

# Part I

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# Chapter 1

## Legal Issues

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### CHAPTER OBJECTIVES

After you have read this chapter, you will be able to understand:

- Negligence and its four elements
- The differences between omission and commission
- The concept of foreseeability, and examples of how harmful acts may and may not be foreseeable
- How comparable and contributory fault affects a plaintiff's compensation in a negligence claim
- The use and importance of assumption of risk documents
- Good Samaritan laws and how they protect a first aider
- How to defend yourself against negligence

In the present day, the potentiality of litigation in the workplace is real. As an exercise scientist, you are responsible for your athletes' well-being. However, exercise scientists who supervise, instruct, and care for athletes are especially at risk for being sued. As a professional, you must continually be cognizant that providing improper first aid injury and illness care for an athlete may have legal ramifications. These statements are not an attempt to discourage you from assisting an injured or ill athlete; on the contrary, caring for your injured and ill athletes is imperative (Figure 1-1). However, it is prudent to obtain proper first aid and cardiopulmonary resuscitation (CPR) training and understand the legalities that govern your actions prior to working with and providing care to athletes. Knowledge of legal issues affecting you as an exercise scientist is crucial. With this knowledge, you can guide your actions to

Figure 1-1

It is important for exercise scientists to properly instruct athletes on how to perform activities correctly and safely.



provide injured and ill athletes proper care, while protecting yourself as best as possible from litigation.

### NEGLIGENCE

The term **negligence** is utilized quite frequently in a variety of contexts. A student could be negligent in completing an assignment. A physician could be negligent

**Negligence** When a person did not act as a reasonable, prudent person would, and damages occurred to another person or his or her property.

when diagnosing a child's illness. Regardless of how negligence is utilized, the term means that a person did not act as a reasonable,

**Tort** A civil wrong that occurs to a person's body or property; not a criminal act.

sensible, or prudent person would. Negligence is a part of tort law. A **tort** is not a criminal act against someone, but a civil wrong that occurs to

a person's body or property, caused by another person. In tort law, negligence is unintentional harm (Cotten & Wolohan, 2010; Osborne, 2001). For exercise science professionals who care for athletes, negligence can cause injury or illness. A caregiver must act in a reasonable manner when tending to athletes. If the caregiver does not act responsibly, then the athlete could become ill or injured.

For a caregiver (defendant) to be found negligent in a court of law, the injured athlete (plaintiff) has the burden of proving that the defendant did not provide care to the plaintiff as any other reasonable person would. In order for the plaintiff to be awarded damages, usually in the form of money, the plaintiff has to prove that the defendant took part in the four components of negligence: (1) a duty existed by the defendant to the plaintiff, (2) the defendant failed to perform the duty, (3) the defendant failing to perform the duty was the actual cause of the plaintiff's injury or illness, and (4) injury or illness (i.e., damages) occurred to the athlete (Wong, 2010). In court, the plaintiff does not have the burden to prove the four elements of negligence by a reasonable doubt as in criminal cases; however, every element must be proven in order for the plaintiff to win the case (Avery, 2009).

## DUTY

An athlete (plaintiff) can claim that negligence caused his or her injury or illness; however, for this claim to go forward in

**Duty** When a person is liable and responsible for the athlete's well-being, due to the special relationship with the athlete at the time of injury.

court, the defendant (caregiver) had to have a **duty** to the athlete. In other words, the defendant was liable and responsible for the athlete's well-being, and had a special relationship with the

athlete at the time of injury. Many professionals, including exercise scientists, have an inherent duty to athletes due to the nature of their employment. Coaches have a duty to their athletes. Personal trainers have a duty to their clients. Physical education teachers have a duty to their students. These three professionals have a responsibility and duty to the people they serve due to their education, qualifications, and certifications (Wong, 2010). If the plaintiff cannot prove that the defendant

had a duty to them, negligence cannot be proven and the case will be dismissed.

## STANDARD OF CARE

When a defendant has been charged with negligence, the plaintiff must show that the defendant not only had a duty to care for the plaintiff at the time of injury or illness, but also did not meet the expected standard of care. The standard of care is the manner in which the defendant acted as compared to other defendants with similar qualifications (Cotten & Wolohan, 2010; Pozgar, 2010).

Consider the following scenario: A first aid-certified physical education teacher conducts an indoor wiffle ball tournament in physical education class. A student participant is injured when a wiffle ball is hit into his eye, causing immediate vision problems. The physical education teacher summons the school nurse and simultaneously dials 911 to obtain emergency care for the student. Until emergency medical services (EMS) arrives, the physical education teacher provides first aid to the student.

In this scenario, the court first determines if the physical education teacher had a duty to the student participant. In this case the court will most likely find that the physical education teacher did have a duty to the student due to the nature of the teacher-student relationship. The court then determines if the physical education teacher's standard of care prior to and after the incident was appropriate for the student and the situation at hand. The court compares the actions of this physical education teacher to other physical education teachers with the same training, qualifications, and certifications. The court's findings determine whether the defendant appropriately met the standard of care.

## FAILURE TO ACT

The second step in proving that a caregiver-defendant is negligent is for the athlete-plaintiff to show the defendant failed to act and perform a duty for the plaintiff. This failure to act exists if the defendant participated in an act of omission, misfeasance, or commission. Omission, also called nonfeasance, is when a person does not perform an act that he or she is qualified to do (Pozgar, 2010; Prentice, 2010).

Consider the following scenario: Many football coaches are required by their institutions and organizations to maintain first aid certification. During practice, a football player incurs a deep, large, bleeding, open wound. The coach chooses to continue practice and does not provide first aid care for his athlete. Days later, the athlete sustains a systemic, secondary illness and infection. The athlete's condition apparently resulted from the



coach's lack of first aid care for the wound. In this scenario, the football coach has taken part in an act of omission.

Misfeasance occurs when a person is legally able to perform an act that he or she is qualified to do, but performs the act improperly. In regards to the previous scenario, let's say the football coach instead tended to the athlete's wound by cleaning it with soap and water, without applying antibiotic ointment or a bandage, and then allowed the athlete to return to play with an uncovered open wound. Consequently, the athlete's wound became infected. The football coach has then participated in an act of misfeasance. He was qualified and knowledgeable on how to provide proper first aid care for an open wound but he did not apply all of the appropriate care as he should have.

