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# WHO TAKES THE HEAT? CRIMINAL LIABILITY FOR HEAT-RELATED DEATHS IN HIGH SCHOOL ATHLETICS

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## INTRODUCTION

Some of the primary purposes of high school athletics are “instill[ing] a sense of pride in community, teach[ing] lifelong lessons of teamwork and self-discipline and facilitat[ing] the physical and emotional development of our nation’s youth.”<sup>1</sup> In contrast,

[t]he purpose of a high school athletic program is not to provide Division 1 college scholarships, develop athletes to produce a college national championship, to provide candidates for professional sports, or to prepare gifted athletes for Olympic competition. All of these high levels of play are tremendous accomplishments for a few; however, they are not our goal at the high school level.<sup>2</sup>

Despite these statements, many high school athletes would likely testify that they devote almost as much time to extra-curricular high school athletics as to the completion of homework assignments for classes. However, while many high school athletes dream of competing at collegiate and professional levels, few actually have the opportunity to fulfill those dreams. Nevertheless, they are often pushed beyond their physical limits, particularly during practice, as if each athlete has a future on a collegiate or professional roster one day.

Many people are aware of the fact that injuries and sports are essentially synonymous with each other in every sport and at all levels of the sport, whether it be sandlot, high school, college, or professional. Injuries occur in athletics because most sports require some degree of strenuous physical activity, mandating that

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<sup>1</sup> National Federation of State High School Associations *The Case for High School Activities 2* (2008), <http://www.nfhs.org/WorkArea/linkit.aspx?LinkIdentifier=id&ItemID=3263> (describing the benefits of co-curricular activities as supporting schools’ “academic missions,” teaching high school students self-discipline and self-confidence, and developing skills to handle competitive situations).

<sup>2</sup> Mike Blackburn, *The Purpose of High School Athletics is Not for the Development of College or Professional Athletics* 1 (2009), [www.magruderathletics.org/index.cfm?action=main.adnews&ID=82788](http://www.magruderathletics.org/index.cfm?action=main.adnews&ID=82788). Mike Blackburn is the Athletic Director at Northwestern High School in Kokomo, Indiana.

athletes train for hours daily in order to perfect their technique, both to meet the challenges of the games or matches, as well as to fine-tune their skills to be more competitive against opponents. Although the hard work in training often prevents injuries during competition, it often results in injuries during practice. To a certain extent, those injuries are forgivable. Perhaps they arose in the heat of the moment, such as when a player was about to score a basket, a touchdown, or a goal, and only a well-executed hit or block could prevent it from happening. Maybe the athlete chose to engage in a particularly difficult or dangerous maneuver. Such injuries are considered inherent risks of the athletes' respective sports, and courts have often held that the athletes assumed the risk of such injuries when they consented to participate in the activity.

However, the hard work at practice has also led to athletes' deaths. While the same argument could be made that the risk of death was assumed in a given sport, this contention becomes problematic when the cause of the athlete's death was not the associated activity of the sport.<sup>3</sup> In particular, over the past few decades, studies have shown a consistent number of deaths resulting indirectly from sports.<sup>4</sup> Examples of causes of those deaths are heart conditions and heat-related illnesses.<sup>5</sup> Although in one respect it seems difficult to blame anyone for an athlete's death when the cause is sudden heart failure,<sup>6</sup> the same is not necessarily true of athletes who die from heat-related illnesses.<sup>7</sup>

In particular, studies by researchers such as Professor Mueller—Director of the National Center for Catastrophic Sports Injury Research—and agencies including the National Athletic Trainers Association (“NATA”) have determined that heat-related illnesses, such as heat stroke, are preventable conditions.<sup>8</sup> Moreover, studies have generally focused on the coaches' ability to prevent the

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<sup>3</sup> In other words, the injury did not result from dribbling a basketball or soccer ball, or from other technical skills involved in the sport.

<sup>4</sup> See Frederick O. Mueller & Robert C. Cantu, *Catastrophic Sports Injury Research Twenty-Sixth Annual Report Fall 1982 – Spring 2008* (2009), <http://www.unc.edu/depts/nccsi/AllSport.pdf>. Indirect injuries are “caused by systematic failure as a result of exertion while participating in a sport activity or by a complication that was secondary to a non-fatal injury.” *Id.* at 2.

<sup>5</sup> *Id.* at 4. It should be noted that there are other causes for indirect fatalities in high school sports, such as seizures; however, the majority of indirect deaths in high school sports have been linked to heart and heat conditions. See *id.*

<sup>6</sup> Someone who dies from a heart condition had that condition prior to participating in high school sports. Therefore, it seems less justifiable to place blame for triggering a pre-existing condition, unless the athlete's coaches and trainers were aware of the athlete's heart condition and still required the athlete to compete.

<sup>7</sup> See *UNC Report: Heat-Related Deaths in High School Football Players Dip, But All are Preventable*, July 30, 2008, <http://uncnews.unc.edu/content/view/full/1430/107/> (statement of Frederick O. Mueller, Ph.D., professor of exercise and sports science in the College of Arts and Sciences at the University of North Carolina at Chapel Hill (“There's no excuse for any number of heat stroke deaths, since they are all preventable with the proper precautions.”)); Helen M. Binkley, et al., *National Athletic Trainers' Association Position Statement: Exertional Heat Illnesses*, 37 J. OF ATHLETIC TRAINING 329 (2002).

<sup>8</sup> *UNC Report*, *supra* note 7.

onset of heat illness in the first place,<sup>9</sup> noting that the most common type of heat stroke experienced by athletes is exertional.<sup>10</sup> As a result, the onus to avoid heat illness ultimately should not be upon the athletes, but rather upon those coaching them, who are in a position to monitor the players and ensure their safety.

Despite the preventability of heat-related deaths, they continue to occur somewhat frequently each year, and the civil system has not adequately dealt with the matter. Instead, criminal liability may be the most effective way of curbing the number of heat-related deaths in high school sports. Part I of this note will explore the vulnerability of high school athletes, given their ages and relationships with the administrators, coaches, and high schools for which they play. Such vulnerability is particularly problematic in light of the consistent number of heat-related deaths occurring in high school sports over the past few decades, as suggested by studies conducted by agencies such as the National Center for Catastrophic Injury Research (“NCCIR”). Part II will examine what occurs in the aftermath of the child’s death; specifically, the civil lawsuits the athletes’ families often bring to seek redress from the responsible parties. Especially noteworthy is the fact that athletes’ families have often been unable to recover monetarily for their children’s deaths, due in no small part to the defenses raised by coaches. Ironically, those defenses—qualified immunity and assumption of risk—are largely unfair and relied on too often. Not only do these defenses deny athletes’ families monetary redress, they also stifle possibilities of deterring heat-related deaths. Part III looks at the inadequacy of the civil court system, evaluating the benefits and risks of using criminal liability to promote greater prevention and deterrence of heat-related deaths in high school athletics. Finally, Part IV argues that criminal liability could be the most effective means of sparking action against heat-related deaths, both on the part of states and schools—not to mention individual coaches who would clearly want to avoid criminal penalties—and could assure greater safety for high school athletes.

## I. BACKGROUND

According to the National Federation of State High School Associations, there were a total of 7,536,753 high school athletes between 2008 and 2009,<sup>11</sup> marking an increase in the number of high school athletic participants for the

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<sup>9</sup> Binkley, *supra* note 7, at 331, 333 (explaining the need for coaches to allow their athletes to adapt to exercise in the heat over a ten to fourteen day period, receive training concerning the “prevention, recognition, and treatment of heat illnesses,” develop practice plans specifically for extraordinarily hot days, check weather conditions prior to practice, and plan rest breaks “to match the environmental conditions and the intensity of the activity”).

<sup>10</sup> *Id.* at 331. Exertional heat stroke is distinguishable from classic heat stroke because it occurs as a result of physical activity. Classic heat stroke “typically involves prolonged heat exposure in infants, elderly persons, or unhealthy, sedentary adults in whom body heat-regulation mechanisms are inefficient.” *Id.*

<sup>11</sup> Bruce Howard & John Gillis, *High School Sports Participation Increases for 20th Consecutive Year*, Sept. 15, 2009, available at <http://www.nfhs.org/content.aspx?id=3505>.

twentieth consecutive year.<sup>12</sup> That number is especially astounding since “it . . . was determined that 55.2 percent of students enrolled in high schools participate in athletics,”<sup>13</sup> also constituting an increase from the 2007-2008 school year.<sup>14</sup> The most popular high school sports include basketball, baseball, cross country, golf, football, soccer, swimming and diving, tennis, track and field, and wrestling, which are divided into three seasons—fall, winter, and spring—correlating with the time of year in which the sport is played.<sup>15</sup> For many young teenagers, their high school sports experiences mark the pinnacle of their athletic careers; most of them never get a chance to play in collegiate or professional sports.<sup>16</sup> Such low prospects deter few high school athletes from investing the effort to become the next starting quarterback or pitcher in the collegiate or professional leagues.<sup>17</sup> As such, every fall, winter, and spring, high school student-athletes around the country practice for hours each day to perfect their skills. They practice catching, throwing, dribbling, and stick handling, among other skills, in addition to improving their endurance through substantial amounts of cardiovascular exercise, specifically running. Often, it is during the running portion of practice that high school athletes succumb to preventable heat-related illnesses.

#### *A. Importance of Helping High School Athletes*

High school student-athletes are in a particularly vulnerable position due to their ages. High school students generally cannot compare physically to collegiate and professional athletes. Younger people tend to produce less sweat, causing them to both heat up faster and acclimate to heat slower than older teenagers and adults.<sup>18</sup> Additionally, the use of protective equipment in many sports compounds these problems for younger athletes, as it “[does] not allow water vapor to pass through and inhibit evaporation, convective, and radiant heat loss.”<sup>19</sup> Furthermore,

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* Significantly, there was an increase in the number of participants in both boys’ sports (50,547 student-athletes) and girls’ sports (56,825 student-athletes). *Id.*

<sup>15</sup> *Id.* The most popular boys’ sports were 11-player football (1,112,303 participants), outdoor track and field (558,007 participants), basketball (545,145 participants), baseball (473,184 participants), soccer (383,824 participants), wrestling (267,378 participants), cross country (231,452 participants), tennis (157,165 participants), golf (157,062 participants), and swimming and diving (130,182 participants). *Id.* The most popular girls’ sports were outdoor track and field (457,732 participants), basketball (444,809 participants), volleyball (404,243 participants), fast pitch softball (368,921 participants), soccer (344,534 participants), cross country (198,199 participants), tennis (177,593 participants), swimming and diving (158,878 participants), competitive spirit squads (117,793 participants), and golf (69,223 participants). *Id.*

<sup>16</sup> See Jenny Dial, *Long, Long Shot*, HOUSTON CHRONICLE, Jan. 31, 2010, available at <http://www.chron.com/dispatch/story.mpl/sports/6844161.html>.

