

**NECESSARY ROUGHNESS?: AN ARGUMENT  
FOR THE ASSIGNMENT OF CRIMINAL  
LIABILITY IN CASES OF STUDENT-ATHLETE  
SUSTAINED HEAT-RELATED DEATHS**

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INTRODUCTION .....	177
I. POSSIBLE OBSTACLES TO THE CIVIL LIABILITY SYSTEM'S DETERRENT EFFECT .....	179
A. Proving Prima Facie Negligence .....	180
B. Defenses to Negligence Claims .....	183
1. Express Assumption of the Risk.....	183
2. Implied Assumption of the Risk .....	185
3. Qualified Immunity .....	187
4. Sovereign Immunity and Damage Caps .....	190
II. UTILIZATION OF THE CRIMINAL JUSTICE SYSTEM TO REDUCE HEAT-RELATED DEATHS.....	193
A. Model Penal Code Section 210.4 — Negligent Homicide .....	195
B. Model Penal Code Section 230.4 — Endangering the Welfare of Children .....	198
C. Model Penal Code Section 211.2 — Recklessly Endangering Another Person.....	200
CONCLUSION .....	201

INTRODUCTION

On August 23, 2008, fifteen year old Max Gilpin, a sophomore at Pleasure Ridge Park High School in Louisville, Kentucky, died as a result of heat stroke, sepsis and multiple

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organ failure at Kosair Children's Hospital.<sup>1</sup> Three days earlier, Max collapsed during what prosecutors later termed a "barbaric" practice conducted in ninety-four degree heat by his high-school football coach, Jason Stinson.<sup>2</sup> When taken to the emergency room, Max's body temperature reportedly registered 107 degrees.<sup>3</sup> On January 22, 2009,<sup>4</sup> in a nationwide first,<sup>5</sup> Jefferson County Prosecutors charged Stinson with reckless homicide<sup>6</sup> resulting from Gilpin's death. Stinson's trial commenced on August 24, 2009, and the jury returned its verdict on September 17, 2009.<sup>7</sup> After only ninety minutes of deliberations, the jury found Stinson not guilty.<sup>8</sup>

The Gilpin-Stinson case brought national media attention to a subject that typically garners only local headlines. This may be changing, however, as student-athlete sustained heat-related deaths have increased in the last decade,<sup>9</sup> leading to

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1. Brett Barrouquere, *Acquitted Ky. Coach: No Winners in Player's Death*, SEATTLE TIMES, Sept. 22, 2009, [http://seattletimes.nwsources.com/html/nationworld/2009919530\\_apusplayerdeathcoach.html](http://seattletimes.nwsources.com/html/nationworld/2009919530_apusplayerdeathcoach.html); Jason Riley, *Stinson Found Not Guilty in PRP Player's Death*, COURIER J. (Sept. 17, 2009), <http://www.courier-journal.com/apps/pbcs.dll/article?AID=2009909170320>; Brett Barrouquere, *Kentucky Coach Acquitted in Rare Player Death Case*, BREITBART (Sept. 17, 2009), [http://www.breitbart.com/article.php?id=D9APCPE80&show\\_article=1](http://www.breitbart.com/article.php?id=D9APCPE80&show_article=1) [hereinafter Barrouquere, *Kentucky Coach Acquitted*].

2. Michael McCann, *Kentucky Trial of High School Coach Has Wide Implications*, SI.COM (Aug. 26, 2009), [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); Riley, *supra* note 1.

3. McCann, *supra* note 2.

4. Cliff Pinckard, *Kentucky High School Football Coach Indicted in Connection with Player's Heat-Related Death*, CLEVELAND PLAIN-DEALER, Jan. 23, 2009, [http://www.cleveland.com/sports/index.ssf/2009/01/kentucky\\_high\\_school\\_football.html](http://www.cleveland.com/sports/index.ssf/2009/01/kentucky_high_school_football.html).

5. McCann, *supra* note 2.

6. KY. REV. STAT. ANN. § 507.050 (West 2010). For details of the statute see *infra*, note 120.

7. See McCann, *supra* note 2; see also Barrouquere, *Kentucky Coach Acquitted*, *supra* note 1.

8. Barrouquere, *Kentucky Coach Acquitted*, *supra* note 1.

9. From 1999–2008 twenty-eight high school or college-aged football players died from heat-related illness, an average of 2.8 deaths per year. FREDERICK O. MUELLER & BOB COLGATE, ANNUAL SURVEY OF FOOTBALL INJURY RESEARCH, Table IV (2009), <http://www.unc.edu/depts/nccsi/FootballAnnual.pdf>. That figure represents an increase of 86% over the ten years previous, during which only fifteen heat-related deaths occurred, for an average of 1.5 deaths per year. *Id.* The ten year period previous to that, 1979–1988, had a similar average of 1.4 deaths per year. *Id.* Further, the number of collegiate and high school football players has not been increasing by a statistically significant amount over the previous twenty five years. See NAT'L FED'N OF STATE HIGH SCH. ASS'NS, <http://www.nfhs.org/Participation/> (select "Sports Search" then

increased attention from parents, coaches and prosecutors alike. The increasing number of heat-related deaths among high-school and college-age football players is a serious problem that needs to be addressed. It is my position that the mere possibility of civil liability in such cases has not been a sufficient deterrent. Heat-related deaths are a significant enough problem that exploration of other avenues to deter and avoid such deaths should be undertaken.

This comment will address several legal issues relevant to the death of high school student-athletes from heat-related injuries and illnesses. Part I will address the aspects of the civil liability system that prevent it from deterring risky behavior on the part of coaches. Part II will address some appropriate criminal charges, using the Model Penal Code as an analytical framework, that may deter risky behavior by coaches.

#### I. POSSIBLE OBSTACLES TO THE CIVIL LIABILITY SYSTEM'S DETERRENT EFFECT

Civil actions are the most common manner of imposing legal liability upon coaches and schools for the death of student-athletes caused by heat-related illness. A survey of the relevant literature and case law demonstrates that "plaintiffs shoulder a formidable burden"<sup>10</sup> when attempting to establish a breach of the requisite standard of care. Furthermore, in most cases, plaintiffs must also overcome significant affirmative defenses, including assumption of the risk and qualified immunity.<sup>11</sup> These various hurdles are

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football 11-player from the drop down menu, then select the appropriate year and state set). This fact obviates the possibility that player deaths are merely on the rise due to an increase in the number of players. According to the National Federation of State High-School Football Associations, the number of players has increased by 9.2% from 2002 to 2009, to just over 1.1 million. *See id.* Further, Frederick O. Mueller, Ph.D., stated that the number of high-school football players has stayed approximately within the 1 million player range rather consistently during his department has compiled its annual reports, which began in 1965. Email from Frederick O. Mueller, Ph.D, to David Marck (Sept. 27, 2009 at 09:31 EDT) (on file with author); *see also National Center for Catastrophic Injury Research*, U. N.C. CHAPEL HILL, <http://www.unc.edu/depts/nccsi/index.htm> (last visited Nov. 26, 2010).

