Assumption of Risk in Sports

Assumption of Risk

In New York State, when a person chooses to engage in or attend a sport or recreational activity, that individual "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation." *Fenty v. Seven Meadows Farms, Inc.*, No. 2012-05234, Slip op. at 1 (2d Dept 2013).

The Assumption of Risk doctrine has traditionally been invoked by baseball teams when defending themselves from liability for fan injuries during games. It has been referred to as the "Baseball Rule." It is common practice for teams to include boilerplate exculpatory language on their tickets that fans assume the inherent dangers of the sport when attending a game.

Many lawsuits by fans throughout the years have been unsuccessful because of this affirmative defense. Lately, however, this doctrine is starting to be challenged, especially in the modern context of baseball and foul balls. New stadium designs have brought fans closer to the action, thus increasing the danger of being struck by errant foul balls. The game itself has also changed with the greater physicality and strength of the athletes resulting in harder hit balls.

A. Assuming Risk when Applied to Recreational Activities

Court of Appeals

Bukowski v Clarkson Univ., 19 N.Y.3d 353, 948 N.Y.S.2d 568 (2012).

A baseball player brought an action against Clarkson University after being hit by a line drive during an indoor practice . The plaintiff was an experienced baseball player and understood the risks that the game posed, especially on a pitcher, with it being common occurrences that line drives can cause injuries to pitchers. The plaintiff alleged that the

university should have provided "L" protection screens to reduce the risk of being struck by a line drive.

The Court found the player assumed the risks of danger that would be involved in throwing live batting practice to hitters from a regulation distance as this is inherent to the game of baseball. The primary assumption of risk doctrine also encompasses risks involving less than optimal conditions (*see Sykes v. County of Erie,* 94 N.Y.2d 912, 913, 707 N.Y.S.2d 374 (2000). The Court held there was insufficient evidence from which a jury could have concluded that plaintiff faced an unassumed, concealed, or enhanced risk, even though it was his first time pitching live in the cage. It also found that while the L screen could have reduced the risk of being struck by a line drive, this did not change the fact that pitchers are at risk from being struck by batted balls when playing baseball.

Custodi v Town of Amherst, 20 N.Y.3d 83, 957 N.Y.S.2d 268 (2012).

Plaintiff was roller blading in her neighborhood and tripped on a neighbor's drainage culvert while attempting to get to the roadway. The Court found that application of the assumption of risk doctrine should be limited to appropriate cases, such as personal injury claims arising from sporting events, sponsored athletic and recreative activities or athletic and recreational pursuits that take place at designated venues. This was recreational roller blading and was not taking place in an organized confined space, like a skating park or competition. The facts did not fit within the assumption of risk framework and the Court declined to apply the doctrine.

Anand v Kapoor, 15 N.Y.3d 946, 948, 917 N.Y.S.2d 86 (2010).

Plaintiff was struck by a golf ball from a fellow player when searching for his own ball. The plaintiff argued that the defendant was negligent for not yelling a warning like "fore" after hitting the golf ball. The Court found that the failure to warn did not constitute intentional or reckless conduct and the risk of being struck by a golf ball during play is commonplace in the sport. The plaintiff assumed the risk when deciding to engage in playing the sport.

Roberts v Boys and Girls Republic, Inc., 10 N.Y. 3d 889, 861 N.Y.S.2d 603 (2008).

The plaintiff was a bystander at a baseball game and was near the on-deck circle of a batter when she was struck by the swing. Plaintiff admitted to seeing players in the area and seeing the swinging take place. The Court found she assumed the risk of injury with being in close proximity to the players.

First Department

Latimer v City of New York, 118 A.D.3d 420, 987 N.Y.S.2d 58 (1st Dept 2014).

Plaintiff was having a football catch with a friend on a concrete playground site when he slipped on a crack on the adjacent sidewalk. The plaintiff's age of 26 was considered by the court as a reasonable age at which one should have a developed awareness of the hazards of playing on a faulty surface. The Court explained that the doctrine of primary assumption of risk provides that a voluntary participant in a sporting or recreational activity "consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation" (*Morgan v. State of New York*, 90 N.Y.2d 471, 484, 662 N.Y.S.2d 421, 685 N.E.2d 202 [1997]). This includes risks associated with the construction of the playing surface, including risks involving less than optimal conditions.