<sup>17</sup> See *id.*

<sup>18</sup> *Awareness Can Prevent Heat Exhaustion in Children, Teens*, WASHINGTON UNIVERSITY IN ST. LOUIS, 2006, <http://www.newswise.com/articles/awareness-can-prevent-heat-exhaustion-in-children-teens>.

<sup>19</sup> Binkley, *supra* note 7, at 335. Additionally, athletes participating in sports that require the use of helmets, such as football, are at a greater risk of heat illness, since “a significant amount of heat is

younger people do not necessarily think to take breaks for rest and water during practice.<sup>20</sup> It is for these reasons that NATA's consensus statement on heat acclimatization, published in 2009,<sup>21</sup> is of such significance for high school athletic teams. NATA's report issues a number of recommendations for preventing and treating heat-related illnesses.<sup>22</sup> Notably, "[p]rofessional and college football have had consistently fewer [heat-related] deaths than have high schools, where medical oversight is often weaker and athletes are typically less conditioned and less prepared for the intensity of practice, especially during the first few days of the season."<sup>23</sup> The same could likely be observed of other sports, explaining the need for greater legal action to prevent such deaths.

Additionally, high school athletes, who generally range from fourteen to seventeen years old, are less likely to defy their coaches or speak up when they feel ill.<sup>24</sup> One journalist with high school athletic experience recalled:

Pushing players to the brink of their endurance is the norm. During the height of twice-a-day practices in August heat, garbage cans were hauled

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dissipated through the head." *Id.*

<sup>20</sup> See Laura Yao, *High Schools Seek to Curb Heat-Linked Sports Injuries*, THE WALL STREET JOURNAL, Jul. 16, 2009, available at <http://online.wsj.com/article/SB10001424052970204376604574280761954597096.html>.

<sup>21</sup> Douglas J. Casa & David Csillan, *Preseason Heat-Acclimatization Guidelines for Secondary School Athletics*, 44(3) J. OF ATHLETIC TRAINING 332 (2009) (defining the *heat acclimatization period* as the "initial 14 consecutive days of preseason practice for all student-athletes" during which the goal is to "enhance exercise heat tolerance and the ability to exercise safely and effectively in warm to hot conditions").

<sup>22</sup> See *id.* Additionally, NATA's guidelines provide the following directions:

During [the first five days of the heat-acclimatization process], athletes may not participate in more than 1 practice per day . . . If a practice is interrupted by inclement weather or heat restrictions, the practice should recommence once conditions are deemed safe. Total practice time should not exceed 3 hours [per] day. A 1 hour maximum walk-through is permitted during [the first 5 days] of the heat-acclimatization period. However, a 3 hour recovery period should be inserted between the practice and walk-through (or vice versa). During [the first 2 days] of the heat-acclimatization period, in sports requiring helmets or shoulder pads, a helmet should be the only protective equipment permitted (goalies, as in the case of field hockey and related sports, should *not* wear full protective gear or perform activities that would require protective equipment). During days 3-5, only helmets and shoulder pads should be worn. Beginning on day 6, all protective equipment may be worn and full contact may begin . . . Beginning no earlier than day 6 and continuing through the day 14, double-practice days must be followed by a single-practice day. On single-practice days, 1 walk-through is permitted, separated from the practice by at least 3 hours of continuous rest. When a double-practice day is followed by a rest day, another double-practice day is permitted after the rest day. On a double-practice day, neither practice should exceed 3 hours [total], and student-athletes should not participate in more than 5 total hours of practice. Warm-up, stretching, cool-down, walkthrough, conditioning and weight-room activities are included as part of the practice time. The 2 practices should be separated by at least 3 continuous hours in a cool environment. Because the risk of exertional heat illnesses during the pre-season heat-acclimatization period is high, [the guidelines strongly recommend] that an athletic trainer be on site before, during, and after all practices.

*Id.* at 333.

<sup>23</sup> Yao, *supra* note 20.

<sup>24</sup> *Id.*

out so we wouldn't vomit on the field. Another time, my coach was supposed to cancel practice due to a smog alert, which he cheerfully ignored. His advice: "Breath carefully."<sup>25</sup>

Perhaps due to the athletes' ages, they may not consider or know the risks involved in carrying out the coaches' instructions. They trust that their coaches know what is best for them and what will mold them into better athletes, and do not necessarily take a moment to think about the harm they are causing to their bodies. One journalist has summed up Dr. William Roberts—a physician and fellow of the American College of Sports Medicine—point on this matter well: "Players themselves often don't speak up when they feel ill because the drive to impress their coaches may cause athletes to ignore common sense."<sup>26</sup>

This matter is worsened by the fact that, unlike collegiate and professional teams that have funding to provide medical training, high schools generally cannot afford to provide adequate medical staff.<sup>27</sup> The median salary for athletic trainers in May 2008 was \$39,640,<sup>28</sup> which has proven to be a prohibitive sum for many high schools<sup>29</sup>—particularly during the current economic recession—in light of the multitude of other costs associated with fielding several athletic teams each sports season, not to mention schools' annual academic expenses. Yet, even supposing each high school could afford *one* athletic trainer, considering the number of student-athletes per sports season, one trainer is most probably inadequate to ensure proper medical observation and response should a student succumb to heat-related illness. Therefore, unlike collegiate and professional coaches, high school coaches simply cannot afford to risk pushing athletes too far, since they often lack adequate medical backup and do not personally have the medical expertise necessary to treat a student suffering from heat illness.<sup>30</sup> Hence, if high school coaches choose to

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<sup>25</sup> Brian Jarvis, *Can We Admit that Legal Drugs are as Deadly as the Illegal Variety?*, MISSOURIAN, Oct. 2, 2009, available at <http://www.columbiamissourian.com/stories/2009/10/02/can-we-admit-legal-drugs-can-be-deadly-illegal-variety/>.

<sup>26</sup> Yao, *supra* note 20.

<sup>27</sup> See Tim Candon & Ken Medlin, *Fatalities Spark Call for Certified Athletic Trainers*, Sept. 30, 2008, <http://www.highschoolot.com/content/story/3639241/>. One high school spokesperson said her school cannot afford to hire a full-time athletic trainer because it would require the trainer to be a teacher as well, and "[w]e just don't have a full-time athletic position." *Id.* The only positions her school could offer to give an athletic trainer would be a part-time position, which would not pay the trainer much or give the trainer many hours. *Id.*

<sup>28</sup> Bureau of Labor Statistics Occupational Outlook Handbook, 2010-11 Edition, available at <http://www.bls.gov/oco/ocos294.htm#earnings> (last visited Jan. 29, 2010).

<sup>29</sup> See Amy M. Whitley, et al., *The Status of Certified Athletic Trainers and Athletic Training Protocols in Mississippi Public High Schools* (2008), <http://www.msaphard.com> (noting that only about half of North Carolina high schools employed certified athletic trainers in 2006, the rest of them relying on teachers and coaches to provide medical care on the field. *Id.* at 4. Similarly, only 6.9% of high schools in Mississippi reported have a full-time athletic trainer, and just 15.3% reported having a part-time trainer. *Id.* at 7. In contrast, of 724 Illinois high schools surveyed, 73% reported having athletic trainers, though 34% of those schools said they did not have a trainer at practices. *Id.* at 4.

<sup>30</sup> See, Jason Riley, *Heat Expert: Max Gilpin Would Have Survived If Treated Correctly*, COURIER JOURNAL.COM, Sept. 10, 2009, <http://www.courier-journal.com/article/20090910/SPORTS05/909100328/Heat-expert--Max-Gilpin-would-have-survived-if-treated-correctly>. Dr. Casa, a medical expert from the University of Connecticut, noted that Max

take such a risk with their student-athletes, resulting in injury or death, the consequences ought to be clear.

Yet, there is no national handbook guiding punishment for coaches, athletic directors, or school districts for high school sports. Nor, for that matter, is there a clear set of rules concerning practice conditions. High school athletics are not governed by a central policy-maker who dictates how coaches must conduct their practices so as to minimize athletes' injuries.<sup>31</sup> Unlike collegiate athletics, which are governed by the National Collegiate Athletic Association ("NCAA"), and professional sports, which are governed by their respective leagues,<sup>32</sup> each state is free to make its rules concerning high school athletics.<sup>33</sup> The problem is that not all states have exercised the authority to oversee their high school sports; rather, they have left such decisions to individual school districts.<sup>34</sup> As a result, there is much disparity among the states' rules for high school athletics.<sup>35</sup> Thus, whereas the NCAA created a rule in 2002—to which all colleges and universities must adhere—establishing a mandated acclimatization period at the beginning of athletic seasons, high school leagues have no such universal rules.<sup>36</sup> Without any centralized policies, high schools and coaches have often been left free to run practices that have led to the consistent number of heat-related deaths in the past few decades.

Finally, unlike collegiate and professional athletes, high school student-athletes do not receive any sort of compensation for their work. Professional athletes, particularly those in Major League Baseball ("MLB"), the National Basketball Association ("NBA"), and the National Football League ("NFL"), receive generous salaries in return for their daily participation in their respective leagues.<sup>37</sup> Although collegiate athletes do not receive salaries, they receive

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Gilpin's high school coaches "could not be expected to have the expertise of an athletic trainer. . . ." *Id.*

<sup>31</sup> See Yao, *supra* note 20.

<sup>32</sup> Examples of professional sports that are governed by their respective leagues include the National Basketball Association and its women's league the WNBA, the National Football League, and the National Hockey League.

<sup>33</sup> See Yao, *supra* note 20.

<sup>34</sup> See *id.*

<sup>35</sup> See *id.* at 1-2. On one hand, this disparity makes sense, since what might be considered excessively hot weather in a northern state such as Maine might not be considered excessively hot in Alabama. See *id.* Consequently, while Maine might see fit to prohibit practices in one level of heat, Alabama might continue to permit practice in that same level of heat, with or without restrictions. See *id.* On the other hand, this situation creates confusion and uncertainty with regard to what a particular state permits or prohibits during high school sport's practices.

<sup>36</sup> 2009-2010 NCAA SPORTS MEDICINE HANDBOOK, June 2002, available at [http://www.ncaapublications.com/Uploads/PDF/SportsMedHandbook\\_update\\_12\\_212848760d-cbd5-47d7-be71-9e152518e0b9.pdf](http://www.ncaapublications.com/Uploads/PDF/SportsMedHandbook_update_12_212848760d-cbd5-47d7-be71-9e152518e0b9.pdf). The NCAA legislation was specifically aimed at football in all three of its divisions. See *id.* The legislation requires a five-day acclimatization period for conducting initial practices for all athletes, including limiting the number of practices to one per day and limiting the amount of equipment that may be worn. *Id.* at 113.

