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THE DUTY OF CARE COLLEGE FOOTBALL COACHES OWE TO STUDENT STAFF MEMBERS: ANALYZING THE TRAGIC DEATH OF A STUDENT VIDEOGRAPHER AT NOTRE DAME

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I. TRAGEDY AT PRACTICE

In October of 2010, an unspeakable tragedy occurred on the campus of the University of Notre Dame (Notre Dame).¹ Declan Sullivan, a student videographer, was filming practice on a scissor lift in the midst of high winds (upwards of fifty-one miles per hour) and generally inclement weather caused by the Great Lakes Cyclone.² The weather was so turbulent that Declan tweeted his final words of fear from atop the platform of the scissor lift.³ No adults at the practice told the student videographers to lower the lifts, so Declan stayed up on the lift and did not come down.⁴ The entire scissor lift fell over, and Declan hit his head upon the street pavement outside of the practice facility.⁵ Ambulances rushed to the scene, and Declan died from the immense head trauma on his way to the hospital.⁶ Declan was twenty years

* J.D., Marquette University Law School, May 2013; B.B.A., University of Notre Dame, 2010. I cannot express enough gratitude to my nana, mother, father, and little brother Mark for all of their love and support in my life. I would also like to acknowledge Professor Matthew Mitten and Lauren Carr for their assistance in reviewing this piece. This Article is dedicated to my Notre Dame family, especially Declan Sullivan.

1. See Daily Mail Reporter, *'I Guess I've Lived Long Enough': Final Tweet of Student Filming University Football Practice Before Camera Tower Collapsed*, MAIL ONLINE, <http://www.dailymail.co.uk/news/article-1324518/Declan-Sullivan-Final-tweet-student-died-falling-camera-tower.html> (last updated Nov. 5, 2010) [hereinafter *Final Tweet*].

2. *Id.*

3. *Id.* Declan Sullivan actually began tweeting his apprehension before practice even began because he knew of the weather system. See *id.* Sullivan tweeted the following at 3:22pm: "Gust of wind up to 60mph well today will be fun at work . . . I guess I've lived long enough." *Id.* Sullivan followed with another tweet at 4:06pm: "Holy f*** holy f*** this is terrifying." *Id.* The scissor lift Sullivan was filming from was knocked down at 4:50pm. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

old and had a younger sister in college with him.⁷

An incident like this one brings much heartache to a campus community. The incident also highlights some problems with large football programs in the Division I Football Subdivision (FBS) of the National Collegiate Athletic Association (NCAA): whether the culture is too oppressive to invite safety concerns from students; whether scissor lifts should even be used anymore in filming football practices (with the availability of better technology); and whether a private university like Notre Dame is ultimately responsible for accidents like this one when students were not properly trained to handle such machinery in the context of inclement conditions. However, the most interesting question—and subject of this Article—surrounds whether an incident like this was something Notre Dame Football head coach Brian Kelly was responsible for. The head coach in FBS college football exercises great control over his program, managing so many details that the stress eventually leads to health problems.⁸ By taking on so much responsibility, does the head football coach also assume responsibility for the safety of student-staff members on the periphery of the program?⁹ This Article contemplates what legal duty of care an FBS head football coach owes to these student workers.

Eventually, the legal issues presented by Declan Sullivan's death were quashed by a rumored settlement with the Sullivan family¹⁰ and a \$42,000 fine imposed on Notre Dame from the Indiana Occupational Safety and Health Administration.¹¹ An internal investigation was launched by the University to

7. *Declan Sullivan, Alum, Died in Tragic Accident at Notre Dame*, CARMEL CATHOLIC HIGH SCH. (Oct. 28, 2010), <https://securelb.imodules.com/s/402/index.aspx?sid=402&gid=1&pgid=504>.

8. *See, e.g.*, Jack Carey, *Dantonio's Recent Heart Attack Puts Focus on Coaches' Health*, USATODAY.COM, http://usatoday30.usatoday.com/sports/college/football/bigten/2010-09-19-michigan-state-dantonio_N.htm (last updated Sept. 21, 2010) (discussing Coach Dantonio and other health problems facing coaches); Matt Hayes, *With Meyer, Ohio State Investing in a Coach Who's No Longer Iron-Clad*, SPORTING NEWS (Nov. 28, 2011), <http://aol.sportingnews.com/ncaa-football/story/2011-11-28/urban-meyer-ohio-state-investing-in-a-coach-whos-no-longer-iron-clad>.

9. Former Ohio State head coach Jim Tressel seemed to think so. *See* John Taylor, *Tressel Was Worried About High Winds Tuesday*, COLL.FOOTBALL TALK (Oct. 27, 2010), <http://collegefootballtalk.nbcsports.com/2010/10/27/tressel-was-worried-about-high-winds-tuesday/>. Just before the incident at Notre Dame, the same high winds were affecting Ohio State practices. *Id.* At a weekly press conference, a reporter asked whether Tressel would practice outside to acclimate his players to the high winds that would likely be present during the game on Saturday. *See id.* Tressel focused on his student videographers in answering the question apprehensively—saying he had to worry about them being up in lifts during such turbulent weather. *Id.*

10. The family says there was no financial settlement with Notre Dame. *See* Stacy St. Clair, *Father of Notre Dame Student Who Died Says Family Never Considered Suing*, CHI. TRIB. (Oct. 27, 2011), http://articles.chicagotribune.com/2011-10-27/sports/ct-met-declan-sullivan-notre-dame-anniversary-20111027_1_declan-sullivan-barry-sullivan-football-practice.