10. Thomas R. Hurst & James N. Knight, *Coaches' Liability for Athletes' Injuries and Deaths*, 13 SETON HALL J. SPORT L. 27, 37 (2003).

11. *Id.* at 51.

major constraints on the ability of tort law to deter activities that lead to deaths caused by heat-related illness.

*A. Proving Prima Facie Negligence*

The majority of civil suits arising from heat-related death rely upon the theory of negligence.<sup>12</sup> It is axiomatic, therefore, that the plaintiff needs to “prove (1) that the defendant owed a duty to conform to a standard of conduct established by law for the protection of the plaintiff; (2) that the defendant breached that duty; (3) that the defendant’s breach was the legal cause of the plaintiff’s injury; and (4) that the plaintiff suffered compensable injury.”<sup>13</sup>

Regarding the first element, coaches typically have a duty to exercise reasonable care to prevent the foreseeable risk of harm to their players.<sup>14</sup> In *Cerny v. Cedar Bluffs Junior/Senior Public School*, the Nebraska Supreme Court found that the plaintiff’s coaches owed him the duty to conform to the standard of care that “the reasonably prudent person holding a Nebraska teaching certificate with a coaching endorsement” would exhibit.<sup>15</sup> The plaintiff, Bret Cerny, was a high-school football player who sustained head injuries after striking his head on the ground during a football game.<sup>16</sup> The main issue on appeal was the standard of care to which Cerny’s coaches should be held.<sup>17</sup> The court specifically rejected the lower court’s finding that coaches would only be held to the standard of a coach untrained in medical affairs in communities similar to the town where the injuries or death occurred.<sup>18</sup> As a result, the standard of care is not affected by a coach’s geographic location or medical sophistication, or lack thereof.<sup>19</sup> In *Cerny*, the effect was to raise the standard of care applicable to the defendant’s

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12. *Id.* at 32.

13. *Id.* (quoting RESTATEMENT (SECOND) OF TORTS § 281 (1965)); *see also* W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 30 at 164–65 (5th ed. 1984).

14. Hurst & Knight, *supra* note 10, at 32–33.

15. *Cerny v. Cedar Bluffs Junior/Senior Pub. Sch.*, 628 N.W.2d 697, 706 (Neb. 2001).

16. *Id.* at 700.

17. *Id.* at 703.

18. *Id.* at 705.

19. *Id.* at 706.

actions, creating a higher duty owed to the plaintiff than would have been owed by a coach lacking any medical training.<sup>20</sup>

It has also been noted that “case law has imposed numerous [other] duties on coaches, including the duties of supervision, proper training, providing adequate medical care, and the warning of latent dangers.”<sup>21</sup> The duty to provide prompt and proper medical care is a typical point of contention in litigation. In *Mogabgab v. Orleans Parish School Board*, two high school football coaches were found to have acted negligently, breaching their duty to provide prompt and proper medical care, after taking two hours to provide medical assistance to a player suffering from heat-stroke.<sup>22</sup> The deceased player, Robert Mogabgab, who collapsed and vomited at 5:20 p.m., was helped back onto the team bus in a semi-conscious state, and taken back with the team to his high school.<sup>23</sup> Upon returning to the school at 5:40 p.m., Robert’s coaches consulted first aid guides, but did little more than undress Robert, attempt to revive him with an ammonia capsule, and massage his arms.<sup>24</sup> By 5:50 p.m., Robert had become “clammy, pale, [and] his breathing was heavy.”<sup>25</sup> By 6:40 p.m., Robert had become “grayish-blue, with his mouth hanging slightly ajar, his lips [and] hand and arm were bluish, and he was moaning.”<sup>26</sup> Only at this point, and prompted by the strenuous urging of an unrelated, but concerned parent, did Robert’s coaches notify his parents of his condition.<sup>27</sup> Robert’s parents called a physician who met them at the school at 7:15 p.m., whereupon Robert was transported to a hospital.<sup>28</sup> The admitting physician described Robert’s condition as “unconscious, cyanotic, cool, clammy, actively sweating, with no pulse in any of his major vessels, no evidence of pressure,” and that Robert’s “pupils

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20. In order to gain a Nebraska “Coaching Certificate” one must complete “a college course in first aid” as well as “a course in care and prevention of athletic injuries.” *Id.* at 705.

21. Hurst & Knight, *supra* note 10, at 33.

22. *Mogabgab v. Orleans Parish Sch. Bd.*, 239 So. 2d 456, 457 (La. Ct. App. 1970).

23. *Id.* at 458–59.

24. *Id.* at 459.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Mogabgab*, 239 So. 2d at 459.

were widely dilated, fixed, and not responsive to light.”<sup>29</sup> Considering the foregoing, Robert was diagnosed as suffering from “profound heat exhaustion with shock to an advanced degree, but not necessarily irreversible.”<sup>30</sup> Robert’s condition, however, was terminal and he died the following morning at 2:30 a.m.<sup>31</sup> The trial court dismissed the claims against the coaches, finding that while they were negligent, the plaintiff failed to prove that their negligence *caused* Robert’s death.<sup>32</sup>

The Louisiana Court of Appeals reversed the trial court, stating “it is plain that [Robert’s coaches] were negligent in denying the boy medical assistance and in plying an ill-chosen first aid.”<sup>33</sup> The appellate court viewed the negligence as self-evident from the facts, choosing to focus its analysis on the link between duty and causation.<sup>34</sup> As such, the court viewed the duty to provide prompt and proper medical care as directly related to the issue of causation. The court reasoned that injury related to heat stroke becomes progressively worse with time, eventually reaching a point at which the injured person can no longer recover.<sup>35</sup> Finally, the court noted that the plaintiff need not prove to a certainty that the decedent would have survived if proper medical care was provided.<sup>36</sup> Rather, the plaintiff needed to show this only by a preponderance of the evidence.<sup>37</sup> In order to meet the preponderance of evidence standard, the court of appeals relied on statements from Robert’s treating physician that if Robert had been taken to the hospital thirty minutes earlier,

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29. *Id.*

30. *Id.*

31. *Id.* at 460.

32. *Id.*

33. *Id.*

34. *Mogabgab*, 239 So. 2d at 460–61.

35. *Id.* at 460 (“The best synthesis of the medical evidence is that heat damage works its wreckage upon the body in a continuum, causing progressive internal changes in the human system much as it causes progressive organic changes in a boiling egg. At some indefinite point in this continuum the process of heat damage becomes irreversible and past that point little can be done.”).

36. *See id.*

37. *Id.* (“Casualty [sic] like most other facts in a civil action, may be proved by a preponderance of the relevant evidence. Stripped of unfortunate jargon concerning certainty, proof by a preponderance of evidence requires only that a litigant satisfy the court or jury by sufficient evidence that the existence of a fact is more probable or likely than its nonexistence.”)

it would have been unlikely he would have died.<sup>38</sup>

Thus, a coach is required to be aware and attempt to prevent foreseeable risks; properly supervise and care for their players; and, most importantly in heat-stroke cases, provide prompt and adequate medical care. A court will measure whether or not a coach meets these duties by comparing his actions to those of a similarly certified coach or teacher. As seen in *Mogabgab*, breach of the requisite standard of care can be proven by demonstrating a coach's "serious inattention, ignorance, and indifference to a player's well-being."<sup>39</sup>

### *B. Defenses to Negligence Claims*

The two most likely defenses to a lawsuit brought by the family or estate of a player injured or killed due to a heat-related illness are assumption of the risk and qualified immunity. In addition, a statutory cap may limit the damages a plaintiff can collect, even if successful.