<sup>37</sup> See generally MLB Salaries, <http://www.cbssports.com/mlb/salaries/avgsalaries> (last visited Oct. 15, 2010); David Aldridge, *Worldwide Recession Affects NBA Salary Cap for 2009-2010*, July 8, 2009, [http://www.nba.com/2009/news/features/david\\_aldrige/07/07/salarycap.feature/](http://www.nba.com/2009/news/features/david_aldrige/07/07/salarycap.feature/); NFL Hopeful FAQs, <http://www.nflplayers.com/About-Us/FAQs/NFL-Hopeful-FAQs/> (last visited Oct. 15, 2010).

scholarships, which can be characterized as “compensation for services rendered.”<sup>38</sup> Since collegiate and professional athletes are being compensated for the risks they take in their respective levels of sports, there is an increased expectation that they will sacrifice themselves for the work for which they are paid. In contrast, high school student-athletes receive no compensation whatsoever, yet are often unjustifiably expected to put out the same effort at practices and competitions as collegiate and professional athletes.

*B. Study on Heat-Related Illnesses and Catastrophic Injuries*

It has been established that “[a]thletes who begin training in the late summer . . . experience exertional heat-related illness more often than athletes who begin training during the winter and spring.”<sup>39</sup> Thus, coaches ought to be aware whether or not athletes in their respective sports are more prone to heat stroke compared to other sports, which train at different times of the year. It is expected of course, that athletes will overheat to some extent when exerting all their energy on the field or court. However, unlike heart failure, which might occur without warning, heat-related illnesses exhibit numerous warning signs before they reaches fatal levels.<sup>40</sup> Significantly, heat stroke is *not* the sort of condition that is instantly fatal; NATA’s report identifies numerous actions to take after the onset of heat stroke that can minimize lasting injury and may even prevent death altogether.<sup>41</sup> Despite reports issued by groups like NATA, and more importantly, the suggestions they provide, heat-related fatalities continue to occur somewhat regularly in high school sports.

Injuries, as categorized by the NCCIR, come in two major forms: direct and indirect.<sup>42</sup> Direct injuries refer to those injuries resulting “directly from participation in the skills of the sport.”<sup>43</sup> Thus, an athlete breaking his spine while attempting a tackle in football, or an athlete suffering a concussion from a check

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<sup>38</sup> ALLEN L. SACK & BRUCE KIDD, *The Amateur Athlete As Employee*, in GOVERNMENT AND SPORT 41, 50 (Arthur T. Johnson & James H. Frey eds., 1985).

<sup>39</sup> Binkley, *supra* note 7, at 329.

<sup>40</sup> University of Maryland Medical Center, First Aid, [http://www.umm.edu/non\\_trauma/dehyrat.htm](http://www.umm.edu/non_trauma/dehyrat.htm) (last visited Jan. 29, 2010) (explaining that the most common symptoms of heat stroke are: “headache, dizziness, disorientation, agitation, or confusion, sluggishness or fatigue, seizure, hot, dry skin that is flushed but not sweaty, a high body temperature, loss of consciousness, rapid heartbeat, and hallucination”). Additionally, according to the National Athletic Trainers Association study, the worst instances of heat exhaustion, which is not necessarily fatal, are quite similar to the aforementioned symptoms associated with heat stroke. Therefore, it seems that if an athlete exhibits any of those symptoms, the coach has fair warning that heat stroke is either imminent or is already occurring, and therefore remedial measures ought to be taken.

<sup>41</sup> Casa & Csillan, *supra* note 21, at 332-333 (Dr. Casa suggesting, among other actions, that the most effective method for lowering the athlete’s core temperature is to remove his or her clothes and immerse him or her in a tub of cold water). See Riley, *supra* note 30, at 1 (Realizing that not all schools have the funding to provide an ice-water bath for their athletes, NATA also recommends removing the athlete’s clothing, “sponging down the athlete with cool water and applying cold towels; applying ice bags to as much of the body as possible, especially the major vessels in the armpit, groin, and neck; providing shade; and fanning the body with air.”). See Binkley, *supra* note 7, at 335.

<sup>42</sup> Mueller & Cantu, *supra* note 4, at 2.

<sup>43</sup> *Id.*

during ice hockey would be considered a direct injury.<sup>44</sup> In contrast, indirect injuries are those “that were caused by systematic failure as a result of exertion while participating in a sport activity or by a complication that was secondary to a non-fatal injury.”<sup>45</sup> An example of an indirect injury would be a heart attack that was aggravated by sprints an athlete performed as part of a practice regimen for his or her sport.<sup>46</sup> As might be expected, significantly more injuries occur due to direct participation in sports.<sup>47</sup>

Although less frequent than injuries, sports also result in death on an all-too-common basis. As it does with injuries in sports, the National Center for Catastrophic Injury (“NCCIR”) categorizes fatalities in sports based on whether they were caused directly or indirectly by the sport being played.<sup>48</sup> Whereas direct injuries accounted for many more of the total number of injuries in high school and college sports, indirect fatalities accounted for the majority of the total number of deaths in high school and college sports between 1982 and 1983 and between 2007 and 2008.<sup>49</sup> The two primary causes of indirect fatalities in high school and college sports are heat stroke and heart failure.<sup>50</sup> Focusing specifically on heat stroke, a person’s body temperature rises dramatically during periods of intense physical exertion.<sup>51</sup> This rise in temperature is exacerbated by the hot weather conditions in which athletic practices often take place, such as outdoors during the late spring and summer months, in temperatures frequently rising to the mid-90s or even over 100 degrees Fahrenheit, combined with high levels of humidity.<sup>52</sup> The following table indicates the number of indirect fatalities associated with high school sports from 1982-1983 to 2007-2008.<sup>53</sup>

<b>Sport season</b>	<b>Female</b>	<b>Male</b>	<b>Total</b>
Fall	17	224	241
Winter	22	128	150
Spring	13	46	59

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<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

<sup>47</sup> See National Center for Catastrophic Injury Research, Table of Injury Statistics, available at <http://www.unc.edu/depts/nccsi/AllSportTables.pdf> (giving statistics for the number of direct and indirect injuries and fatalities in high school and college sports between the 1982-1983 and 2007-2008 sports seasons). Notably, since the study only accounts for those injuries and fatalities since the 1982-1983 athletic season, there are likely many other deaths and injuries that are unaccounted for from earlier previous years.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* (showing a total of 450 indirect fatalities since the 1982-1983 season, compared to 152 direct fatalities since the 1982 to 1983 season).

<sup>50</sup> See Mueller & Cantu, *supra* note 4.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

<sup>53</sup> See National Center for Catastrophic Injury Research, *supra* note 47.

As the table indicates, there were 450 indirect fatalities that occurred during the period in question, many attributable to heat illness of some sort.<sup>54</sup> This means that while the number of deaths has fluctuated each year, there has been an average of 15 indirect fatalities of high school athletes annually over the last 26 years.<sup>55</sup>

Based on these statistics and the reports from organizations like NATA, heat-related fatalities in high school sports are clearly an issue. Furthermore, they are preventable tragedies, thus avoidable for purposes of determining whether or not they can be considered “inherent” risks in high school sports.<sup>56</sup> Consequently, “[w]hile coaches do not create the anatomical conditions underlying heat-stroke-related [deaths], they often control the context in which such injuries arise. Failure to adopt reasonable preventative measures—such as having water available on hot days—clearly ‘increases the risk’ that such injuries will occur.”<sup>57</sup>

## II. TORTIOUS LIABILITY FOR HEAT-RELATED DEATHS

Currently, families of athletes who are injured or die during participation in high school sports rely primarily on common law causes of action in order to seek redress for the harm to their sons or daughters.<sup>58</sup> The general consensus appears to favor lawsuits alleging negligence on the part of the coach, which led to the player’s wrongful death.<sup>59</sup> In order to make out a prima facie case of negligence and wrongful death, the child’s family must demonstrate several elements.<sup>60</sup> The

“critical inquiry [is] whether the coach has fulfilled the duty to exercise reasonable care for the protection of the athletes under his or her supervision, which duty will be satisfied by providing proper instruction in how to play the game and by showing due concern that the athletes are in proper physical condition.”<sup>61</sup>

If the coach can demonstrate that he or she “properly instructed the player,”<sup>62</sup> he or she will not be liable for “injuries caused when [for example] a first baseman hits another participant with a wildly thrown ball or when a slightly injured player is sent home without receiving first aid.”<sup>63</sup> In fact, provided the evidence does not

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<sup>54</sup> *See id.*

<sup>55</sup> *See id.*

<sup>56</sup> Riley, *supra* note 30.

<sup>57</sup> Timothy B. Fitzgerald, *The “Inherent Risk” Doctrine, Amateur Coaching Negligence, and the Goal of Loss Avoidance*, 99 NW. U. L. REV. 889, 918 (2005).

<sup>58</sup> *See Draughon v. Harrett County Bd. of Ed.*, 158 N.C. App. 705 (2003).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> CYM H. LOWELL, *LIABILITY FOR INJURIES IN SPORTS*, Law & Amateur Sports, 40, 62 (1982).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* The thought in the former example being that the athlete assumed the risks inherent in the activity, and that the coach could not have anticipated both baseball players being inattentive at the same time, resulting in the plaintiff being hit by the wildly thrown baseball. *McGee v. Board of Educ. of New York*, 16 A.D.2d 99 (N.Y. App. Div. 1st Dep’t 1962). In the latter example, a young athlete reinjured a

demonstrate that the coach failed to instruct his or her athletes properly, coaches have even been absolved of liability for injuries as serious as broken necks.<sup>64</sup>

In contrast, when the evidence demonstrates that “the coach [did] not conduct the activities, or the persons, under his or her direction in such a way as to minimize the possibility of injury, the coach will be liable for the injuries thereby caused.”<sup>65</sup> Consider the following hypothetical example: A fifteen-year old female basketball player was participating in her high school team’s practice. On the day in question, the practice gymnasium was quite hot, and the team’s coach viewed a number of players having difficulty breathing throughout the two hour practice. In fact, the athlete in question requested a number of water breaks from her coach, but was denied each time, instead told she would receive water when the rest of the team received water. At the end of the practice, the coach instructed the players to run several sets of wind sprints,<sup>66</sup> during which the fifteen-year old athlete collapsed. After about fifteen minutes of unsuccessful attempts to revive her, the coach called for an ambulance, and the girl was eventually treated for heat stroke at the local hospital. However, the doctors’ treatment was unsuccessful and she died. Arguably, there was a substantial risk of heat stroke that a coach who, exercising ordinary care under similar circumstances, would have recognized. Moreover, the girl died as a result of her coach’s failure to recognize the substantial risk of heat stroke. Such negligence is what her family would have to show the court in order to find the coach liable and recover for her death.