11. Press Release, Ind. Dep't of Labor, *Notre Dame Agrees to a Unique Settlement with the Department of Labor over Death of Student Employee Declan Sullivan*, (July 1, 2011), *available at*

rectify the mistakes that led to Declan's death.¹² Ultimately, nobody at Notre Dame was fired or even reprimanded for the actions that led to the student's death.¹³ Many were outraged that nobody was held accountable for the young man's death and that the university simply swept the whole incident under the rug.¹⁴

Aside from the \$42,500 fine that had to come out of the billion dollar university endowment,¹⁵ there were never any real punishments imposed on the University or Brian Kelly for negligence. Significant legal questions remain as a similar set of circumstances could easily happen again at other university football programs across the country. This Article explores the potential result if the case was tried on behalf of the Sullivan family. Part II will discuss health and safety issues in interscholastic and college sports to provide a legal background for the present case. Part III will briefly lay out a tort claim in Indiana, where Notre Dame is located and where Declan suffered his accident. Part IV will assess the merits of the Sullivan case and discuss the likely result. Part V will discuss policy issues with the culture of college football and what measures a university like Notre Dame should take to ensure the safety of student staff members in the context of a football atmosphere.

II. HEALTH AND SAFETY ISSUES IN SPORTS AND EDUCATION GENERALLY

To better understand how to evaluate Declan's estate's potential claim against Brian Kelly and Notre Dame, an analysis of similar situations is necessary. Subsection A discusses the duty high schools and their employee-coaches owe student-athletes in the context of injuries. Subsection B expands the discussion to the higher education context and considers situations where regular students are tort victims. Understanding the case law will help a judge better approximate the duty Brian Kelly and Notre Dame owed to Declan.

<http://www.in.gov/dol/files/settlement-agreement-final.pdf>. The Indiana Occupational Safety and Health Administration initially imposed a \$77,000 fine upon Notre Dame, but the parties later reached a settlement agreement that reduced the fine to \$42,000. *Id.*

12. Associated Press, *ND Issues Report on Student's Death*, ESPN, <http://sports.espn.go.com/ncf/news/story?id=6382097> (last updated Apr. 19, 2011).

13. *Notre Dame Sees No Fault in Lift Death*, PAINTSQUARE NEWS (Apr. 26, 2011), <http://www.paintsquare.com/news/?fuseaction=view&id=5494>.

14. For an editorial opinion on the tragedy and why moral accountability should reside with Brian Kelly, see Jason Whitlock, *Notre Dame's Kelly Must Go*, FOX SPORTS, <http://msn.foxsports.com/collegefootball/story/notre-dame-must-fire-brian-kelly-over-student-death-102910> (last updated Oct. 30, 2010).

15. See generally Justin Menza, *Notre Dame 'Earns Stripes' in Current Market: Endowment Chief*, CNBC (Oct. 15, 2012), http://www.cnbc.com/id/49419001/Notre_Dame_039Earns_Stripes039_in_Current_Market_Endowment_Chief.

A. High Schools

Professor Matt Mitten is the director of the National Sports Law Institute and a leading authority on sports law.¹⁶ He provides a great introduction to the history surrounding the topic by speaking to interscholastic sports as a background:

A high school is not an insurer of a student-athlete's safety and is not strictly liable for his or her injuries. To recover for an injury, a high school athlete is required to prove tortious conduct on the part of a school district or its employees. . . . [A] school may be liable for the negligent conduct of employees such as coaches, trainers, and administrative personnel under vicarious liability principles. . . . [However], increasingly courts have limited the range of risks for which high schools will incur tort liability to their student-athletes.¹⁷

While Professor Mitten's treatment of high school health and safety issues may not be directly transferable to cases where a private college is involved, it does provide an initial starting point for a relevant legal analysis. Courts have imposed liability on high school institutions or school districts for the negligent conduct of their employee-coaches.¹⁸ In *Hanson v. Reedley Joint Union High School District*, members of the tennis team took other team members home from the tennis class because the activities bus had already departed.¹⁹ The team members needing transportation were paired with other team members, who had transportation, for rides home.²⁰ One car collided with another attempting to pass, resulting in death to one of the students needing a ride.²¹ The coach was found to have not exercised reasonable care over the students by not providing them with transportation.²² This liability was imputed to the coach's employer, the school district.²³

Accordingly, common law standards in many jurisdictions have found that high school students participating in sports are owed a duty of care from coaches (and therefore, the high school or school district). The willingness of

16. See generally MATTHEW J. MITTEN ET AL., *SPORTS LAW AND REGULATION* (2d ed. 2009).

17. *Id.* at 936–37.

18. See *Hanson v. Reedley Joint Union High Sch. Dist.*, 111 P.2d 415, 419 (Cal. Dist. Ct. App. 1941).

19. *Id.* at 416–17.

20. *Id.*

21. *Id.* at 417.

22. *Id.* at 419.

23. *Id.*

courts to impose an affirmative duty upon the coaches is important for an analysis on the collegiate level. This gives courts an idea of how to treat the duty of college coaches, because that duty also occurs in a similar educational context.

B. Colleges

First, it is important to remember the present set of facts do not involve the safety of an athlete. Rather, the facts involve the safety of a student who acted as a support person to an athletic team. Most of the focus in sports law tort issues at the college level centers around injuries to student-athletes.²⁴ However, these cases help provide clues as to how a court would rule on the facts of the Declan Sullivan case because student workers and student-athletes are similarly supervised.

