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TORTS—PARTICIPANT IN ATHLETIC COMPETITION STATES CAUSE OF ACTION FOR INJURIES AGAINST OTHER PARTICIPANT

*Nabozny v. Barnhill*¹

Plaintiff and defendant were participants in a soccer match. Plaintiff, the goal keeper, received a pass and gained possession of the ball in the "penalty area."² Defendant, an opposing forward, continued to run toward plaintiff and kicked his head causing plaintiff severe injuries. Plaintiff commenced this action for negligence and produced expert witnesses who testified that soccer rules prohibit opposing players from making contact with the goal tender while he has possession of the ball in the penalty area. The trial court directed a verdict in favor of defendant. On appeal the court reversed and remanded, holding that when athletes are engaged in athletic competition, the teams are trained and coached by competent personnel, a recognized set of rules governs the play, and a safety rule is contained therein which is primarily designed to protect players from injury, a player is liable for a deliberate, wilful, or reckless violation of said rule which causes injuries. The court explicitly denied defendant's contention that he was immune from tort liability for an injury to another player happening during the course of a game.

A participant in an athletic event can base an action to recover for injuries caused by another player upon three theories. The first theory is assault and battery. The defendant is liable for battery if he acts intending to cause a harmful or offensive contact upon a person and such contact results from his act.³ The defendant is liable for assault if, with the same intent, the plaintiff is put in imminent apprehension of a battery.⁴ These elements can usually be established when a fight occurs during a sporting event and thus it would appear that plaintiff-athletes would often be successful.⁵ However, defendants have usually escaped liability for assault and battery by establishing the defense of consent.⁶

1. 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

2. The penalty area is a rectangular area between the eighteenth yard line and the goal.

3. RESTATEMENT (SECOND) OF TORTS § 13 (1965).

4. *Id.* at § 21. In general the intent required in assault and battery is met if the defendant desires the results or believes that the results are substantially certain to follow. *Id.* at § 8A.

5. Comment, *Violence in Professional Sports*, 1975 WIS. L. REV. 771, 775 (1975).

6. The courts have also precluded recovery for assault and battery by finding either insufficient evidence of intent or that the contact was not "offensive contact." In *Thomas v. Barlow*, 5 N.J. Misc. 764, 138 A. 208 (1927) the plaintiff alleged that the defendant intentionally struck him with a fist during a basketball game, fractur-

Courts have drawn a distinction in assault and battery cases between consent to acts which are lawful and those which are criminal. The majority view holds that consent to a criminal act does not prevent recovery in civil assault and battery.⁷ The minority view holds that consent to a criminal act is a defense to civil assault and battery,⁸ presumably because of the public policy of denying a wrongdoer redress for his participation in illegal events. Thus, under the minority view if *A* and *B* consent to a boxing match which is criminal under state law neither is liable in tort to the other.⁹ The cases dealing with lawful games hold that consent precludes recovery for assault and battery. In *McAdams v. Windham*¹⁰ deceased and defendant were engaged in a legal boxing match. An unknown heart defect of the deceased caused his death after a blow to the chest by defendant. The court denied recovery, holding that deceased consented. In *Gibeline v. Smith*¹¹ two adults were playfully scuffling and plaintiff was injured. Although not explicitly mentioning consent, the Missouri court denied recovery for assault and battery, finding that the parties' acts were voluntary, mutual, and lawful.¹²

Consent to an assault and battery may be actual or apparent.¹³ In *Hellriegel v. Tholl*¹⁴ plaintiff was attending a picnic with friends. After plaintiff playfully taunted, "you couldn't throw me in the lake if you tried," defendants grabbed him and in the ensuing scuffle one of the defendants accidentally slipped and fell onto plaintiff's head, breaking his neck. The court held that plaintiff's words, in this playful setting, could reasonably be understood as inviting defendants to try to throw him into the lake and thus constituted apparent consent.¹⁵ The *Restatement (Second) of Torts* states that by taking part in a game or contest one apparently consents to such bodily contacts as are permitted by the rules and customs of the game.¹⁶ As

ing his jaw. The court held that a directed verdict should be set aside as the evidence showed only an accidental blow. *See also* *Hellriegel v. Tholl*, 69 Wash. 2d 97, 417 P.2d 362 (1966) (contact not "offensive contact"); *Bourque v. Duplechin*, 331 So. 2d 40 (La. App. 1976) (contact not intentional).