Seemingly, in cases where a young athlete dies after participating in practice or conditioning,<sup>67</sup> showing damage or injury is not difficult. In contrast, demonstrating the coach’s negligence is often a more challenging task, since “[h]indsight is 20/20.”<sup>68</sup> It is easy to look back on a situation and point out the coach’s mistakes and what a reasonable person might have done under similar circumstances; however, the risk of injury may not have been as obvious at the time.<sup>69</sup> Additionally, parents of deceased high school athletes have traditionally

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shoulder that he had dislocated two weeks earlier, and was thereafter sent home by his coach after having his arm placed in a sling. *Duda v. Gaines*, 12 N.J. Super. 326, 328 (App. Div. 1951). The court did not find there was a pressing emergency such that it was necessary to obtain medical assistance before returning home. *Id.* at 329.

<sup>64</sup> LOWELL, *supra* note 61, at 62 (referring to *Vendrell v. School Dist.*, 233 Ore. 1 (Or. 1962)).

<sup>65</sup> *Id.* Consequently, coaches have been found liable for injuries to their athletes when the coaches “[knew], or in the exercise of ordinary care should have known, that the player[s] were already suffering from serious injuries. . . .” *Id.*

<sup>66</sup> Wind sprints are a series of runs, typically conducted by coaches at the end of a practice. Though they vary in style and duration, wind sprints often involve athletes running from one end or side of a field or court to the other end or side. Occasionally, the athletes are required to complete each set of sprints in a specific amount of time.

<sup>67</sup> Conditioning, as distinguishable from practice, generally involves cardiovascular training. In contrast, practice often involves drills to work on a given sport’s skills, techniques, and plays.

<sup>68</sup> Sarah Kelley, *Tough Coaching or Criminal Act?*, LEO WEEKLY, Jan. 28, 2009, <http://leoweekly.com/news/tough-coaching-or-criminal-act>.

<sup>69</sup> For example, Max Gilpin’s coach testified that Max only looked like he was tired from conditioning, and that he was able to walk off the field on his own. Andrew Wolfson & Antoinette

had trouble proving a causal connection between the coach's negligence or recklessness and the athletes' deaths. Given the complexity of the human body, each young athlete reacts differently to weather conditions and strenuous practices. As such, it is not always clear whether the death was truly preventable had practice conditions been less intense.<sup>70</sup> Yet, the most difficult hurdles for families to overcome have been two defenses that coaches often advance—qualified immunity and assumption of risk.

### A. *The Doctrine of Qualified Immunity*

Generally, states have created legislation granting schools and their employees some degree of immunity from lawsuits.<sup>71</sup> Such statutes have broad-reaching consequences for families of those high school athletes who died of heat-related complications while participating in their respective sports. Before the trial court can actually decide the case on the merits, it must perform a preliminary evaluation in which it determines whether the school and/or coach are entitled to immunity. Each state imposes its own standards for applying an immunity defense; however, focusing specifically on coaches' ability to use it, there seems to be a general consensus that at the very least, recklessness will defeat any immunity. This section will explore several standards for determining immunity for coaches.

#### 1. Actions Constituting Gross Negligence

In 2004, the Court of Appeals of Michigan addressed the issue of immunity for coaches in *Tarlea v. Crabtree*.<sup>72</sup> The case arose in the wake of the death of Jeremy Tarlea, a high school student in his second year on the school's varsity football team.<sup>73</sup> In August 2000, the team had a three-day preseason conditioning camp to prepare for the upcoming season.<sup>74</sup> Despite numerous precautions prior to and during the practices,<sup>75</sup> Tarlea collapsed after completing a 1.5 mile run

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Konz, *Police: PRP Coach Admitted Denying Players Water*, COURIERJOURNAL.COM, Mar. 3, 2009, <http://www.courier-journal.com/article/20090303/NEWS01/90303010/Police--PRP-coach-admitted-denying-players-water>.

<sup>70</sup> For example, defense experts in the criminal case against Max Gilpin's coach explained how it "appeared a combination of heat, the use of the dietary supplement creatine and attention deficit disorder drug Adderall, and being ill were the main factors that contributed to Gilpin's death. . . ." Brett Barrouquer, *Kentucky Coach Acquitted in Rare Player death Case*, Sept. 17, 2009, available at <http://abcnews.go.com/US/wireStory?id=8604609>.

<sup>71</sup> See *Harris v. McCray*, 867 So. 2d 188, 189 (Miss. 2003) ("A governmental entity and its employee enjoy immunity if there is exercise of ordinary care in the performance of a duty under a statute, ordinance or regulation."); *Tarlea v. Crabtree*, 263 Mich. App. 80, 89 (Ct. App. 2004) ("Generally, governmental employees acting within the scope of their authority are immune from tort liability except in cases in which their actions constitute gross negligence.")

<sup>72</sup> See *Tarlea v. Crabtree*, 263 Mich. App. 80 (Ct. App. 2004).

<sup>73</sup> *Id.* at 83-85.

<sup>74</sup> *Id.* at 84.

<sup>75</sup> No players were permitted to participate in the conditioning camp without prior physical examination by a physician, and the kids received "a healthy diet and plenty of water at all times," including during practice. *Id.* at 85. Each player also received two-minute breaks between each set of

following morning drills on the first day of camp.<sup>76</sup> His coaches responded immediately—taking him directly to the hospital—but Tarlea was later pronounced dead from “heat stroke with multisystem organ failure, shock, consumptive coagulopathy, liver failure, kidney failure, cerebral edema, and a *Pseudomonas* bacterial infection . . . .”<sup>77</sup>

Before addressing the facts of the case, the Court of Appeals of Michigan specifically explained how Michigan law provides that “a governmental employee is not responsible in tort for personal injuries unless the governmental employee is grossly negligent, which the statute defines as ‘conduct so reckless as to demonstrate a substantial lack of concern for whether an injury results.’”<sup>78</sup> Using this standard, the appellate court determined that the trial court had mistakenly permitted the case to go to a jury.<sup>79</sup> Since there were no triable issues of fact regarding whether the coaches’ actions demonstrated “a substantial lack of concern for whether an injury results,”<sup>80</sup> the court granted the coaches’ motion to dismiss.<sup>81</sup> Significantly, the court explained its rationale as to the matter of gross negligence:

Simply alleging that an actor could have done more is insufficient under Michigan law, because, with the benefit of hindsight, a claim can always be made that extra precautions could have influenced the result . . . . Even the most exacting standard of conduct, the negligence standard, does not require one to exhaust every conceivable precaution to be considered not negligent. The much less demanding standard of care—gross negligence—suggests, instead, almost a willful disregard of precautions or measures to attend to safety and a singular disregard for substantial risks.<sup>82</sup>

Noting the precautions the coaches took,<sup>83</sup> as well as their responses once Tarlea collapsed from heat stroke,<sup>84</sup> the court found that no reasonable person could conclude that the coaches had demonstrated gross negligence, and therefore dismissed Tarlea’s parents’ claim.<sup>85</sup>

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exercises on the morning of Tarlea’s death.

<sup>76</sup> *Id.* at 86. Significantly, Tarlea’s coaches did not require the players to complete the run; some did in fact decline to run. *Id.* at 86. Additionally, those players who decided to run were permitted to take breaks whenever they felt the need and could sit in the shade during those breaks. *Id.* at 86.

<sup>77</sup> *Tarlea*, 263 Mich. App. at 87. The record at trial revealed that of forty-one players who participated in the camp, Tarlea was not only the sole fatality, but he was also the only player to become ill. *Id.* at 87.

<sup>78</sup> *Id.* at 82.

<sup>79</sup> *Id.* at 83.

<sup>80</sup> *Id.* at 82.

<sup>81</sup> *Id.* at 83.

<sup>82</sup> *Tarlea*, 263 Mich. App. at 90.

<sup>83</sup> *Id.* at 85.

<sup>84</sup> The coaches brought Tarlea to a hospital immediately in an air conditioned car. *Id.* at 86.

<sup>85</sup> *Id.* at 83.

## 2. Deliberate Indifference Toward the Victim

Another standard for determining immunity to which courts have adhered is “deliberate indifference towards the victim.”<sup>86</sup> In *Livingston v. DeSoto Independent School District*, the parents of a teenage girl who played for her school’s girls’ basketball team sued a coach in the United States District Court for the Northern District of Texas under—among other grounds—a 42 U.S.C. § 1983 claim that their daughter’s coach and athletic trainer failed to provide proper medical attention.<sup>87</sup> Their daughter, Kourtnei, became ill after running on an outdoor track as part of her training for the girls’ basketball team on August 23, 2002.<sup>88</sup> Kourtnei’s coach brought her to the athletic trainer’s room soon thereafter, where the trainer called 911, but Kourtnei died as a result of her heat-related illness.<sup>89</sup>

According to the District Court, coaches have immunity in Section 1983 lawsuits, subject to defeat by fulfilling two prongs.<sup>90</sup> The first requires the plaintiff to plead facts that demonstrate the coach’s and trainer’s actions “violated a clearly established constitutional right.”<sup>91</sup> The second requires considering whether the coach and trainer failed to act “in an objectively reasonable manner in light of the clearly established law at the time of [the athlete’s] untimely death.”<sup>92</sup> Noting that the first prong must be satisfied before examining the second prong, the court explained how in order to establish that a constitutional right has been violated, the athlete’s parents have to show that the coach acted with “deliberate indifference.”<sup>93</sup> Deliberate indifference means “consciously disregard[ing] a known and excessive risk to the victim’s health and safety.”<sup>94</sup> Consequently, although the evidence in a

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<sup>86</sup> *Livingston v. DeSoto Independent School District*, 391 F. Supp. 2d 463, 467 (N.D. Tex. 2005).

<sup>87</sup> *Id.* 42 U.S.C. § 1983 provides, in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1996). Although § 1983 is not a typical cause of action used in the type of lawsuits discussed in this Note, Kourtnei’s parents drew on the statute’s “deprivation of . . . rights” language, asserting that her coaches violated her “right to bodily integrity and personal security, as guaranteed by the Fourteenth Amendment . . . .” *Livingston*, 391 F. Supp. 2d at 467. The District Court acknowledged such a right, remarking, “[t]he Fifth Circuit has recognized ‘a student’s liberty interest in maintaining bodily integrity.’” *Id.* (citing *Moore v. Willis Independent School District*, 233 F.3d 871, 875 (5th Cir. 2000).)

<sup>88</sup> *Livingston*, 391 F. Supp. 2d. at 465.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 466.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 467.