The case law for health and safety issues in college sports varies widely across jurisdictions. In *Orr v. Brigham Young University*, a federal district court in Utah ruled that the university was not responsible for injuries suffered by a football player who was not coerced by staff to keep playing in games despite his back injuries.²⁵ The court in *Orr* characterized the relationship between the student-athlete and the school as more contractual than custodial.²⁶ The Supreme Judicial Court of Maine, in *Isaacson v. Husson College*, ruled that a college has a legal duty to exercise reasonable care towards its students,²⁷ and later, in another case, ruled that duty extends to coaches exercising reasonable care towards student-athletes.²⁸ In *Davidson v. University of North Carolina at Chapel Hill*, the Court of Appeals of North Carolina found that a “special relationship” existed between a member of a school-sponsored intercollegiate team and the university.²⁹ The court emphasized that there was not a special relationship between the college and a student, but because of the college’s degree of control over the athletic program—and the benefits the college derived from the intercollegiate team—the college had established an affirmative duty of care and a special

24. See generally Timothy Davis, *Examining Educational Malpractice Jurisprudence: Should a Cause of Action be Created for Student-Athletes?*, 69 DENV. U. L. REV. 57 (1992).

25. *Orr v. Brigham Young Univ.*, 960 F. Supp. 1522, 1528–29 (D. Utah 1994).

26. *Id.* at 1528.

27. *Isaacson v. Husson Coll.*, 297 A.2d 98, 103 (Me. 1972).

28. *Searles v. Trs. of St. Joseph’s Coll.*, 695 A.2d 1206, 1209 (Me. 1997).

29. *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001); see, e.g., *Kleinknecht v. Gettysburg Coll.*, 989 F.2d 1360, 1367 (3d Cir. 1993); *Stineman v. Fontbonne Coll.*, 664 F.2d 1082, 1086 (8th Cir. 1981).

relationship with the plaintiff.³⁰

Comparing these three cases with each other shows that the characterization of the student-athlete's relationship to the coach and therefore, the school, as more or less custodial depends on which jurisdiction you find yourself in. A court in Utah might not be as sympathetic to the tort victim student-athlete because of the characterization of the relationship as more contractual. A jurisdiction like Maine or North Carolina supports a more custodial characterization between the student-athlete and the coach along with the university that would be more favorable to a tort victim like Declan.

Of most direct relevance, because the case was decided under Indiana law, is *Geiersbach v. Frieje*, where the Court of Appeals of Indiana found that when conducting sporting events and practices, the university had a duty "to avoid reckless or malicious behavior or intentional injury."³¹ This case, while decided in favor of the defendant-university, provides a legal hook to bring suit against the university when the participant is injured due to reckless or malicious behavior. In Declan's estate's case, clearly ignoring the weather conditions of the day and still making student videographers film practice could qualify as reckless under this standard. However, the court in *Geiersbach* specifically applies this standard to athletes who agree to participate in a given sport and accept that sport's inherent dangers.³² The negative outcome of the case for the plaintiff centers on the athlete choosing to accept the risks of competition.³³ *Geiersbach* makes clear that "[t]he reasonable care standard was developed to guide people in their day to day lives. . . . Athletes, on the other hand, choose to participate in sports. Sports, by their nature, involve a certain amount of inherent danger."³⁴ Therefore, the critical inquiry in deciding what standard of care applies in Declan's case could be whether falling off a tower due to high winds was a risk he accepted and was an inherent danger.

30. *Davidson*, 543 S.E.2d at 927-28.

31. *Geiersbach v. Frieje*, 807 N.E.2d 114, 118 (Ind. Ct. App. 2004). Part of the holding in *Geiersbach* has been disapproved by the Supreme Court of Indiana in *Pfenning v. Lineman*, 947 N.E.2d 392 (Ind. 2011). However, the factual circumstances in *Pfenning* are different from those in *Geiersbach*. Compare *Pfenning*, 947 N.E.2d at 397-398, with *Geiersbach*, 807 N.E.2d at 116. In *Pfenning*, the court focused on the duty of a participant in a sport to observers. *Pfenning*, 947 N.E.2d at 404. Alternatively, in *Geiersbach*, the court focused on the duty owed between participants. *Geiersbach*, 807 N.E. 2d at 120. This factual difference allows for the reasonable conclusion that a school still owes a duty to student-athletes to not act in a reckless manner. Further, in *Geiersbach*, the language of the holding is similar to that of *Pfenning* because both state that something more than negligence must occur for a participant to be liable for another's injuries.

32. *Id.*

33. *Id.*

34. *Id.*

The holding in *Geiersbach* is crucial because the Court of Appeals of Indiana had the chance to rule on the extent of the relationship between the student-athlete and the institution. While the Court of Appeals of Indiana ruled to insulate colleges from tort liability within the context of athletic co-participants,³⁵ it did not rule whether student-athletes do in fact enjoy a special relationship with the university.³⁶ The important takeaway from this is that the law in Indiana is still undecided as to exactly what duty of care a university owes its students-athletes who suffer injuries that are not the result of inherent dangers in the game.