Second Department

Spiteri v. Bisson 134 A.D.3d 799, 20 N.Y.S.3d 429 (2d Dept. 2015).

Plaintiff was a bystander near a lacrosse field where the athletes were throwing the ball and was injured when the ball hit her. Even though the plaintiff was not a participant, the Court found the plaintiff assumed the risk by entering the fenced-off field where players were warming up for lacrosse practice and jogging around the perimeter of the field where lacrosse balls were being thrown. The defendants, through their athletic activity, did not unreasonably increase the risk.

Rosenfeld v. Hudson Valley Stadium Corp. 65 A.D.3d 1117, 885 N.Y.S.2d 338 (2d Dept. 2009).

Plaintiff was struck by a foul ball when sitting in a picnic area at a baseball game. The Court found that the proprietor of a ball park need only provide screening for the area of the field where the danger of being struck by a ball is the greatest. The proprietor fulfills the duty of care imposed by law and, therefore, cannot be liable in negligence as long as such screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to be seated there during game. Citing *Akins v Glens Falls City School Dist.*, 53 N.Y.2d 325 (1981) .

Third Department

Morrisey v Haskell, 133 A.D.3d 949, 950, 19 N.Y.S.3d 134, 2015 (3d Dept 2015).

Plaintiff umpire was injured after a player threw a bat in the air after popping out. The Court found that this was an inherent risk of the game and the umpire with experience should have been aware. The bat was also not thrown intentionally at the umpire. The umpire assumed the risk. The Court found the player did not create a risk over and above usual dangers inherent in the sport.

Fourth Department

Savage v Brown, 128 A.D. 3d 1343 (4th Dept. 2015).

Plaintiff was struck by a sled that was operated on property owned by defendant. Throughout the course of the day, plaintiff had observed that the sledding conditions were dangerous and caused excessive speed down the hill, including an accident into a snow bank. The Court found that the plaintiff showed an awareness of the defective or dangerous condition or risk and therefore assumed the risk of spectating nearby.

Menter v. City of Olean, 105 A.D.3d 1405, 1405 (4th Dept. 2013).

Plaintiff brought an action against the defendant after slipping on a diving board. The middle part of the diving board where plaintiff was injured was worn from overuse and a new coating had not been put on it for at least the past two years to combat the wearing of the surface. The Court found that the worn diving board was not an inherent aspect of the sport of diving and that the defendant neglected to maintain the board for that activity. Assumption of Risk was not a viable defense.

B. Modern Litigation (Our Cases)

Cowan v. High Velocity Paintball

Plaintiff was injured when he tripped on an uneven wood plank while playing paint ball on an outdoor course. Defendant argued that plaintiff assumed the inherent risk of participating in paint ball and was fully aware of the dangers of the sport that included tripping. Further, the defendant argued that it neither created nor had notice of the alleged defective floor plank condition.

The Court denied the defendant's motion for summary judgment and compared the dangerous bridge condition to a dangerous premises condition that is not inherent to the sport of paintball. The Court stated that there was not adequate evidence to support the finding that the bridge was in a reasonably safe condition at the time of the incident; that plaintiff was aware of the condition; or that it was open and obvious.

Hines v. City of New York

An experienced para-athlete claimed she was injured during the running portion of the triathlon when she was operating a push-rim racer and was stuck by an alleged non-participant jogger. She blamed the cone spacing and position of the marshals as inviting the hazard. She claimed she never signed the liability waiver releasing the City of New York and World Triathalon from liability.

The court found the waiver was enforceable and that she likely signed it. Defendants explained that athletes could not participate without signing and there was an eyewitness report of her on the entrance line. There was "no trace" of gross negligence to override the waiver. "The position of cones and marshals where Hines' accident occurred does not rise to the level of intentional wrongdoing or evince a reckless indifference to the rights of others." Defendant's Motion of Summary Judgment granted.

C. Recent Developments in Sports Assumption of Risk

A recent spate of foul ball injuries to fans at baseball games are calling into question the so-called blanket doctrine employed by baseball teams which absolves them of liability based

on the assumed risk of attending a baseball game or sitting in seats that are in areas of the stadium susceptible to foul ball contact.