<sup>94</sup> *Livingston*, 391 F. Supp. 2d at 467. The *Livingston* court noted that Kourtnei’s coach attended to her “approximately five minutes after she finished her two-mile run . . . . At that time, with the assistance of two of Kourtnei’s teammates, [Kourtnei’s coach] took [her] to the training room within seventeen

case might indicate that the coach was inept or negligent, that would not be enough to defeat immunity for a coach in a Section 1983 lawsuit.<sup>95</sup>

### 3. Immunity Where There is Exercise of Ordinary Care

Another court approached the issue of immunity for high school coaches in a slightly different manner, increasing the burden the athlete's family must prove in order to defeat the immunity.<sup>96</sup> In *Harris v. McCray*, a case from 2003, the Supreme Court of Mississippi acknowledged immunity for school districts and their employees "if there is exercise of ordinary care in the performance of a duty under a statute, ordinance or regulation."<sup>97</sup> At the same time, the court explained, "a governmental entity and its employee enjoy immunity under Miss. Code Ann. §11-46-9(1)(d) '[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion be abused.'"<sup>98</sup> In order to gain a better understanding of the impact of this type of statute on *Harris*, the facts of the case ought to be explained briefly.

On August 21, 1995, Victor Lorell Harris, a fifteen-year old high school student at Jefferson County High School, allegedly suffered a heat stroke while participating in football practice.<sup>99</sup> Harris filed suit against the football team's head coach, Coach McCray, and the Jefferson County School District for damages resulting from the heat stroke.<sup>100</sup> Although the trial court found that Harris had suffered \$350,000 worth of damages, the Mississippi Torts Claims Act ("MTCA")<sup>101</sup> granted the school district and Coach McCray immunity because the coach's actions were discretionary in nature.<sup>102</sup> In light of the aforementioned statutes, the Supreme Court of Mississippi upheld Coach McCray's immunity for Harris' heat stroke injuries.<sup>103</sup> In essence, the MTCA made it nearly impossible

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minutes of finishing the run." *Id.* at 468. This, the court explained, did not amount to deliberate indifference toward Kourtnei. *Id.* at 468. Consequently, her parents' argument failed.

<sup>95</sup> *Id.* at 467. (noting that "deliberate indifference is a 'lesser form of intent' rather than a 'heightened degree of negligence'").

<sup>96</sup> See *Harris v. McCray*, 867 So. 2d 188, 189 (Miss. 2003).

<sup>97</sup> *Id.* at 189 (citing MISS. CODE. ANN. §11-46-9[1][b] [2002]).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 188.

<sup>101</sup> See MISS. CODE ANN. § 11-46. (2010).

<sup>102</sup> *Harris*, 867 So. 2d at 189.

<sup>103</sup> *Id.*

Who knew the football players of the 1995 Jefferson County High School football team better than Coach McCray? He knew what players would complain only when hurt and what players would complain at a drop of a hat simply to be able to take a break from football practice on a hot August day. . . . Coaches will know their players well enough to know who may holler "wolf" and who will not. When Victor Harris complained of feeling weak and needing a water break, Coach McCray told Harris he was "faking it." Unfortunately, he was not. Harris's injuries and resulting damages are not to be treated flippantly. However, we cannot fast-forward past the facts of this case and the applicable law just to arbitrarily impose liability in an attempt to right a perceived wrong.

*Id.* at 192.

for Harris to recover from his school or football coach. It is difficult to imagine a situation in which the court would say that a high school coach did not exercise discretion in the performance of his or her duties.

### *B. Doctrine of Assumption of Risk*

Even if a claim of qualified immunity is successfully overcome, the athlete and his or her family must still overcome another obstacle before being able to recover for damages. Often, a case will hinge on whether the athlete is deemed to have assumed the risk of his or her injury. The doctrine of assumption of risk “is a basic tort concept and is generally understood to occur when the plaintiff knows, or should know, of the risk and voluntarily assumes it.”<sup>104</sup> Courts have debated over how strictly to apply the doctrine of assumption of risk;<sup>105</sup> however, it is generally understood that athletes have consented to risks that are known or foreseeable in the sport being played.<sup>106</sup> As such, courts are unwilling to permit athletes to recover arbitrarily for injuries they receive while competing. The idea is to “facilitate free and vigorous participation in athletic activities.”<sup>107</sup> If other athletes on the field, referees, coaches, and administrations such as school districts and leagues had to worry about being sued when a player is injured, people might either refuse to exert maximum effort in sports—lest they hit someone and hurt him or her—or simply not play that sport. All sports involve some degree of danger, and it would not be fair for courts to permit injured athletes and their families to recover for injuries that were foreseeable given the nature of the sport.

To illustrate this scenario, in 1983, George Washington High School (“GW”) in New York was upgraded from the less competitive Division B to the more competitive Division A high school football league.<sup>108</sup> Despite appeals against this move, and warnings that GW was outmatched in Division A, GW was forced to play in the higher division for the 1983 football season.<sup>109</sup> During one of the team’s games, Sixto Benitez was injured while attempting a block during his team’s kick-off return toward the end of the first half. Benitez later admitted to being fatigued,<sup>110</sup> but sued the New York City Board of Education, its Public Schools Athletic League, and the City of New York for his injuries.<sup>111</sup>

On appeal, the Court of Appeals of New York weighed in on the assumption of risk that had been raised against the defendants’ liability. The court stated, “[p]layers who voluntarily join in extracurricular interscholastic sports assume the

<sup>104</sup> Andrew F. Beach, *Dying to Play: School Liability and Immunity for Injuries that Occur as a Result of School-Sponsored Athletic Events*, 10 SPORTS LAW J. 275, 280 (2003).

<sup>105</sup> *Id.* (noting that the risk can be expressly or impliedly assumed).

<sup>106</sup> *Id.*

<sup>107</sup> *Benitez v. New York City Bd. of Educ.*, 73 N.Y.2d 650, 657 (1989).

<sup>108</sup> *Id.* at 654.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* Benitez also admitted he had not notified his coach that he was fatigued. *Id.* at 655.

<sup>111</sup> *Id.*

risks to which their roles expose them but not risks which are ‘unreasonably increased or concealed.’<sup>112</sup> Nevertheless, the court was sure to point out that the assumption of risk defense is not absolute. For example, the Court of Appeals noted that when an athlete is compelled by a superior to participate in a given sport, assumption of risk does not shield the superior’s liability, even if the risks were obvious.<sup>113</sup> Thus, in the case of young high school athletes who voluntarily choose to play sports, despite their impressionable ages, they will be assumed to have consented to all open and obvious risks of their respective sports. In light of *Benitez*, this holds true even if the danger incurred was not merely one imposed by the sport itself, but rather one created by outside influences, such as the decisions of various officials involved in the administration of the sport.

### III. ANALYSIS OF TORT LIABILITY FOR HIGH SCHOOL ATHLETES’ HEAT-RELATED INJURIES

Clearly, there is a heavy burden for a teenage athlete and his or her family to overcome when suing for the athlete’s injuries and/or death. Often, this means that though the athlete is hurt or deceased, his or her family cannot recover for damages. As was shown earlier, it is difficult to defeat the defense of qualified immunity. At the very least, some states require the athlete to show that the coach was negligent in handling practice.<sup>114</sup> Other states impose more stringent standards for defeating qualified immunity, such as requiring a display of gross negligence on the part of the coach.<sup>115</sup> Even the federal government requires athletes and/or their families to demonstrate there was deliberate indifference by the coach as to the risk and/or injury of the athletes,<sup>116</sup> or a showing that the coach essentially *intended* to harm the athlete.<sup>117</sup> Either way, courts have shown their unwillingness to look at the case from a hindsight perspective, believing—as the court did in *Tarlea*—that it is easy to point out the coach’s mistakes and what more he or she could have done after the fact.<sup>118</sup> Second, even if the athlete’s family can overcome the qualified immunity defense, they must demonstrate that the particular risk of injury or death was not assumed. As long as the athlete was aware of the risk of being injured in

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<sup>112</sup> *Id.* at 658 (citing *McGee v. Bd. of Educ.*, 16 A.D.2d 99, 102 (N.Y. App. Div. 1962); PROSSER AND KEETON, TORTS 487 (5th ed. 1984)).

<sup>113</sup> *Benitez*, 73 N.Y.2d at 659. The Court of Appeals found that *Benitez* might have thought his coach would sit him out for the rest of the game if he said anything to his coach about being fatigued; however, there was no evidence that *Benitez* was concerned about an unreasonably heightened risk under the circumstances, nor that his coach instructed him to disregard an unreasonable risk. Consequently, the court concluded that *Benitez* had not been under influence of compulsion from his coach, having participated voluntarily in the football game and having not informed his coach that he was too fatigued to play.

<sup>114</sup> See *Harris v. McCray*, 867 So. 2d 188 (2003).

<sup>115</sup> *Tarlea*, 263 Mich. App. at 85.

<sup>116</sup> *Livingston*, 391 F. Supp. 2d at 468.

<sup>117</sup> *Id.*

<sup>118</sup> *Tarlea*, 263 Mich. App. at 86.

such a manner, he or she is deemed to have consented to those risks, seemingly regardless of age.

On one hand, it seems understandable that states have imposed checks on people's ability to sue for injuries to high school athletes. After all, as various courts have noted, sports are inherently dangerous to an extent, so injuries are within the realm of thought, even for teenage athletes.<sup>119</sup> Perhaps just as significantly, courts have reasoned that "requiring a standard of care that exceeds negligence comports with the social desire not to chill vigorous participation in competitive sports."<sup>120</sup> There is little doubt that if courts imposed a lower standard of burden for plaintiffs in sports injury cases, fewer people would want to participate in a competitive setting, coach, or even administer the activity, lest they hurt one of the athletes indirectly and be held liable. The court in *Knight* elaborated on this point, noting,

The courts have concluded that vigorous participation in such sporting events, [baseball or football], likely would be chilled if legal liability were to be imposed on a participant on the basis of his or her ordinary careless conduct . . . . [I]mposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule.<sup>121</sup>

Once more suits are brought for injuries, sports leagues will have little choice but to change their rules in an attempt to prevent injuries altogether in order to avoid liability for these deaths.

On the other hand, it must be noted that the damage in the cases discussed here is heat-related death, which has occurred mostly unchecked for decades. Traditionally, one way of deterring harmful acts has been to hold the responsible parties liable in some way; however, as the aforementioned cases demonstrated, families often do not succeed in their civil suits following their children's heat-related deaths. The issue with those lawsuits did not lie in the facts of the cases; rather, they were rooted in the liberal acceptance of the coaches' and high schools' defenses. Thus, the cases were dismissed on procedural grounds, without ever analyzing the substantive claims or merits. The following section scrutinizes those defenses, reaching the same conclusion in both cases: they are unreasonable and contrary to what should be the most important public policy to courts: protecting

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<sup>119</sup> See generally Walter T. Champion, Jr., *Fundamentals of Sports Law*, § 3:1 (2008); Fitzgerald, *supra* note 57; Andrew F. Beach, *supra* note 104.

<sup>120</sup> Timothy Davis, *Tort Liability of Coaches for Injuries to Professional Athletes: Overcoming Policy and Doctrinal Barriers*, 76 UMKC L. REV. 571, 575 (2008) ("[A]dopting a negligence standard would create the potential for mass litigation and may deter participation in sports because of fear of incurring liability for the injuries and mishaps incident to the particular activity" (quoting *Mark v. Moser*, 746 N.E.2d 410, 419)).