Taking a step back from student-athletes and getting closer to Declan's status as a normal student, the Supreme Court of Indiana in *Clark v. Wiegand* found that a student enrolled in a judo class could recover damages for injuries suffered as a result of the participation.³⁷ The student's knee was injured as a result of the class, and the trial court returned a \$50,000 award for the student, finding the instructor of the class, and therefore, the university negligent.³⁸ The *Clark* decision iterated that to establish a defense of assumption of the risk, it must be specifically tailored to the harmful conduct having happened before—a high evidentiary standard to meet, demonstrating that the Supreme Court of Indiana will allow a jury to return damages to the student in certain circumstances.³⁹

Clark illustrates how the assumption of the risk defense is so narrowly tailored that it would be fairly difficult for Brian Kelly and Notre Dame to assert it. The case also shows that facts matter because a jury is more likely to sympathize with a young student who looks to have been the victim of negligence rather than a high-profile university with a multi-billion dollar endowment. If a jury does indeed sympathize with Declan's plight, *Clark* shows that Indiana case law would likely allow such a verdict to stand.⁴⁰

Returning for a moment to *Davidson*, one should note the importance of the legal characterization of the special relationship status.⁴¹ The court concluded the status extended to a student who was not necessarily an athlete and based the extension on the degree of control the university had over the student.⁴² In the context of college coaches' high degree of control over their

35. *Id.* at 120.

36. *Id.* at 117–18.

37. *Clark v. Wiegand*, 617 N.E.2d 916, 917, 920 (Ind. 1993).

38. *Id.* at 917.

39. *See id.* at 918–20.

40. *See id.*

41. *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 926–27 (N.C. Ct. App. 2001).

42. *Id.* at 927.

staffs, applying the logic in *Davidson* could be very beneficial for Declan's relationship status with Notre Dame.

Finally, there is a Supreme Court of Minnesota case that relates closely to the facts of the present situation. In *Miller v. Macalester College*, the defendant institution was held liable for injuries suffered by a student who was on a scaffold that fell over while removing lighting fixtures for a drama class production as directed by an instructor.⁴³ The student was directed by the instructor of the drama production to climb onto a scaffold raised to thirty-five feet in height.⁴⁴ The student and scaffold fell when the scaffold was being moved and hit a dirt trench in the ground.⁴⁵ The court in *Miller* upheld the lower court's instructions to the jury, which stated that the instructor owed the student a duty of exercising reasonable care in assembly, inspection, and operation of the scaffold.⁴⁶ The *Miller* court agreed with the lower court's reasoning that it was the duty of the instructor to be informed on such matters of safety and assume a duty of reasonable care for the student when directing a student to engage in such a dangerous activity.⁴⁷ Further, the *Miller* court held that the student could not legally be responsible for assuming the risks of such a dangerous condition or being contributorily negligent unless the danger was so obvious that a reasonable person would have not followed such instructions.⁴⁸ Essentially, *Miller* dictates a standard that holds college educators responsible for a college student's safety when the educator has generally directed the student to engage in work that has inherent health and safety risks.⁴⁹

All of the cases, taken together, establish a string of legal conclusions. First, the body of law surrounding tort liability of a university, and its employees, to students is still developing in the sports context. Second, depending on which jurisdiction—and context—the tort occurs in, a plaintiff student may be able to have a greater chance of prevailing in a tort action because of a special relationship enjoyed with the university. Third, Indiana has not ruled on the characterization of the relationship between student-athletes and a university. Fourth, courts have characterized the relationship between a student and an institution as special when the institution exerts a higher degree of control over the student's activities. Finally, the Supreme

43. *Miller v. Macalester Coll.*, 115 N.W.2d 666, 669, 673 (Minn. 1962).

44. *Id.* at 669.

45. *Id.*

46. *Id.* at 673.

47. *Id.* at 671–73.

48. *Id.* at 674.

49. *See id.*

Court of Minnesota upheld a trial verdict for a plaintiff on nearly identical facts to Declan's fall. With these cases in mind, the next section sets the brief framework for asserting a tort claim of negligence and recklessness in the state of Indiana.

III. ASSERTING VARIOUS TORT CLAIMS IN INDIANA

A plaintiff asserting a tort claim for negligence in Indiana would have to prove: (1) the defendant owed the plaintiff a reasonable duty of care; (2) the defendant breached such a duty; (3) the breach of the duty was the proximate cause of damages to the plaintiff; and (4) there were actual damages suffered by the plaintiff.⁵⁰ Whether there is a duty owed to the plaintiff is determined by a judge.⁵¹ This is a threshold question. As mentioned above, Indiana common law does not express what type of legal relationship—and subsequent duty—exists between student-athletes and universities to comprise a special relationship raising the standard of care owed by the defendant university. However, Indiana courts have ruled that universities owe a reasonable duty of care to students engaged in extracurricular activities.⁵²

A plaintiff seeking to establish a recklessness claim in Indiana would need to show the harm was caused by behavior that went beyond mere negligence. Instead, the plaintiff must show the defendant clearly disregarded the present risks, and such disregard for the risks demonstrates the defendant probably knew the conscious decision to ignore them would lead to significant injury.⁵³ The key showing from the plaintiff must be that the facts suggest behavior of a more malicious nature where risks are plainly ignored.

IV. DECLAN SULLIVAN'S NEGLIGENCE AND RECKLESSNESS CLAIMS IN INDIANA

The next sections detail the claims of negligence and recklessness against Notre Dame and Brian Kelly and how the claims would withstand the likely defenses. After analyzing the case, this Article contemplates the likely result of such a case.