#### 1. Express Assumption of the Risk

Assumption of the risk is a traditional common-law defense, of which there are two major types. Express assumption of the risk occurs when the plaintiff has given his or her express consent via a formal release or other exculpatory agreement, relieving the defendant of liability for "risk of harm arising from the defendant's negligent or reckless conduct."<sup>40</sup> The defense is not available "if the agreement is invalid as contrary to public policy."<sup>41</sup> Express assumption of the risk does not usually serve as a viable defense in heat-related suits because contracts exempting schools from providing the duties listed above have been found to be contrary to public policy.<sup>42</sup>

Regarding releases<sup>43</sup> from liability, *Wagenblast v. Odessa*

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38. *Id.* at 461.

39. Hurst & Knight, *supra* note 10, at 37; *Mogabgab*, 239 So. 2d at 457.

40. RESTATEMENT (SECOND) OF TORTS § 496B (1965).

41. *Id.*

42. Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 SETON HALL J. SPORT L. 1, 56 (1996).

43. Release is defined herein as a "surrender of the right to sue." *See id.* at 54.

*School District* is instructive and illuminating.<sup>44</sup> In order to participate in interscholastic athletics, the Odessa School District (“District”) required students and their parents to sign a standardized form releasing the District from “liability resulting from any ordinary negligence that may arise in connection with the school district’s interscholastic activities programs.”<sup>45</sup> Parents of affected students sought an injunction barring the use of the releases.<sup>46</sup> The trial court found for the plaintiffs, holding that the release was an “unconscionable contract of adhesion and that the School District’s attempt to limit its liability is void as against public policy.”<sup>47</sup>

The District appealed to the Washington Supreme Court.<sup>48</sup> In affirming the trial court’s holding, the Washington Supreme Court stated that “to the extent that the release portions of these forms represent consent to relieve the school districts of their duty of care, they are invalid whether they are termed releases or express assumptions of risk.”<sup>49</sup> The Court also found that generally releases should be subject to a six-part test to determine whether they violate public policy.<sup>50</sup>

In addition to releases, courts have also viewed exculpatory agreements<sup>51</sup> as suspect.<sup>52</sup> Specifically, “if an agreement is ambiguous or covers a definite time, place, or

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44. See *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968 (Wash. 1988).

45. *Id.* at 969.

46. *Id.*

47. *Id.*

48. *Id.* at 848.

49. *Id.* at 973–74.

50. McCaskey & Biedzynski, *supra* note 42, at 56–57 n.247 (summarizing the *Wagenblast* factors as, “1) the law’s reluctance to permit those charged with a public duty to discharge this duty by contract; 2) disparity in bargaining power; 3) the ‘importance of the service provided’; 4) whether the party ‘holds himself out as willing to perform this service for any member of the public who seeks it . . .’; 5) since a release may arguably be a contract of adhesion, whether or not the party seeking the release ‘makes . . . provisions whereby a purchaser may pay additional reasonable fees and obtain protection against negligence’; and 6) whether the releasing party is, in essence, placed under the control of the party seeking the release, which is only limited by that party’s recklessness.”). The *Wagenblast* court adopted its test almost verbatim from *Tunkl v. Regents of University of California*, 383 P.2d 441 (Cal. Sup. Ct. (1963)). See McCaskey & Biedzynski, *supra* note 42, at 55–56 n.242.

51. “Exculpatory agreement” is herein defined as “when one expressly agrees to accept a risk of harm arising from another’s conduct, which in turn may be enforceable against that individual.” McCaskey & Biedzynski, *supra* note 42, at 60.

52. *Id.*



risk, it will not be interpreted to release a tortfeasor from liability for harm occurring at another time and place or in a different manner.”<sup>53</sup> Accordingly, “exculpatory agreements are usually not enforced against persons not a party to them, nor are the agreements likely to be effective against minors.”<sup>54</sup>

## 2. Implied Assumption of the Risk

Implied assumption of risk occurs when “a plaintiff who fully understands a risk of harm to himself or his things caused by the defendant’s conduct. . .and who nevertheless voluntarily chooses to enter or remain. . .under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.”<sup>55</sup> Despite that seemingly broad definition, implied assumption of the risk will not apply “in any situation in which an express agreement to accept the risk would be invalid as contrary to public policy.”<sup>56</sup> In other words, if the player, or his parents, could not waive his rights to sue or otherwise exculpate the coaches or school, due to the public policy concerns outlined in *Wagenblast* and *Tunkl*,<sup>57</sup> then the defense will not be able to allege that the player impliedly assumed such a risk. Accordingly, although a plaintiff cannot assume the risk of his coach breaching his duty of care, but *may* impliedly accept the dangers inherent in the activity.<sup>58</sup> As such, the determination of those risks that are inherent in an activity and those that have been impliedly accepted by the player is critical. If the coach can successfully portray the injuries as those that a player, or his parents, impliedly assumes from participation in the respective sport, including practices, then he may be successful in his defense.

Primary implied assumption of risk<sup>59</sup> arises when the

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53. *Id.*

54. *Id.*

55. RESTATEMENT (SECOND) OF TORTS § 496C(1) (1965).

56. § 496C(2).

57. *See supra* notes 44–50 and accompanying text.

58. McCaskey & Biedzynski, *supra* note 42, at 46 (“[P]articipants do not consent to the risk of negligent supervision.”).

59. *Id.* at 44 n.191 (explaining that secondary implied assumption of risk covers instances “where the defendant has in fact breached his or her duty to the plaintiff,” and yet the plaintiff knowingly “aware of the risk...voluntarily encounters it.”). The affirmative defense of secondary implied assumption of risk has been omitted from this comment because it is not relevant herein. It is not relevant because a minor cannot

“defendant was not negligent because he or she either owed no duty to the plaintiff or did not breach a duty that was owed.”<sup>60</sup> If the injuries sustained by the plaintiff are the type inherent in the sport, the coach and school will not be liable, as primary implied assumption of the risk will completely bar recovery. In order to determine whether a risk is inherent in an activity, a court will consider “the nature of the activity, the relationship of the defendant to the activity, and the relationship of the defendant to the plaintiff.”<sup>61</sup> Examples of risks that courts have deemed *objectively* inherent in their respective sports are falling out of a boxing ring,<sup>62</sup> being struck in the face by a wild pitch in a little league game,<sup>63</sup> and being tackled in a high-school football game.<sup>64</sup>

Some courts have applied a subjective element to the implied assumption of the risk analysis.<sup>65</sup> In *Vendrell v. School District No. 26C*, the court held that the plaintiff, considering his previous participation in the sport of football, assumed the “obvious risk attendant upon being tackled.”<sup>66</sup> Therefore, according to *Vendrell*, *unless the defendant has increased the risks inherent in a sport* then the plaintiff’s assumption of the risk will be considered a viable defense.<sup>67</sup>

Whether a heat-related death – without a breach of duty by the defendant – constitutes an objectively inherent risk in the practice and play of football is an interesting issue that

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impliedly accept the risks arising from a coach’s breach of his duty to the player. See § 496C(2) (“[Implied assumption of risk] does not apply in any situation in which an express agreement to accept the risk would be invalid as contrary to public policy.”). Accordingly, if the minor would not have been able to expressly assume the risks arising from his coach breaching the duty owed to him, for reasons of public policy, see *Tunkl v. Regents of Univ. of Cal.*, 60 Cal. 2d 92, (Cal. Sup. Ct. (1963)), then he will not be able to impliedly assume such a risk.