<sup>121</sup> *Knight v. Jewett*, 834 P.2d 696, 710 (Cal. 1992).

high school athletes from fatal heat-related illnesses during practice and competition.

*A. Rejection of Broad Qualified Immunity Statutes*

As the majority opinion in *Harris v. McCray* illustrates, there are issues with some of the statutes that grant governmental employees—including high school coaches—qualified immunity.<sup>122</sup> The court concluded—based on the applicability of a Mississippi statute—that since the coach’s acts or omissions were “discretionary in nature,” he was immune from civil liability for the injuries one of his football players received after suffering a heatstroke during a scheduled practice.<sup>123</sup> The court explained its determination, reasoning that the coach knew his players’ habits better than others.<sup>124</sup> He knew which players would try to avoid difficult drills simply because it was hot and they were tired, and he knew what he had to do to motivate his players.<sup>125</sup> Yet, curiously, the court remarked, “When Victor Harris complained of feeling weak and needing a water break, Coach McCray told Harris he was ‘faking it.’ Unfortunately, he was not.”<sup>126</sup> Even the Supreme Court of Mississippi acknowledged that Harris had informed his coach that he needed water and rest, that his coach rejected his plea, and that Harris was physically hurt as a result.<sup>127</sup> These facts seem to indicate that Harris’ coach abused his discretion, but the Mississippi statute bound the court’s hands. In effect, the Mississippi statute gives coaches much leeway to run their practices and make careless decisions without having to make amends when one of the players is hurt as a result.

Perhaps an even better example would be a case that occurred prior to the enactment of an immunity-granting statute and examine how the statute’s existence might have altered the outcome. In 1970, two Louisiana parents brought a lawsuit on behalf of their son, Robert Mogabgab, who died from heat stroke at his high school’s football practice.<sup>128</sup> According to the plaintiffs, Robert’s symptoms of heat stroke first appeared around 5:20 p.m.; however, his coaches delayed administration of proper treatment until it was too late.<sup>129</sup> Robert’s parents brought

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<sup>122</sup> *Harris v. McCray*, 867 So. 2d. 188 (Miss. 2003).

<sup>123</sup> *Id.* at 189. The court said that “[a] governmental entity and its employee enjoy immunity if there is exercise of ordinary care in the performance of a duty under a statute, ordinance or regulation.” *Id.* at 189. Additionally, the court pointed out that “a governmental entity and its employee enjoy immunity under Miss. Code Ann. § 11-46-9(1)(d) ‘base[d] upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion be abused.’” *Id.* at 189.

<sup>124</sup> *Id.* at 192.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Mogabgab v. Orleans Parish School Bd.*, 239 So. 2d 456, 457 (La. Ct. App. 1970).

<sup>129</sup> *Id.* “[T]he first symptoms of illness appeared at approximately 5:20 o’clock p.m. on August 16, 1966, and that Robert became unconscious at 5:25 o’clock p.m.” *Id.* at 457. Thereafter, the plaintiffs alleged that Robert’s coaches did not contact his mother until approximately 6:45 p.m., at which point

two charges against his coaches.<sup>130</sup> First, the coaches were negligent when they failed to provide “all necessary and reasonable safeguards to prevent accidents,” which led to Robert’s heat stroke.<sup>131</sup> Second, Robert’s coaches failed to administer proper treatment, pursuant to the American Medical Association’s recommendations, once Robert collapsed.<sup>132</sup>

Notably, *Mogabgab* arose approximately 29 years prior to the enactment of a statute in Louisiana that addressed limitation of liability for school employees. In 1999, the Louisiana state legislature created Title Seventeen, Section 439 of the Louisiana Revised Statutes, which states in pertinent part,

Except as otherwise provided in this Section, no person shall have a cause of action against any school employee based on any . . . action taken by the school employee provided that the action . . . was within the course and scope of the school employee’s duties as defined by the school board in which the school employee is employed and was within the specific guidelines for school employee behavior as established by that school board. As used in this Section, the terms “school employee” means any school employee who has direct contact with students in the course and scope of the school employee’s duties as defined by the school board by which the school employee is employed, and includes . . . coaches . . . . The immunity from liability established by this Section shall not apply to any action or statement by a school employee that was maliciously, willfully, and deliberately intended to cause bodily harm to a student . . . .<sup>133</sup>

Applying this statute to the facts in *Mogabgab*, it appears that had the case been heard after this statute was enacted, Robert’s parents would not have won their suit against his coaches. Although the facts seem to illustrate that Robert’s coaches were negligent, it would be difficult to argue that they were “maliciously, willfully, and deliberately” intending to cause Robert bodily harm.<sup>134</sup> Due to similar statutes in other states, it is difficult for parents of deceased teenage athletes to recover for their children’s deaths in these situations. Granted, while not every case merits recovery by the athlete’s family, it should not be so difficult when the athlete was truly a victim of someone else’s actions. Affording seemingly blanket immunity for the responsible parties in these cases inhibits the efforts that schools and states ought to, and—to some extent—have been making to curb heat-related deaths.

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she first notified a doctor. *Id.*

<sup>130</sup> *See id.*

<sup>131</sup> *Id.*

<sup>132</sup> *Id.*

<sup>133</sup> LA. REV. STAT. ANN. tit. 17 § 439 (2009).

<sup>134</sup> *Mogabgab*, 239 So. 2d at 457. Robert’s coaches asserted they had taken proper precautions, treated him appropriately, and that he appeared mostly stable throughout the ordeal. *Id.* Expert testimony at trial revealed that the coaches were incorrect for covering Robert with a blanket, and for not contacting emergency services sooner. *Id.* The court concluded that Robert’s coaches delayed his treatment for approximately two hours, and were therefore held liable. *Id.*

*B. Rejection of Assumption of Risk Doctrine*

Likewise, the assumption of risk doctrine is an unfair defense to raise in these lawsuits, and it is one that does not aid in the prevention of heat-related deaths. As at least one author has pointed out, heat-related deaths are not inherent in sports and not technically assumed.<sup>135</sup> In order to be considered an assumed risk, “(1) the risk must be ‘open and obvious,’ and (2) the risk must be unavoidable.”<sup>136</sup> If a risk is inherent in a sport—injuries due to tackling, throwing, kicking, and other similar risks—it is presumably assumed.<sup>137</sup> Yet, even if a risk is not necessarily inherent, if it fulfills the aforementioned prongs, it is considered assumed.<sup>138</sup>

Heat-related deaths are not a risk assumed by high school athletes. First, heat stroke and heat-related deaths *are* avoidable.<sup>139</sup> According to an article citing the NCCIR’s research on heat-related deaths, fatalities from heat-related complications are the result of the coach’s failure to emphasize the importance of drinking lots of water before, during, and after practice, and to take breaks to cool off the athletes’ bodies throughout practice.<sup>140</sup> Moreover, such changes “merely create a safer context for vigorous competition—they neither affect competition itself nor detract from the vigor inherent in the underlying activity.”<sup>141</sup> Given the ease with which practice methods may be changed to avoid heat illness, heat illness—in and of itself—should be considered an avoidable risk.

Second, heat-related deaths often occur because of an error—or series of errors—committed by someone other than the athletes themselves, and are therefore latent.<sup>142</sup> This is to say, the teenage athlete cannot actually assume the risk of heat-related death because it is not the type of risk that he or she would expect or be able to anticipate.<sup>143</sup> High school athletes, being less experienced athletes than college or professional athletes, place “greater reliance . . . upon the instruction and supervision of [their] coach[es],” and therefore trust their coaches to oversee their health and safety during all practices and competitions.<sup>144</sup> Moreover, “it is doubtful that any student-athlete acknowledges, understands, or expects that a coach will fail to act reasonably with respect to his or her safety.”<sup>145</sup> Since high

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<sup>135</sup> See Fitzgerald, *supra* note 57, at 918.

<sup>136</sup> *Id.* at 915.

<sup>137</sup> *See id.*

<sup>138</sup> *See id.*

<sup>139</sup> *See id.* at 916.

<sup>140</sup> *See id.* at 917. Unlike a check in hockey or a tackle in football, which sometimes result in physical injury to the initiator or the recipient, simply changing practice to allow for more water breaks easily avoids heat illnesses. *Id.*

<sup>141</sup> Fitzgerald, *supra* note 57, at 917.

<sup>142</sup> *See id.* at 919.

<sup>143</sup> *See id.* at 920.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

school athletes do not necessarily anticipate the risk of heat illness, it is not something “open and obvious,” and therefore cannot be assumed.<sup>146</sup>

Finally, heat-related deaths in high school sports are not inherent, and therefore cannot be presumably assumed. As one author states, “because negligent coaching is avoidable, it should be avoided; because such conduct is inherently latent in nature, it should be avoided by coaches, not allocated to unsuspecting student-athletes.”<sup>147</sup> Put another way, since heat-related illness due to careless coaching is “neither open and obvious nor unavoidable,” it cannot be considered an inherent risk in high school sports.<sup>148</sup> It is an indirect injury, and therefore not actually a result of the sport being played.<sup>149</sup>

Additionally, just as athletes assume certain risks when participating in sports, high school coaches and related parties are, themselves, making voluntary decisions to participate in high school sports. They are also assuming the risk of an athlete getting injured during the course of competition. Why should athletes bear the responsibility of “assuming the risk” of an injury such as heat stroke if those who *have* the power to prevent such injuries fairly easily do not? It is often only because the athlete was pushed beyond his or her physical limit—without proper precautions and care—that he or she suffered some form of heat illness. As such, if courts are worried about policy, then they ought to closely inspect the facts of the case without trying to apply abstract legal principles that allocate the risk of heat-related death to a teenager. The relatively high number of heat-related deaths in high school sports warrants reconsidering the possible chilling effect on high school sports, focusing instead on the probability that high school coaches *are* liable for such deaths, and that steps ought to be taken to reduce the frequency of these casualties.

One such step—reversing the judgments in lawsuits similar to the ones discussed earlier—might send a positive message to high school athletes and their families that the legal system is attempting to deal with the matter. Yet, courts must follow precedent, and precedent has usually been set against the athlete. Consequently, it would require tort reform of the way courts evaluate the facts of the cases and the defenses raised to help athletes and their families. Even then, there is no guarantee that successful civil suits will prevent heat-related deaths in high school sports. Ultimately, civil liability—monetary penalties—only helps to assuage the athletes’ families, but does not necessarily pose a menacing threat to coaches and others who will likely pay damages through the high schools’ insurance policies and continue using the same harsh practice methods. Therefore, another method of deterrence is necessary.

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<sup>146</sup> *Id.* at 915.