50. *Peters v. Forster*, 804 N.E.2d 736, 738 (Ind. 2004) (citing *Benton v. City of Oakland City*, 721 N.E.2d 224, 232 (Ind. 1999); *Wilson v. Haimbaugh*, 482 N.E.2d 486, 487 (Ind. Ct. App. 1985)).

51. *See Wilson*, 482 N.E.2d at 487 (citing *Lambert v. Parrish*, 467 N.E.2d 791, 796 (Ind. Ct. App. 1984)).

52. *See Clark v. Wiegand*, 617 N.E.2d 916, 917, 920 (Ind. 1993).

53. *See Geiersbach v. Frieje*, 807 N.E.2d 114, 118–20 (Ind. Ct. App. 2004).

A. Negligence Claim and What Duty Applies

At the very least, Indiana law, and tort law in general, dictates that Declan was owed a duty of reasonable care as an employee or student of the university-sponsored football team.⁵⁴ Applying this lower standard of care still could lead to a favorable result for Declan's estate. First, there were massive wind gusts that many eyewitnesses and practice attendees reported at the time of practice.⁵⁵ In fact, the National Weather Service had issued a wind advisory at the time of the practice due to such high winds of over fifty miles per hour.⁵⁶ Setting aside the questionable characterization of the "extraordinary" wind burst leading to the toppling of the tower by Athletic Director Jack Swarbrick,⁵⁷ there seems to be a general consensus from many eyewitnesses (and meteorologists) that it was an extremely windy day on campus.⁵⁸ Declan was directed by his superiors to do his job from the top of a scissor lift not rated for use in winds over fifty miles per hour.⁵⁹ A typical scissor lift is only rated to be extended in winds of up to thirty-five miles per hour.⁶⁰

Evidence of wind policies from other collegiate football programs at the time could demonstrate how unreasonable the decision was to let and direct Declan to film practice. Brian Hamilton of the *Chicago Tribune* surveyed college football programs across the country to see what was common operating procedure for lowering scissor lifts in windy conditions.⁶¹ Hamilton found a number of colleges had specific guidelines calling for a specific measure of wind to trigger the lowering of the lifts.⁶² Twenty-five miles per hour winds ground lifts at Illinois, Indiana, Nebraska, and Kentucky.⁶³ Twenty-eight miles per hour winds ground the lifts at Penn State.⁶⁴ Texas Tech will not use the lifts when winds gust to forty miles per hour but begin

54. *Id.* at 117-18.

55. Associated Press, *Notre Dame AD: Strong Gust of Wind Knocked over Student's Tower*, FOX NEWS (Oct. 28, 2010), <http://www.foxnews.com/sports/2010/10/28/indiana-agency-investigating-death-notre-dame-student-filming-football-practice/>.

56. *Id.*

57. *Id.*

58. *See Final Tweet*, *supra* note 1.

59. *Notre Dame Sees No Fault in Lift Death*, *supra* note 13.

60. UNIV. OF NOTRE DAME, INVESTIGATION REPORT: OCTOBER 27, 2010 AERIAL LIFT ACCIDENT 3 (2011), available at <http://www.nd.edu/assets/files/notre-dame-investigation-report.pdf>.

61. *See* Brian Hamilton, *Policies on Lifts Vary by School; Many Won't Used Them if Winds Exceed Set Level*, CHI. TRIB., Oct. 31, 2010, at C4.

62. *Id.*

63. *Id.*

64. *Id.*

taking height precautions with the lifts when winds reach twenty-five miles per hour.⁶⁵ North Carolina State uses an operating procedure based on the wind rating of the lift.⁶⁶ Hamilton also reported Michigan significantly lowered scissor lifts during an outdoor practice coinciding with similar conditions present on the same day of Declan's death.⁶⁷

Like the student in the *Miller* case,⁶⁸ Declan was a student worker sent into hostile conditions on top of a high platform. Brian Kelly, by holding practice outdoors and having videographers present in scissor lifts, negligently breached his duty of reasonable care to a student and imputed liability on Notre Dame as well. A jury could surely find these facts convincing enough to reach a verdict for Declan's estate.

However, this duty is the low watermark of what degree of care Brian Kelly and Notre Dame actually owed Declan. Applying all of the case law aforementioned, it is reasonable to deduce that Brian Kelly and Notre Dame owed Declan a higher standard of care because of the degree of control asserted over his job.⁶⁹ A special relationship could have been created.⁷⁰ Indiana courts have not ruled on this characterization of relationships applying in a collegiate athletics context but persuasive authority exists in *Davidson*.⁷¹ Declan clearly was under heavy direction in how he performed his job and it was in the context of a testosterone-rich sports culture. Notre Dame Football is not an extracurricular activity that allows for free-flowing ideas and expression.⁷² The program is regimented and extremely organized, like most FBS programs.⁷³ Football teams are run with iron fists where there is extreme control from the top down.⁷⁴ Jim Tressel demonstrated this when he said he had to consider his videographers when making the decision whether to practice outdoors.⁷⁵ As a student worker without a voice in how he did his job or expressing concern for his safety, Brian Kelly and Notre Dame "assumed" a heightened duty of care and created a special custodial relationship with

65. *Id.*

66. *Id.*

67. *Id.*

68. See generally *Miller v. Macalester Coll.*, 115 N.W.2d 666 (Minn. 1962).

69. See *Davidson v. Univ. of N.C. at Chapel Hill*, 543 S.E.2d 920, 927 (N.C. Ct. App. 2001).

70. *Id.*

71. *Id.*

72. See Paul M. Banks, *What Will Declan Sullivan Tragedy Cost Notre Dame Football?*, CHI. SPORTS GURU (Nov. 8, 2010), <http://www.chicagonow.com/chicago-sports-guru/2010/11/what-will-declan-sullivan-tragedy-cost-notre-dame-football/>.

