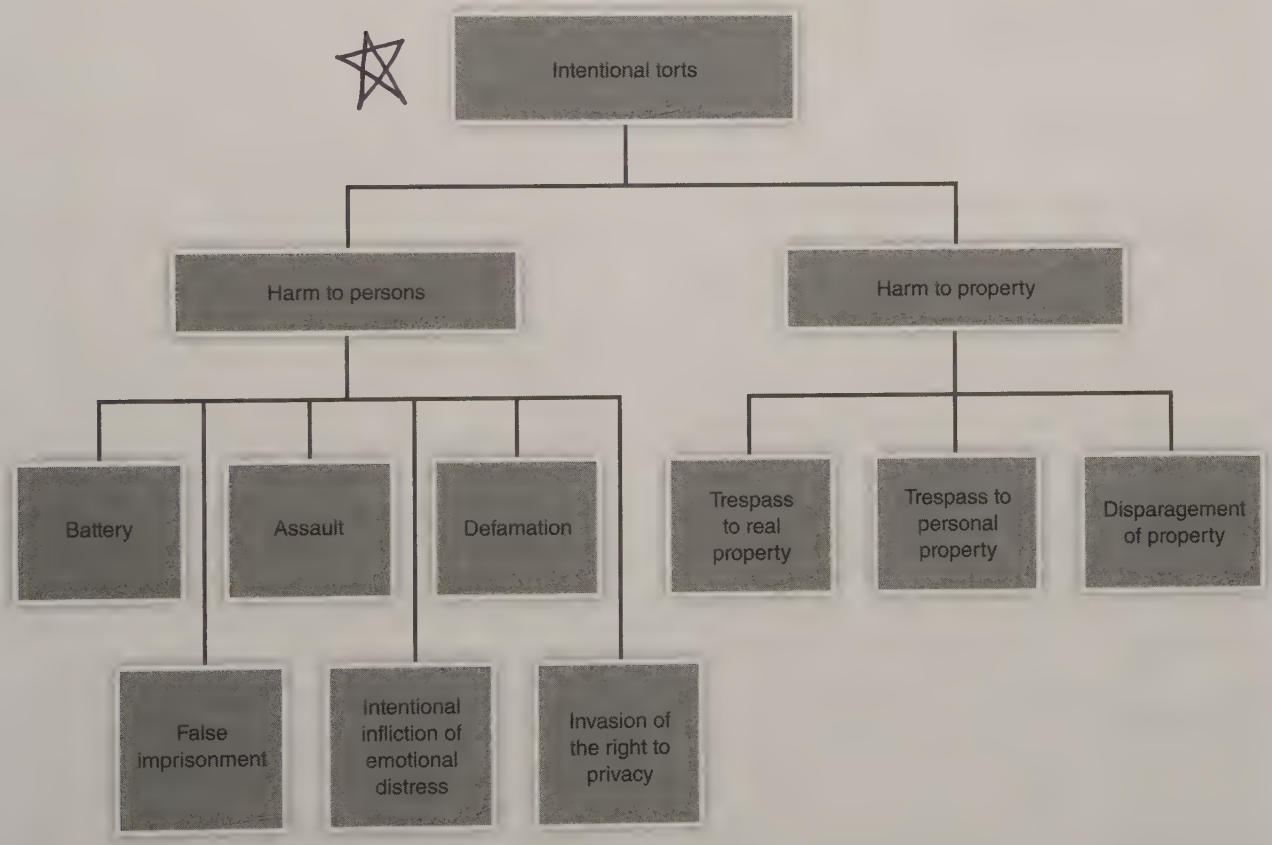
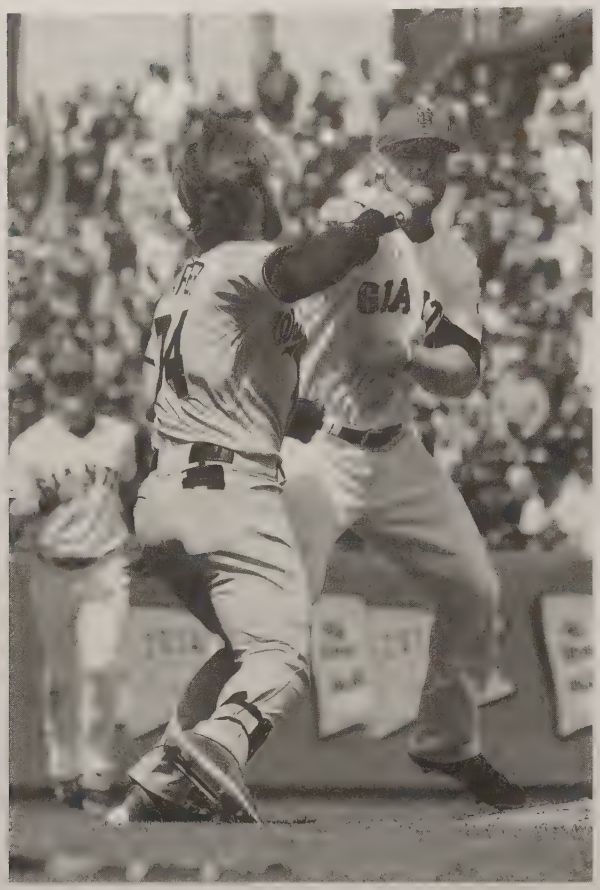