<sup>147</sup> Fitzgerald, *supra* note 57, at 922.

<sup>148</sup> *Id.*

<sup>149</sup> See Mueller & Cantu, *supra* note 4.

## IV. CRIMINAL LIABILITY

A recent case involving Max Gilpin's death in early 2009 brought up such an alternative manner of dealing with high school student-athletes' heat-related deaths—criminal liability.<sup>150</sup> On August 20, 2009, Max Gilpin, a fifteen-year-old high school football player at Pleasure Ridge Park High School, and another player on the team collapsed during practice.<sup>151</sup> While the other player recovered, Max died three days later.<sup>152</sup> Max's parents brought a lawsuit against Max's coach, David Jason Stinson ("Coach Stinson"), for negligence and reckless disregard<sup>153</sup> in connection with Max's death amid allegations that Coach Stinson had refused water to their son.<sup>154</sup> In addition, prosecutors charged Coach Stinson with reckless homicide and wanton endangerment,<sup>155</sup> reportedly "the first time a criminal charge has been filed in such a case involving a high school or college coach in the United States, according to sports experts."<sup>156</sup> While the civil suit has not yet been decided, the criminal trial against Coach Stinson took place over three weeks in August 2009, after which a jury found Coach Stinson not guilty of both charges.<sup>157</sup> The unprecedented charges against Coach Stinson prompted varying responses.

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<sup>150</sup> Michael McCann, *Kentucky Trial of High School Coach Has Wide Implications*, SPORTS ILLUSTRATED, Aug. 26, 2009, available at [http://sportsillustrated.cnn.com/2009/writers/michael\\_mccann/08/26/kentucky.coach/index.html](http://sportsillustrated.cnn.com/2009/writers/michael_mccann/08/26/kentucky.coach/index.html).

<sup>151</sup> Antoinette Konz & Jason Riley, *Kentucky Football Coach Indicted in Prep Player's Death*, USA TODAY, Jan. 25, 2009, available at [http://www.usatoday.com/sports/preps/football/2009-01-22-coach-indicted\\_N.htm](http://www.usatoday.com/sports/preps/football/2009-01-22-coach-indicted_N.htm).

<sup>152</sup> *Id.*

<sup>153</sup> *Kentucky Coach Pleads Not Guilty in Player's Death*, FOXNEWS.COM, Jan. 26, 2009, <http://www.foxnews.com/story/0,2933,483027,00.html>.

<sup>154</sup> See McCann, *supra* note 150.

<sup>155</sup> McCann, *supra* note 150. According to Kentucky law, reckless homicide is the "reckless causing of another person's death," and wanton endangerment is defined as "extreme indifference to the value of [human] life." *Id.*

<sup>156</sup> Konz & Riley, *supra* note 151.

<sup>157</sup> *Coach Found Not Guilty in Death of Player*, CNN.COM, Sept. 17, 2009, <http://www.cnn.com/2009/CRIME/09/17/kentucky.coach.trial/index.html>. During the ensuing police investigation after Max's death, witnesses testified that Coach Stinson had the football team run "gassers" at the end of practice. Andrew Wolfson & Antoinette Konz, *Prep Coach Admits Denying Some Water But Not Player Who Died*, USA TODAY, Mar. 4, 2009, available at [http://www.usatoday.com/sports/preps/football/2009-03-04-louisville-prep-football-death\\_N.htm](http://www.usatoday.com/sports/preps/football/2009-03-04-louisville-prep-football-death_N.htm). Gassers are a series of wind sprints where the players run the width of the field and back twice. *Id.* Several witnesses explained that Coach Stinson called players who attempted to get water during the gassers "babies" and "cowards." *Id.* Other spectators remarked that there were several other players—besides Max—who appeared ill, including Antonio Calloway, who was hospitalized for two days after the practice. *Id.* One witness told police that after Max collapsed, his coaches kept him on the field for approximately ten minutes before moving him near a water fountain to douse him with water. *Id.* Additionally, since there was no medical trainer present, one of the team's assistant coaches acted as an unofficial trainer. *Id.* In response, Coach Stinson told police that his team received at least three scheduled water breaks throughout the practice, when the heat index reached 94 degrees. *Id.* Additionally, Coach Stinson claimed he did not believe Max appeared to be in distress; rather, he was eventually able to walk off the field on his own, and merely appeared tired from the conditioning at the end of practice. *Id.* Significantly, Coach Stinson claimed he did *not* deny Max water, though he admitted denying other players water. *Id.*

Some—such as Coach Stinson’s attorney, and likely many other high school coaches and Athletic Directors—likened holding coaches criminally liable for athletes’ heat-related deaths to a “witch hunt.”<sup>158</sup> Those on the coaches’ side believe—as did the jury in Coach Stinson’s case—that these sorts of deaths are accidents and do not warrant pointing a finger at the athletes’ coaches.<sup>159</sup> In fact, during Coach Stinson’s trial, his attorney identified numerous other factors that contributed to Max’s death besides running at the end of practice, such as Max’s use of Adderall to treat his attention deficit disorder, Creatine for building muscle, and the fact that Max told friends earlier in the day that he felt ill.<sup>160</sup>

Opponents to criminal liability for coaches would also point to the likely chilling effect.<sup>161</sup> If imposing civil liability could lead to people resigning from coaching positions to avoid possible monetary penalties, threatening high school coaches with jail time would act as an even greater deterrent against people coaching high school athletics. Without coaches, high school sports could not continue. Opponents might argue that this policy would run counter to the purpose of high school sports.<sup>162</sup>

In contrast, proponents of criminal liability for high school coaches might point to those instances in which the evidence indicates the coach *is* to blame for the athlete’s death.<sup>163</sup> In the interest of doing justice for the athlete’s family and to prevent future young athletes from succumbing to the same fate because of a coach’s harsh practice methods, the coach should be held criminally accountable for the player’s death. The threat of criminal liability would likely be a strong deterrent against the practice methods that result in high school athlete’s heat-related deaths; coaches are generally not criminals, and would want to avoid being treated as such.<sup>164</sup>

Additionally, one might look at the way criminal liability has been treated with regard to high school athletes’ conduct during competition. Prosecutors have been willing to impose criminal liability against athletes whose harmful actions transpired during the course of competition. For example, on November 3, 1999, a

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<sup>158</sup> McCann, *supra* note 150.

<sup>159</sup> Jason Riley, *Coroner’s Report Calls Max Gilpin’s Death an ‘Accident’*, COURIER JOURNAL, Aug. 29, 2009, <http://www.courier-journal.com/article/20090829/SPORTS05/908290336/Coroner-s-report-calls-Max-Gilpin-s-death-an-accident/>.

<sup>160</sup> Jason Riley, *Former Medical Examiner Testifies Max Gilpin’s Death Was An “Accident”*, COURIER JOURNAL, Sept. 15, 2009, <http://www.courier-journal.com/article/20090915/SPORTS05/909150331/Former-medical-examiner-testifies-Max-Gilpin-s-death-was-an-accident/>.

<sup>161</sup> See, e.g., Mark B. Busick, *Liability of Coaches for Athletes’ Injuries*, Feb. 10, 2009, <http://www.mccormickbarstow.com/showarticle.aspx?Show=218>; Posting of Snark to Wave3 Message Boards, <http://boards.wave3.com/eve/forums/a/tpc/f/764107271/m/4271038043> (last visited Oct. 17, 2010).

<sup>162</sup> See Blackburn, *supra* note 2.

<sup>163</sup> See, e.g., *Parents: Coach Pushed Son “Over the Edge”*, CBSNEWS.COM, Jan. 27, 2009, <http://www.cbsnews.com/stories/2009/01/27/national/main4755336.shtml>.

<sup>164</sup> McCann, *supra* note 150.

fifteen-year-old player who delivered a check from behind during a high school ice hockey game,<sup>165</sup> rendering the recipient of the hit a quadriplegic, was charged with two counts of aggravated battery.<sup>166</sup> Although the charged player ultimately did not receive any juvenile detention or prison sentencing,<sup>167</sup> the case set a precedent for high school athletes who intentionally—or perhaps even recklessly—injure other players during contests. In light of the game’s intensity, some may argue that the act occurred during the heat of the moment, and the player should not have been charged with criminal conduct. The prosecutor, however, “believe[d] the evidence [was] clear that the defendant [15-year-old Glenbrook North hockey player] intended to harm the victim [Neal Gross],”<sup>168</sup> and charged him nevertheless.

Given that in at least one instance, prosecutors have charged a player criminally for his actions during a game, there seems little reason why high school coaches—who, unlike players, have time to consider their practice plans—should not be held criminally accountable for heat-related deaths of high school athletes.<sup>169</sup> Consider the standard for a crime like reckless homicide in Kentucky—where Max Gilpin died from heat stroke.<sup>170</sup> Prosecutors would have to “convince a jury that Stinson (1) failed to perceive a substantial and unjustifiable risk of such a nature and degree that his failure constituted gross deviation from a reasonable standard of care; and (2) his failure resulted in Gilpin’s death.”<sup>171</sup> It does not seem implausible to say that, given the evidence about Coach Stinson’s treatment of the athletes and the weather conditions, there was a substantial and unjustifiable risk of at least one player contracting heat stroke on August 20, 2009, and a reasonable coach under similar circumstances would have avoided pushing the players as hard.<sup>172</sup>

Instead, by failing to hold high school coaches criminally liable for athletes’ heat-related deaths, states have sent messages to coaches that they can conduct practices in any format they please—even recklessly—and not be held answerable

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<sup>165</sup> In hockey, checks from behind are especially egregious infractions. First, the player who is hit never sees the hit coming, and is therefore unable to brace for it in any way. Second, they often occur a few feet away from the boards, and result in the player who is hit falling head-first into the boards. There have been a number of incidents where such hits have resulted in fractured vertebrae or severe concussions.

<sup>166</sup> Jason R. Schutte, *Adolescent Sports Violence-When Prosecutors Play Referee. Making Criminals Out of Child Athletes, But Are They the Real Culprits?*, 21 N. ILL. U. L. REV. 515, 589 (2001) (brackets in original). The facts of the case were that on November 3, 1999, after a particularly hard-fought and penalty-ridden game, a high school hockey player intentionally skated across the rink and cross-checked an opponent from behind in the waning seconds of a game when the game had—for all intents and purposes—already been decided. *See id.* at 526-529. The player who was hit fell head-first into the boards, fracturing his fourth cervical vertebrae, rendering him a quadriplegic. *See id.* at 527-529.

<sup>167</sup> *See id.*

<sup>168</sup> *Id.* at 529.

<sup>169</sup> *See id.*

<sup>170</sup> McCann, *supra* note 150.

<sup>171</sup> *Id.*

<sup>172</sup> In light of testimony that Coach Stinson did not deny Max water, it seems difficult to say that Coach Stinson was guilty of wanton endangerment.

when their athletes die. Such a message clearly runs counter to the goal of preventing these types of deaths, and may convince potential high school athletes to reconsider signing up for their school teams, deciding that their lives are not worth risking in order to play on the varsity squad.