7. *Miller v. Bayer*, 94 Wis. 123, 68 N.W. 869 (1896).

8. *Goldnamer v. O'Brien*, 98 Ky. 569, 33 S.W. 831 (Ky. App. 1896).

9. RESTATEMENT (SECOND) OF TORTS § 892C, Comment b, illus. 1 (Tent. Draft No. 18, 1972). The Restatement follows the minority approach. *See generally* Note, 26 MICH. L. REV. 322 (1927).

10. 208 Ala. 492, 94 So. 742 (1922).

11. 106 Mo. App. 545, 80 S.W. 961 (K.C. Mo. App. 1904).

12. In *Nicholls v. Colwell*, 113 Ill. App. 219 (1903) defendant while involved in roughhouse play squeezed a young girl causing her injuries. The court stated that if the contact by defendant was invited, provoked, or willingly encouraged by plaintiff the sporting conduct would be lawful and the defense of consent would be available to the defendant.

13. RESTATEMENT (SECOND) OF TORTS § 892 (Tent. Draft No. 18, 1972).

14. 69 Wash. 2d 97, 417 P.2d 362 (1966).

15. This reasoning is consistent with the approach taken by the RESTATEMENT (SECOND) OF TORTS § 892 (Tent. Draft No. 18, 1972) which defines apparent consent as words or conduct which are reasonably understood by another as intended as consent.

16. RESTATEMENT (SECOND) OF TORTS § 892, Comment b (1965).

in *Hellriegel*, the setting, consisting of the rules and customs of the game, determines if plaintiff's participation in the game can reasonably be interpreted as consent to bodily contacts. Thus, participating in a game does not manifest consent to acts which are prohibited by the rules and customs of the game, especially if such rules are designed to protect players from harm.¹⁷ A football player, by the fact of his participation, apparently consents to the normal intentional contact incident to the game but does not consent to an intentional "clip" which is a violation of a rule designed primarily to protect players from serious harm.

In *Hellriegel* plaintiff also contended that defendants' conduct exceeded the scope of his consent because he merely consented to being thrown in the lake and not to having his neck broken. Following the *Restatement (Second) of Torts*,¹⁸ the court held that for consent to be effective it need only be to the intentional act, such as rough and tumble horseplay, and not to the injuries which may accidentally result. The risk of accidental injuries is on the person who engages in the athletic event. Thus, if athletic participants do not engage in intentional conduct which is markedly different from that to which plaintiff consented or apparently consented,¹⁹ they will not be liable in assault and battery for resulting accidental injuries.²⁰

The second theory of recovery available to a participant injured in an athletic event is negligence. Early cases seemed to allow recovery only for intentional acts²¹ and recovery for negligence seemed "almost out of the question."²² In more recent cases a cause of action for negligence has been stated for injuries incurred in golf,²³ fishing,²⁴ baseball,²⁵ snow skiing,²⁶

17. *Id.*

18. RESTATEMENT (SECOND) OF TORTS § 892A (Tent. Draft No. 18, 1972) provides in part:

(2) To be effective, consent must be

(a) By one who has the capacity to consent, or by a person empowered to consent for him, and

(b) To the particular conduct, or to substantially the same conduct.

