CHILD'S EYE INJURY AN ASSUMED RISK IN PAPER CLIP FIGHT?

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Negligence liability is based upon the reasonable person standard. Reasonableness is a two-way street. Consequently, the injured plaintiff must also look out reasonably for his/her own safety. If the injured plaintiff fails to do so, such unreasonable conduct may reduce or preclude any recovery for defendant's negligence. Similarly, negligence liability may be barred where the plaintiff voluntarily encountered a known hazard. The defense to negligence liability is referred to as assumption of risk. The *McQuiggan* case described herein illustrates the assumption of risk defense.

NO RIGHT TO COMPLAIN

In the case of *McQuiggan v. Boy Scouts of America*, 536 A.2d 137 (Md.App. 1988), plaintiff Nicholas McQuiggan, age 12, alleged that the defendant Boy Scouts of America and their scoutmasters (BSA) were negligent in conducting a scout meeting. McQuiggan was injured on April 8, 1981 sometime between 7:10 and 7:15 p.m. The scout meeting was scheduled to start at 7:30 p.m. At the time of the incident, three assistant scoutmasters were present in the meeting room. The facts of the case were as follows:

> When McQuiggan arrived, he noticed several other scouts engaged in a game in which they shot paper clips at each other from rubber bands they held in their hands. The paper clips were pulled apart on one end and squeezed closed on the other... Upon arriving at the meeting room, McQuiggan sat at a table and read his Boy Scout Handbook. Between four and eight other scouts had been playing the paper clip shooting game and running in and out of the hallway leading to the meeting room for about ten minutes before McQuiggan decided to join them. Prior to his joining the game, no one had shot paper clips at him. When one of the boys asked McQuiggan to join in the game, he did so freely, feeling no pressure to participate. McQuiggan further related that he knew that the object of the game was to shoot paper clips; he knew that the paper clips would be shot at him; he knew that there was a chance he would be hit with a paper clip.
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> When he decided to join in the game, McQuiggan looked through some material on a shelf, and he located an elastic hair band with which he intended "to chase" the other boys. McQuiggan and an unidentified boy scout then chased Billy Harem Jr. and Kevin McDonnell up the hallway. McQuiggan said he had no paper clips, but the boy with him was shooting them. McQuiggan admitted at trial that his actions were such as to lead McDonnell or Harem to believe that he had a paper clip in his possession. McQuiggan further narrated that he was actively "participating" in the game.
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> After McQuiggan had chased Hamm and McDonnell down the hallway for about ten feet, the two boys turned around and chased McQuiggan back down the hall. McQuiggan said that he dropped the hair band and entered the meeting room. He

> then stopped running, "split apart" from the unidentified boy, and started to walk toward a table. He told the [trial] court that at that point he "stopped playing," but he did not communicate that fact in any way to the other boys. Approximately five seconds later and five feet into the meeting room, McQuiggan felt something in his right eye. When he brushed the eye, a paper clip dropped to the floor. According to McQuiggan, his entire involvement in the game consumed approximately thirty seconds.

After McQuiggan had presented his case at trial, the trial court granted judgment to BSA and the scoutmasters, as well as Harem and McDonnell. McQuiggan appealed.

As described by the appeals court, the issue was "whether a twelve-year-old boy should be barred from recovery for an eye injury he sustained when he voluntarily participated in a paper clip shooting 'game'." According to the appeals court, the injured plaintiff "is said to have assumed the risk of injury when, with full knowledge and understanding of an obvious danger, he/she exposes himself or herself to that particular danger, thus voluntarily abandoning his/her right to complain." Further, the appeals court 'noted that "a voluntary participant in any lawful game, sport or contest, in legal contemplation by the fact of his participation, assumes all risks incidental to the game, sport or contest which are obvious and foreseeable."

> 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 Maryland Courts have identified three elements to be established before a risk is deemed legally assumed. The defendant must show that the plaintiff (1) had knowledge of the risk of danger, (2) appreciated the risk, and (3) voluntarily exposed himself to it.

Applying these principles to the facts of the case found that McQuiggan "appreciated the obvious dangers attendant to his playing in a paper clip shooting game, and that he assumed the risk and consequences of his involvement."