FIGURE 2.2 Categories of intentional torts.



Thearon W. Henderson/Getty Images

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 person, for example, might be called, text-messaged, or emailed 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) first-year quarterback who is playing for the first time on an opposing team. The mother of the first-year 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 what hypothetical facts would need to be added to the case to have the actions of a coach rise to the level of extreme and outrageous conduct in the context of concussions and head injury.

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

1. *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

IN THE COURTROOM

Liability in Coaching Behavior

Swank v. Valley Christian School (2019)

In *Swank v. Valley Christian School*, a high school football player, Drew Swank, was playing in a football game when he sustained a hard hit to the head. He left the game and began experiencing neck pain and headaches. Drew saw a doctor several days later. The doctor provided ibuprofen and advised Drew to rest. Several days later his headache disappeared, and his doctor cleared him to return to play. Soon after, Drew's team had another game. During the game, Drew, one of the better players on the team, appeared uncharacteristically sluggish and confused, and his condition became increasingly evident as the game progressed. He missed plays, was often out of position, and generally played well below his normal ability level. His mother, coaches, teammates, and others who were watching the game observed his subpar play. The coaches yelled at Drew because of his poor performance. When he came to the sideline, his head coach grabbed Drew's face mask, jerked it up and down, and yelled, "What are you doing out there?" The coach sent Drew back out onto the field, where he soon sustained a hit from an opposing player. He staggered to the sideline and collapsed. Drew died two days later. Drew's parents sued the school, the football coach, and Drew's doctor for negligence. Defendants argued that the Lystedt law did not apply to the case and that, among other claims, the head coach was entitled to volunteer immunity. The Lystedt law creates, by statute, certain required conduct on the part of coaches related to training and coaching, as well as when a concussion is suspected. The trial court, deciding the case in favor of the defendants, granted summary judgment against the Swanks on all claims, and the Washington Court of Appeals affirmed. The case was appealed to the Washington Supreme Court, which held that the lawsuit could proceed under the requirements of the Lystedt law, and that the coach was subject to potential liability despite the limited volunteer immunity protecting him. The case was therefore remanded back to the trial court for further proceedings.

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.

2. *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).

3. *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.

4. *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 the 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. Negligence claims involving products might also place liability on the purchaser of the equipment. These types of claims often address whether the purchaser followed the manufacturer's guidelines for the safe use and operation of the equipment. The following case illustrates this point.

The case of *Jimenez v. 24 Hour Fitness USA, Inc.* (2015) provides an example of a negligence claim in the context of fitness and a sport-related example of a product liability claim. Etelvina Jimenez was a member of 24 Hour Fitness USA. During one of her workout sessions, Etelvina fell off a treadmill and was seriously injured. Although she had no recollection of the circumstances surrounding her injury, a reconstruction of the incident found that she fell backward off a moving treadmill and hit her head on the exposed steel foot of an exercise machine that defendant had placed directly behind the treadmill. The steel foot of the exercise machine on which she hit her head was only 3 feet, 10 inches (1.2 m) behind the running belt of the treadmill. Etelvina suffered serious injury. During the discovery process before trial, it was found that the treadmill manufacturer's owner's manual had guidance on safety for the treadmill purchased by the gym for the use of its patrons. The manual, titled "Treadmill Safety Features," stated that "it is important to keep the area around the treadmill open and free from encumbrances such as other equipment. The minimum space requirement needed for user safety and proper maintenance is 3 feet wide by 6 feet deep . . . directly behind the running belt." Also, the manufacturer's assembly guide said to provide a minimum clearance of 6 feet behind the treadmill for user safety and maintenance. Plaintiff brought a lawsuit against 24 Hour Fitness claiming they were grossly negligent in setting up the treadmill in a manner that violated the manufacturer's safety instructions. The defendant argued in their defense that they were not liable because plaintiff had signed a waiver. The trial court agreed with the defendant and granted summary judgment. Plaintiffs appealed the judgment of the trial court and won their case on the appeal.

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,