60. McCaskey & Biedzynski, *supra* note 42, at 43–44 n.191 (citing John L. Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717, 731 (1991)).

61. *Foronda v. Haw. Int’l Boxing Club*, 25 P.3d 826, 841 (Haw. Ct. App. 2001).

62. See *id.* at 826.

63. See *Balthazor v. Little League Baseball, Inc.*, 62 Cal. App. 4th 47, 49 (Cal. Dist. Ct. App. 1991).

64. See *Vendrell v. Sch. Dist. No. 26C*, 376 P.2d 406, 409 (Or. 1962).

65. McCaskey & Biedzynski, *supra* note 42, at 42.

66. *Vendrell*, 476 P.2d at 414.

67. *Hurst & Knight*, *supra* note 10, at 41 (“[I]n cases where an instructor is found to have acted ‘so as to increase the risk of harm inherent in a particular sport’ is that instructor deprived of the defense of primary assumption of risk.” (quoting *Balthazor*, 62 Cal. App. 4th at 47)).

has not been explored in relevant case law. Regardless, this is more of a hypothetical than a common occurrence. The *typical* aggravating circumstance in heat-related deaths is not the initial collapse of the player, but rather the supposed breach of duty and the facts surrounding it, such as the failure to render proper medical care,<sup>68</sup> or running an especially brutal practice,<sup>69</sup> that is the allegedly causal factor in the death of the player.

A player, or his parents, cannot impliedly assume the risks flowing from a subsequent breach by his coach. Therefore, assumption of the risk is likely not a viable defense for a coach in the case of heat-related illness. Implied assumption of the risk is a better fit in instances in which participation in football or other athletics may be dangerous without a breach by a coach. The question of whether the coach breached his duty is a highly fact sensitive question for the jury. Moreover, express assumption of the risk will likely not be a successful defense in cases involving minors, their schools and their agents (coaches) due to the rule laid out in *Wagenblast*.<sup>70</sup> Although coaches may not always rely on the defense of assumption of the risk in circumstances such as those in the deaths of Robert Mogabgab and Max Gilpin, the following defense has had a large impact on these types of cases.

### 3. Qualified Immunity

Qualified immunity is an affirmative defense that is a derivative of sovereign immunity.<sup>71</sup> It releases government employees from *personal liability* for “damages arising from their ‘discretionary’ acts, as opposed to ‘ministerial functions,’ [when] taken in good faith [and] within the scope of their authority.”<sup>72</sup> An employee is acting within the scope of his authority “when [his actions] are incidental to his regular duties as such an employee and are of some benefit to the

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68. See *Mogabgab v. Orleans Parish Sch. Bd.*, 239 So. 2d 456, 460 (La. Ct. App. 1970).

69. See *Riley*, *supra* note 1

70. See *supra* text accompanying note 49.

71. See BLACK'S LAW DICTIONARY (8th ed. 2004) (“A government’s immunity from being sued in its own courts without its consent.”).

72. *Hurst & Knight*, *supra* note 10, at 43.

employer and not personal to the employee.”<sup>73</sup> As qualified immunity creates a broad protection over employee’s actions, most states require that the employee act grossly negligently, fraudulently, or in bad faith in order for a plaintiff to overcome a government employee’s affirmative qualified immunity defense.<sup>74</sup> Accordingly, the main issue a court needs to resolve regarding qualified immunity is whether the defendant’s allegedly negligent conduct was “discretionary.”

The Restatement (Second) of Torts has outlined several factors for determining if the actions of a government employee were discretionary.<sup>75</sup> The South Dakota Supreme Court, in *Gasper v. Freidel*, summarized and outlined the factors as:

- 1) The nature and importance of the function that the officer is performing . . . .
- 2) The extent to which passing judgment on the exercise of discretion by the officer will amount necessarily to passing judgment by the court on the conduct of a coordinate branch of government . . . .
- 3) The extent to which the imposition of liability would impair the free exercise of his discretion by the officer . . . .
- 4) The extent to which the ultimate financial responsibility will fall on the officer . . . .
- 5) The likelihood that harm will result to members of the public if the action is taken . . . .
- 6) The nature and seriousness of the type of harm that may be produced . . . .
- 7) The availability to the injured party of other remedies and other forms of relief.<sup>76</sup>

Other courts have added to that list, including factors such as “personal deliberation,”<sup>77</sup> “difficult decision making,”<sup>78</sup> and “the ability of public officers to engage in making a decision

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73. See BALLENTINE’S LAW DICTIONARY (3d. ed. 1969). For the purposes of this comment it is assumed that a coach is acting within the scope of his employment when he is conducting a practice.

74. *Id.* at 44–47.

75. RESTATEMENT (SECOND) OF TORTS § 895D (1965).

76. *Gasper v. Freidel*, 450 N.W.2d 226, 230 (S.D. 1990) (quoting § 895D cmt. f).

77. *Lennon v. Petersen*, 624 So. 2d 171, 174 (Ala. 1993).

78. *Id.*

by weighing the policies for and against it.”<sup>79</sup> The touchstone for all of the factors is whether the actions at issue in the litigation “required decision making and the use of judgment,”<sup>80</sup> compared to a purely ministerial function such as filling out paper-work or other non-optional activities undertaken at a superior’s behest.<sup>81</sup>

In *Gasper*, two high-school football coaches were sued by a student-athlete’s parents over an injury sustained by a player at a summer weightlifting and conditioning program.<sup>82</sup> The trial court found qualified immunity applied to the coaches’ activity because the practice was within the scope of the coaches’ employment,<sup>83</sup> the coaches were not grossly negligent in running it,<sup>84</sup> and choosing to run the program was an exercise of the coaches’ discretionary powers.<sup>85</sup> The court held that imposing liability in such circumstances would “impair the free exercise of discretion”<sup>86</sup> reserved to a coach. The court reasoned that conditioning is considered an important function left to the discretion of the coach.<sup>87</sup>

In *Lennon v. Petersen*, the Alabama Supreme Court found that a coach was exercising his discretionary powers, even though the plaintiff alleged that the coach exceeded his authority by “discourag[ing] players from seeking treatment for their injuries.”<sup>88</sup> The court reasoned that the coach’s discretionary functions included “*difficult decisions* [such as] determining whether a player was injured and should report to the trainer or whether the player was merely faking an injury to avoid practice. . . .”<sup>89</sup>

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79. *Id.*

80. *Id.* at 174–75.