> First, McQuiggan had observed the other boys shooting paper clips at each other for about ten minutes before he joined in, and he knew that the object of the game was to hit another with paper clips that were shot from the rubber band. Furthermore, he testified that no paper clips were shot at him before his involvement in the game, and he knew that by participating paper clips would be shot at him. Second, he twice admitted during his testimony that he knew there was a "chance" he could be hit someplace on or about his person while playing the game or that somebody might strike him with a paper clip. Third, he admitted that he joined the game freely.
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> There was no evidence at all that McQuiggan did not understand, appreciate, or voluntarily expose himself to the risk encountered... Although by entering into the game, McQuiggan did not assume all risks, being shot in the eye was not an unusual danger or one that a child his age could not comprehend, understand or appreciate... Even though McQuiggan was only twelve years of age at the time

> of the incident, there is no doubt that a child of that age can assume the risk of his or her action.

McQuiggan argued further that "he did not assume the risk of the injury he sustained after he stopped playing." In other words, McQuiggan contended that he "ceased assuming the risk" by "terminating his involvement" in the game. The appeals court rejected this argument.

> The record reveals that McQuiggan's total involvement in the game lasted approximately thirty seconds. He was, as we have seen, shot in the eye within five seconds of his having made a subjective determination to stop playing. The simple fact that he dropped his elastic band as soon as the "hunted" became the "hunters" and he stopped running once he was five feet into the meeting room was not a sufficient manifestation of his intent to the other boys in the game. By failing to notify the players that he was no longer in the contest, McQuiggan assumed the risk that the other boys would believe him to still be a willing, active participant.

In addition to assuming the risk of injury (i.e. a voluntary encounter with a known hazard), the appeals court found that McQuiggan was also guilty of contributory negligence (i.e. an unreasonable failure to look out for one's own safety).

> By voluntarily chasing the boys when he had already observed the nature of the game, McQuiggan not only assumed the risk of injury but was negligent from the very start. Through his involvement, McQuiggan, from the beginning, did something which directly contributed to the injury sustained. When he later failed to externalize in some fashion his subjective intent to terminate the game, he simultaneously failed to do something which would have prevented the injury.
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> McQuiggan's argument is another version of one child's striking another then calling "time" before a return blow can be struck. McQuiggan seeks to be "saved by the bell." The difficulty is that he was the only one who heard it ring, because it rang in his mind and was not audible to the other players. He cannot now be heard to exclaim that defendants [Harem and McDonnell] had a duty to stop the game, when he, himself, neglected to call a halt to it. It is a fundamental principle of negligence that a person must use his Providence-given senses to avoid injury to himself. This tenet has been recognized since time immemorial.

The appeals court, therefore, concluded that McQuiggan's "participation in the game and his failure to make known to others his termination of that participation are prominent decisive acts which directly contributed to his injury."

The appeals court also considered whether McQuiggan's allegations established a cause of action for assault and battery against Harem and McDonnell. The trial court had found that McQuiggan "consented to the infliction of injury upon him" by "not only participating in the game but pursuing Billy Harem and Kevin McDonnell down the hallway." As described by the appeals court, the applicable legal principles were as follows:

> A battery consists of the unpermitted application of trauma by one person upon the body of another person. The gist of the action is not hostile intent but the absence of consent to the contact on the plaintiff's part. When a plaintiff manifests a willingness that the defendant engage in conduct and the defendant acts in response to such a manifestation, his consent negatives the wrongful element of the defendant's act, and prevents the existence of a tort [i.e. a civil wrong, in this instance, battery]...
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> One who enters into a sport, game or contest may be taken to consent to physical contacts consistent with the understood rules of the game. *It is only when notice is given that all such conduct will no longer be tolerated that the defendant is no longer free to assume consent.* (Emphasis supplied by court.)

Applying these principles to the facts of this case, the appeals court found that McQuiggan's "willful joining in the game, without any notice of his withdrawal from participation" did not constitute an assault and battery by Harem and McDonnell. The appeals court, therefore, affirmed the judgment of the trial court in favor of all defendants.