19. RESTATEMENT (SECOND) OF TORTS § 892A, Comment e (Tent. Draft No. 18, 1972) provides in part:

The consent must be to the actor's conduct, or to substantially the same conduct, rather than to the invasion which results from it. Consent to an invasion by particular conduct is not consent to the same invasion by entirely different conduct. Thus one who consents that another may walk across his land does not, without more, consent that the other shall drive an automobile across it

20. In *McAdams v. Windham*, 208 Ala. 492, 94 So. 742 (1922) deceased and defendant were engaged in a mutual boxing match in a spirit of play. An unknown heart defect of deceased caused his death after a blow to the chest by the defendant. The court used the defense of consent to deny recovery. The deceased consented to the particular act of defendant's punches and his consent was effective although there was no consent to the unanticipated death.

21. *Thomas v. Barlow*, 5 N.J. Misc. 764, 138 A. 208 (1927) (intentional blow to the jaw in a basketball game).

22. Note, 26 MICH. L. REV. 322 (1927).

23. *Thomas v. Shaw*, 217 Ga. 688, 124 S.E.2d 396 (1962).

24. *Hawayek v. Simmons*, 91 So. 2d 49 (La. App. 1956).

and ice skating.²⁷

Contributory negligence and assumption of the risk are defenses to negligence. Contributory negligence requires conduct by the plaintiff which falls below the standard to which he is required to conform for his own protection.²⁸ Assumption of the risk takes two forms in sporting events. When the plaintiff voluntarily enters into a game knowing and appreciating the risks involved in the sport he is deemed to *impliedly* agree to relieve the defendant of his duty to the plaintiff.²⁹ In effect, the defendant is granted an immunity from liability. This form of assumption of the risk is most commonly encountered in the cases and is referred to as *implied* assumption of the risk. The other form of assumption of the risk is where the plaintiff is aware of and voluntarily encounters a risk created by the existing negligence of the defendant.³⁰ In both forms a subjective test is used to determine whether the plaintiff knows and appreciates the risk, but his testimony on this matter will not be conclusive.³¹

The defense of contributory negligence and assumption of the risk often overlap. When plaintiff enters into a sporting event knowing the risks involved and reasonably incurs them, he has *impliedly* assumed the risk but is not contributorily negligent.³² When plaintiff enters into a sporting event knowing the risks involved and unreasonably incurs them, he has *impliedly* assumed the risk and is contributorily negligent.³³

25. *Richmond v. Employers' Fire Ins. Co.*, 298 So. 2d 118 (La. App. 1974); *Niemczyk v. Burluson*, 538 S.W.2d 737, (Mo. App., D. Spr. 1976).

26. *Ninio v. Hight*, 385 F.2d 350 (10th Cir. 1967).

27. *Moe v. Steenberg*, 275 Minn. 448, 147 N.W.2d 587 (1966).

28. PROSSER, HANDBOOK OF THE LAW OF TORTS § 65 (4th ed. 1971).

29. RESTATEMENT (SECOND) OF TORTS § 496C (1965).

30. *Id.* at § 496A, Comment c.

31. *Crane v. Kansas City Baseball Co.*, 168 Mo. App. 301, 153 S.W. 1076 (K.C. Mo. App. 1913).

32. RESTATEMENT (SECOND) OF TORTS § 496A, Comment c (1965).

33. *Id.* at Comment d. This area of overlap between the two defenses is often overlooked by the courts. In *Boynton v. Ryan*, 257 F.2d 70 (3rd Cir. 1958) plaintiff-golfer teed off, lost his ball in foliage, waived defendant through, and then entered the foliage in search for his ball knowing another ball was to be hit which he would not be able to see. The plaintiff was contributorily negligent since his conduct was unreasonable. The utility of finding his ball at that moment was outweighed by the risk of grave harm which could result. The court overlooked the defense of assumption of the risk. Plaintiff voluntarily incurred a known risk.

In *Turel v. Milberg*, 10 Misc. 2d 141, 169 N.Y.S.2d 955 (App. Term 1957) plaintiff was actually aware of defendant's negligence in hitting the golf ball without shouting a warning. The plaintiff actually saw defendant swing the club and then diverted his attention elsewhere. The court held that plaintiff had assumed the risk but failed to recognize that contributory negligence was also involved. Once having discovered defendant's negligence, plaintiff unreasonably encountered it.

