



# WASHINGTON CASE UPDATE

case in point...

## Schools can be Liable for Allowing Concussed Students to Participate in Sports

**From the desk of Thomas McCurdy:** Washington's Lystedt law requires that youth athletes who sustain concussions be immediately removed from a practice or game and prohibits their return to play until they are released by a licensed medical care provider. However, the language of the statute does not explicitly provide a cause of action to enforce these requirements. Does a youth athlete have a cause of action if he or she sustains injury because he or she is permitted to participate in a sport after sustaining a concussion? Read on to learn more.

**Claims Pointer:** In this case arising out of the death of a high school football player due to complications following a head injury, the Washington Supreme Court held that the Lystedt law implies a cause of action and allowed claims against the football player's high school and coach to proceed. The case is a reminder to schools and coaches of the importance of carefully following the Lystedt law's requirements with respect to head injuries to keep student athletes safe and to avoid potential liability.

[Swank v. Valley Christian School et al., No. 93282-4, Washington Supreme Court \(July 6, 2017\)](#)

Drew Swank ("Drew"), a student and football player at Valley Christian School ("VCS") in Spokane Valley, Washington, sustained a head injury during a football game and was promptly removed from the game. Drew's mother took him to see his primary care physician, Dr. Timothy Burns ("Dr. Burns"). Dr. Burns told Drew's mother that Drew should be kept out of contact sports for the next three days and advised that if Drew experienced headaches after playing football, he would have to stay out of contact sports for a full week. Two days later, Drew's mother called Dr. Burns' office and told a nurse that Drew has stopped having headaches. She requested that Dr. Burns write and sign a release allowing Drew to return to practice. Dr. Burns wrote a note releasing Drew to play football that same day.

The following day, Drew played in a football game. Although Drew initially performed well, his quality of play declined sharply over the course of the game. Drew's coach, Jim Puryear ("Puryear") called Drew to the sidelines where he grabbed Drew's facemask, and, according to Drew's father, jerked it up and down while yelling at Drew about his performance. Drew returned to the game and

was hit by an opposing player. He sustained a head injury and staggered to the sideline where he collapsed, dying two days later. His parents, Donald and Patricia Swank (the "Swanks"), sued VCS, Coach Puryear, and Dr. Burns, alleging common law negligence claims and violations of Washington's Lystedt law. VCS, Coach Puryear, and Dr. Burns all moved for summary judgment, which the trial court granted. The Swanks appealed. The Court of Appeals affirmed summary judgment on all but the general negligence claim against VCS. The Swanks appealed to the Supreme Court.

Washington's Lystedt law, RCW 28A.600.190, was adopted in 2009, and was touted as the nation's first comprehensive concussion law. The Lystedt law's purpose is to reduce risk of injury or death to youth athletes who suffer concussions by preventing them from returning to play too soon. The law requires school districts to educate coaches, youth athletes, and parents about the risk of concussions by preparing a "concussion and head injury information sheet" that the youth athlete and his or her parents or guardians must sign every year. The law also prohibits that youth athletes from participating in practices or games if it is suspected that the athlete is concussed. Finally, the law requires that a licensed health care provider clear the youth athlete before he

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or she may return to play. Both the trial court and the Court of Appeals reasoned that although the Lystedt law imposes these requirements regarding youth athletes on schools, it does not create an implied statutory cause of action, meaning that it does not provide a remedy for violations of the law.

To determine whether a statute contains an implied cause of action, Washington courts apply a three-part test known as the Bennett test: first, whether the plaintiff is within the class for whose special benefit the statute was enacted; second, whether legislative intent supports creating or denying a remedy; and third, whether implying a remedy is consistent with the underlying purpose of the legislation. The Supreme Court began its analysis by applying the Bennett test. First, it noted there was no dispute that Drew was a member of the class for whose special benefit the Lystedt law was enacted: youth athletes who sustain concussions or head injuries. Thus, the first factor of the Bennett weighed in favor of implying a cause of action. The Court next examined the statute to assess whether the legislature intended to grant a right of recovery for statutory violations. The Court noted that the legislature recognized that some youth athletes are prematurely returned to play after sustaining head injuries, leading to actual or potential physical injury or death. Despite this legislative concern, the Lystedt law did not provide a clear mechanism for enforcing its requirements. The Court pointed out that the statute actually exempts volunteers from liability, evidence that the legislature intended to imply a cause of action. Accordingly, the Court inferred that the legislature intended to provide an enforcement mechanism.

Finally, the Court considered whether implying a cause of action was consistent with the purpose of the statute. As the Court explained, one of the major purposes of tort law generally is to encourage people to act with reasonable care for the welfare of themselves and others,

and the purpose of the Lystedt law is to prevent further injury or death to youth athletes suffering from concussions and head injuries. For the Court, implying a cause of action was consistent with the Lystedt law's purpose because these injuries are easily prevented, and a cause of action encourages people to act with due care for the welfare of youth athletes and gives youth athletes recourse when they suffer injury or death due to improper management of their concussions. Because all three factors of the Bennett test weighed in favor of implying a cause of action, the Court held that the Lystedt law implies a cause of action. Accordingly, the claims arising out of the Lystedt law should have been permitted to proceed.

As a final point, the Court addressed whether Coach Puryear was entitled to volunteer immunity under the Lystedt law. The Court explained that although the Lystedt law contains a provision exempting volunteers from liability for acts of simple negligence, it also permits claims against volunteers for gross negligence or recklessness. Because the Swanks presented evidence from which a reasonable jury could infer that Coach Puryear acted with gross negligence or recklessness, there were issues of material fact precluding summary judgment in his favor.

View full opinion at: <https://www.courts.wa.gov/opinions/pdf/932824.pdf>

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