

# Assumption of Risk in Sport

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## ■ ABSTRACT

For many years, the doctrine of assumption of risk was broadly applied to participation in sport and recreation activities with the result that few, if any, courts imposed liability on a participant for injuries inflicted upon another. Courts did not want to "chill the vigor of athletic competition" and found it difficult to determine whether injuries were intentional. However, recent trends showing increased skill and strength of participants and increased violence in sports participation have resulted in the courts extending "some of the restraints of civilization" to athletic and recreational participation. Today the majority view is that participants in an athletic event owe a duty to other participants to refrain from reckless misconduct and liability may result from injuries caused a player by reason of the breach of that duty.

## ■ INTRODUCTION

For many years, the courts were reluctant to penalize one for misconduct during athletic contests that resulted in physical harm to another participant. This reluctance was a product of the *sui juris* restriction that so long as the activity was played in good faith, and the injury did not result from an intentional or willful act there was no liability. Because of the difficulty courts had in determining whether a person had the intent to harm, courts did not decide what was or was not intentional misconduct. Thus, until the 1970's, courts did not separate flagrant misconduct from the inherent risks of sport, except for those persons who engaged in mutual combat. In those situations, the majority rule followed is that individuals who engage in mutual combat are each civilly liable to each other for any physical harm inflicted during the fight and the fact that both parties voluntarily engaged in the combat is no defense. This approach has been followed in sports events as shown in *Averill v. Luttrell* (1957). In this case, a professional baseball player was held personally liable for injuries he inflicted on an opposing player whom he struck with his fist during the course of a game.

Beginning in the 1970's violence in sport has been increasingly brought to the spectators' attention. Television sports programs have graphically displayed violence using the instant replay technique. During interviews some professional athletes have publicly announced their intentions to intimidate and hurt other players. These activities have served to raise public consciousness about the violence existing in sport. Courts often mirror the public opinion of current

situations, and this appears to be the case over the past few years with regard to violence in sport. Legal commentators (Carbonneau, 1979; Woolf, 1980) have indicated courts are changing their view toward participants' misconduct; disregard for rules and behavior outside the rules are no longer considered to be an inherent risk of sport.

## ■ ASSUMPTION OF THE RISK

The *Restatement (Second) of Torts* (American Law Institute, 1965) presents a restrictive view toward the amount of consent that sports participants give when they take part in games and contests, stating:

Taking part in a game manifests a willingness to submit to such bodily contacts or restrictions as are permitted by its rules and usages. Participating in such a game does not manifest consent to contacts which are prohibited by rules and usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill. This is true although the player knows that those with or against whom he is playing are habitual violators of such rules (50).

It is observed that taking part in a game manifests a willingness to submit to such bodily contacts or restrictions of liberty as are permitted by its rules. For example, if A, a member of a football team, tackles B, a player for the opposing team, A is not liable to B, because A's conduct is within the rules of the game. It is further observed that participating in a game manifests consent to bodily contacts which are prohibited by rules of the game if such rules are intended merely to secure the better playing of the game as a test of skill. The illustration states that if A, a member of a football team, tackles B, an opposing player, while A is "offside," and the tackle is made with no greater violence that would be permissible by the rules were A "onside," A is not liable to B, because A has not subjected B to a violence greater than or different from that permitted by the rules, even though A is in violation of a rule.

In an early case (*Murphy v. Steeplechase Amusement Company*, 1929), Judge Cardozo outlined the conditions necessary before a participant may recover for injuries related to sporting activity as follows:

One who takes part in such a sport [voluntarily entering an amusement device] accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts to risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the poses of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chances of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

A different case would be here if the dangers inherent in the sport were obscure or unobserved, or so serious as to justify the belief that precautions of some kind must have been taken to avert them. Nothing happened to the plaintiff except what common experience tells us may happen at any time as the consequence of a sudden fall. Many a skater or horseman can rehearse a tale of equal woe. A different case

there would also be if accidents had been so many as to show that the game in its inherent nature was too dangerous to be continued without change ... Some quota of accidents was to be looked for in so great a mass. One might as well say that a skating rink should be abandoned because skaters sometimes fall (pp. 482-83).

The traditional position, illustrated by *McGee v. Board of Education* (1962), holds that coaches, umpires and players assume the dangers of play as a matter of law. That court ruled "the participants in an athletic event are held to have assumed the risks of injury normally associated with the sport" (p. 331) and that the "voluntary participants must accept risks to which their roles expose them" (p. 331). This approach expressed the belief that the actor could not have been negligent under the circumstances of competition in games.