Occasionally the courts recognize that both assumption of the risk and contributory negligence are available as defenses. In *Benedetto v. Travelers Ins. Co.*, 172 So. 2d 354 (La. App. 1965) the batter threw the bat and hit plaintiff who was sitting along the third base line. The court recognized that the plaintiff was not only contributorily negligent but assumed the risk as well.

When assumption of the risk is raised as a defense to negligence, the key issue is identifying the types of conduct a participant *impliedly* assumes the risks of by the fact of his participation in the game. Some cases state that participants assume the risk of negligent conduct which is foreseeable,³⁴ or that participants assume the risks that are inherent or ordinarily incident to that sport.³⁵ However, these cases merely establish labels which are used to support the court's ultimate decision that the particular risk has or has not been assumed by the plaintiff. No analysis is supplied to guide future decisions. Thus, a case by case approach is necessary to determine what risks are "foreseeable" or are "inherent" or "ordinarily incident" to that sport.

Some cases state a broad rule that a participant, by the fact of his participation, assumes the natural and ordinary risks of the contest but does not *as a matter of law* assume the risk of defendant's negligence.³⁶ The cases provide no justification for such an absolute rule. This rule is analogous to the master-servant concept that a servant does not assume the risk of his master's negligence. Thus, whenever proof of negligence on the part of the master appears, the defense of assumption of the risk "falls out of the case."³⁷

Some cases properly recognize that the risk of defendant's negligent conduct can be assumed when the plaintiff voluntarily exposes himself to defendant's existing negligent acts. In *Turpin v. Shoemaker*³⁸ deceased and defendant were engaged in a "quick draw" contest. Unfortunately, defendant's revolver contained a live cartridge. The court stated that a plaintiff may assume the risk of defendant's negligence which he knows of and appreciates.³⁹ The court held that deceased did not assume the risk because he did not know that defendant's gun contained a live cartridge.⁴⁰ In *Gregory v. Hester*⁴¹ plaintiff's eye was injured when a bullet ricocheted from a target at which plaintiff and defendant were shooting. The court stated that where a participant knows a dangerous act is taking place and he voluntarily engages in the activity, he assumes the risk even if the act

34. *Bourque v. Duplechin*, 331 So. 2d 40, 42 (La. App. 1976); *Brady v. Kane*, 111 So. 2d 472, 474 (Fla. App. 1959).

35. *Richmond v. Employers' Fire Ins. Co.*, 298 So. 2d 118, 122 (La. App. 1974); *Gaspard v. Grain Dealers Mutual Ins. Co.*, 131 So. 2d 831, 834 (La. App. 1961); *Schamel v. St. Louis Arena Corp.*, 324 S.W.2d 375, 378 (St. L. Mo. App. 1959).

36. *Rosenberger v. Central Louisiana Dist. Livestock Show, Inc.*, 312 So. 2d 300, 304 (La. 1975); *Hawayek v. Simmons*, 91 So. 2d 49, 53 (La. App. 1956); *Page v. Unterreiner*, 106 S.W.2d 528, (Spr. Mo. App. 1937); *Toohy v. Webster*, 97 N.J.L. 545, 117 A. 838 (Ct. Err. & App. 1922); Annot., 7 A.L.R.2d 704, 706 (1949).

37. *Terry v. Boss Hotels, Inc.*, 376 S.W.2d 239, 247 (Mo. 1964).

38. 427 S.W.2d 485 (Mo. 1968).

39. *Id.* at 490.

40. *Id.* See also *Niemczyk v. Burleson*, 538 S.W.2d 737, 741 (Mo. App., D. Spr. 1976).