Similarly, the treatment—or lack thereof—of high school coaches in these instances has likely conveyed messages to the athletes' parents as well. First, parents who may already be uncomfortable with the possibility of their children becoming injured or dying during their athletic participation will be considerably less likely to allow their children to play high school sports. Second, the law would be creating a double standard.<sup>173</sup> Certainly, if parents directed their child to do chores outdoors in 95 degree heat, and refused to allow water breaks, causing the child to subsequently die of heat stroke or a related illness, the criminal system would hold the parents liable for that child's death. However, when a coach commits a similar act of working his or her players hard and refuses them water or breaks, thus resulting in a player's death, the law often seems to hold the *athlete* responsible for his or her own death. Supposing, then, that states begin to address high school athletes' heat-related deaths by charging their coaches criminally, it becomes necessary to evaluate possible consequences.

One legal scholar, Professor Michael McCann from Vermont Law School, has suggested that the trial of Coach Stinson might have widespread implications in the ways states approach the issue of heat-related death and illness at the high school level.<sup>174</sup> Notably, the majority of high school student-athletes complete their senior year without ever seriously injuring themselves. With that in mind, and given the significance of high school athletics as a training ground for adolescents in various aspects of their lives, states would not want to see high school sports falter solely because people would not want the responsibility of coaching at the risk of receiving jail or prison sentences resulting from their players' heat-related deaths.

In an effort to avoid diminishing the popularity of high school sports, while also increasing student-athletes' safety, states might impose new safety regulations for high school athletics.<sup>175</sup> For example, in the wake of Coach Stinson's criminal charges, in spring 2009, Kentucky amended ones of its laws to require coaches to

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<sup>173</sup> Kristina Rico, Note, *Excessive Exercise as Corporal Punishment in Moore v. Willis Independent School District – Has the Fifth Circuit “Totally Isolated” Itself in its Position?*, 9 VILL. SPORTS & ENT. L.J. 351, 356 (2002). Rico examines the issue of corporal punishment by school coaches; however, it is not difficult to see a similarity with the way some coaches run their practices in a corporal manner. Rico states:

The law [is] establishing a double standard: teachers [and coaches] who detect unusual bruises on children's bodies are required to report suspected abuse to authorities, while parents who see the same thing on their children as a result of educators' [or coaches] disciplinary procedures get little to no back up from the law.

*Id.* at 356. (brackets in original).

<sup>174</sup> McCann, *supra* note 150.

<sup>175</sup> *Id.*

undergo training on player safety—especially concerning emergency situations such as heat illness—and to require each athletic team to have at least one coach with such training at every high school athletic practice and competition.<sup>176</sup> Even Jefferson County, Kentucky Public Schools, where Max Gilpin’s high school is located, have created new rules requiring “all athletes and at least one parent to watch a 40-minute video that touches on everything from dietary supplements to bacterial infections.”<sup>177</sup> Additionally, “[l]ocal high school coaches must attend a seminar on using positive reinforcement when dealing with students.”<sup>178</sup> These legislative responses, a step in the right direction toward promoting greater high school athlete safety, resulted from just one coach being charged with criminal acts.

While perhaps extreme, it seems possible that if more people were charged with criminal acts for players’ heat-related deaths, states, or perhaps school districts, would pass even more safety measures in an effort to stem heat-related deaths, while still facilitating the growth of high school sports. For example, the original Kentucky bill proposed in spring 2009 included a provision requiring high schools to provide pools of ice at all practices and competitions taking place in temperatures of ninety-four degrees Fahrenheit and above.<sup>179</sup> A pool of ice would have been crucial for Max Gilpin, whose life—as one expert witness explained—“would have been ‘guaranteed’ saved if staff would have taken [him] into the school’s locker room, about two minutes away, and put him into an iced whirlpool within five minutes of when he went down.”<sup>180</sup> The whirlpool and ice, both of which were available in the Pleasant Ridge Park School’s locker room, “would have dropped Max’s temperature to 104 degrees—below a critical level of about 105 degrees—in just 15 minutes.”<sup>181</sup> Other regulations proposed have included requirements that athletic trainers be on-site at all practices and competitions,<sup>182</sup> a stipulation NATA has called for in the past.<sup>183</sup>

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<sup>176</sup> See KY. REV. STAT. ANN. § 160.445 (2009). The statute in pertinent part reads as follows:

(1) The Kentucky Board of Education or organization or agency designated by the board to manage interscholastic athletics shall require each high school coach to complete a sports safety course consisting of training on how to prevent common injuries. The content of the course shall include but not be limited to emergency planning, heat and cold illnesses, emergency recognition, head injuries, neck injuries, facial injuries, and principles of first aid. The course shall also be focused on safety education and shall not include coaching principles. *Id.*

<sup>177</sup> *Stinson Not Guilty on All Charges*, ESPN, Sept. 17, 2009, <http://sports.espn.go.com/espn/print?id=4482371&type=HeadlineNews&imagesPrint=off>.

<sup>178</sup> *Id.* Sensitivity on the part of high school coaches is particularly important because “[they’re] pushing people to the brink of death with these practices . . . A lot of coaches want to have it as hard as possible in the first couple of days, to separate the boys from the men.” Yao, *supra* note 20. Coaches need to understand that their players have physical limits, especially at the beginning of the sports season, and that pleas for water and rest during practice are —more often than not—legitimate.

<sup>179</sup> H.R. 383, 2009 Gen. Assem., Reg. Sess. (Ky. 2009).

<sup>180</sup> Riley, *supra* note 30.

<sup>181</sup> *Id.*

<sup>182</sup> McCann, *supra* note 150.

<sup>183</sup> See Binkley, *supra* note 7, at 335.

While tighter regulation is possible and definitely preferable from a safety perspective, requiring ice baths, athletic trainers, and other measures might not be practical. Regulations could make practices “potentially more costly, including for the taxpayers who fund local sports.”<sup>184</sup> Even assuming schools would only be required to employ one full-time athletic trainer, given the relatively high cost to hire full-time athletic trainers,<sup>185</sup> hiring athletic trainers may be prohibitive for many—if not most—high schools across the country. Likewise, athletic whirlpools cost over three thousand dollars,<sup>186</sup> which might be out of range for many high schools around the country. During such a difficult economic period, in which high schools have sought ways to minimize costs for sports just to continue fielding teams,<sup>187</sup> high schools might not be able to afford what might currently be considered luxury items such as full-time athletic trainers and whirlpools.

At the same time, should possible future regulations require athletic trainers and ice baths or whirlpools, it seems difficult to justify not investing in those assets when the alternative is to risk athletes’ safety. Even practically speaking, the best way to avoid costs associated with trials and heat-related injuries or deaths is to prevent them from occurring in the first place. Prevention would also avoid any sort of chilling effect against people becoming involved in high school sports, whether as administrators, coaches, or—most importantly—participants.

#### CONCLUSION

High school athletes are developing adolescents, capable of being pushed harder than middle-school athletes, but they lack the physical strength and endurance of college and professional athletes. They must balance long days of class and homework, which for many high school student-athletes takes precedence over sports, and are then expected to put forth 110% at practices and games. They work hard for their coaches, doing as they are told, because good performance during practice means more game-time play. They are not compensated for their efforts, and therefore are not contractually bound to their coaches and teams, yet must play as if they are. Thus, when high school student-athletes die from heat illness brought on by the amount of energy they have been expected to expend, the question becomes, how will the legal system treat those deaths?

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<sup>184</sup> McCann, *supra* note 150.

<sup>185</sup> See Bureau of Labor Statistics, *supra* note 28.

<sup>186</sup> See, e.g., Whitehall Sports Whirlpool, <http://www.wisdomking.com/product115192.html> (last visited Aug. 16, 2010) (advertising a sports whirlpool for \$3,462.65).

<sup>187</sup> Bob Collins, *Are High School Sports a Luxury?*, MINNESOTA PUBLIC RADIO, Mar. 3, 2009, [http://minnesota.publicradio.org/collections/special/columns/news\\_cut/archive/2009/03/is\\_high\\_school\\_sports\\_a\\_luxury.shtml](http://minnesota.publicradio.org/collections/special/columns/news_cut/archive/2009/03/is_high_school_sports_a_luxury.shtml). (“Clearly, some district[s] are looking to save money by cutting high school sports. The Minnesota State High School league, at the request of some central Minnesota school districts, considered reducing the number of games the schools play, eliminating classes and divisions in some sports, and getting rid of some tournament games.”).

Generally, families of those deceased student-athletes have tried to recover monetarily for the deaths in civil courts. Yet, as has been illustrated in this Note, the general tort system has been inadequate or faulty in facilitating such recovery, favoring coach immunity over a possible chilling effect on high school athletics due to coaching shortages. The problem with the current system is that the families are left both without their children—who are deceased—and also without any feeling of retribution against the coach who ignored the athletes' sickly appearance and/or pleas for water breaks or rest. Unless state legislators are willing to enact new laws that reduce coaches' immunity, families will not be able to recover as often as they should. In turn, coaches will continue to run their practices unchecked, and high school student-athletes' heat-related deaths will continue to make the front pages of local newspapers across the country.

Although it may seem extreme, criminal liability may be the most effective way of preventing heat-related deaths, short of state legislation requiring ice baths and athletic trainers at practice.<sup>188</sup> Granted, naysayers may point out that coaches would not want to work in high school sports if they had to worry about jail time for a student-athlete's death; however, there is little question that such threat of jail time would also be a useful deterrent against harsh practice methods that unnecessarily kill high school athletes. Additionally, it seems unreasonable to argue that protecting coaches against criminal liability is more important than making sure teenagers can play sports without fear of dying on the practice field in ninety-five degree weather, just because their coaches would not let them take a water break. Furthermore, as shown in Kentucky, state legislatures might take reactionary positions to criminal charges brought against high school coaches, passing new legislation that will ultimately make high school sports safer.

The purpose of high school sports is *not* to place athletes in college athletic programs or professional leagues. Nor is the purpose of high school sports to boost coaches' egos by giving them unchecked authority over the way they run their teams. Instead, the purpose of high school sports is to provide young adolescents an opportunity to develop their leadership skills, confidence, and physical condition in a safe environment. Imposing greater liability on high school coaches for heat-related deaths of student-athletes would vastly improve the effectiveness of the high school athletic programs currently in place. Significantly, for the athletes, it would provide a safer environment in which they can practice and compete, thereby increasing their security—not to mention that of their parents—in high school sports, thus propelling greater levels of participation in what many consider a highly beneficial adolescent activity.

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<sup>188</sup> See H.R. 383, *supra* note 179 (proposed Kentucky bill requiring pools of ice at practices in excessively hot weather).