81. See § 895D cmt. h (“Ministerial acts are those done by officers and employees who are required to carry out the orders of others or to administer the law with little choice as to when, where, how or under what circumstances their acts are to be done. Examples of acts held to be ministerial under ordinary circumstances are the preparation of ballots, the registration of voters, the recording of documents and filing of papers . . .”).

82. *Gasper*, 450 N.W.2d at 228.

83. *Id.* at 231.

84. *Id.* (the plaintiff had been instructed as to proper use of the equipment and warming up.)

85. *Id.*

86. *Id.* at 232.

87. *Id.*

88. *Lennon v. Petersen*, 624 So. 2d 171, 173 (Ala. 1993).

89. *Id.* at 174–75 (emphasis added).

As applied to negligent heat stroke deaths sustained by high-school athletes in the course of a relatively normal practice, qualified immunity serves as a strong bar to personal civil liability for the coaches involved. Very few states have adopted the Restatement (Second) of Torts' rule that qualified immunity is unavailable in instances of negligence. In fact, the majority of states have adopted laws closer to those outlined above, which require gross negligence or bad faith to preclude qualified immunity from protecting the otherwise discretionary actions of a coach.<sup>90</sup> In the end, and in all but the most egregious circumstances, qualified immunity will shield a coach from personal liability. This bar to recovery reduces the deterrent effect of the civil liability system.

#### 4. Sovereign Immunity and Damage Caps

By limiting recoveries for plaintiffs, the doctrine of sovereign immunity and the statutory caps placed on damages also prevent the civil liability system from functioning as a sufficient deterrent in instances of student-athlete heat-related deaths.<sup>91</sup> Considering the difficulty in finding coaches personally liable due to the qualified immunity defense, plaintiffs typically and understandably attempt to sue the coaches' employer following the death or injury of a player. The doctrine of sovereign immunity applies in these instances because the coaches are usually employed by the local public school district, which is generally considered part of the sovereign.<sup>92</sup>

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90. Hurst & Knight, *supra* note 10, at 47 ("Thus, under the common law coaches acting within the scope of their employment in tasks requiring the exercise of discretion are largely shielded from personal liability by qualified immunity. Furthermore, modern statutes waiving sovereign immunity may provide sweeping immunity from personal liability for public employees, with respect to all but certain narrow categories of outrageous or illegal acts.").

91. Clay Travis, *Are Laws Too Weak, Damages Too Low to Prevent Heat-Related Deaths?*, NCAA FOOTBALL FANHOUSE (Aug. 12, 2009), <http://ncaafanhouse.com/2009/08/12/are-laws-too-weak-damages-too-low-to-prevent-heat-related-death/> ("Even if employees of those places happen to be negligent, no verdict is going to be so large as to send a message that heat-related deaths aren't to be trifled with.").

92. McCaskey & Biedzynski, *supra* note 42, at 68 ("Generally, school boards have been given the broad exceptions of immunity in various ways. Additionally, other governmental "actors" have been afforded such immunity. For example, one Pennsylvania court broadly interpreted the definition of an "employee" to include a high

Although each state's sovereign immunity statute differs, a general rule can be stated: sovereign immunity encapsulates the "principle that the sovereign cannot be sued in its own courts or in any other court *without its consent and permission*; a principle which applies with full force to the several states of the Union."<sup>93</sup> Although most states waive their sovereign immunity—to some degree—via statute,<sup>94</sup> requirements for finding liability vary widely by state, and many jurisdictions do not allow plaintiffs to collect punitive damages.<sup>95</sup> Many states also cap damages at \$500,000.<sup>96</sup>

Additionally, some states require gross negligence before a plaintiff can recover from the state. For example, Kansas requires gross negligence before the public entity can be found liable.<sup>97</sup> Kansas caps damages at \$500,000 unless the public entity, the school district, has insurance for a greater amount, while also barring any recovery of punitive damages.<sup>98</sup> Other states, like Oklahoma, "specifically exempt[] liability for any injury incurred in 'participation in or practice for any interscholastic or other athletic contest sponsored or conducted by or on the property of the state or a public subdivision.'"<sup>99</sup> If the school, however, has purchased liability insurance, it will be liable up to the amount of the insurance.<sup>100</sup>

Even in states that allow plaintiffs to recovery for the mere negligence of a public employee, the states greatly limit damages. Oregon,<sup>101</sup> Pennsylvania,<sup>102</sup> Mississippi,<sup>103</sup>

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school football player who had worn the jersey of a particular school district and had represented himself by acting on behalf of that district.").

93. BALLENTINE'S LAW DICTIONARY (3d ed. 1969) (emphasis added).

94. McCaskey & Biedzynski, *supra* note 42, at 67 ("[I]n recent years, commentators have noted that sovereign immunity has been eliminated or limited substantially in a majority of states. With a few exceptions, school districts and their employees can now be held liable for injuries.").

95. *See, e.g.*, KAN. STAT. ANN. § 75-6105(c) (2008); OKLA. STAT. tit. 51, § 162(d) (2009).

96. *See infra* notes 101–13.

97. KAN. STAT. ANN. § 75-6104(o) (2008).

98. *Id.* § 75-6105(a), (c).

99. OKLA. STAT. tit. 51, § 155(20) (2009).

100. *Herweg v. Bd. of Educ. of the Lawton Pub. Schs.*, 673 P.2d 154, 157 (Okla. 1983).

101. OR. REV. STAT. § 30.270 (2007).

102. 42 PA. CONS. STAT. § 8528 (2009) (\$1,000,000 recovery cap in actions against the commonwealth); *id.* § 8553 (\$500,000 recovery cap in actions against local

Louisiana,<sup>104</sup> and Idaho,<sup>105</sup> among others, have recovery limits of \$500,000 per incident. Many other states, including Colorado,<sup>106</sup> Florida,<sup>107</sup> Kentucky,<sup>108</sup> Maine,<sup>109</sup> Massachusetts,<sup>110</sup> Rhode Island,<sup>111</sup> Ohio,<sup>112</sup> and Virginia<sup>113</sup> have caps with even lower limits, ranging from \$100,000 to \$400,000.

Many states also require the plaintiff to provide the state or public entity with notice of a claim or incident within a specified period of time, such as ninety days or six months.<sup>114</sup> Without providing proper notice a subsequent civil suit will fail.<sup>115</sup> In addition to the notice requirement, most states also have a shorter statute of limitations for claims against the state.<sup>116</sup>

This limited waiver of sovereign immunity, and the damage caps and filing procedures that go along with that waiver, make it difficult for plaintiffs to succeed in suits against school districts. When combined with the affirmative defense of qualified immunity available to coaches, this leaves many guardians of deceased student-athletes with a lower chance of a successful and meaningful suit. The lack of million dollar judgments in cases of heat-related deaths, and the concomitant inability of the civil liability system to function as a deterrent to risky behavior on the part of coaches, has prevented this issue from being sufficiently addressed by states, schools or coaches. If this issue was

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[municipal] agencies).

103. MISS. CODE ANN. § 11-46-15 (2009) (bars punitive damages and attorney's fees unless otherwise specifically authorized).

