

HEAD SHOTS JUST PART OF THE GAME

James C. Kozlowski, J.D., Ph.D.

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From a legal perspective, getting smacked in the face on the street is categorically different from taking that same smack in the face when participating in a sport or recreational activity. Ordinarily, a careless blow to the head causing injury might give rise to civil liability for negligence. However, as illustrated by the opinions described below, participants necessarily assume the foreseeable and inherent risk of injury normally associated with a given sport or recreational activity, including potential head injuries. One state supreme court has described this legal distinction for sport participants within the context of golfing activity as follows:

Acts that would give rise to tort liability for negligence on a city street or in a backyard are not negligent in the context of a game where such an act is foreseeable and within the rules. For instance, a golfer who hits practice balls in his backyard and inadvertently hits a neighbor who is gardening or mowing the lawn next door must be held to a different standard than a golfer whose drive hits another golfer on a golf course.

A principal difference is the golfer's duty to the one he hit. The neighbor, unlike the other golfer or spectator on the course, has not agreed to participate or watch and cannot be expected to foresee or accept the attendant risk of injury.

Conversely, the spectator or participant must accept from a participant conduct associated with that sport. Thus a player who injures another player in the course of a sporting event by conduct that is a foreseeable, customary part of the sport cannot be held liable for negligence because no duty is owed to protect the victim from that conduct

WATER POLO CONCUSSION

In the case of *Mayall v. USA Water Polo, Inc.*, 2016 U.S. Dist. LEXIS 115047 (C.D. Cal. 8/26/2016), Alice Mayall's daughter, H.C., sustained a concussion while playing water polo for a team governed by the rules and policies of defendant USA Water Polo.

On February 15, 2014, H.C. was playing in a water polo tournament when she suffered a concussion after a ball hit her in the face. Neither the referee nor the coach stopped the game. Her coach, who was not trained or educated in concussion management, allowed her to continue playing. H.C. continued to play in other games that day and took additional hits to the head that exacerbated her initial injury.

Two days after the initial blow to H.C.'s head, H.C. started to experience physical symptoms, including headaches, sleepiness, and fatigue. Shortly thereafter, H.C. was diagnosed with post-concussion syndrome. H.C. continues to experience physical symptoms and to struggle socially and academically.

In her complaint, Mayall alleged it was negligent to allow H.C. to return to play the same day she suffered a concussion without medical clearance. In so doing, Mayall alleged the USA Water Polo coach and referee had "increased the risk to H.C. of aggravated, secondary injuries."

INHERENT RISKS ASSUMED

As cited by the court, "a Plaintiff must allege facts supporting a duty, breach of duty, causation, and damages" in order to "state a claim for negligence." In determining negligence, the preliminary issue before the court was whether a legal duty existed under the circumstances of this particular case. Generally, the court noted "a duty is owed to use due care to avoid injury to others."

However, in the "sports setting," the court acknowledged "conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself." Further, under the primary assumption of risk doctrine, the court found "[d]efendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself."

That being said, the court recognized that "defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport."

Conduct is not inherent in the sport if that conduct is totally outside the range of ordinary activity involved in the sport and if the prohibition of that conduct would neither deter vigorous participation in the sport nor otherwise fundamentally alter the nature of the sport.

SECONDARY HEAD INJURIES

In this particular instance, Mayall did not claim that USA Water Polo had a duty to prevent the inherent risk of concussions." On the contrary, Mayall claimed USA Water Polo had a duty to address "the risk of *secondary injuries* that can occur if a player returns to the game prematurely following a concussion." Specifically, Mayall alleged that USA Water Polo had a duty "to prohibit same day return to play after a concussion, head blow or the exhibition of concussion symptoms."

Moreover, Mayall claimed USA Water Polo had a duty "to prohibit premature return to play before a player has fully recovered from a concussion. This alleged duty would ensure that a player is "asymptomatic after proceeding through a stepwise return to play protocol, and is cleared by a physician."

The court, however, found: "Getting hit in the head and suffering a concussion is common in water polo. " Mayall had further acknowledged that such "injuries are also a prevalent, related occurrence."

Studies show that players who have not recovered from a concussion and those with a history of previous concussions are more likely to have future concussive injuries than those with no history, particularly within the same playing season.

In the opinion of the court, the risk of secondary head injuries, specifically concussions, are inherent to the sport. According to the court, "the adoption of return to play policies in many states and organizations could prove that the risk of secondary injuries is part and parcel with playing a sport such as water polo."