73. See *id.*

74. *Id.*

75. Taylor, *supra* note 9.

Declan.⁷⁶ A heightened duty of care would clearly be violated by the actions of Brian Kelly and Notre Dame because a student worker was directed to work on a scissor lift not rated to withstand the conditions of that gusty day.

B. Recklessness Claim

Alternatively, Declan's estate could assert a claim of recklessness against Brian Kelly and Notre Dame. As mentioned above, recklessness requires a breach of duty that rises above negligence.⁷⁷ Recklessness requires a conscious disregard of the risks that caused the tort victim to suffer damages.⁷⁸ Declan's estate could realistically apply the claim to the present set of facts. Very gusty conditions outside seem to invoke simple common sense that you should probably not be using flimsy scissor lifts or putting students on them. Brian Kelly decided to have practice outside amidst such chaotic weather.⁷⁹ Brian Kelly controlled the practice and its setting.⁸⁰ Coaches like Jim Tressel have shown that the safety of student videographers during the practice (among the many people at practice they are responsible for) is one consideration that must be taken into account when choosing a practice venue.⁸¹ This is not to say Brian Kelly should be responsible for every dangerous condition by having practice outdoors. If a freak accident occurs where a fifty miles per hour wind came out of nowhere (in the context of a normal day) to knock over the tower Declan was standing on, then perhaps Notre Dame would have a stronger argument. In fact, Athletic Director Jack Swarbrick tried to assert this is exactly what happened.⁸² But with the National Weather Service reporting high winds during the time of the practice and Declan tweeting⁸³ his apprehension shortly before his fateful fall, the characterization of the evidence by Swarbrick and Kelly seems misplaced. The fact is that there was an extremely dangerous condition present and Declan's supervisor, Kelly, decided to put him on top of a scissor lift in the

76. See *Yost v. Wabash Coll.*, 976 N.E.2d 724, 738–39 (Ind. Ct. App. 2012) (“Waiver notwithstanding, a duty of care may arise where one party gratuitously or voluntarily assumes such a duty. An assumption of duty creates a special relationship between the parties and a corresponding duty to act as a reasonably prudent person.” (citing *Delta Tau Delta*, 712 N.E.2d 968, 975 (Ind. 1999))).

77. See *Slusher v. Indiana*, 437 N.E.2d 97, 100–01 (Ind. Ct. App. 1982).

78. *Id.*

79. Associated Press, *Irish Remember Declan Sullivan at Game*, ESPN, <http://sports.espn.go.com/nfl/news/story?id=5744730> (last updated Oct. 31, 2010).

80. *Id.*

81. Taylor, *supra* note 9.

82. *Notre Dame AD: Strong Gust of Wind Knocked over the Student's Tower*, *supra* note 55.

83. *Final Tweet*, *supra* note 1.

context of the dangerous condition. Kelly consciously knew of the high winds and the videographers up on scissor lifts, and he disregarded the threat of potential injury. Accordingly, Notre Dame and Brian Kelly could be found liable to Declan's estate for recklessness.

C. Defenses Brian Kelly and Notre Dame Could Assert

There are a number of defenses Notre Dame and its employee, Brian Kelly, could assert to rebut potential tort claims by Declan's estate.⁸⁴ First, the defense could be made that Declan was contributorily negligent in filming from the dangerous lift by not protesting his directions and willingly accepting the dangerous conditions. Indiana case law shows that a plaintiff's damage claim can be reduced by proving contributory negligence⁸⁵ to his or her own injury compared to the defendant—i.e., comparative negligence.⁸⁶ The comparative negligence of the plaintiff is left as an inquiry for the trier of fact to decide.⁸⁷

Declan could have possibly been contributorily negligent for a number of reasons. First, the university and Brian Kelly could argue that Declan simply getting on the lift was enough to show some comparative negligence. After all, it would seem unreasonable to comply with such orders in the middle of such a dangerous wind storm. Second, there seems to be evidence directly proving Declan was aware of this dangerous risk, such as his posting fearful statements on Twitter, so he could have still walked away both when he viewed weather reports for the day and when he was on top of the lift.⁸⁸

However, this defense is rebuttable under the similar facts of the persuasive *Miller* case.⁸⁹ The analogous facts led the *Miller* court to decide the student could not be held to be contributorily negligent or assuming the risks of the activity unless the danger was so obvious that a reasonable person would not follow the direction.⁹⁰ Declan's estate could argue the danger was

84. See Thomas R. Hurst & James N. Knight, *Coaches' Liability for Athletes' Injuries and Deaths*, 13 SETON HALL J. SPORT L. 27, 37, 47–49 (2003); Phillip M. Hirshberg, Note, *The College's Emerging Duty to Supervise Students: In Loco Parentis in the 1990s*, 46 WASH. U. J. URB. & CONTEMP. L. 189, 199–204 (1994).

85. Contributory-negligence doctrine is defined as “[t]he principle that completely bars a plaintiff's recovery if the damage suffered is partly the plaintiff's own fault. Most states have abolished this doctrine and have adopted instead a comparative-negligence analysis.” BLACK'S LAW DICTIONARY 378 (9th ed. 2009).

