

TOUGH BREAKS ARE JUST PART OF THE GAME

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In the case of *Kelly v. McCarrick*, 841 A.2d 869 (Md.App. 2004), Tara Kelly, age 13, was injured while playing second base in a fast pitch softball game at St. Joseph's Parish. Tara played second base for the St. Mark's Parish 7th and 8th grade team in a CYO (Catholic Youth Organization) league. In the bottom of the first inning, with no outs, St. Joseph's was already beating St. Mark's badly. According to witnesses, Amy G., a good player for St. Joseph's, had either hit the ball or was stealing second when she slid into the base feet first, colliding with Tara, who made the tag for the first out of the inning.

Tara's right foot had been positioned on the back corner of the stationary base, which was anchored by a stake into the ground. She placed it along the side toward first base, but left most of the base open along the base path, so that she did not obstruct Amy's path. In the collision, Tara's ankle was severely fractured.

ALLEGED NEGLIGENCE

Tara's parents brought suit on Tara's behalf against the CYO, St. Joseph's Parish, its coach, and St. Mark's Parish, as well as the Archdiocese of Washington, under whose supervision the parishes and their staffs work. In their complaint, the Kellys alleged that the defendants were negligent in failing "to train players and coaches how to safely play softball." In addition, the Kellys claimed that the defendants had negligently "failed to ensure that Tara's team was not scheduled to play against teams with more skilled players."

As to the negligent training and mismatch claims, the trial court concluded that "a person of normal intelligence, in a similar position as [the Kellys], would clearly have comprehended the danger" in tagging out a sliding base runner. Citing Tara's four years in softball and her "normal intelligence," the trial court further held that Tara clearly understood the risk of injury by participating in softball and especially when she positioned herself in front of or in the path of a runner that could result in a collision. Moreover, given the fact that "sliding is a part of softball," the trial court acknowledged that "contact between a runner and the base defender is a risk incidental to the game of softball, which is obvious and foreseeable."

As a result, the trial court granted summary judgment on all counts to all defendants. The Kellys appealed.

ASSUMPTION OF RISK

As defined by the appeals court, "Assumption of the risk negates the issue of a defendant's negligence by virtue of a plaintiff's previous abandonment of his or her right to maintain an action if an accident occurs."

The concept is grounded on the theory that a plaintiff who voluntarily consents, either expressly or impliedly, to exposure to a known risk cannot later sue for damages incurred from exposure to that risk. The defense rests upon an intentional and voluntary exposure to a known danger and, therefore, consent on the part of the plaintiff to relieve the defendant of an obligation of conduct toward him and to take his chances from harm from a particular risk.

Thus, if the plaintiff (1) had knowledge of the risk of danger, (2) appreciated that risk and (3) voluntarily exposed himself to it, then assumption of the risk has been established.

Further, the appeals court noted that “Assumption of the risk principles apply to children as well as adults.”

Like adults, children are held to an objective standard, albeit one reflecting the child's age, mental capacity, experiences, and circumstances. A child, however, is not to be held to the same standard or degree of care that an adult would have used. A child should be deemed to have assumed the risk if another child of similar age, intelligence, experience and development, would have acted differently, under the same circumstances.

Applying these principles to “athletes injured during play,” the appeals court noted that “the general rule is that a voluntary participant in any lawful game, sport or contest... assumes all risks incidental to the game, sport or contest which are obvious and foreseeable.”

[T]he risks assumed by participating in a game are only the "usual" and foreseeable dangers that a similarly situated player reasonably would expect to encounter during that game. These foreseeable dangers include risk of injury resulting from the type of physical contact that is an integral part of the sport as it is typically played.

NEGLIGENT COACHING

On appeal, the Kellys argued that the trial court had erred in granting summary judgment on their various "negligent coaching" claims. Specifically, the Kellys contended that “Tara was not trained in how to tag out a runner sliding into second base.”

As noted by the appeals court, the “majority view” among courts in various jurisdictions holds that “a claim for personal injury incurred during a voluntary athletic competition may not be premised on mere negligence, but only on intentional or reckless acts or omissions.”