Commission, also called malfeasance, occurs when a person performs an act that he or she is not qualified to perform on another person (Prentice, 2010). To change the scenario again, the football coach cared for his athlete's deep, large, bleeding, open wound, but decided to stitch the wound himself instead of referring the athlete to a physician or calling 911 for emergency services. The football coach is not qualified to suture wounds. Days later, the athlete's wound is infected and he has a systemic illness due to the coach's care. In this scenario, the football coach participated in an act of commission.

In any of these scenarios, by the nature of the coach-athlete relationship, the coach has a duty to perform proper first aid on his players as any other reasonable coach would. However, the coach failed to act in a proper manner and could be found negligent.

### FAILURE TO ACT AS THE PRIMARY CAUSE OF INJURY

In order to prove negligence, the plaintiff has the burden of showing that the defendant's failure to act in a reasonable manner is the primary cause for the plaintiff's injury or illness. The plaintiff has the opportunity to make various claims. A plaintiff can claim that physical bodily injury or illness resulted from the defendant's failure to act in a reasonable manner. Likewise, he or she can claim to have suffered negative emotional, psychological, or social damages due to the defendant's failure to act. The plaintiff can also claim that he or she has lost employment and earnings due to the defendant's failure to act (American Academy of Orthopaedic Surgeons [AAOS], 2012). In the previous scenarios, the football coach took part in acts of omission and commission. However, if these acts did not directly cause the illness, then the plaintiff's negligence claim is dismissed. Despite the fact that the plaintiff has experienced injury or illness, often it is very difficult for the plaintiff to prove that the defendant's actions were the proximate cause.

### ACTUAL HARM OR DAMAGES OCCURRED

A coach may have had a duty to his or her athlete, and breached the duty to provide a reasonable standard of care that caused the athlete's injury or illness, but the athlete must prove that actual harm resulted. Let's return to the wiffle ball tournament scenario, but this time the physical education teacher breached her duty to the student, which caused an immediate vision problem. The student sued the physical education teacher for negligence that caused vision loss. The student did not sue the physical education teacher for any other damages; however, if the student's vision returned to normal, then no actual damages occurred. Consequently, the negligence claim would be dismissed. Even though damages did not occur, the student may attempt to prove that a potential for harm to his eye or vision existed. Negligence claims of what could have occurred, or the potentiality of harm, will not hold up in court (Osborne, 2001). Therefore, this negligence claim of what could have happened to the student's eye would be dismissed.

### FORESEEABILITY

Even though a special relationship exists between people, such as a personal trainer and his or her client, a duty or obligation from one person to another may not exist. When a court of law finds insufficient foreseeability for the personal trainer to safeguard the client's health and welfare, then the personal trainer does not have a duty to the client. Foreseeability is the ability of a person to anticipate danger and resultant harm that could occur to others sharing in the special relationship. Even when a person conducts him- or herself in a reasonable manner, an unforeseeable act can cause harm to another person (Cotten & Wolohan, 2010). When an act is not foreseeable, then the person who performed the act cannot be found negligent.

Reflect upon the following scenario: A Little League baseball team is playing a game during a partly cloudy day. As usual, throughout the day and immediately prior to the game, both teams' coaching staff and the umpires view the weather forecast. Not one meteorologist predicted rain or stormy weather for this day. The home team coach also utilized a lightning detector, which did not detect lightning. The visiting team is in the field. Unexpectedly, out of nowhere, lightning strikes an outfielder. The home team coach calls 911 immediately. Despite the coaches' efforts to provide CPR, the player is pronounced dead by EMS. In this scenario, the coaching staffs and the umpires were unable to foresee that lightning, coming from 30 miles away, would strike a player. The coaching staffs and the umpires had been particularly cognizant

of the weather report throughout the course of the day and immediately prior to the game. No meteorologists predicted lightning storms on this day, and the working lightning detector did not reveal any threat. This unfortunate event was not foreseeable. A jury ultimately determines foreseeability in any negligence case. In this particular scenario it is evident that the coaches and umpires could not foresee the lightening strike so it is unlikely that they would be found negligent (Cotten & Wolohan, 2010).

## COMPARABLE FAULT

**Comparable fault** When the court assigns some fault to both the defendant and the plaintiff.

When a defendant is found negligent, the court will determine if **comparable fault**, also called comparable negligence, exists.

Although the defendant is deemed negligent, in some cases the plaintiff contributed to the damages that he or she incurred. Comparable fault in a negligence case is when the court assigns some fault to both the defendant and the plaintiff (Fitzgerald, 2005; Hekmat, 2002). In comparable fault cases, after hearing the case the court typically assigns blame to both the defendant and plaintiff as a percentage of total faults. The court determines how much the plaintiff contributed to the negligence. Judgment, in the form of monetary compensation, is then awarded to the plaintiff. Because the plaintiff is to some extent at fault, the compensation will not meet the plaintiff's original demands. Instead, the compensation is a percentage of the demanded award, which is usually derived from the defendant's percentage of fault from the total demanded compensation.

Most states have adopted this principle of comparable fault; however, in the past, most states utilized the principle of

**Contributory negligence** When a plaintiff is deemed to be responsible to some extent for her or his injury.

**contributory negligence.** As with comparable fault, contributory negligence is found when a plaintiff is deemed to be responsible to some extent for the injury.

The major difference between contributory negligence and comparative fault is in how the compensation is awarded. Unlike comparable fault, if contributory negligence is found, with the plaintiff contributing to the injury to any extent, then no compensation whatsoever is awarded to the plaintiff. Because the contributory negligence principle seems very unyielding, many states changed their statutes to utilize comparable fault instead. Only four states, Alabama, Maryland, North Carolina, and Virginia, and the District of Columbia

currently utilize the contributory negligence principle in court (Cotten & Wolohan, 2010).