CONCUSSIONS NOT RECOGNIZABLE

In this particular instance, the court found USA Water Polo had "made an attempt to minimize the risk of secondary head injuries by adopting a policy prohibiting premature return to play." Regardless "if such an attempt was unsuccessful, " in the opinion of the court "failing to minimize risks inherent to the sport is not the same as increasing those risks." More importantly, the court noted "concussions are not readily recognizable during a game."

Whether a concussion is recognizable is important because Defendant's alleged breach—that Defendant failed to adopt certain return-to-play guidelines before sending a concussed player back in the game—depends on a coach recognizing that the player was concussed in the first place.

In this particular instance, the court found no allegation that "H.C.'s concussion was readily recognizable." Aside from being "dazed" during the game, the court noted "H.C. didn't start showing symptoms until two days after being hit in the head." Accordingly, "the only way to recognize H.C.'s head injury would have been to stop the game each time H.C. was hit." To impose such a legal duty would, in the opinion of the court, "water polo's fundamental nature" would be altered.

[W]ater polo is a contact sport. Taking a player out of the game every time a ball hits her in the head might leave teams without any players left in the game. Such an action would fundamentally alter the game.

As characterized by the court, "[t]his alleged duty even goes above and beyond the return-to-play policies adopted by many states and organizations cited by Plaintiff [Mayall] as support" for her negligence claim.

As a result, the court concluded that Mayall had "failed to adequately allege a legal duty" under the circumstances of this particular case. The federal district court, therefore, granted USA Water Polo's motion to dismiss Mayall's negligence claims.

KARATE NOSE BREAK

In the case of *Morgan v. Kent State University*, 2016-Ohio-3303; 54 N.E.3d 1284; 2016 Ohio App. LEXIS 2160 (6/7/2016), plaintiff Aaron Morgan was injured in a karate class at Kent State University.

In the fall semester 2012, Morgan enrolled in a beginning karate class taught by Edward Malecki, an employee of KSU. Morgan had no experience in martial arts before enrolling in the

beginning karate class, but had a general idea of what karate entailed through movies and television.

The course syllabus for beginning karate listed objectives for the students, including: "demonstrating basic self defense techniques including release from various holds and counter attacks, joint locks and throws." Additionally, the syllabus listed a variety of fighting techniques, including punches and kicks that the students were expected to perform. Students enrolled in the class were required to wear a mouth guard and padded gloves.

As part of the class, students were required to spar with one another and with the instructor using only "light physical contact." According to Malecki, there was no bodily or facial contact permitted either by the students or the instructor. During the sparring, students practiced guarding themselves using their hands in defensive postures in front of their body. It was not uncommon for students to make mistakes, such as dropping their guard by lowering their hands. When a student would drop his or her guard, the instructor would stop the sparring procedure until the student resumed guarding himself or herself.

On October 24, 2012, while Morgan was sparring with Malecki, he lost his balance and dropped his guard. When Morgan dropped his guard, Malecki punched Morgan in the face. According to Morgan, Malecki's palm struck him on the nose. Malecki was not wearing padded gloves when he struck Morgan. Morgan's nose immediately started bleeding. Malecki and a student employee helped to stop Morgan's bleeding and then filled out an incident report. Morgan later sought medical care and was told that he suffered a nasal fracture.

On July 15, 2014, Morgan filed a lawsuit alleging negligence against Malecki and negligent hiring against KSU. The state court of claims granted KSU's motion for summary judgment, effectively dismissing Morgan's lawsuit. Morgan appealed. On appeal, Morgan argued the trial court had erred in finding his negligence claim against KSU was barred by the doctrine of primary assumption of risk.

PRIMARY ASSUMPTION OF RISK

As cited by the appeals court, "Ohio courts have historically applied the doctrine of primary assumption of the risk to cases involving sporting events and recreational activities":

Under the doctrine of primary assumption of the risk, a plaintiff who voluntarily engages in a recreational activity or sporting event assumes the inherent risks of that activity and cannot recover for injuries sustained in engaging in the activity unless the defendant acted recklessly or intentionally in causing the injuries.

According to the court, the rationale for the primary assumption of risk doctrine is "certain risks are so inherent in some activities that they cannot be eliminated, and therefore a person participating in such activities tacitly consents to the risks involved." Moreover, the court noted the "test for applying the doctrine of primary assumption of the risk to recreational activities and sporting events" was as follows:

(1) the danger is ordinary to the game, (2) it is common knowledge that the danger exists, and (3) the injury occurs as a result of the danger during the course of the game.