New York Times

- November 20, 2015- "Danger at the Ballpark, and in Baseball Ticket's Fine Print"

A fan at a Yankee game was sitting in the third row, 50 feet past first base, when he was stuck in the face by a foul ball hit by Hideki Matsui. He did not have a chance to move because the foul ball was hit so hard down the line. He sustained severe facial injuries. Furthermore, it was a rainy day outside and the open umbrellas around him obstructed his vision and made it harder to adequately defend himself. The fan brought a lawsuit seeking the Yankees to adjust their umbrella privacy and Major League Baseball to commit resources to address the safety needs of the fans regarding foul ball injuries.

Similarly, cases have also been brought, but typically have been thrown out of court because of the boilerplate language on the tickets discharging the Yankees from liability. The language is: "The bearer of the ticket assumes all risk and danger incidental to the game of baseball" and disclaims all liability from the Yankees if a fan is injured at Yankee Stadium. However, recently attorneys have been challenging this extension of the assumption of risk doctrine. An attorney involved in a class action suit on the issue recently explained that fans "cannot assume a risk that [they] cannot protect against." If the ball is hit hard down the line, even the most astute fan will not be able to react quickly enough to avoid serious injury. The game has evolved with the strength of players and the newer designs of the ballparks of seating closer to the foul line, that baseball teams should no longer be protected through Assumption of Risk.

-December 18, 2015- "Baseball has a New Policy on Netting, but There's a Catch"

Major League Baseball recently released a new policy on foul ball risks and netting. Teams are encouraged to extend netting behind home plate 70 feet or so down the foul lines which lead to the side of dugout near home plate. However, it is not a requirement. The Minnesota Twins are taking it further and extending the netting towards the far end of the dugout. MLB also wants teams to provide greater awareness to fans about the seats most susceptible to foul ball risks. Critics of the new proposal believe MLB maintains a hesitancy to purse the netting issue further because of the tradition of the proximity of fans to players during the game and that the seats closest to the field would also not be as marketable.

One of the injured Yankee fans, who has worked as a real estate attorney in Manhattan, suggests that the MLB use an arbitration process to decide the foul ball cases. Both sides, the fan and the team, would submit a fair number they view as just compensation for the injuries and the arbitrator would decide which number to take without splitting the difference. It is unclear if this concept will gain traction, but one must consider the possibilities with the recent string of the foul ball injury cases.

In the past, the Assumption of Risk doctrine has been successful in fending off liability for much of the foul ball cases. However, courts throughout the nation are beginning to reconsider this question. Recently, in November 2015, an Ohio appeals court reversed a ruling on foul balls that favored the team. In *Rawlins v. Cleveland Indians Baseball Co. Inc.*, a fan was motioned by a stadium attendant to move from his seat prior to the ending of a baseball game and before the post-game fireworks celebration. Plaintiff was struck by a foul ball and brought an action against the Cleveland Indians. The attendant gave no reason for

plaintiff's movement and only after plaintiff left his seat was he struck by the foul ball. The Court found that the "baseball rule" or assumption of risk would not apply because the stadium attendant motioning the fan to leave his seats was not an inherent risk to the sport of baseball.

In February 2013, the Idaho Supreme Court in *Rountree v. Boise Baseball LLC* rejected the baseball rule and assumption of risk as a viable defense. In *Rountree*, a spectator was struck by a foul ball during the course of a game and, as a result, lost an eye. The Court did not want to adopt the baseball rule because it believed that it would be overstepping its boundaries by redefining the scope of the team's liability. The defendant did not provide any tangible data regarding the statistical frequency or design flaws of stadiums that may have lead to these injuries, thus the Court felt it was the duty of the legislature to define that scope. However, regarding assumption of risk, the Court chose not to apply the standard because it conflicted with the comparative negligence standard relied on in Idaho. The plaintiff's claim was permitted to proceed to trial in order to determine if there was inherent spectator risk at a baseball game.

-**April 15, 2016**- "A Fine Line Separates Ball and Fan (and Injury)"

The Minnesota Twins have been proactive in protecting fans close to the field and have installed netting high enough to protect 14 rows of seats from a line-drive foul ball. The team offered their season ticket holders other seats that were unprotected if they felt they were too detached from field experience. Only six season ticket holders have taken them up on the offer and there have been largely no complaints about the expanded netting installed.

Other teams, like the Atlanta Braves, have also begun to address the issue by raising their netting from 10 feet to 35 feet. The Texas Rangers raise their netting before the game and then

drop the netting after the game starts to balance the on field intimacy and safety concerns of the fans. However, much of the league still has not taken any measures and has rather opted for better warnings to fans about the risks associated with some of the seating.