Consider the following scenario regarding comparable fault: A personal trainer works at We R Fit Gym. He and his client have been working together to increase the client's muscle mass and strength for approximately 1 year. The personal trainer repetitively explains and demonstrates to his client how to utilize the equipment properly and safely. The client understands how to utilize the equipment and does so as taught by his personal trainer. One day, the client comes into the gym for a training session with the personal trainer. The client is angry, and in an unsettled mood. The personal trainer recommends to the client that he not train today due to his disposition. However, the client willingly and voluntarily participates in the day's training session. In a hesitant but usual manner, the personal trainer instructs his client to perform the daily training session activities, which are written on the client's chart. The client begins the training session and the personal trainer assists another client. Without the personal trainer's direction, the client decides not to follow the charted activities. The client proceeds to increase his resistance on the lumbar spine extension machine. Immediately upon beginning the exercise, the client feels a tearing sensation in his lower back and experiences excruciating pain. The client reports the event to the personal trainer. The personal trainer immediately calls for an ambulance to transport his client to the emergency room (ER), and then cares for the injury. As per the ER physician's prescription, the client must lie in bed to rest his back for a minimum of 1 week. Consequently, the doctor's orders result in the client being unable to work during this time. Due to the nature of his employment, the client does not get paid when he is not working, nor does he get worker's compensation.

The client decides to sue the personal trainer for negligence. The client demands monetary compensation in the sum of \$100,000 for pain and suffering and loss of wages. In this case, the court considers comparable fault. The client voluntarily participated in the training session against the personal trainer's professional judgment. The personal trainer previously taught the client how to properly and safely utilize the equipment. The client had always utilized the equipment as instructed for previous training sessions. The personal trainer set up the daily activities as usual, which the client disregarded. Consequently, the client is injured due to lack of judgment and failure to follow the personal trainer's directions. The personal trainer may be found negligent to some extent, however. The personal trainer did not prevent the client from training on that day due to his angry and unsettled mood. Also, the defendant may be found negligent because



he left the client temporarily, to assist another client, which caused a temporary lack of supervision. However, the court will use the comparative fault principle and find the client contributed to his injury. In this scenario, the court judges what percentages the defendant and plaintiff were at fault and awards a percentage of monetary compensation according to the percentage the defendant was at fault. If the court states that the defendant was 25% at fault and the plaintiff was 75% at fault, then the court would award \$25,000 of the \$100,000 original demands to the plaintiff.

## VICARIOUS LIABILITY

In the previous scenario, the personal trainer's employer, We R Fit Gym, would also be liable for the client's injury, and consequently named in the lawsuit. We R Fit Gym is liable due to vicarious liability. Vicarious liability, also called *respondeat superior*, is when an employer is responsible for its employees' negligent acts. This doctrine is imposed only if the employee was working in his or her employment capacity under the employer's direction. If the employee is not working under his or her employer's direction at the time the negligent injury occurred, then the employer is not held liable by vicarious liability (Wong, 2010).

Consider this example: The personal trainer, who works for We R Fit Gym, decides to train his client at his own home. He is training his client on his personal time. The personal trainer has the client pay him in cash for services after each training session. The personal trainer is an independent agent in this instance, and is not working for We R Fit Gym. If the client is injured as in the previous scenario, then We R Fit Gym is not held responsible for the personal trainer's negligence. Whenever an employer has a "master-servant" (Pozgar, 2010, p. 241) relationship with its employees, then vicarious liability exists. Other common master-servant relationships include a school district and a physical education teacher, a school district and a school nurse, an athletic director and coaching staff, a strength and conditioning coach and athletic team members, and coaching staff and their athletes (Wong, 2010).

## ASSUMPTION OF RISK

**Assumption of risk** When an athlete knowingly recognizes the inherent risk of injury, and voluntarily participates in the activity.

In many athletic activities, due to the inherent nature of the activity, the risk of injury is possible. **Assumption of risk** is when a person knowingly recognizes the inherent risk of injury by

participating in an activity, and then voluntarily participates in the activity anyway. This inherent risk is evident in sports such as football, ice hockey, and rugby. For other activities such as running, weight lifting, and golf, the risk of injury is not as significant. Regardless, most athletes understand that by the activity's nature injury can result.

In order to participate in activities, the athletes voluntarily accept the risk of injury. Assumption of risk is categorized as either implied or express. Implied assumption of risk is when an athlete assumes the inherent danger associated with an activity. Express assumption of risk is when the participant recognizes the potential for harm and signs a waiver relieving the organization from any liability for incurred injury (Fitzgerald, 2005; Pozgar, 2010). In most traditional athletic activities, implied assumption of risk is prevalent. Depending on the events that occur, implied assumption of risk varies in regard to the court's judgment and award. The judgment varies depending on whether the danger is inherent in the athletic activity and the plaintiff willingly participated, or whether the defendant was negligent and the plaintiff had knowledge of this negligence and participated in the athletic activity regardless.

Consider the following two scenarios. In one scenario, a high school senior football player and his parents knowingly assume the inherent risks of football. The athlete voluntarily participates and his parents voluntarily allow him to do so. During a game, the athlete is hit by an opposing player and suffers a season-ending knee injury. The player's parents attempt to sue the coach and school district for damages, because the player will no longer be recruited by universities to play football as a scholarship athlete. The coach and university are not found negligent, because no duty to the athlete existed. The injury was a direct result of football, a collision sport, and its inherent dangers. Consequently, no compensation is awarded to the plaintiff.

In the second scenario, a head coach and assistant baseball coach have batting practice using an L screen. The assistant coach notices that the screen has a tear in it. He informs the head coach. The head coach does not fix the tear or have the assistant coach use another L screen. The head coach mandates that the assistant coach use the screen during batting practice despite the defect. Standing behind the screen, the assistant coach pitches the ball to an athlete. The athlete hits the ball, which penetrates the L screen at the tear. The assistant coach gets hit in the face with the batted ball and suffers a fractured cheekbone. The assistant coach sues the head coach and the school district for negligence. In this case, the assistant coach knowingly participated in the act of having batting practice using a defective screen. The head coach is negligent because he has a duty to the assistant coach as his

supervisor. He also has a duty to remove the screen from use and utilize a functional screen that is not defective. Although the head coach's negligence caused the assistant coach's injury, the assistant coach contributed to his own injury by utilizing the screen despite knowing the danger. Consequently, the damages awarded are treated as in a comparative fault case. The assistant coach is awarded only a percentage of the demanded monetary compensation because he contributed to his own injury.

