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# How Courts Apply Contact-Sports Exception To Nonplayers

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Awareness of concussion risks in sports may be at an all-time high. Lawsuits have been filed at every level of play against sports organizations, schools, coaches, medical professionals, helmet manufacturers and others.

The legal claims typically include failure to warn of the risk of harm (about which the player claims a lack of knowledge), negligent or reckless failure to develop rules to limit the risk of concussion (such as return-to-play rules), failure to teach proper playing techniques, failure to provide appropriate medical care and failure to provide adequate equipment. Typical defenses highlight manifestation of injury, accrual of the claim, causation and the evolving state of knowledge (both by the industry and the individual plaintiff) regarding the risks and consequences of concussions.

Modern concussion lawsuits are rarely, if ever, filed against a co-participant. Historically, however, players have pursued ordinary negligence claims alleging a co-participant injured them in some other manner, such as one player breaking another player's leg. In that context, a body of case law developed holding that a sports participant has no claim against another sports participant for an injury sustained during play, unless the co-participant intentionally or recklessly injured the other; this became known as the "contact-sports exception."

The exception is widely applied in the co-participant context.[1] Under the reasoning of the exception, a player has no claim for ordinary negligence when the player voluntarily submits himself or herself to participate in a sport that necessarily involves physical contact and the potential for injury. According to the Illinois Supreme Court, "Participants in team sports, where physical contact among participants is inherent and virtually inevitable, assume greater risks of injury," and therefore recovery is granted "only if the injuries are caused by willful and wanton or intentional misconduct of co-participants."[2]

A few courts have addressed whether and how to apply the contact-sports exception in the context of concussion-based allegations brought against team owners, organizers, sports leagues and athletic associations. Those courts have grappled with how to apply a rule written for players to entities that are often far removed from the field of play and the fast-paced decisions made in real time, such as when to allow a player to return to the game.

Illinois courts have applied the contact-sports exception to youth, high school and collegiate sports organizations, requiring plaintiffs to plead and prove that the organization acted with intent to cause injury or that its conduct was totally outside the range of ordinary activity associated with the sport.[3] Application of the rule — which was crafted to address behavior on the field — to a sports organization or other nonplayer entity can seem mismatched.

Courts may therefore apply a three-factor test in determining whether policy reasons justify application of the exception to a nonplayer: (1) the circumstances of the sport and its inherent risks; (2) the relationship of the parties to the sport and each other; and (3) whether imposing broader liability on the defendant would harm the sport or cause it to be changed or abandoned.[4]

For example, rules violations and body checking are an inherent part of hockey, and imposing an ordinary negligence standard would likely have a chilling effect on vigorous participation in the sport. Therefore, the court in Karas v. Strevell applied the contact-sports exception to the association of officials and the amateur hockey league named as defendants and held that they could not be liable absent (1) intentional conduct meant to cause injury or (2) conduct totally outside the range of ordinary activity.[5]

In Pierscionek v. Illinois High School Association, a high school football player alleged negligence against the Illinois High School Association for its failure to "act in a way that would minimize the risk of concussion for student athletes in Illinois."[6] After weighing the factors outlined in Karas, the court held that the contact-sports exception applied, noting that the IHSA's relationship to the sport and plaintiff was too remote for ordinary negligence to apply — the IHSA had no direct relationship to either the sport of football or to the plaintiff.[7]

The court likewise held that imposing liability "would certainly change the sport of football and potentially harm it or cause it to be abandoned."[8] Therefore, the IHSA could only be liable if the plaintiff pleaded and proved conduct beyond ordinary negligence.

At least one court has expanded Connecticut's contact-sports exception to sports organizations, including World Wrestling Entertainment Inc. Several professional wrestlers sued the WWE claiming they sustained head trauma during matches and that the WWE "failed to either intervene or diagnose them with concussions following the incident" and similarly failed to educate players concerning concussion symptoms.[9]

The District of Connecticut required plaintiffs to plead and prove that the WWE acted with reckless and intentional conduct, not just ordinary negligence, in causing their concussion-related injuries.[10] Because plaintiffs were injured by other participants in a manner "reasonably anticipated by an ordinary person who volunteers to 'endure' an at least partially-simulated beating before a television audience," the contact-sports exception was properly applied.[11]

California recently applied its contact-sports exception to nonparticipants in Mehr v. Féderation Internationale de Football Association, wherein seven youth soccer players alleged that soccer organizations, including FIFA and U.S. Soccer (1) failed to educate players concerning concussion symptoms; (2) failed to warn of risks of repeated concussions; and (3) failed to promulgate rules and regulations to address dangers of repeated concussions.[12]

The Northern District of California held that soccer organizations had "no duty to prevent risks that are

inherent in the sport itself" and had "only a duty not to increase the risks to a participant over and above those inherent in the sport."[13] While the court cited a case involving co-participants in its reasoning, it held that the contact-sports exception is also applicable to determine the duty of care owed by organizational defendants.[14]

Other states, applying an assumption-of-risk doctrine similar to the contact-sports exception, have indicated that the doctrine might apply to organizations. A Missouri appeals court held that a professional hockey team owner had no duty to prevent a severe body check because that conduct "was not outside the realm of reasonable anticipation" when playing a contact sport.[15]

Conversely, the New Hampshire Supreme Court refused to adopt a blanket standard of care that holds participants, sponsors and organizers liable only for reckless or intentional conduct.[16] Instead, the court determined that the defendant's conduct should be measured against the conduct that a reasonable person would engage in under the circumstances. If the defendant created an extraordinary risk not reasonable under the ordinary circumstances associated with the sport, the defendant could be found to have breached the standard of care.

Determining the appropriate standard of care required consideration of the nature of the sport, the type of contest, the characteristics of the participants, the type of equipment and the level of violence usually accepted. Thus the negligence/standard-of-care analysis undertaken ultimately did not differ significantly from those decisions in which the contact-sports exception was adopted as a blanket rule, and the defendant was not liable for conduct that was not unreasonable under the ordinary circumstances of the sport.

At least one court has held that the contact-sports exception did not apply to an organizational defendant based on the specific facts before it. An Illinois appellate court refused to apply the exception to an amateur softball league organizer that had allegedly set up the field in an unreasonably dangerous manner, which resulted in a collision at first base.[17] Despite holding that softball is a contact sport, the court refused to apply the exception because liability was based on the defendant's decisions made before the game — i.e., in setting up the softball field.

The court recognized that decisions made during play — which are inherently subjective, made at a fast pace and prone to second-guessing — should more often fall within the contact-sports exception because attaching liability for ordinary negligence would have a chilling effect on the game.[18] Here, though, applying an ordinary negligence standard to a pregame decision regarding field setup (which was inconsistent with established field configuration rules aimed at reducing collisions at first base) would not alter the game in any way.

Most courts that have considered the issue have held that the contact-sports exception (or an equivalent) applies to nonparticipant defendants and bars recovery for anything short of intentional or reckless conduct leading to sports injuries. Courts recognize that holding players liable for ordinary negligence would change the face of sports as we know it, as virtually any conduct by a player in a contact sport could be cast as negligent.

If a player can only be held liable for reckless or extraordinary conduct, then the same standard must apply to nonplayers associated with the sport. Otherwise, nonplayer entities such as sports associations would abandon the sport because the risk of liability would be too high. Nonplayer entities that are sued in any concussion litigation should carefully scrutinize the relevant state's law to ensure the appropriate liability standard is applied.

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[1] See, e.g., