

CAUSATION, ASSUMED RISK, AND A FAILURE TO WARN IN SPORTS SUITS

James C. Kozlowski, J.D., Ph.D.  
© 1988 James C. Kozlowski

This month's column presents three recently reported appellate court in the area of sports injury liability. The *Locilento* case illustrates the legal principle of proximate cause. To establish liability, plaintiff has the burden of proof to allege and ultimately establish defendant's negligence caused plaintiff's injuries by a preponderance of the evidence, i.e. more likely than not, better than 50-50. If the causal link between defendant's alleged carelessness and plaintiff's injuries amounts to mere speculation or conjecture, then plaintiff has failed to prove negligence.

Both the *Locilento* and *O'Neil* cases illustrate aspects of the assumption of risk defense. Sports participants generally the assume the risk of injury associated with inherent risks in an activity. This principle is referred to as primary assumption of risk. The *O'Neil* case involved such a situation where a sports participant consented to injury associated with apparent risks in a sports activity. On the other hand, the *Locilento* decision found injuries associated with improper equipment are not necessarily inherent risks in a sport. Consequently, such risks are not assumed, absent an expressed assumption or risk by the participant.

The jury instruction cited in *Meizoso* decision illustrates a general principle regarding the legal effect of a warning. Very simply, an adequate warning takes a hidden hazard and makes it open and obvious to the recreational user. As a result, no warning is required if the hazard in question is already known and, therefore, open and obvious to the recreational user. Under such circumstances, defendant's failure to warn of a hazard already known to the plaintiff is insufficient to establish negligence liability.

LACK OF PROTECTIVE EQUIPMENT

In the case of *Locilento v. John A. Coleman Catholic High School*, 523 N.Y.S.2d 198 (A.D. 3 Dept. 1987), plaintiff Richard Locilento was injured while participating in an intramural sports event at his school. The facts of the case were as follows:

On November 1, 1981, Locilento, a 17-year-old senior at Coleman Catholic High School, sustained a dislocated shoulder during an intramural tackle football game at the school. The game was an annual, informal contest between students, and was officiated by two instructors from Coleman. No protective equipment was provided and Locilento was injured while attempting to tackle another player.

Locilento alleged that Coleman "failed to properly supervise the game and to provide the necessary equipment and training." The jury in this case found Coleman 60% liable and Locilento 40% at fault for his injuries. Both Coleman and Locilento appealed.

On appeal, Coleman argued that Locilento had "failed to present sufficient evidence of proximate [i.e. legal] cause," In other words, the evidence did not establish that any negligence on the part of Coleman had, more likely than not, resulted in Locilento's being injured. The appeals court described proximate cause in determining negligence liability as follows:

To establish a prima facie case [i.e. sufficient allegations to prove negligence], plaintiff was required to demonstrate that defendant's negligence was a substantial factor in bringing about the injury. Plaintiff was not required to eliminate all other potential causes, but simply to present a sufficient evidentiary basis from which causation could reasonably be inferred.

Applying these principles to the facts of the case, the appeal court concluded that "the jury could readily infer that Coleman's failure to provide protective equipment was a proximate cause of Locilento's shoulder injury."

Locilento's expert witness and orthopedic surgeon both essentially testified that shoulder pads serve to decrease the potential for shoulder injuries. This testimony was sufficient to allow the jury to conclude that the failure to equip Locilento with shoulder pads was the proximate cause of his resulting injury. In so holding, we fully recognize that neither witness could confirm that shoulder pads would have prevented Locilento's injury. It is also common knowledge that tackling injuries of this nature can occur even when players are professionally trained and equipped. The fact remains, however, that the likelihood of injury was greater because of Coleman's failure to provide the necessary protective equipment.

Coleman also argued that Locilento had "assumed the risk of injury as a matter of law" because he had "voluntarily participated in game, fully aware of potential hazards."

When one voluntarily and expressly agrees to encounter a known danger, the law will bar any recovery for negligence liability based upon the defense of express assumption of risk. On the other hand, assumption of risk which is implied from one's voluntary participation and encounter with known dangers in a sport will not necessarily bar recovery. On the contrary, the jury will simply consider such implied assumption of risk as one factor in apportioning fault between the plaintiff and defendant.

In this instance, the appeals court found that there was no express agreement between Locilento and Coleman in which Locilento agreed to assume the risk of injury associated with playing tackle football without shoulder pads. Absent such an expressed agreement, Locilento's mere voluntary participation in the game would not preclude liability for Coleman's negligence.

Coleman's argument fails to make the distinction between express and implied assumption of risk. Here, there is no suggestion of an express assumption [of risk] which would in fact act as a bar to recovery. Rather, Locilento's voluntary participation clearly speaks to an implied assumption [of risk], which is simply a factor relevant in the assessment of culpable conduct [by the jury]. Thus, the jury was properly allowed to apportion culpability. Parenthetically, no challenge [on appeal by Coleman] has been made to the actual apportionment [of fault, i.e. 60% Coleman and 40% Locilento].

The appeals court, therefore, affirmed the judgment of the trial court which found Coleman liable for 60% of Locilento's damages attributable to his shoulder injury.

#### CONSENT TO APPARENT RISKS

In the case of *O'Neil v. Daniels*, 523 N.Y.S.2d 265 (A.D. 4 Dept. 1987), plaintiff Patrick O'Neil "was injured when he was struck in the eye by a softball thrown by defendant Kenneth Daniels, a teammate, during a 'warm-up' activities prior to an amateur softball game." The trial court granted summary judgment to Daniels and dismissed O'Neil's negligence claim. O'Neil appealed.

On appeal, O'Neil argued that he "did not assume a known or foreseeable risk so as to relieve defendant Daniels of liability." Under the circumstances of this case, the appeals court concluded that O'Neil "understood and accepted the dangers of the sport, including those resulting from carelessness during 'warm-up' activities."

It is clear that O'Neil's participation in the game "warm-up" was voluntary, and thus our concern is only with the scope of the consent. It is well established that participants may be held to have consented by their participation, to injury-causing events which are known, apparent or reasonably foreseeable, but they are not deemed to have consented to acts which are reckless or intentional. The question of whether the consent was an informed one includes consideration of the participant's general knowledge and experience in the activity.

As a result, the appeals court found that O'Neil's complaint was properly dismissed. The appeals court, therefore, affirmed the judgment of the trial court in favor of defendant Daniels.

#### KNOWN HAZARDS REQUIRE NO WARNING

In the case of *Meizoso v. Bajoros*, 12 Conn.App. 516, 531 A.2d 943 (1987), plaintiff Felix Meizoso alleged that his broken ankle was "caused by the defective condition of a softball field under the control of defendant Joseph Bajoros." The facts of the case were as follows:

On June 28, 1980, Bajoros, owner of Capellero's Grove, catered a picnic for the International Association of Electrical Inspectors. Bajoros' business specialized in social catering for large groups offering activities of basketball, badminton, Ping-Pong, softball, and volleyball. Meizoso, an electrical contractor, attended the picnic after paying the ticket price of \$15. While playing second base in a softball game, he tripped and fell in an attempt to catch a fly ball.

The jury in this case returned a verdict for defendant Bajoros. Meizoso appealed.

On appeal, Meizoso argued that the trial judge erred in providing the following instruction to the jury regarding the legal duty of care owed by landowner's to invitees on the premises.

Now, as far as warnings are concerned, in this case, Meizoso testified... that he knew the field was bumpy when he went on to the field. If you believe that the bumpy condition of the field caused Meizoso to fail or that Meizoso already knew that the field was in a bumpy condition, then Bajoros was not legally obligated to give any warning. The purpose of a warning is to alert somebody to the condition that he doesn't know about. There is no need to warn someone of a condition if he's already aware of it. I mean, that would make, that wouldn't add anything to the situation. If you find Meizoso already knew of the condition of the field, then Meizoso wouldn't be entitled to any warning from Bajoros.

In the opinion of the appeals court, the judge's instruction to the jury "was an accurate reflection of the law regarding landowner liability under the circumstances of this case." The appeals court, therefore, affirmed the judgment of the trial court in favor of defendant Bajoros.