Express assumption of risk occurs when an athlete knowingly and voluntarily participates in activities with inherent

**Waiver** A type of contract that releases an organization under which the athlete participates from liability.

danger, but prior to participation he or she signs a **waiver** or release of liability (**Box 1-1**). A waiver is a type of contract presented to an

athlete by an organizing body with which the athlete participates. Once the athlete signs the waiver, the organization (e.g., We R Fit Gym, the school district) is released from liability if the athlete is injured. If the organization wishes to utilize waivers, the director or administrator must consider various issues when developing and instituting these documents. The waivers must be written clearly without fine print to make the athlete aware of the inherent risks of injury by participating in the activity. They must utilize words that the athlete fully understands; this means common language, not legal jargon, must be utilized. The waiver must be written in the athlete's first language (e.g., English, Spanish, French). The organization also should have an attorney who has legal knowledge regarding athletic participation waivers review the document before use.

When presenting the waiver to an athlete, make sure he or she recognizes and acknowledges the activity's inherent risks. Be certain the athlete understands injury may occur as a result of participation. He or she must voluntarily agree to participate in the activity and willingly sign the waiver. These steps in signing the waiver must take place for the waiver to be upheld in court (Cotten & Wolohan, 2010; Pozgar, 2010). However, as in all legal cases, the court makes the ultimate decision as to whether to uphold the waiver. The court considers whether the athlete understood the waiver and its contents clearly enough before voluntary participation. If the athlete did not clearly understand what he or she was signing, then the waiver is not enforced and the organization is held liable for the athlete's injury. The court also determines whether the athlete was coerced or forced to sign the waiver by an organization's employee. If the athlete was coerced or forced to sign the waiver, then the waiver is not enforceable. Even if an athlete clearly understands the waiver's terms, willingly signs it, and voluntarily participates in the activity, but an employee or participant inflicts careless or deliberate harm on the athlete, then the waiver is enforced and the organization is held liable for the athlete's injury.

Consider another scenario at We R Fit Gym: It is winter in the northeast United States. A client joins We R Fit Gym and signs a waiver. This waiver releases the gym from any liability if the client is injured while participating in weight training and conditioning activities at the gym. One snowy day, the client enters the gym and begins his weight training session. At the end of the session, the client exits the gym through a commonly used exit door. Unknown to the client, the exit has a great amount of ice located immediately outside of the door on the sidewalk, which is on We R Fit Gym's property. The client exits the gym, slips on the ice, falls hard on the ground, and breaks his fibula. This injury ultimately prevents the client from performing his employment duties. Consequently, he is unable to work for weeks, and is not paid by his employer. Also due to the nature of the injury, complications, and multiple surgeries, the client incurs major medical bills that are not entirely covered by his employer's medical insurance. The client sues We R Fit Gym for negligence. In the suit, the client claims the assumption of risk waiver should not be upheld, and demands monetary compensation for salary lost, medical bills, and pain and suffering. In this case, We R Fit Gym's waiver that the client voluntarily signed most likely will not be upheld. We R Fit Gym has the responsibility to keep the gym and the grounds safe for its patrons. Ice had accumulated at the doorway on the We R Fit Gym's property where the patrons exit. The We R Fit Gym staff was careless and did not remove

#### Box 1-1 An Example of a Basic Waiver

I, \_\_\_\_\_ (name), attest that I am voluntarily participating in the activities that We R Fit Gym provides. I entirely understand that there is an inherent risk of injury, including the possibility of disabling injuries and even death, while participating in these activities, and I knowingly and willingly assume this risk. I also attest that I have voluntarily signed this waiver, and was not coerced to do so.

\_\_\_\_\_  
Participant Signature

\_\_\_\_\_  
Date

\_\_\_\_\_  
Witness Signature

\_\_\_\_\_  
Date



the ice prior to opening the facility. Therefore, due to the gym's duty and lack of action to secure the safety and welfare of its clients, We R Fit Gym is negligent. The waiver did not state that We R Fit Gym is released from liability for any risk—only the risk inherent in participating in the weight training and conditioning activities. Therefore, in this scenario the waiver the client signed that releases We R Fit Gym from any liability is upheld and judgment is in the client's favor.

In most assumption of risk cases when adults have signed waivers, and the requirements necessary to uphold the waiver are in place, the court upholds the waiver. Again, the court determines whether to uphold the waiver on a case-by-case basis. However, it becomes increasingly difficult for the courts to uphold waivers when parents sign waivers on behalf of their minor children. This difficulty occurs because some minor children do not or cannot truly understand the inherent risks of athletic activity. Also, the courts have to discern whether it is reasonable for the parents to sign a waiver on behalf of their minor children. Parents who sign on behalf of their minor children essentially relinquish their children's rights (Wong, 2010). Ultimately, waivers may or may not be upheld in court. Regardless, organizations that utilize waivers have instituted one means to defend themselves and their employees against litigation.

## GOOD SAMARITAN LAWS

All 50 states and the District of Columbia have some type of **Good Samaritan laws**. Good Samaritan laws are statutes that protect someone from legal liability when they are assisting an injured or ill person. The person being helped is typically a stranger, and requires some sort of first aid care. Often these laws are considered first aid immunity. The Good Samaritan laws are different among the states, but in general they provide some protection for people providing necessary first aid care to others in emergency and life-threatening situations. HeartSafe America's website ([http://www.heartsafeam.com/pages/faq\\_good\\_samaritan](http://www.heartsafeam.com/pages/faq_good_samaritan)) provides each state's Good Samaritan laws. The laws apply if you provide first aid to an injured or ill person in certain circumstances. In all cases, you are protected if you provide first aid in an emergency situation, at the immediate emergency location, with good intentions, in a prudent manner, and without any monetary or other compensation (Cotten & Wolohan, 2010).