86. See *Sauders v. Cnty. of Steuben*, 693 N.E.2d 16, 18, 20 (Ind. 1998).

87. *Id.* at 20.

88. *Final Tweet*, *supra* note 1.

89. See *Miller v. Macalester Coll.*, 115 N.W.2d 666, 668–69 (Minn. 1962).

90. *Id.* at 671–74.

not obvious enough to ignore the instruction. The critical component to this decision is the context of his work environment. While Declan was probably scared to film practice in such conditions, he was working in a football program. Not listening to a coach or staff member is not likely to be taken lightly, and he had to have been very sure of his danger. Especially considering he was under the direction of people running a very publicly known university football program, his deferment to Brian Kelly's judgment is well-founded and does not make the danger of filming from the lift obvious enough to warrant contributory negligence. Declan was just following orders.

Similarly, Notre Dame and Brian Kelly could assert Declan assumed the risks⁹¹ of the activity involved—filming from a high platform—when he consciously posted material on his Twitter account detailing his appreciation for the risks involved with filming that day.⁹² However, applying the persuasive *Miller* case once again shows the risk was not obvious enough to subject Declan to this potential defense.

Finally, Notre Dame and Brian Kelly could assert that they did not owe Declan a reasonable duty of care to begin with because he was not in a custodial relationship with the school or coach. However, this defense would not work because the *Clark* case clearly establishes students—not just student-athletes—are owed a duty of reasonable care in Indiana, thus allowing the facts of the present case to withstand summary judgment and proceed to trial.⁹³ With some potential defenses established against the tort claims and the fact that the case could proceed to a fact-finder; the next subpart of the Article analyzes how a jury would likely rule on this matter.

D. Likely Result

Applying the facts to the law set forth above leads to the result that Declan's estate would likely recover damages from Brian Kelly and, by proxy, Notre Dame. At minimum, the hypothetical defendants owed the plaintiff a duty of reasonable care, and that duty was breached. Declan was filming in a very dangerous condition because he was directed by superiors to film—superiors far older than a young college student. Declan did not simply volunteer to film practice that day, he was given orders to do so.

His orders to go up a scissor lift in fifty mile per hour winds would likely be viewed by a jury as unreasonable for a variety of reasons. First, common

91. See *Pfenning v. Lineman*, 947 N.E.2d 392, 397–99 (Ind. 2011).

92. *Final Tweet*, *supra* note 1.

93. See *Clark v. Wiegand*, 617 N.E.2d 916, 917–20 (Ind. 1993) (inferring from the court's analysis of assumption of risk that duty exists from a School to its students).

sense seems to weigh in favor of not having college students operate dangerous machinery in dangerous conditions; it is probably best to leave such operations to more experienced adults. Secondly, there is a plethora of evidence—in the form of scissor lift operating procedures—at similar college football programs⁹⁴ that indicates a lift would have never been in operation under the dangerous conditions that day. Notre Dame did not even have an operating procedure on hand.⁹⁵ This would indicate a lack of diligence on the part of the University and Brian Kelly. When the University of Michigan, Pennsylvania State University, and the University of Nebraska all unequivocally say they have procedures in place to preserve safety of the videographers—and people on the ground—Notre Dame's lack of such procedure and foresight seems unreasonable.⁹⁶

Even if the *Miller* standard did not apply with respect to the ability of Notre Dame and Brian Kelly to assert assumption of the risk and contributory negligence defenses, a jury could very likely reject such defenses. First off, assigning a student blame who is under direction from football coaches seems far-fetched. Contributory negligence is predicated on choice; one must personally make choices that lead to contribute to one's own injury.⁹⁷ However, there was little choice involved in this matter and a high degree of control over Declan. If Declan chose not to film practice that day, it is not wholly unreasonable to speculate he could have suffered substantial repercussions from his superiors. Even though such a thought is purely speculation, the jury has to consider this context and what consequences would have resulted from not following orders because he was scared of the wind that day. As mentioned above, college football coaches—and their employer universities by proxy—exercise a high degree of control over their football programs. Given this degree of control over student workers, a jury would likely recognize that Declan did not make the decision to climb the scissor lift by himself—he was heavily influenced. As Minnesota has shown, juries and judges may not be sympathetic to the instructor or university when such control is exercised.⁹⁸

Finally, a jury would likely not find Declan to have assumed the risk of falling off the scaffold that day. Student-athletes assume the risks of being injured in play.⁹⁹ Students in general do not assume the risks of dangers

94. See Hamilton, *supra* note 61.

95. *Id.*

96. *Id.*

97. See Clark, 617 N.E.2d at 919.

98. See Miller v. Macalester Coll. 115 N.W.2d 666, 668, 673 (Minn. 1962).

99. See Pfenning v. Lineman, 947 N.E.2d 392, 411 (Ind. 2011).

associated with their jobs, especially if they are placed in those dangers by the direction of superiors.¹⁰⁰ While Declan did express his concern for his safety through Twitter postings,¹⁰¹ the fact remains he was still subject to the authority of very controlled work.¹⁰² If anything, a jury would probably deduce Declan assumed he was safe under the directions of professionals he worked for. Simply because he expressed concern for such a dangerous situation does not mean he assumed the risks involved. A jury would likely speculate as to what Declan would have done absent the controlled atmosphere; being directed by Notre Dame and Brian Kelly to climb up a scissor lift in high winds is much different from simply climbing up a lift without such direction. The latter decision would—and should—give the university protection; the former decision likely would not.