Further, for primary assumption of risk to apply, the court acknowledged "the risk must be one that is so inherent to the sport or activity that it cannot be eliminated."

[T]he spectator or participant must accept from a participant conduct associated with that sport. Thus a player who injures another player in the course of a sporting event by conduct that is a foreseeable, customary part of the sport cannot be held liable for negligence because no duty is owed to protect the victim from that conduct. Were we to find such a duty between co-participants in a sport, we might well stifle the rewards of athletic competition.

Accordingly, when applicable, the court noted "[t]he affirmative defense of primary assumption of the risk completely negates a negligence claim because the defendant owes no duty to protect the plaintiff against the inherent risks of the recreational activity in which the plaintiff engages."

Further, primary assumption of risk defense would apply by the mere fact of one's participation in a sport or recreational activity. As noted by the court, "the injured plaintiff's subjective consent to and appreciation for the inherent risks are immaterial to the analysis."

[E]ven persons entirely ignorant of the risks of a sport, still assume the risk by participating in a sport or simply by attending the game. The law simply deems certain risks as accepted by plaintiff regardless of actual knowledge or consent... If the activity is one that is inherently dangerous and from which the risks cannot be eliminated, then a finding of primary assumption of the risk is appropriate.

FOCUS ON INHERENT RISKS

Moreover, the appeals court found "the doctrine of primary assumption of the risk applies to co-participants and non-participants alike." In so doing, the court noted "the analysis of the doctrine focuses exclusively on the activity itself." As a result, "if the activity is one that is inherently dangerous and from which risks cannot be eliminated," the appeals court found "primary assumption of the risk is applicable." In the opinion of the appeals court, "[a] holding to the contrary would likely shift the focus of the analysis away from the activity and its inherent risks."

The analysis would then unnecessarily focus upon the extent of the defendant's involvement and the defendant's classification as a participant, nonparticipant, coach, instructor, official, operator, owner, sponsor, provider, or otherwise. Injured participants would frame their allegations sufficiently to cast a liability net... with no regard for the inherent risks of the activity.

On appeal, Morgan argued that primary assumption of risk did not apply in this particular

instance because his injury was "not a 'foreseeable' consequence of participating in the subject Beginning Karate class." In so doing, Morgan claimed the following alleged facts proved the injury he sustained was not an inherent risk in this particular instance:

(1) all of the students in the class were "novices in martial arts"; (2) "the students were specifically assured by the instructor that there would be no bodily contact during the class and that facial contact was explicitly prohibited"; (3) "the instructor was required to wear padded, protective gloves as a further safeguard against injury"; and (4) "when a student dropped his or her guard, the instructor was required to stop the session until the student raised his or her guard."

According to Morgan, in considering the applicability of primary assumption of risk, the trial court should have considered that he had "no experience in the martial arts." The appeals court rejected this argument. In the opinion of the appeals court, considering Morgan's lack of experience in determining primary assumption of risk improperly "shifts the focus of the analysis away from the activity and its inherent risks."

Accordingly, the appeals court would focus its analysis on the inherent risks associated with karate activity. Specifically, the court would "consider whether karate is an inherently dangerous activity from which the risks cannot be eliminated."

In this particular instance, the state claims court had found "there is no question that the martial arts class was a sports or recreational activity with an inherent risk of injury." Moreover, the state claims court had acknowledged "physical contact between participants during karate sparring is simply a foreseeable hazard of the activity":

Karate is a recreational activity involving physical contact in the form of punches, kicks, and other techniques as detailed in the course outline for the beginning karate course in which Morgan was enrolled. Thus, by its very nature, karate, as a martial art, is an inherently dangerous activity from which the risk of harm cannot be eliminated.

According to the court, the course outline itself recognized the dangerous nature of the activity by requiring a "mouthguard; sparring gloves; athletic supporter w/cup." Further, the court found "danger is inherent in karate." Moreover, it was "common knowledge that such danger exists." As a result, the appeals court concluded the doctrine of primary assumption of the risk applied in this particular case because Morgan's injury occurred during the course of participating in the inherently dangerous activity.

Accordingly, the appeals court held KSU owed "no duty to protect Morgan from the inherent risks from the inherent risks of the activity." The appeals court, therefore, affirmed the trial court's granting summary judgment in favor of KSU.

James C. Kozlowski, J.D., Ph.D. is an attorney and associate professor in the School of Recreation, Health, and Tourism at George Mason University in Manassas, Virginia. E Mail:

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