Even though Good Samaritan laws exist, in certain situations the person providing first aid (the first aider) is required

to obtain consent from the injured person before performing first aid skills. If the victim is a conscious adult, the first aider obtains consent to assist the victim. If the victim is a child and the guardian is present, the first aider obtains consent from the guardian in order to assist the child. In an emergency situation, if the victim is a minor without a guardian present, or is an unconscious adult, then consent is implied and the first aider can begin assisting the victim immediately (AAOS, 2012).

How the Good Samaritan laws are written and the laws' content in each state's statutes determine which first aid actions are considered covered under the laws. A scenario where Good Samaritan laws often apply, again depending on the state, is as follows: You are a coach for a recreational junior high soccer team. Your team is playing a game on your home field. Parents, family members, and spectators fill the bleachers. During half-time, one parent in the stands screams. Her husband is apparently unconscious on the bleachers. You and your assistant coach run to the victim to see what is wrong. The woman says that her husband was clutching his chest, and then suddenly passed out. You tell your assistant coach to call for an ambulance immediately. You have had CPR training in the past. You find that he is not breathing and begin CPR immediately. You do not remember the accurate number of breaths and compressions, but you assist the man anyway. Unfortunately, the man does not survive. The woman attempts to sue you in court for your actions, under the pretense that you were not currently certified in CPR and did not remember the exact proper CPR skill set when you provided care for her husband. In this instance, in most states, Good Samaritan laws prevail and you would not be held responsible for the man's death. Likewise, the court would rule that you are not responsible for any compensation to his wife.

Although it is rare for first aiders to be sued in court, the Good Samaritan laws do not apply in all cases. In some states, the first aider is protected when she or he participates in ordinary acts of omission; however, in many states, the first aider cannot act in a willful, reckless manner that causes additional injury (AAOS, 2012). Consider the previous scenario where you are a coach for a recreational junior high soccer team. In this case, a parent in the stands screams because her toddler son is having trouble breathing. You and your assistant coach run to the boy, who is wheezing. The mother tells you that he has not previously been diagnosed with asthma. Against your will, your assistant coach, who has asthma, decides to give two puffs of her rescue inhaler to the toddler. The toddler reacts adversely to the medication and his situation becomes worse. He stops breathing and goes unconscious. You call for an ambulance. The ambulance arrives minutes later. The EMTs perform CPR and revive the

**Good Samaritan laws**  
Statutes that protect people from legal liability when assisting injured or ill people in an emergency situation.

boy. Unfortunately, he has minor brain damage. In this case, the courts find that the Good Samaritan laws do not prevail for the assistant coach because her first aid conduct for the boy was reckless and caused further harm. The assistant coach is under your and the employer's supervision. Even though your assistant coach gave the boy her medication against your will, vicarious liability prevails. You and your employer are named in the lawsuit along with the assistant coach.

If you choose to provide first aid to an injured person, you have the duty to stay with that person until EMTs or another equally or more qualified person assists the victim (AAOS, 2012). However, one issue to consider when deciding to provide first aid care for bystanders is that most states do not have laws that mandate a person has a duty to provide first aid assistance to an injured or ill person in the first place (Cotten & Wolohan, 2010; Pfeiffer & Mangus, 2012). Although no duty may exist, your personal ethics and morals come into play when you witness an emergency situation in which a person is seriously injured or ill.

It is extremely important to know the Good Samaritan laws in your state. Good Samaritan laws provide you, as a first aider, some protection against lawsuits in emergency situations, so hopefully you and other bystanders will be willing to assist the injured and ill victims in these unfortunate situations.

## STATUTE OF LIMITATIONS

When an injured person decides to file a negligence claim against another person, he or she does not have an unlimited amount

**Statute of limitations** A finite number of years that a person has to file a negligence claim in court. The statute of limitations is determined by and varies from state to state.

of time to file a lawsuit. The **statute of limitations** is a finite number of years in which a person can file a negligence claim. The statute of limitations is determined by and varies from state to state. In most states, the statute

of limitations is from 1 to 4 years. An exception to this rule is when the damages occurred to a minor. In this case, the statute of limitations begins when the child turns 18 years old (Cotten & Wolohan, 2010). Also, in some states the statute of limitations begins when the person has been given notice or has knowledge that the negligent act created the injury or illness. The statute of limitations also begins when a person "should have discovered the injury" (Pozgar, 2010, p. 207). Often, even with each state's designated statute of limitations, the courts have difficulty determining when the statutory period began.

The court must determine whether the plaintiff knew or should have known that the negligent act caused the injury, and the date when this knowledge occurred. Consider the

previous case in which the assistant coach provided first aid assistance to the toddler boy at the soccer game. Instead of being permanently injured immediately, consider that the boy has no apparent injury or illness after the incident. Years later, when the boy is a 20-year-old adult and attends college, he begins to have migraines, memory loss, a cognitive deficit, and vision problems. His mother tells him what occurred at the soccer game many years before. He decides to file a lawsuit against the assistant coach for damages that occurred when he was a toddler. The plaintiff sues and demands monetary compensation for medical bills and pain and suffering.

The courts consider a variety of factors in this case. First, as previously determined, the court finds that the Good Samaritan laws do not prevail in this case. Also, the court considers the state's statute of limitations in regard to the plaintiff's age. The injury occurred when the plaintiff was a minor. In most states the statutory time period begins when the child turns 18 years old. If the statute of limitations is greater than 2 years, then the man can file the lawsuit. If the statute of limitations is less than 2 years, then the man cannot file the lawsuit. The court recognizes that this incident was a probable cause of the injury and illnesses he incurred. However, in this case the court determines that the man should have known of the incident because his parents should have informed him.

Depending on the situation, the statute of limitations can complicate an injured person's ability to sue another person in court. Although each state has its own rules governing the statute of limitations for negligence cases, all states do have one aspect in common: If a person attempts to file a lawsuit after the statute of limitations, then the lawsuit will not ensue.