Another example of a typical early decision was reported in *Thomas v. Barlow* (1927). In its decision, the court overturned a jury verdict for the plaintiff stating that the preponderance of the evidence clearly indicated that a blow the plaintiff received from an opposing basketball player was entirely accidental and unintentional. In arriving at this decision, the appellate court did not review the evidence supporting the claims of the plaintiff that the opponent struck him in the jaw with his fist, fracturing his jawbone and seriously injuring him. The court accepted, without question, the defendants denial of deliberately striking him and his insistence that the act was unintentional and he had no knowledge that he struck the plaintiff. The court appeared to accept the premise that a team sport participant will generally be held to assume the risk of unintentional injuries suffered at the hands of an opponent and did not address the issue of intent to injure.

### **Voluntary Activities**

One of the requirements for assumption of the risk has been knowledge of the risk and another has been that the risk must be voluntarily assumed. Appellate Courts have long recognized that not all participation in sporting events is voluntary. The following cases are examples of this position.

In extreme situations, the pressures that are a part of competition may eliminate the voluntariness of participation. An example of this position was stated by the court in *Martini v. Olyphant Borough School District* (1952).

[I]t is also debatable whether or not the usual disciplinary authority of the coach, the presence of school spirit, the probable odium attached to refusal to play, both by his fellow-players and his schoolmates, might not have robbed him of volition under the circumstances (p. 211).

The actions of state boards of education and school personnel may also eliminate voluntariness from participation (*Niemcazyk v. Burlson*, 1976). For example, the plaintiff in *Bellman v. San Francisco High School District* (1938) was injured while participating in a tumbling class because of her failure to do the "roll over two" gymnastic exercise properly. The school district was found liable for her injuries. According to the facts of the case, she was enrolled in the tumbling class under protest because the other gymnasium classes which she wished to continue to attend were filled. She was told, when she wished to withdraw because of a bad knee, that she would have to continue the class to get credits necessary for graduation. The court held in view of these circumstances the plaintiff's participation in the gymnastic activity was not voluntary.

## ■ ATTACHMENT OF LIABILITY

The general rule may not apply in situations where the injured participant can demonstrate that the injuries were the result of other than good faith competition or the product of risks which are not ordinary or inherent in the sport in question. Examples include: (1) acts of other participants; (2) lack of skill by other participants; (3) improper conduct of other participants; and, (4) the manner in which the activity is conducted.

### **Acts of Other Participants**

An unreasonable risk of injury may be created by the improper conduct of other participants. Such risks would not be assumed by the participant to the extent that they did not constitute the ordinary and inherent risks of sport. A novice skier brought a successful action against another skier for injuries sustained when that skier overtook and collided with her (*Ninio v. Hight*, 1967). The “rule of the road” places a duty on all skiers to look for dangerous conditions and to exercise care to avoid them. The “rule of the road” is a customary skiing safety regulation of which all skiers are or should be aware. According to the court, “when, in the exercise of ordinary care, one has a duty to look for dangerous conditions, he will be presumed, in case of accident, to have looked where he was supposed to look and to have seen what he could reasonably be expected to see. And, failure to look and to see what reasonably could and should have been seen is negligence” (p. 352).

### **Lack of Skill**

In *Sunday v. Stratton Mountain Corp.* (Carbonneau, 1979; p. 92), the court held that technological advances made in the maintenance of ski slopes and the reliance of skiers upon these improvements rendered the doctrine of assumption of risk inapplicable when a 24-year-old novice skier was severely injured after the tip of his ski became caught in the underbrush that was growing on the trail. The fact that this skier was a novice may have been the deciding factor in this case. Advertisements that suggest the facility is safe and without danger may also contribute to courts finding in favor of novice participants.

### **Improper Conduct of Other Participants**

*Bourque v. Duplechin* and *Nabozny v. Barnhill* represent cases in which the behavior of other participants resulted in injury and liability for play outside the rules of the game. In *Bourque v. Duplechin* (1976), the plaintiff, a second baseman, was injured when the defendant, a member of an opposing softball team, ran out of his way when running from first to second base to run into the plaintiff, who was standing five feet away from second base. The injury was caused by a blow delivered under the chin, and the sides were retired as a result because the collision was a flagrant violation of the rules of the game. According to testimony, Duplechin turned and ran directly at Bourque, going full speed and did not attempt to reduce his speed or slide. The court held that Duplechin was under a duty to play softball in the ordinary fashion without unsportsmanlike conduct or wanton injury to his fellow players. Bourque assumed the risk of being hit by a bat or a ball and of injury

resulting from standing in the base path and being spiked by someone sliding into second base, but not the risk of Duplechin going out of his way to run into him at full speed when he was five feet away from the base. In summary, the court held that "...a participant in a game or sport assumes all of the risks incidental to that particular activity which are obvious and foreseeable. A participant does not assume the risk from fellow players acting in an unexpected or unsportsmanlike way with a reckless lack of concern for others participating" (p. 42).