V. POLICY CONCERNS WITH COLLEGE FOOTBALL CULTURE

The obvious problem of this whole situation can be distilled to one issue: control. College football coaches exercise high control over their programs.¹⁰³ Such a decision makes sense. Football is a game that requires a high degree of discipline and little distraction. When millions of dollars are at stake surrounding such a game, the degree of control can only increase. Playbooks are guarded, operational tasks are handled by professionals with years of logistical experience, and public relations are streamlined into one message.¹⁰⁴ At the center of such control is the college's employee football coach. The coach is usually blamed for losses and celebrated for wins. The amount of pressure on the coach is commensurate with the salary he receives. Usually the highest paid employee on a college's payroll,¹⁰⁵ the coach understandably wants to control every aspect of his program.

However, with such control comes an authoritarian structure.¹⁰⁶ The coach is hardly questioned on his decisions, especially if he has experienced

100. See *Miller*, 115 N.W.2d at 671–72, 674.

101. *Final Tweet*, *supra* note 1

102. Banks, *supra* note 70.

103. Bruce Feldman, *Institutional Control? Report Shows Tragic Result of Coach as King Culture*, CBSSPORTS.COM (July 12, 2012), <http://www.cbssports.com/collegefootball/story/19571969/institutional-control-report-shows-tragic-result-of-coach-as-king-culture>.

104. See Associated Press, *Syracuse Spring Football Clouded in Secrecy*, ESPN, <http://sports.espn.go.com/espn/wire?section=nfc&id=7799611> (last updated Apr. 11, 2012).

105. See Christine Brennan, *SEC Invests Heavily to Reap Its Titles*, USA TODAY, Jan. 10, 2012, at 8C.

106. See Napp Nazworth, *Did the Culture of College Football Enable the Penn State Scandal?*, CHRISTIAN POST (Nov. 13, 2011), <http://www.christianpost.com/news/did-the-culture-of-college-football-enable-the-penn-state-scandal-61621/>.

success.¹⁰⁷ He is the ruler and, in many cases, the idol on campus.¹⁰⁸ As the case of Joe Paterno would suggest, deplorable crimes could happen under a coach's regime but his stature could prove to ultimately curb such crimes.¹⁰⁹ The power of a football coach is unquestioned, and it must carry with it responsibilities.

Coaches set up a militaristic culture in college football. Players, staff, etc. listen to the coach, and there hardly is room to question him. Accordingly, the coach's control over his program should approximate his legal responsibility for the people he has nearly unfettered direction over. If a coach decides to have practice outside, he must assume responsibility for the choice he makes. Coaches have no room to argue that the coaches, players, or staff members working for them have choices in the course of their work. When a coach decides to have a practice outdoors, he knows there will be weather factors and he must make a decision as to whether the student videographers who work for him will be safe—Jim Tressel sure did.¹¹⁰ In a culture where expression is muted and control is exerted, courts should recognize the problem of allowing a coach to not assume responsibility for the subjects he controls. This case exhibits the fact that coaches can put their students in dangerous situations, and the student is in a position where protesting being placed in such situations has all sorts of negative connotations. The oppressive culture of a football organization should show judges and juries that a college coach has a lot of control and should therefore assume a lot of responsibility for the people that work for him. Declan's tragedy could have been prevented either by Declan choosing not to film, or Brian Kelly or Notre Dame deciding not to use scissor lifts in dangerous wind conditions. The culture of college football seems to indicate the latter was the only option at Notre Dame, and because that option was not exercised, liability should be imputed upon the coach and university.

VI. CONCLUSION

In conclusion, Declan Sullivan's estate could potentially win a lawsuit against Notre Dame and Brian Kelly. Brian Kelly was acting as an employee for Notre Dame when he decided to have practice outdoors in dangerous wind conditions, exposing Declan to high winds atop a scissor lift not rated for such conditions. The action was a failure of the duty of care owed to Declan, and a

107. *See id.*

108. *See id.*

109. *Id.*

110. *See Taylor, supra note 9.*

jury likely would sympathize with Declan's plight rather than accept a defense from Brian Kelly that Declan should share in responsibility for the damages.

Student videographers operate within a culture of oppression in FBS football programs. There is no opportunity to have safety concerns brought to the attention of superiors without the threat of ridicule. This is not a problem as long as the superiors ensure the safety of student videographers in such a weak position. Coaches running practices assume this duty (as evidenced by Jim Tressel's remarks shortly before Declan Sullivan's death) and must take necessary precautions to avoid injury occurrences to student staff members.

In the present case, a myriad of failures came together and led to the death of a student videographer who was directed to film practice atop a scissor lift (not meant to be used in winds exceeding thirty-five miles per hour). At the end of the day, the coach must account for these risks if he is to have sole authority over the conduct of such practice. Because Brian Kelly did not direct Declan's direct supervisor—or Declan himself—to immediately come down from the scissor lift, Declan perished. The same negligence and recklessness liability should have been imputed if a player was injured by the falling tower (or other debris flying through the air) in such terrible weather conditions. If Brian Kelly wants to rule with an iron fist over student workers like Declan, he had better be prepared for the iron-clad responsibility of keeping such workers safe. Such a responsibility goes a long way in protecting innocent students and their families. Ultimately, a lawsuit will not be able to bring Declan back to his loved ones, but maybe making Brian Kelly think twice about his actions will keep the next student in Declan's position alive and in the company of his or her family in the future.