## DEFENSES AGAINST NEGLIGENCE

You can take action and attempt to defend yourself against negligence claims. What you do to protect yourself can mean the difference between being found negligent in court and liable for damages, or not. Because you instruct and supervise athletes on a continual, daily basis, you are responsible for their lives. You have the duty to protect your athletes from harm; however, you have to protect yourself in case one of your athletes chooses to sue you for negligence. To best prepare yourself for legal action, take the steps shown in [Table 1-1](#) to make sure you have the best protection against these tortuous claims.

As previously discussed, important defenses from negligence are waivers, release of liability, or assumption of risk agreements. Utilize these documents whenever you are responsible for athletes' safety and well-being, and regardless of whether you are self-employed or work for an organization or institution. Similar to these documents are contracts, which can also include assumption of risk elements. If you



**Table 1-1** A Checklist for Defending Against Negligence

<p>You should complete the following actions as part of your “to do” checklist in order to actively prepare yourself for a defense against a negligence claim:</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Utilize waivers, releases of liability, and assumption of risk agreements with your athletes.</li> <li><input type="checkbox"/> Utilize contracts that specify the terms of use for the athlete at your facility.</li> <li><input type="checkbox"/> Have all athletes complete a medical history questionnaire prior to participation.</li> <li><input type="checkbox"/> Have every athlete complete a preparticipation examination (PPE), performed by a physician (MD or DO).</li> <li><input type="checkbox"/> Mandate that all athletes who have preexisting or questionable injuries and/or illnesses must be cleared for participation by a physician (MD or DO).</li> <li><input type="checkbox"/> Create, maintain, and practice emergency action plans (EAPs) at your facility.</li> <li><input type="checkbox"/> Warn the athletes of the inherent dangers of the activities.</li> <li><input type="checkbox"/> Provide proper training and instruction to the athletes within your qualifications.</li> <li><input type="checkbox"/> Supervise the athletes appropriately.</li> <li><input type="checkbox"/> Provide proper, well-fitted, and safe equipment for the athletes’ use.</li> <li><input type="checkbox"/> Hire qualified employees to work with the athletes.</li> <li><input type="checkbox"/> Obtain quality professional certifications.</li> <li><input type="checkbox"/> Participate in continuing education activities.</li> <li><input type="checkbox"/> Purchase liability and malpractice insurance for yourself and your employees.</li> </ul>
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are the owner of We R Fit Gym, you can have each client sign a contract that provides not only information such as the gym’s terms of use and fees required from the client, but also assumption of risk elements.

#### Tips from the Field

**Tip 1** All important documents such as the athlete’s assumption of risk, PPE, and medical history questionnaire paperwork must be duplicated and stored in two separate locations. One copy of the documents should be electronic and password protected, on a computer hard drive. The other copy should be on paper, which is filed by the athlete’s name in a locked filing cabinet. A third location could be on a password-protected flash drive. The paper copies can be scanned into the computer and saved as electronic PDF files. Computer software programs also exist to record your athlete’s information. Access to these confidential documents should be limited to the personnel who would need them and have the legal right to view them.

Other documents utilized to avoid negligence claims include a preparticipation exam (PPE), a medical questionnaire, a medical participation notice, an emergency medical treatment consent form, and daily treatment and injury report documentation. A PPE along with a medical questionnaire help you to identify an athlete’s predisposing medical conditions, both physical and psychological, which could cause injury or illness during participation at your facility. The PPE should be performed by and the medical questionnaire verified by a licensed physician. This physician verification is particularly important if you are self-employed. The physician signs and dates the forms and states whether the athlete is allowed to fully participate in your organization’s activities. Whether the forms are scanned and downloaded into a computer or kept in a hard copy, these documents must be kept in a protected, confidential file. Confidentiality is important in regard to all athletes’ files. Your athletes’ personal health information is protected by the Health Insurance Portability and Accountability Act of 1996 (HIPAA), which prevents athlete health information sharing between various entities without his or her permission. This information includes all medical information. Unless the athlete signs a waiver giving you permission to disclose his or her personal health information to others, you are not allowed to share that athlete’s information with anyone. Likewise, you do not have access to your athlete’s health information from his or her physician or other healthcare providers. If the athlete needs or wants you to have his or her health information, he or she must sign a waiver at the physician or healthcare provider’s offices allowing you to obtain that health information.

#### Tips from the Field

**Tip 2** If the athlete has any questionable or previous injuries, illnesses, or conditions, as identified to you by the athlete’s medical history questionnaire, do not let the athlete participate in any activity at your facility. Require the athlete to have a PPE and obtain a physician’s (MD or DO) clearance for the athlete to participate in the activity prior to participation. The physician writes the clearance, or lack thereof, on prescription paper or letterhead. This paperwork is kept in the athlete’s files.

At least once per year, review the athlete’s participation forms with her or him. This regular review is important to determine whether the athlete’s medical status has changed. By having these forms completed by the athlete (and reviewed and co-signed by the athlete’s parents or guardians if the athlete is a minor), and the athlete’s medical clearance verified by

a licensed physician, you have taken additional steps to protect yourself against a negligence claim.

### Tips from the Field

**Tip 3** When you are working with a minor athlete (under the age of 18), regularly communicate with his or her parents or guardians regarding the child's progress, changes in his or her training program or activity, and any concerns regarding their child. When you communicate with the parents regarding their child, give them the opportunity to respond to your comments, questions, and concerns. Allow them to ask questions. By communicating with the parents regarding their child, you give them proper notification, warning, and knowledge of the activity and situation at hand.