[T]he overwhelming majority of the cases . . . have concluded that it is improper to hold a sports participant liable for ordinary careless conduct committed during the sport... and that liability properly may be imposed on a participant only when he or she intentionally injures another player or engages in reckless conduct that is totally outside the range of the ordinary activity involved in the sport.

Applying this rule to the facts of the case, the appeals court found no evidence to suggest that “Amy was instructed or encouraged to intentionally slide into Tara in an effort to prevent her from making the play (*i.e.*, to execute a take-out slide).”

Further, in the opinion of the appeals court, “assumption of the risk principles applicable to negligent play claims” were equally applicable to “negligent coaching claims,” including negligence claims based on instruction and supervision of athletes and teams.

In assumption of sports risk case, the general duty for those involved in sporting events is limited to a duty to exercise care to make the conditions as safe as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty. Plaintiff's "consent" is implied from the act of the electing to participate in the activity... [In addition, courts will] consider the plaintiff's knowledge and experience in the sport. The more experience the plaintiff has in the sport, the more likely it is that he made an informed judgment regarding the inherent risks.

On the other hand, the appeals court acknowledged that "coaches must be aware of preventable risks to their athletes and they must take measures to properly supervise and care for their players." In particular, the court noted that “a sports instructor or coach owes a duty of due care not to increase the risk of harm inherent in learning an active sport.” However, in order to establish “a coach's negligence in relation to these duties,” the appeals court recognized the burden of proof to establish coach liability for the injured athlete demands more than a showing of mere carelessness.

In practice, liability of coaches and athletic leagues has been restricted to instances in which the alleged misconduct not only directly resulted in injury, but also reflected an unusual disregard for a player's well-being. Accordingly, to sustain a plaintiff's claim of coach negligence, there must be evidence of serious misconduct amounting to inattention, ignorance and indifference to a player's well- being.

Further, in the sports setting, the appeals court noted that “conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself.” In particular, the court found that required instruction and training in order to play a specific sport may pose inherent and unavoidable dangers to participants. Under such circumstances, the appeals court concluded that it would be inappropriate to recognize a

legal duty of care which would “require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events.”

Accordingly, the appeals court held that “defendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport, or to eliminate risk from the sport, although they generally do have a duty not to increase the risk of harm beyond what is inherent in the sport.”

KNOWN SPORT RISKS

Applying these principles to the facts of the case, the appeals court found that Tara “knew and appreciated” the risk of injury,” even though she might not have “anticipated the precise nature, severity, or source” of her injury. As a result, the court held that Tara had assumed the risk that “a reasonable person would have known and appreciated that injury could occur in the manner that it did.” In this particular instance, the appeals court determined that Tara knew, “as any reasonable person with their respective experiences in the sport would have,” that she “could be hurt during the tag-out play that she would be called upon to execute at second base.”

Tara testified that she knew from growing up with the game that she had to tag the runner to get the out. This is a routine, if not easily executed, play in both softball and baseball; it is a potentially dangerous but integral part of the game...

Tara acknowledged generally that she was aware that "it was possible that you could get hurt playing the game." She was a veteran second baseman, having played that and other infield positions for St. Mark's in previous CYO games. Thus, the slide and tag-out play, and its inherent risk for fielders, had been a routine part of the games that the Kellys watched, played, and prepared for.

Given her experience and familiarity with the sport as it is commonly played, the appeals court agreed with the trial court's determination that Tara “must have understood and appreciated the danger that she could be hurt as she tried to tag out a sliding runner.”

In reaching this conclusion, the appeals court rejected the notion that “a coach may be held liable for negligent instruction based solely on the fact that the injured athlete claims that she silently misunderstood the rules governing a frequently occurring play in which the coach has given instruction and training.” In the opinion of the court, Tara “could and should have ask questions before taking the field” if she needed “further instruction” regarding the rules pertaining to “the obvious danger involved in this play.”