A similar result occurred in *Nabozny v. Barnhill* (1975) where the plaintiff was a goal keeper in a soccer game. While he was crouched on one knee with the ball in the penalty area, the defendant kicked him in the head and he suffered permanent damage to his skull and brain. This court stated:

... when athletes are engaged in athletic competition, all teams involved are trained and coached by knowledgeable personnel; a recognized set of rules governs conduct of the competition; and a safety rule is contained therein which is primarily designed to protect players from serious injury, a player is then charged with a legal duty to every other player on the field to refrain from conduct proscribed by a safety rule. A reckless disregard for the safety of other players cannot be excused. To engage in such conduct is to create an intolerable and unreasonable risk of serious injury to other participants... [A] player is liable for injury in a tort action if his conduct is such that it is either deliberate, willful or with a reckless disregard for the safety of the other player so as to cause an injury to that player (pp. 260-61).

Many states (*Marlowe v. Rush-Henrietta School District*, 1990; *Dotzler v. Tuttle*, 1990; *Marchetti v. Kalish*, 1990; *Gauvin v. Clark*, 1989; *Bourque v. Duplechin*, 1976; *Nabozny v. Barnhill*, 1975; *Kabella v. Bouschelle*, 1983; and *Ross v. Clouser*, 1982) have adopted a majority rule that participants in an athletic event owe a duty to other participants to refrain from reckless misconduct, and liability may result from injuries caused a player by reason of the breach of that duty. Consequently, individuals who engage in recreational or sports activities assume the ordinary risks of the activity and cannot recover for any injury caused by others unless they can show that the other participant's actions were either "reckless" or "intentional." Recklessness, having the same meaning as "wanton and willful," is defined as "the disregard for or indifference to the safety of another or for the consequences of one's act" (*Dotzler v. Tuttle*, 1990; p. 782).

Until recently, the courts were reluctant to impose that standard of care upon professional athletes. *Hackbart v. Cincinnati Bengals, Inc. and Charles "Booby" Clark* (1977, 1979a, 1979b) reversed this policy. Summarizing the facts involved in this case, Hackbart was playing a free safety position on the Denver Broncos' defensive team and Charles Clark was playing fullback on the Cincinnati Bengals' offensive team. During the play when the injury occurred, Clark was in an area that was the defensive responsibility of Hackbart. A pass was intercepted by a Denver linebacker and Hackbart fell to the ground during an attempt to block Clark in the end zone. He turned and while on one knee watched the play continue upfield. Clark, acting out of anger and frustration, but without specific intent to injure, struck a blow with his right forearm to the back of Hackbart's head with sufficient force to cause both players to fall forward to the ground. Following the game, Hackbart experienced pain and soreness. Later he was released on waivers and after losing his employment he sought medical assistance, at which time it was discovered he

had suffered a neck injury.

The trial court refused to find any liability for the injury on the part of the Bengals and Clark and stated,

... to decide which restraints should be made applicable [to professional football] is a task for which the courts are not well suited. There is no discernible code of conduct for NFL players ... There are no Athenian virtues in this form of athletics. The NFL has substituted the morality of the battlefield for that of the playing field and the 'restraints of civilization' have been left on the sidelines... If there is to be any governmental involvement in this industry, it is a matter which can be best considered by the legislative branch. ...Football as a commercial enterprise is something quite different from athletics as an extension of the academic experience and what I have said here may have no applicability in other areas of physical competition (1977, p. 358).

Two things stand out in the trial court's decision: (1) the judge would not attempt find a specific intent to injure, and (2) professional football was viewed as a commercial enterprise, not athletics with a code of conduct. Because of this approach to the sport, the trial court refused to find any liability on the part of Clark.

The 10th Circuit Appellate Court reversed this decision using an opposite approach to the issue. It ruled the appropriate standard was recklessness and "... that the injuries were the result of acts of Clark which were in reckless disregard to Hackbart's safety" (1979a, p. 525). Recklessness was defined as existing when a person intends the act and knows that the act is harmful but fails to realize that it will produce the extreme harm which it did produce. According to this court, there are no principles of law which allow a court to rule out certain tortious conduct by reason of the general roughness of professional sports like football, or of the difficulty in administering it. The court concluded ... "that the trial court did not limit the case to a trial of the evidence bearing on defendant's liability but rather determined that as a matter of social policy the game was so violent and unlawful that valid lines could not be drawn. We take the view that this was not a proper issue for determination and that plaintiff was entitled to have the case tried on an assessment of his or her rights and whether they had been violated" (1979a, p. 526).