104. LA. REV. STAT. ANN. § 13:5106 (2009).

105. IDAHO CODE ANN. § 6-926 (2009).

106. COLO. REV. STAT. § 24-10-114 (2009).

107. FLA. STAT. § 768.28(5) (2009).

108. KY. REV. STAT. ANN. § 44.070(5) (West 2010).

109. ME. REV. STAT. ANN. tit. 14, § 8105(1) (2009).

110. MASS. GEN. LAWS. ch. 258, § 2 (2009).

111. R.I. GEN. LAWS § 9-31-2 (2009).

112. OHIO REV. CODE ANN. § 2744.05(C)(1) (West 2010).

113. VA. CODE ANN. § 8.01-195.3 (2009).

114. *See, e.g.*, N.J. STAT. ANN. § 59:8-8 (2009) (ninety days); 42 PA. CONS. STAT. § 5522(a)(1) (2009) (six months).

115. *See, e.g.*, N.J. STAT. ANN. § 59:8-8; PA. CONS. STAT. § 5522(a)(1).

116. *Compare* ARIZ. REV. STAT. ANN. § 12-821 (2009) (one year statute of limitations in actions against the state) *with* ARIZ. REV. STAT. ANN. § 12-542 (2009) (two year statute of limitation for private actions related to an injury or death).



being sufficiently addressed, and coaches were deterred from running dangerous practices or were aware of the proper medical procedures, then heat-related deaths may not have increased by 86% over the past decade.<sup>117</sup>

## II. UTILIZATION OF THE CRIMINAL JUSTICE SYSTEM TO REDUCE HEAT-RELATED DEATHS

Due to the structural problems underlying the civil liability system, and its inability to function as a sufficient deterrent to student-athlete heat-related deaths, some commentators have explored a turn to the criminal justice system to accomplish the goal of deterrence.<sup>118</sup> In fact, the mere possibility of criminal liability for coaches has already led to changes.<sup>119</sup> This provides further proof of the efficacy of criminal liability as a mechanism to spur reform on the state, school, and coaching level.

Precipitating these reforms was the trial of David Jason Stinson for the death of Max Gilpin based upon the theory of Negligent Homicide.<sup>120</sup> The Gilpin-Stinson case marked the

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117. *See supra* note 9.

118. Travis, *supra* note 91.

119. Dan Fitzgerald, *Friday Night Rights: Kentucky v. Stinson to Trigger Changes in High School Athletics*, CONN. SPORTS L. (Sept. 23, 2009), <http://ctsportslaw.com/2009/09/23/friday-night-rights-kentucky-v-stinson-to-trigger-changes-in-high-school-athletics/> (outlining the effects of the Stinson case, such as legislative changes – “[c]oaches in the Commonwealth now must take a 4-hour online course that covers topics from temperature-related illnesses to head, neck and facial injuries;” – and contractual changes between the school and coach, and other changes in coaching doctrine – “[t]he culture of coaching is bound to change. The tough, old-school methods of toughening a team up – especially in football – are likely to become relics of the past.”).

120. It must be noted at this point that although the Kentucky statute that Stinson was charged under is termed “Reckless Homicide,” *see* KY. REV. STAT. ANN. § 507.050, the standard for “recklessness” as defined by section 501.020(4) and interpreted by the Kentucky Supreme Court is something closer to Model Penal Code negligence rather than recklessness. *Compare* *Robinson v. Commonwealth*, 569 S.W.2d 183, 184–85 (Ky. Ct. App. 1978) (holding and applying KY. REV. STAT. ANN. § 507.050, “[t]he gravamen of the offense is the *failure to perceive a substantial and unjustified risk* when such failure is a gross deviation from the standard of care that a reasonable person would observe in the situation. It is obvious that no specific intent that the act or omission cause injury is required. Nor is there any requirement to show a subjective realization on the part of the actor that his conduct creates a substantial risk.”(emphasis added)) *with* MODEL PENAL CODE § 2.02(2)(d) (1962) (“A person acts *negligently* with respect to a material element of an offense when he *should be aware of a substantial and unjustifiable risk* that the material element exists or will result from his conduct. The

first time a coach was criminally charged for the death of one of his players as the result of a heat-related injury.<sup>121</sup> The State charged Stinson following Gilpin's death, which occurred during an August 20, 2008 practice at Pleasure Ridge Park High School in Louisville, Kentucky.<sup>122</sup> The basis of the prosecution's charge was not that Stinson failed to render proper medical care, as was the case in *Mogabgab*,<sup>123</sup> but rather that Stinson ran a brutal and "barbaric" practice and "withheld water from players and ran them excessively . . . the day Max collapsed because he was angry that players weren't practicing hard, telling them they would run until someone quit the team."<sup>124</sup> Effectively, the prosecution alleged that Stinson should have been aware, due to his heat-related illness training, that doubling the number of wind-sprints the players had to run in that day's ninety-four degree heat was at a minimum a "failure to perceive it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."<sup>125</sup>

Stinson's defense rested on the testimony of several players who stated that they did not run significantly more sprints than normal that day.<sup>126</sup> Further, the defense procured Gilpin's stepmother, along with three of his classmates, who testified "that Gilpin complained of not feeling well throughout the day he collapsed."<sup>127</sup> The defense also produced medical experts who opined "that it appeared a combination of heat, the use of the dietary supplement

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risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation." (emphasis added)). For the purposes of this comment, I will refer to the standard that Stinson was tried under as criminal negligence, for the touchstone of the charge was failure to *perceive* a risk, rather than *conscious disregard* of a risk, which is the core of a recklessness charge based on Model Penal Code section 2.02(2)(c). "A person acts *recklessly* with respect to a material element of an offense when he *consciously disregards a substantial and unjustifiable risk* that the material element exists or will result from his conduct." § 2.02(2)(c) (emphasis added).

121. McCann, *supra* note 2.

122. Barrouquere, *Kentucky Coach Acquitted*, *supra* note 1; Riley, *supra* note 1.

123. *Mogabgab v. Orleans Parish Sch. Bd.*, 239 So. 2d 456, 457 (La. Ct. App. 1970).