Coaches and leagues are not insurers of athletic prowess; they cannot be expected to train players in a manner that eliminates all dangers created by misplay, whether that misplay is caused by a young athlete's physical error or by her mental error. It is no mystery to any coach, ball player, fan, or

youth league parent that miscues on the field often reflect such mistakes. Thus, "the risks associated with *learning* a sport may themselves be inherent risks of the sport."

Sound public policy supports that conclusion. Much as they might wish otherwise, coaches cannot guarantee that their athletes will learn all the rules of the game, remember them in a game situation, and then properly execute the play according to those rules. It would unquestionably harm the sport to lay legal responsibility for an athlete's failure to understand a particular rule at the cleats of a coach who has offered that athlete time to learn the rule and to ask about it during practice and game situations. Indeed, if coaches and their sponsoring leagues can be held liable for a single player's unstated misunderstanding of rules governing a complex sport like softball, the type of instructional league that the Kellys joined may quickly become a thing of the past.

In this particular instance, however, the appeals court found that "Tara's injury did not result from a lack of instruction or training." On the contrary, Tara was injured "during a routine game play" which did not require Tara to "perform a risky play for the first time, without prior notice or training."

As a result, the appeals court found defendants had "established the necessary three elements of assumption of the risk," i.e., Tara (1) had knowledge of the risk of danger, (2) appreciated that risk and (3) voluntarily exposed herself to it. Specifically, the appeals court determined that Tara must have understood the risk of injury associated with a runner attempting to slide into second base. Moreover, Tara "understood that proper training in the rules governing tag-out play was necessary to reduce the risk" of injury. Accordingly, the appeals court concluded that Tara had "assumed the risk that training and instruction would not prevent all mistakes that could result in injury on the base paths."

NEGLIGENT MISMATCH?

On appeal, the Kellys had also argued that Tara had not assumed the risk of playing against "opposing players who were substantially beyond her level of skill." As characterized by the appeals court, "[t]he duty not to place players in a non-competitive setting, otherwise known as the duty not to 'mismatch,' can be understood as a coach's responsibility not to pit players of unequal skill, size, weight, or strength against one another."

In this particular instance, however, rejected the notion that the more skilled and competitive players on St. Joseph's middle school team was sufficient, by itself, to raise an inference that these two teams were unreasonably mismatched. On the contrary, the appeals court found "no allegation or evidence that Tara's injury resulted from any disparity in skill or aggressiveness." Specifically, the court found nothing to suggest that "Amy's superior talent or competitiveness caused Tara to misunderstand that she

had to keep her foot on the bag while making the tag.”

Further, the appeals court rejected “the Kellys' suggestion that recreational coaches and leagues have a duty to exclude more skilled players that are otherwise eligible by age and other objective criteria.” In the opinion of the court, it would “fundamentally alter the game” to recognize such a legal duty.

Uneven matches of player talent in sporting events are as common as lopsided scores. But they do not always dictate the outcome of a particular game, as any delighted coach can attest when a "David" player plays a pivotal role in a win over a team led by one or more "Goliaths."

If recreational league coaches are pressured by liability threats to subjectively segregate "better" players from "average" players, instructional leagues would lose the opportunity to play with and against more skilled players in an effort to improve their game to "the next level" demonstrated by the more skilled players. That would defeat one of the primary reasons for instructional leagues.

Accordingly, under the circumstances of this case, the appeals court concluded that “Tara and her parents must have understood that she would be playing against better softball players who might be not only more skilled, but also more aggressive.” In the opinion of the court, “aggressive play and coaching are inherent and foreseen aspects of any organized team sport.”

Just as players are entitled to play aggressively without fear of liability, a coach properly may encourage players to play aggressively. Indeed, a coach's ability to inspire players to compete aggressively is one of a coach's important attributes. The mere possibility that some players might overreact to such inspiration or encouragement should not, by itself, suffice to impose liability on a coach.

Having found no legal basis for imposing negligence liability under the circumstances of this case, the appeals court affirmed the trial court's summary judgment in favor of all defendants.