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PITCHER STRUCK BY BATTED BALL ASSUMED RISK OF INJURY

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Pitcher Struck by Batted Ball Assumed Risk of Injury

In 1929, Judge Benjamin Cardozo succinctly articulated the assumption of risk doctrine in the context of recreational activities:

One who takes part in such a sport [an amusement park ride] 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.... 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.[1]

'Bukowski v. Clarkson University'

The Court of Appeals recently affirmed the grant of a directed verdict to Clarkson University, in an action brought by Clarkson pitcher Shawn Bukowski. Bukowski was hit in the face by a line drive while pitching indoor batting practice without an L-screen.[2] Bukowski also claimed that the multi-colored pitching backdrop was unsafe, and that the lighting in the indoor facility was poor.

The court found that Bukowski, an experienced baseball player of college age, assumed the risk of injury, and reaffirmed that the assumption of risk doctrine applies to sports injuries when the damages are caused by known risks that are inherent in the activity. We discuss in this article the assumption of risk doctrine, the holding in Bukowski, and a recent products liability trend against bat manufacturers.

'Morgan v. State of New York'

Baseball players and fans have long known that pitchers, throwing only 60 feet, 6 inches from the batter, are at great risk of getting struck by batted balls. In 1957, Herb Score of the Cleveland Indians was one of baseball's best young pitchers. Score's career was effectively ended that year when Gil McDougald of the New York Yankees hit a line drive at Score that shattered numerous bones in his face. Ultimately, Score altered his delivery and was never again the same pitcher. More recently, in 2000, Ryan Thompson of the New York Yankees hit a line drive back to pitcher Bryce Florie of the Boston Red Sox. The ball struck Florie in the face, causing multiple broken bones and eye damage. Florie made a comeback, but retired a year later.

In Morgan v. State of New York,[3] a consolidated case, the Court of Appeals addressed whether the assumption of risk doctrine applied to four different plaintiffs. The injured litigants were injured while participating in various sporting activities, and sued the owners and operators of athletic facilities.

The court found that the doctrine was inapplicable in only one of the cases, which involved a torn tennis net. In that case, Siegel v. City of New York, plaintiff was playing tennis on a city-owned court when he caught his foot on a torn side divider net. Even though the plaintiff admitted that he knew of the defect, the Court of Appeals held that he did not assume the risk because "a torn or allegedly damaged or dangerous net—or other safety feature—is by its nature not automatically an inherent risk of a sport as a matter of law for summary judgment purposes."

The Morgan court found that the assumption of risk doctrine did apply to the claims of the other plaintiffs, whose cases involved bobsledding and martial arts injuries. The common thread in those fact patterns was that the owners' alleged negligence did not increase the danger of the activity above the level of risk inherent in the sport, and the participants were experienced enough to know and appreciate the inherent risks.

'Checchi v. Socorro'

Although none of the cases discussed in Morgan were baseball-related, the Court of Appeals may have been informed by an earlier case involving an injury to a pitcher, Checchi v. Socorro.[4] In Checchi, the plaintiff was playing stickball when the stickball bat accidentally flew out of the hands of the batter and struck him in the head. The plaintiff claimed that the bat's diameter and lack of tape increased the risk of the activity. However, the Second Department found that "[t]he danger of a bat slipping out of a player's hands is common in a game of stickball, and was foreseeable by the plaintiff."

Following Checchi, it was not a far leap for the Bukowski court to find that the risk of a ball striking a pitcher was an inherent one, given the precedent that an errant bat was found to be an inherent risk in baseball/stickball. The court also likely considered that the risk of getting struck by a batted ball during batting practice, as happened in Bukowski, is obviously greater than during a game.

Bats and Products Liability

Perhaps, though, the decision in Bukowski would have been a closer call if the plaintiff had brought a products liability claim against the manufacturer of the bat used by the hitter.

Ever since the NCAA permitted aluminum bats in 1974, administrators and other observes have debated the benefits and risks of metal bats compared to those of wooden bats. Aluminum bats are more durable and thus more cost-effective over the long term, but some have argued that the bats cause balls to travel at a higher speed than wooden bats do, and thus arguably increase the risk of injury.

In 1999, the NCAA adopted the BESR (ball exit speed ratio) standard to regulate the performance of metal bats. However, in 2009, the NCAA discovered that a large percentage of BESR-compliant bats significantly exceeded the speed standard after they were used for some time. As a result of this discovery, the NCAA banned the use of the bats, and last year replaced the BESR standard with the BBCOR (bat-ball coefficient of restitution) standard. This new standard requires metal bats to produce a batted-ball speed that is purportedly no greater than that of a wooden bat.

Plaintiffs around the country have brought cases against bat manufacturers, claiming that the bat producers have failed to properly manufacture and design bats, and have failed to warn consumers about allegedly unsafe aluminum bats. The cases usually involve Little League participants, but one notable case involved a college pitcher in California. In Sanchez v. Hillerich & Bradsby,[5] a University of Southern California pitcher brought a products liability claim against the manufacturer of an aluminum bat after he was struck by a line drive.

The manufacturer relied on the doctrine of assumption of risk and won summary judgment dismissal of the claims against it. However, the California Court of Appeals held that there was sufficient evidence to establish that the design properties of the bat caused the incident, and it reversed the grant of summary judgment. The court held that while the risk of injury from being struck by a baseball is an inherent risk in the sport, a manufacturer has the responsibility to not enhance that risk.

Thus, had Bukowski somehow demonstrated that the bat used by his opponent batter caused the ball to travel at an unsafe and unexpected speed, the New York Court of Appeals may not have held that he assumed the risk of injury.

Conclusion

In sum, Bukowski makes clear that unless a defendant increases a sport's inherent risk, experienced participants will be found to have assumed the risk of injury.

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Endnotes:

1. Murphy v. Steeplechase Amusement, 250 NY 479, 482-83 (1929).

2. Bukowski v. Clarkson Univ., 2012 NY Slip Op 04274 (2012). An L-screen is a net in the shape of an "L" designed to protect pitchers during batting practice.

3. 90 N.Y.2d 471, 662 N.Y.S.2d 421 (1997).

4. 169 A.D.2d 807, 565 N.Y.S.2d 175 (2d Dept. 1991).

5. 104 Cal. App. 4th 703 (Cal. Ct. App. 2002).