41. 123 Ga. App. 406, 181 S.E.2d 104 (1971).

constitutes negligence *per se*.⁴²

When the risk of conduct is held not to be assumed by a participant, the courts often talk in terms of reckless behavior not being assumed by a participant or are dealing with behavior by the defendant which approaches recklessness. These courts do not say that the doctrine of assumption of the risk is not a defense to recklessness, but rather, that reckless behavior is not within the scope of conduct which is "foreseeable," "inherent," or "ordinarily incident" to that sport. Again, the courts are merely attaching labels to conduct to support their ultimate decision that the particular risk has or has not been assumed by the plaintiff. A case by case approach is needed to determine what conduct falls into the category of "reckless." In *Moe v. Steenberg*⁴³ the court held that an ice skater assumed the risk of falling down and having nearby skaters, who were skating backwards, fall over her. However, the court stated that a participant does not assume the risk of conduct which is so reckless or inept as to be unanticipated.⁴⁴ In *Bourque v. Duplechin*⁴⁵ the court held that plaintiff second baseman did not assume the risk of defendant base runner going five feet out of his way to run over plaintiff. The court stated that a participant does not assume the risk of injury from players acting with reckless disregard for others.⁴⁶ Similarly, in *Arnold v. Schmeiser*⁴⁷ plaintiff, who was being thrown into the air by two defendants in a game of "fireman's chair," did not assume the risk that defendants would make no attempt at all to catch him and simply walk away.

In Missouri, the viability of the defense of assumption of the risk in negligence cases has been questioned.⁴⁸ In *Niemczyk v. Burlison*⁴⁹ defendant shortstop positioned herself in the baseline so that plaintiff base runner would collide with her. The plaintiff alleged negligence and the court held that the petition stated a claim upon which relief could be granted. Although the court recognized that recent cases had characterized assumption of the risk as "an extremely doubtful defense,"⁵⁰ it concluded that the doctrine had not yet expired in Missouri.

The third theory of recovery available to a participant injured in an athletic event is recklessness. Recklessness requires an act or omission by one knowing of facts which would lead a reasonable man to realize his

42. *Id.* at 409, 181 S.E.2d at 107.

43. 275 Minn. 448, 147 N.W.2d 587 (1966).

44. *Id.* at 451, 147 N.W.2d at 589.

45. 331 So. 2d 40 (La. App. 1976).

46. *Id.* at 42. *See also* Douglas v. Converse, 248 Pa. 232, 93 A. 955 (1915).

47. 34 App. Div. 2d 568, 309 N.Y.S.2d 699 (1970).

48. *Ballew v. Schlotzhauer*, 492 S.W.2d 774, 777 (Mo. 1973). *See also* Terry v. Boss Hotels, Inc., 376 S.W.2d 239, 248 (Mo. 1964); *Kungle v. Austin*, 380 S.W.2d 354, 362 (Mo. 1964) (an instruction on assumption of the risk should only be given in exceptional cases).

49. 538 S.W.2d 737 (Mo. App., D. Spr. 1976).

50. *Id.* at 741. *See* McCormick v. Smith, 459 S.W.2d 272, 274 (Mo. 1970).

conduct creates a high degree of risk to the safety of another.⁵¹ Unlike negligence actions, plaintiff's contributory negligence is not a defense to defendant's reckless conduct.⁵² However, the doctrine of assumption of the risk is a defense to both negligent and reckless conduct.⁵³

In *Nabozny v. Barnhill*⁵⁴ the Illinois Court of Appeals held that a player is liable for injury if his conduct was either deliberate, wilful, or reckless. The court acknowledged that it was carefully narrowing the standard of conduct in order to control this new field of personal injury litigation.⁵⁵ The court also declared that three additional elements must exist before this standard applies: (1) the teams must be trained and coached by knowledgeable personnel; (2) there must be a recognized set of rules in force; and (3) a safety rule must be contained therein which is primarily designed to protect players from injury the violation of which must cause the injury. The court disagreed with defendant's contention that he was immune from tort action for an injury to another player during the course of a game. The court also found plaintiff not contributorily negligent because sufficient evidence existed for a jury to find that he exercised ordinary care.

