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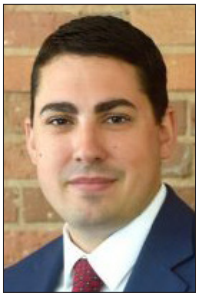
Insurance and Injury Corner: Basics of the primary assumption of risk doctrine



By PATRICK D. LEAVY

Although this winter season is certainly not over, last week we were reminded that spring is not far off as pitchers and catchers reported to spring training facilities across the country. With the start of spring training, and baseball's opening day about a month away, a recent 3-2 decision from the Appellate Division, Third Department provides a timely application of the primary assumption of risk doctrine.

The primary assumption of risk doctrine is a defense to tort recovery in actions that arise from injuries sustained in athletic, amusement, or recreational activities, such as baseball, basketball, cheerleading, football, hockey, lacrosse, and whitewater rafting, just to name a few. In essence, the doctrine negates the duty owed by the defendant to the plaintiff. As the Court of Appeals explained, "a plaintiff who freely accepts a known risk commensurately negates any duty on the part of the defendant to safeguard him or her from the risk." (*Custodi v Town of Amherst*, 20 NY3d 83, 87 [2012]) The key to the doctrine is consent and the plaintiff's awareness of the risks. The doctrine applies when a consenting participant in a qualified activity is aware of the risks, has an appreciation of the nature of the risks, and voluntarily assumes the risks. New York courts frequently hold that "a person who chooses to engage in such an activity consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." (*id.*, quoting *Morgan v State of New York*, 90 NY2d 471, 484 [1997]) As Chief Judge Cardozo succinctly explained in a case often taught in law schools: "One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball." (*Murphy v. Steeplechase Amusement Co.*, 250 NY 479, 482 [1929])

Simply put, a person consents to risks that are known, apparent, or reasonably foreseeable when he or she participates in a sport. Thus, the duty owed by defendants under these circumstances is "a duty to exercise care to make the conditions as safe as they appear to be." (*Turcotte v Fell*, 68 NY2d 432, 439 [1986]) The courts continue to apply this doctrine based on policy considerations, reasoning that the doctrine encourages free and vigorous participation in sports and shields co-participants and venue owners from crushing liability.

Significantly, however, "participants are not deemed to have assumed risks resulting from the reckless or intentional conduct of others, or risks that are concealed or unreasonably enhanced," (Custodi, 20 NY3d at 88), and litigation concerning the doctrine often centers around what constitutes a risk that is inherent in the sport and whether the plaintiff was aware of and appreciated the nature of the risk.

In *Grady v. Chenango Val. Cent. School Dist.*, (– AD3d – , 2021 NY Slip Op 21371 [3d Dept 2021), the Appellate Division, Third Department considered a case of student injured during his high school baseball practice. The plaintiff was a member of the Chenango Valley High School boys varsity baseball team, and the incident occurred during practice, when the players were doing an infield drill called the "Warrior Drill." The drill involved multiple baseballs being in play at the same time with players throwing to two separate first basemen, the first situated at first base and the second half-way between first and second base. Since there were two first basemen located near each other, and multiple balls in play at the same time, the coaching staff put a 7-by-7 screen between the two first basemen in hopes of blocking stray balls. Unfortunately, during the drill an errant throw went over the screen and struck the plaintiff in his right eye, causing permanent injuries.

After discovery, the defendants moved for summary judgment, contending that the doctrine of primary assumption of risk precluded any recovery. The Third Department majority agreed, concluding that the evidence established that the plaintiff was an experienced baseball player who was aware of the risks associated with the drill, including the risk of being hit with a baseball. In fact, as the majority noted in its decision, the plaintiff witnessed earlier that same practice another student being hit with an errant thrown ball. The majority disagreed with the plaintiff's contention that the presence of the screen provided a false sense of security, stating that the plaintiff had testified that he did not rely on the screen for his safety.

In dissent, Justice Pritzker opined that issues of fact remained. He found that the critical fact was the presence of an inadequate safety measure, i.e., the screen. In his view, the doctrine would be improperly expanded if the courts immunized defendants who put ineffective safeguards in place that concealed or falsely minimized the risk. Thus, for Justice Pritzker, there was an issue of fact whether the plaintiff assumed the risk where the coaches had provided safety measures that turned out to be inadequate.

In a separate dissent, Justice Colangelo found that issues of fact precluded summary judgment, reasoning that "the risks assumed must be risks inherent to the sport itself, not risks inherent to the drill. The more attenuated that an activity or a drill is from the essential elements of the sport itself, the less reason there is to enforce an exception to the comparative negligence rule." He opined that it should be left to the trier of fact to decide whether the particular risk was sufficiently related to the game of baseball and whether it posed an unreasonable risk above the usual dangers in a game.

With the 3-2 decision, the Court of Appeals may have the opportunity to weigh in on whether the doctrine was appropriately applied and whether summary judgment was properly granted in this case.

Some takeaways for litigators are that the primary assumption of risk doctrine poses a significant hurdle for plaintiffs who are injured while participating in sporting activities, especially during baseball games or practices. Plaintiffs may want to focus on whether the particular risk that caused the injury was a risk that is inherent in the sport, whether the risk was too attenuated from the sport, or whether the particular risk resulted from reckless or intentional conduct. Plaintiffs may also want to explore whether the risk was concealed, or the conduct unreasonably increased the risk.

Defendants who assert the doctrine as an affirmative defense may want to focus their defense on establishing the plaintiff's experience level in the sport and his or her knowledge and awareness of the risks inherent in the sport.

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