Therefore, courts in the 10th Circuit are bound by the decision above, namely, that a plaintiff has the right to a review of his or her rights and a determination of whether they had been violated, regardless of the nature of the sport and whether it was a professional contest. If other circuits adopt this approach, rather than the trial court approach, injured professional athletes will be able to bring suit against other professional athletes who injure them through conduct outside the rules of the game.

### **Manner in Which the Activity Is Conducted**

The following case provides an example of the liability that can exist based on the manner in which the activity is conducted. In *Carabba v. School District* (1967), the court imposed liability upon the school district for lack of adequate supervision by a wrestling referee hired by the school district. In this case, a contestant suffered a broken neck from an illegal hold applied while the referee closed a gap between mats, allowing participants to continue to wrestle during the time his attention was diverted from them. The court stated the duty owed by a school district to its pupils is "...to anticipate reasonably foreseeable dangers and to take precautions protect-

ing the children in its custody from such dangers” (p. 946). “That the school districts actively encourage participation by students in such sports programs is beyond question. The schools provide coaches for the training of participants. They provide the premises upon which such activities are engaged in by the students and the equipment which is used in the wrestling matches. Under these conditions we must conclude that the school districts do, in fact, owe a duty to the student participants” (p. 947).

## ■ EQUIPMENT

The nature and state of equipment used in physical activities can also produce liability for injuries. In *Byrns v. Riddell, Inc.* (1976), the operative law was that in determining whether a defect is “unreasonably dangerous”, it is helpful to consider: usefulness and desirability of the product; availability of other and safer products to meet the same need; the likelihood of injury and seriousness of danger; common knowledge and normal public expectation of danger, particularly for established products; avoidability of injury by care in the use of the product, including the effect of instructions and warnings; and the ability to eliminate danger without seriously impairing the usefulness of the product or making it unduly expensive. This approach was also followed in *Nissen Trampoline Company v. Terre Haute First National Bank* (1975), with the court holding that a product, though virtually faultless in design, material and workmanship, may nevertheless be deemed defective so as to impose liability upon the manufacturer for physical harm resulting from its use, where the manufacturer fails to discharge a duty to warn or instruct with respect to potential dangers in the use of a product.

Likewise, in *Filler v. Rayex Corporation* (1970), the court held that the manufacturer could not escape liability on the ground that the sunglasses were unavoidably unsafe products where the glasses were not accompanied by a proper warning. However, “defective” products that injure participants will not always result in liability. In an action following injuries suffered when an allegedly defective bat broke and struck a boy during a ball game, the court in *James v. Hillerich & Bradsby Company* (1957) held the:

... [o]rdinary risks of personal injury involved in a baseball or softball game, from breaking of even a properly made bat, are such that a defective bat cannot be said to materially increase the risk or to create an unreasonable risk and thus a manufacturer of bats cannot be held liable to ultimate users thereof for injury suffered from breaking of a defective bat. It is common knowledge that bats frequently break, and it is immaterial that a properly made bat ordinarily will splinter with grain while one made of defective wood may break across grain (p. 94).

## ■ SUMMARY

As a matter of law, all the ordinary and inherent risks in sport, so long as the activity is played in good faith and the injury is not the result of an intentional or willful act, are assumed by the participants. In the past, courts were hesitant to determine if injuries incurred during sports were caused by willful and reckless behavior. Since courts did not determine whether the injury was the result of

intentional misconduct, the result was that few, if any, players were penalized for their misconduct.

Today, courts have taken a more active role in sports activities and are much less hesitant to determine whether an injury was the result of intentional misconduct or reckless behavior. Two classes of rules govern athletics: rules which equalize play and rules which provide for safety. Behavior that intentionally goes beyond the safety rules and causes injury can be deemed willful or intentional misconduct. Teachers and coaches must teach both classes of rules and can not condone conduct that violates the safety rules.

Likewise, the manner in which an activity is conducted, the nature of equipment and the presence or absence of safety warnings may determine whether the participant assumes the risk of certain injuries. Realistic efforts must be made to make sports participation not only enjoyable, but as safe as possible for the participants.

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*McGee v. Board of Education of the City of New York*, 226 N.Y.S.2d 329 (1962), but professional athletes may be held to a higher standard of care than is true for nonprofessional athletes; see *Heldman v. Uniroyal, Inc.*, 53 Ohio App.2d 21, 371 N.E.2d 557 (1977) and *Tope v. Waterford Hills Rd. Racing Corp.*, 265 N.W.2d 761 (Mich. App. 1978).

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