124. Riley, *supra* note 1.

125. KY REV. STAT. ANN. § 507.050; *Robinson*, 569 S.W.2d at 184–85; Riley, *supra* note 1.

126. Barrouquere, *Kentucky Coach Acquitted*, *supra* note 1.

127. *Id.*

creatine and attention deficit disorder drug Adderall, and being ill were the main factors that contributed to Gilpin's death, which they called an accident."<sup>128</sup> Lastly, the "the defense brought in several experts who said Max was not dehydrated after his collapse,"<sup>129</sup> indicating to the jury that the cause of Max's death were factors unique to Max, rather than actions Stinson took or risks he should have avoided.<sup>130</sup>

The jury returned its verdict after only ninety minutes, finding Stinson not guilty.<sup>131</sup> Although there was no detailed finding of fact by the jury, some light may be shed on their view of the case by the comments of one of the jury members. Speaking anonymously, one of the eight male jurors<sup>132</sup> stated that the verdict was a "no brainer" and the overwhelming medical testimony was the most persuasive part of the case.<sup>133</sup> The juror did not "feel like the coach did anything wrong to hurt Max Gilpin."<sup>134</sup> Furthermore, the juror stated that the other jurors felt the same way and that in actuality they only deliberated for thirty-five minutes.<sup>135</sup>

#### *A. Model Penal Code Section 210.4 — Negligent Homicide*

The Stinson case serves as a good jumping-off point for an investigation into the types of criminal charges that states may use to confer criminal liability onto coaches. The Model Penal Code (MPC), and its commentaries, lay out the standard and policy behind the theory of negligent homicide, one such criminal charge.<sup>136</sup> The comments to section 210.4 state that the section "recognizes that penal sanctions are appropriate in some cases of inadvertent homicide" and seeks "primarily to rationalize the concept of negligence that may serve as an appropriate basis for punishing inadvertent

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128. *Id.*

129. Riley, *supra* note 1.

130. *Id.*

131. *Id.*

132. *Id.* (The jury was composed of eight men and four women).

133. *Juror: Stinson Verdict Was a "No Brainer"*, WHAS11.COM (Sept. 21, 2009), <http://www.whas11.com/news/local/64440907.html>.

134. *Id.*

135. *Id.* ("I was amazed that we were all on the same page. There were older people, younger people, middle aged people, and it was amazing all of us were on the same page so we all must've heard the same thing out of that courtroom.")

136. *See generally* MODEL PENAL CODE § 210.4 (1962).

homicide.”<sup>137</sup> Defining negligence, the MPC states in section 2.02(2)(d) that:

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.<sup>138</sup>

Moreover, the commentaries to the MPC stress that epithets such as “wanton disregard,”<sup>139</sup> previously used in states under the common law, were eschewed in favor of a standard that is external, objective, and based upon the “reasonable man.”<sup>140</sup> This external standard derives from the “critical issue of the perception of the risk of death” and whether a reasonable person in similar circumstances would have foreseen that risk.<sup>141</sup> Ultimately, “that [the defendant] does not view his conduct as dangerous is of no consequence.”<sup>142</sup>

The Commentaries to the MPC address and justify the policy behind ascribing criminal liability for negligent homicide from both utilitarian and moral/retributive angles. Addressing the utilitarian concerns that “the inadvertent actor by definition does not perceive the risks of his conduct, and thus cannot be deterred from risk creation,”<sup>143</sup> the drafters of the code noted that “[c]riminal punishment of negligent homicide is not impotent to stimulate care that might otherwise not be taken, nor is a person's failure to use his faculties for the protection of others an improper basis for condemnation.”<sup>144</sup> Moreover, the MPC “insists on proof of substantial fault and limits penal sanction to cases where ‘the significance of the circumstances of fact would be apparent to one who shares the community's general sense of right and

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137. *Id.* explanatory note of section.

138. *Id.* § 2.02(2)(d).

139. § 210.4 cmt. 2.

140. *Id.*

141. § 210.4 cmt.2 n.19 (quoting *People v. Eckert*, 2 N.Y.2d 126, 131 (N.Y. 1956)).

142. MODEL PENAL CODE § 210.4 cmt.2 n.19.

143. § 210.4 cmt. 3.

144. *Id.*

wrong.”<sup>145</sup> Concluding, the drafters noted that “[j]ustice is safeguarded by insisting upon . . . gross deviation from ordinary standards of conduct” and “[l]iability for inadvertent risk creation is properly limited to cases where the actor is grossly insensitive to the interests and claims of other persons in society.”<sup>146</sup> Addressing penalties, the drafters noted that, by deeming negligent homicide a third degree felony and recommending between one and five year sentences, the “sanctions do not seem excessive”<sup>147</sup> and their approach constitutes a considerable relaxing of possible sentences that defendants could have faced compared to common law involuntary manslaughter statutes.<sup>148</sup>

Considering the finding of the Stinson jury, one may conclude that negligent homicide is an unlikely candidate for expanding imposition of criminal liability onto allegedly negligent coaches. That conclusion may be in error. The statement by the juror in the Stinson trial that he did not “feel like the coach had done anything wrong to hurt Max Gilpin,”<sup>149</sup> may indicate that the jury misunderstood, to some extent, the standard of culpability required under Kentucky Law. It is possible that because Stinson’s charge was termed “Reckless Homicide,” the jury required some level of consciously *reckless* action on the part of Stinson, rather than the *grossly negligent* action that is actually the basis of Kentucky Reckless Homicide Law. In effect, by mislabeling the law, the Kentucky Legislature may be confusing juries by terming a crime “Reckless Homicide” when the definition of recklessness found in section 501.020(4) of the Kentucky Revised Statutes requires only “*a failure to perceive a substantial and unjustified risk and a gross deviation from care from the standard of care that a reasonable person would observe in a similar situation.*”<sup>150</sup>

As illuminating as the Stinson case might have been as an application in form, if not in name, of the MPC’s Negligent Homicide standard, the incorrect terminology used by the

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145. *Id.* (quoting Henry M. Hart, Jr., *The Aims of Criminal Law*, 23 L. & CONTEMP. PROBS. 401, 407 (1958)).

146. *Id.*

147. *Id.*

148. MODEL PENAL CODE § 210.4 cmt. 3.

149. Riley, *supra* note 1.

150. KY. REV. STAT. ANN. § 501.020(4) (West 2009) (emphasis added).

Kentucky legislature, along with the juror's aforementioned statements, demonstrate that the Stinson case may not be a proper template upon which to gauge the willingness or unwillingness of juries to utilize the criminal justice system in instances of heat-related deaths. Therefore, the Stinson acquittal should not be seen as the final word on the acceptance or rejection of a negligent homicide charge in heat-related deaths. In fact, the Stinson case is likely only the beginning of such prosecutions.

In order to convict a coach for the negligent homicide of one of his players in an instance of heat-related death, a prosecutor must allege that the coach acted with gross negligence—evidenced by unreasonably failing to perceive a substantial and unjustifiable risk to his players.<sup>151</sup> If a coach knew that a player was taking a certain medication, such as Max Gilpin taking Adderall,<sup>152</sup> a jury may find that the coach's failure to perceive the risk of overexertion in ninety-plus degree heat was a gross deviation from a reasonable standard of care. In the Stinson case, however, the State did not allege that Stinson knew Gilpin used Adderall.<sup>153</sup>

*B. Model Penal Code Section 230.4 — Endangering the Welfare of Children*

The MPC states that a “parent, guardian, or other person supervising the welfare of a child under [eighteen] commits a *misdemeanor* if he knowingly endangers the child's welfare by violating a duty of care, protection or support.”<sup>154</sup> Elaborating further, section 230.4 “is designed to replace vague and uncertain laws dealing with contributing to the delinquency of a minor, child neglect, and corrupting the morals of a

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151. MODEL PENAL CODE § 210.4.