The Illinois court has made recklessness an element of plaintiff-participant's case. By adopting this approach, the court appeared to reject the recent line of cases which allow plaintiff a cause of action for negligence.⁵⁶ By requiring recklessness in order for plaintiff to recover, the Illinois court obtained the same result that other courts could reach by using assumption of the risk analysis and following the cases that recognize that in a sporting event the risk of defendant's negligence can be assumed by the plaintiff in the proper circumstances⁵⁷ but not the risk of defendant's recklessness.⁵⁸ Thus, by analyzing tort cases in athletic events from the basis of assumption of the risk a result is reached nearly identical to the Illinois court's holding that recklessness is needed for recovery.

Analysis by assumption of the risk is a superior approach because it does not establish a rigid rule that recklessness is needed for recovery. It is more flexible because it properly focuses on what risks the plaintiff actually was aware of, appreciated, and voluntarily incurred rather than automatically requiring that defendant be reckless. However, in Illinois the defense of assumption of the risk is probably not available except in master-servant cases.⁵⁹ Contributory negligence of the plaintiff was not available because

51. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

52. *Id.* § 503.

53. *Id.* § 496A, Comment d.

54. 31 Ill. App. 3d 212, 334 N.E.2d 258 (1975).

55. *Id.* at 215, 334 N.E.2d at 261.

56. Cases cited notes 23-27 *supra*.

57. Cases cited notes 38-42 *supra*.

58. Cases cited notes 43-47 *supra*.

59. The majority of Illinois cases hold that the defense of assumption of the risk is not available except in master-servant cases. *Mayneir v. Rush*, 80 Ill. App. 2d 336, 225 N.E.2d 83 (1967). A minority of cases allow the defense in other situations. *Hargis v. Standard Oil Co.*, 10 Ill. App. 2d 119, 134 N.E.2d 518 (1956). Only one

reasonable care was exercised by the plaintiff. Thus, the only remaining alternative which would restrict recovery for athletic injuries was to make recklessness an element of plaintiff's case.

In requiring reckless conduct by defendant before plaintiff can recover for injuries suffered in an athletic event, the Illinois court is fostering free and vigorous participation in sports. The court is correct in following this policy because the law should not place unreasonable burdens on participation in sporting events. Fear of civil litigation arising from injuries suffered in an athletic event could severely limit the fervor with which the game should be played as well as deter individuals from participating. Yet, of course, some civil controls are necessary to protect players from injury. Several approaches are available to the courts in jurisdictions other than Illinois. First, they could follow the Illinois approach and restrict recovery in tort by requiring recklessness as an element of plaintiff's cause of action. Contributory negligence would not be a defense and the various forms of assumption of the risk may be a defense if recognized in the jurisdiction. Second, they could allow plaintiff to state a cause of action for negligence. Contributory negligence would be a defense but often would not bar recovery because plaintiff's participation in the sport is usually reasonable. If assumption of the risk is available as a defense, the courts could follow the cases which hold the plaintiff does not as a matter of law *impliedly* assume the risk of defendant's negligence.⁶⁰ Under this view recovery by plaintiff would be readily available in negligence actions. The courts could follow the cases which recognize that a plaintiff may assume the risk of defendant's negligence, if he knows the dangerous act is taking place and he voluntarily exposes himself to the risk.⁶¹ Under this latter view recovery by the plaintiff could be denied in negligence actions. To foster unfettered participation in sports, plaintiff should be allowed to state a cause of action for negligence but his recovery should be limited by recognizing that the risk of defendant's negligence can be assumed when the player knows the dangerous act is taking place and he voluntarily exposes himself to the risk. If assumption of the risk is not recognized as a defense in the jurisdiction, plaintiff should only be allowed to recover if the defendant was reckless.

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case has argued for the doctrine's general applicability. *Campion v. Chicago Landscape Co.*, 295 Ill. App. 225, 14 N.E.2d 879 (1938) (a golfer assumed the risk of being struck by a ball of another player).

60. Cases cited note 36 *supra*.

61. Cases cited notes 38-42 *supra*.