Another defense against negligence is to always have emergency action plans (EAPs) at your facility. EAPs are written documents that prepare you, the staff, and your athletes for various emergencies. By having EAPs, you show your organization's preparedness for protecting your clients' safety and welfare at your facility if an emergency occurs. EAPs specify the course of action to be followed by the facility's staff in case of emergencies, such as when an athlete is injured or comes down with an illness, a fire breaks out, or an environmental emergency occurs. EAP components include the location of emergency phones and emergency numbers. Staff members have particular roles, such as who is responsible for calling 911, who remains with the injured athlete, and who meets the ambulance. The EAP addresses facility access, including how emergency personnel enter and exit. The EAP also depicts the emergency exit routes for each facility area. It delineates who has access to all rooms, fields, gates, and the like while the facility is in use. The emergency and first aid supplies location is also noted in the EAP, as is the location of all athlete emergency and health information, and who has access to the confidential information. An employee is assigned to keep the crowd, including other athletes and employees using the facility, under control. The personnel involved in instituting the EAPs must understand each EAP's purpose and their role in the EAP. Likewise, each EAP is practiced by the employees in a simulated manner on a regular, continual basis to be certain that the emergency plans run smoothly and appropriately.

### Tips from the Field

**Tip 4** If an injury does occur to your athlete at your facility, make sure you document the incident immediately. Write in detail the day, time, pertinent athlete information,

events that occurred, and care given. Write legibly and clearly in ink. Do not use white-out or other erasable devices or ink. Sign and date the injury report and keep it somewhere safe. If you are summoned to court by the injured athlete you can utilize this documentation to recall events and perhaps present it in court.

Other than utilizing various forms of documentation, you should perform certain actions to prevent yourself from being sued. If you are a coach, physical education teacher, exercise scientist, or someone who works with, instructs, and supervises athletes, you have a duty to do the following:

- Warn the athletes of the activity's inherent dangers
- Provide proper training and instruction
- Supervise the athletes appropriately
- Provide proper equipment for their use
- Hire qualified employees

Informing the athlete of the activity's inherent risks includes not only having him or her read and voluntarily sign waivers, but also thoroughly explaining the risks involved and answering any questions the athlete has in regard to the risks. If you are in charge of hiring qualified personnel, consider your state laws and the policies of your organization and its governing bodies. The New Jersey State Interscholastic Athletic Association (NJSIAA), for example, is a governing body for interscholastic athletics in New Jersey (<http://www.njsiaa.org>). The NJSIAA requires all interscholastic secondary school coaches to complete a fundamentals of coaching course designated by the NJSIAA. Also, coaches must complete Sports First Aid, CPR and AED certification, and Concussion Awareness courses in order to coach. Depending on your organization, facility, institution, or the like, you may want to consider hiring appropriate healthcare personnel, or you may be required to do so. Laws in each state vary, as do the policies within organizations' governing bodies, in regard to the availability of healthcare personnel on site. To protect your organization from negligence lawsuits, you can hire physicians, athletic trainers, physical therapists, psychologists, EMTs, or other healthcare personnel to assist in caring for your athletes. Always cover your bases to make sure your athletes are safe and well cared for. At the same time, you will protect yourself from litigation by hiring appropriate personnel.

Once the athlete understands the activity's inherent risks and voluntarily signs the waiver, you need to provide her or him with proper training and instruction. If an athlete is attempting a new activity, show her or him how to properly and safely perform the activity. If a client at We R Fit Gym is



going to utilize the leg press machine for the first time, demonstrate and clearly explain the purpose of the exercise, how to utilize the machine properly and safely, and what to do if she has difficulty or pain when completing the exercise. After you have instructed her to use the equipment properly, continually supervise the athlete to make sure she is utilizing the proper techniques and performing the activity safely, as you instructed her. When the athlete is working with equipment, or has equipment to wear, it is your responsibility to make sure the equipment is safe, in good working order, properly fitted for her, and frequently checked and reconditioned according to safety standards. Utilize all equipment as intended by the manufacturer. Any unapproved alterations and/or equipment modifications render the product unsafe to use by manufacturers' standards. If the athlete uses this altered product and is injured as a result, the manufacturer is released of liability. The individual who altered the equipment could be held liable for damages. If you are the employer or the person in charge of hiring staff, hire competent, certified, knowledgeable employees. Thoroughly interview each prospective employee, review the applicants' qualifications, and acquire character references and employment recommendations. If you perform all of these actions, you demonstrate your desire to ensure the health, safety, and welfare of your athletes. These actions are extremely important if an athlete claims that you are negligent.

Various actions that you take to protect yourself from a negligence claim can enhance your personal and professional development as an exercise scientist. Obtain professional certifications in your field. By obtaining high-level, national, professional certifications, you demonstrate that you are knowledgeable and skilled in your field. Some organizations claim to offer respected certification programs, but in reality the certifications are not highly regarded and are very simple for a candidate to obtain. Investigate and seek out the reputable organizations in your field of work and obtain the corresponding certifications. One well-respected organization is the National Strength and Conditioning Association (NSCA), which offers a Certified Strength and Conditioning Specialist (CSCS) certification that is nationally recognized and challenging to obtain. Candidates must have at minimum a bachelor's degree and pass a rigorous certification exam. The NSCA also offers an NSCA-Certified Personal Trainer (NSCA-CPT) certification. Because the NSCA is a highly respected organization in the personal training and fitness field, the certifications that a personal trainer or certified strength and conditioning specialist hold from the NSCA show that the professional has met the stringent education, knowledge, and testing requirements. (Please note that this organization is only one example of the highly regarded national organizations that provide

additional certifications and credentialing for professionals in your field of expertise.) If a personal trainer holds additional respectable certifications and credentials, an athlete can be reasonably assured that he or she is under the supervision of a highly knowledgeable professional.

Finally, by participating in continuing education activities, you further protect yourself from being found negligent. In professional fields, such as exercise science, information and practices are continually changing based on new research activities and conclusions. Professionals must be up to date with the latest information, technology, and best practices. Because you are working with, supervising, and teaching other people who depend on your expertise, it is imperative to continue your education for as long as you are employed and practicing in your field. If you are well-versed, knowledgeable, and utilize current, research-based best practices with your athletes, you have another defense against a negligence claim. Some professional organizations demand that credential holders complete continuing education and report these activities to the professional organization. For example, once you have earned credentials through the NSCA, you are required to participate in continuing education activities based on the NSCA's continuing education policies (see <http://www.nasca.com> for these policies). This organization's continuing education policies ensure that its credentialed professionals stay abreast of new, evolving information and best practices in the strength and conditioning realm. The continuing education requirements for other professions depend on the profession's and/or professional's affiliation with a national, regional, or state organization as well as individual state rules and regulations. Some of the continuing education activities required include attendance at seminars, workshops, laboratories, and webinars. Continuing education participation can assist you if you are brought to court for a negligence claim. You can demonstrate to the court that you are up-to-date with the most current information and best practices in your field. You can also explain how you used the knowledge and best practices with your athlete. With this continuing education and its application, you have another defense in court against a negligence claim.