152. Riley, *supra* note 1 (“[A]n amphetamine used to treat attention-deficit hyperactivity disorder.”).

153. An issue that needs additional exploration is whether jurors in similar cases, due to the societal value that Americans ascribe to athletics in general, may or may not be willing to utilize a charge as serious as negligent homicide in order to punish coaches. This is an unresolved question that will require further case law, prosecution, and academic research to develop. Because of the possible institutional, societal, and judicial bias in favor of sports, a prosecutor seeking to utilize the criminal justice system may want to explore some of the following lesser charges.

154. MODEL PENAL CODE § 230.4 (1962) (emphasis added).

minor.”<sup>155</sup> The drafters of the MPC specifically wanted to forgo such amorphous language found in the common law because “the basic error in such legislation is the assumption that the vague and comprehensive terms used . . . [are] appropriate for the definition of a criminal offense.”<sup>156</sup> Rather, the MPC “limits the reach of the criminal law to situations where a parent, guardian, or other person supervising the welfare of a child under eighteen knowingly endangers the child’s welfare by violating a duty of care, protection, or support.”<sup>157</sup>

The physical, mental, and moral welfare of the child are all protected by the section’s broad language.<sup>158</sup> The duty violated by the adult “need not be stated in the penal code but may arise from contractual obligation, from settled principles of tort or family law, or from other legal sources.”<sup>159</sup> A “temporary or insignificant default is not criminal, although it may give rise to civil liability.”<sup>160</sup> Rather, the commentary notes that the section seeks to punish only “*consequential* acts violative of some settled obligation springing from the supervisory relationship of actor to child.”<sup>161</sup> The element of mens rea “explicitly requires that the actor be aware of the fact that his conduct endangers the welfare of the child;”<sup>162</sup> however, “it does not mean that he must be aware that the law imposed the legal duty or that he must himself draw the conclusion that he is violating a legal duty.”<sup>163</sup> As such, the section imposes culpability in instances where the adult has caused actual and significant physical, mental, or moral injury to a child, in breach of a duty arising from his supervisory relationship to the child. Further, the adult need not be aware of the legal consequences, rather he need only be aware that his conduct endangers the child.

It should be noted that a duty between a coach and a

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155. *Id.* explanatory note of section.

156. *Id.* cmt. 1.

157. *Id.* explanatory note of section.

158. *Id.* cmt. 3 (“The tentative draft referred to ‘physical or moral’ welfare, but a subsequent suggestion to add ‘mental’ to the description prompted deletion of all qualifying adjectives as an economical way to achieve comprehensive coverage.”).

159. *Id.*

160. MODEL PENAL CODE § 230.4 cmt. 3.

161. *Id.* (emphasis added).

162. *Id.*

163. *Id.*

player clearly exists, as it is the basis of civil liability. Section 230.4, depending on the factual circumstances of a situation, may act as a successful mechanism for the imposition of criminal liability, albeit only a misdemeanor, on a coach. Two caveats apply, however. First, no state has expressly adopted MPC section 230.4, although many have followed its underlying principles.<sup>164</sup> For example, New Jersey's child endangerment statute states that "any person having a legal duty for the care of a child or who has assumed responsibility for the care of a child," is guilty of second degree felony if that person "causes the child harm that would make the child an abused or neglected child."<sup>165</sup> New Jersey defines an abused or neglected child as one who has suffered (a) "unnecessary suffering or pain, either mental or physical;" or (b) "any willful act of omission or commission whereby unnecessary pain and suffering, whether mental or physical, [was] caused or permitted to be inflicted on [the] child;" or (c) exposure to "unnecessary hardship, fatigue or mental or physical strains that [injured] the health or physical or moral well-being of such child."<sup>166</sup> Therefore, applicability will depend heavily upon the statute as written in a given jurisdiction, as well as its accompanying interpretive case law. Second, the higher mens rea requirement, requiring something akin to recklessness—awareness that one's "conduct endangers the welfare of the child"<sup>167</sup>—creates another more significant hurdle. Regardless, this lesser charge, in a case where the coach may have been recklessly aware of a risk of injury, may be seen by a reluctant jury as a more appropriate charge and penalty due to an underlying bias in favor of protecting coaches, which precludes them from finding a coach guilty of a more serious charge, such as negligent homicide.

*C. Model Penal Code Section 211.2 — Recklessly Endangering Another Person*

A prosecutor may also use MPC section 211.2 to confer criminal liability on a coach even if the player does not die.<sup>168</sup>

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164. *Id.*

165. N.J. STAT. ANN. § 2C:24-4 (2010).

166. *Id.* § 9:6-1.

167. MODEL PENAL CODE § 230.4 cmt. 3.

168. *See generally id.* § 211.2.



The prosecutor will, however, need to prove recklessness, because “[n]egligently placing another in danger of death is a felony of the third degree *if death results*, but no crime at all if it does not.”<sup>169</sup> On the other hand, this section applies “without regard to whether . . . harm actually occurs.”<sup>170</sup>

Section 211.2 states that a “person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.”<sup>171</sup> Unlike section 230.4—Endangering the Welfare of a Child—this section expressly requires recklessness on the part of the defendant.<sup>172</sup> The MPC stresses that recklessness revolves around a “*conscious disregard* [of] a substantial and unjustifiable risk,”<sup>173</sup> as compared to criminal negligence, which stresses “a *failure to perceive* a substantial and unjustified risk.”<sup>174</sup> This is a high threshold to meet and it is unlikely that a prosecutor will commonly encounter facts to support a successful charge. A defense attorney would likely be able to—in all but the most egregious instances of callous activity by a coach—raise a reasonable doubt as to whether the defendant was acting with the requisite “conscious disregard,” especially compared to facially reckless common law activities the section was intended to replace.<sup>175</sup> Although prosecutors may find it difficult to obtain a conviction under the MPC’s Reckless Endangerment section, they should still explore it in the appropriate circumstances.

## CONCLUSION

Heat-related deaths sustained by high school student-athletes are on the rise because the civil liability system is not fully performing its deterrent function. Certain aspects of the civil liability system, such as qualified and sovereign immunity, hamper plaintiffs’ ability to recover damages

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169. *Id.* cmt. 2 (referring to negligent homicide MODEL PENAL CODE § 210.4) (emphasis added).

170. *Id.*

171. *Id.* § 211.2.

172. *Id.*

173. MODEL PENAL CODE § 2.02(2)(c).

174. § 2.02(2)(d).

175. § 211.2 cmt. 1 n.13.

202      *Seton Hall Journal of Sports and Entertainment Law* [Vol. 21.1

significant enough to change the behavior of coaches and schools. The filing of criminal charges related to the death of Max Gilpin spurred action by schools, legislatures, and coaches to a degree that previous deaths and ensuing civil litigation were unable.<sup>176</sup> The threat of criminal prosecution, even in the absence of a conviction, has shown an ability to precipitate the adoption of coaching and school behavior which will reduce the risk of further deaths. Due to this effect, criminal prosecutions should not be abandoned prematurely, regardless of the lack of a conviction in the Stinson trial. If further unsuccessful prosecutions begin to show that juries are unwilling to utilize the criminal justice system in order to penalize coaches for their dangerous behavior, legislatures may need to reexamine the doctrines of qualified and sovereign immunity in order to bolster the deterrent effect of the civil liability system.

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176. See *supra* note 119 and accompanying text.