Even if you take all of the aforementioned actions to prevent and defend yourself against the potential for negligence litigation, unfortunately you may still be named as a defendant in a negligence claim. What will happen if you are brought to court for a negligence claim? Fortunately, professional liability and malpractice insurance exists that can assist you as a defendant in a negligence lawsuit. If you are employed by an organization, often your employer provides this insurance at no cost to you. Determine whether your employer provides this

insurance, obtain a copy of the insurance policy, and investigate the coverage terms. While working under the direction of the employer, this liability and malpractice insurance should minimally provide you legal defense and fees. The insurance policies only provide you with certain monetary limits per lawsuit per year. However, your employer's insurance may not provide you adequate coverage while on the job, and in most instances does not provide you any coverage when working outside your duties for your employer.

Consider this scenario: You are working for We R Fit Gym. The gym provides liability and malpractice insurance for all employees. Each personal trainer has \$1 million of insurance coverage per claim (i.e., lawsuit) per year, with a maximum of \$3 million total per year. You decide to begin your own personal training business in your home, separate from We R Fit Gym. One of your clients sustains an injury at your home while performing training techniques that you instructed. She files a negligence claim against you. You do not have any professional liability and malpractice insurance other than the insurance provided by We R Fit Gym. Because you were training your client under your personal business and not as an employee of We R Fit Gym, your We R Fit Gym liability and malpractice insurance is not applicable to cover you for this claim. You have to pay all legal defense fees, among other expenses, which most likely will prove to be extremely costly. As a professional, purchase liability and malpractice insurance for as long as you work with athletes. Even if your employer provides this insurance for you, it is always prudent to purchase your own personal liability and malpractice insurance as a supplement to your employer's insurance. By having this professional liability and malpractice insurance, you can rest easy knowing that if you find yourself as a defendant in a negligence claim you have adequate protection and representation.

## SUMMARY

As an exercise scientist, you must be aware of and knowledgeable about legal issues that can affect you. You work with athletes and are responsible for their lives, so you have a standard to uphold not only in your athletes' eyes, but also in the eyes of the courts. If you actively recognize these legal issues, and take action to be a prudent, responsible professional when working with your athletes, you will be on the right track to avoid the courtroom.

## DISCUSSION QUESTIONS

1. In regard to the four components of negligence, which component(s) do you feel would be the most difficult for a plaintiff to prove in a negligence claim? Why do you feel this way?
2. Describe an example of a foreseeable event in the exercise science field that could cause harm or damages to another person.
3. Would vicarious liability exist at your place of employment with a negligence claim? Why or why not?
4. If you came across an injured person who desperately needed first aid, what could you do to protect yourself from being named in a negligence lawsuit?
5. What specific actions can you take during your daily activities and employment to protect yourself from being a defendant in a negligence claim?

## CASE STUDY

### One Seemingly Harmless Decision Creates Huge Legal Ramifications

Mike is a new performance enhancement trainer at the Garden State Performance Training Center. He is meeting today with Meredith, who is a new client. Meredith is a 6-foot-tall, 130-pound, 18-year-old collegiate volleyball player who is very athletic and fit. She wants to continue increasing her speed and power, especially when she jumps to spike a ball. Mike plans to help her attain her goals. Today she meets Mike at the center to complete the necessary paperwork, including a medical history, insurance, and assumption of risk forms. Mike aspires to begin her first training session after the paperwork has been completed. As per the Garden State Performance Training Center policies, if a new client does not have medical conditions that would prevent her from participating on the same day that she completes the medical questionnaire, then she can begin her first training session immediately. Meredith indicates on her medical questionnaire that she has "heart problems." When Mike questions what the "heart problems" entail, Meredith says, "I think my doctor said I have something minor like a heart murmur, but I am not sure." Mike knows that athletes with heart murmurs have participated in his strenuous training activities before without any problems. He tells Meredith that he needs a clearance note from her doctor before she participates. Meredith says she just saw her doctor last week when she returned from college, and her doctor said she can participate in all athletic activities. Meredith is anxious to begin her training session today, and knowing that she may not be able to do so is getting her visibly upset. After briefly thinking about the situation, Mike decides to allow Meredith to participate in

one session before obtaining the medical clearance. After all, Meredith said her doctor allowed her to participate in all athletic activities last week when she saw him.

Mike begins the hour training session with Meredith. She is performing high intensity vertical jumping and sprinting activities. She seems to be doing very well with the activities, but is breathing very fast and shallow. With approximately 10 minutes remaining in the session, Meredith begins to complain of chest pain and dizziness. Mike immediately stops her session, and asks her what is wrong. Meredith says that she “feels lightheaded and out of breath.” She continues to say that her “heart is pounding hard and hurts.” Mike notices Meredith’s face is pale and she is unsteady when standing. Mike helps her sit comfortably in a chair, and leaves her briefly to go to the sign-in desk to call 911. When Mike returns to Meredith she is unconscious and not breathing. Mike begins CPR without any protective barriers. Within a few minutes, the EMTs arrive and take over. They apply an automated external defibrillator (AED) and are able to restart her heart, but Meredith is still unconscious. Mike’s supervisor, Pamela, arrives at the scene and asks Mike what happened. The EMTs take Meredith to the hospital via ambulance. Now that the scene is cleared, Pamela orders Mike to come to her office to discuss what happened.

1. How should Mike have handled this situation differently from the beginning, so as to avoid any potential litigation?

2. What legal issues does Mike have to consider in this scenario?
3. Will Mike be liable for any damages resulting from this event?
4. Will the Garden State Performance Training Center be liable for any damages?

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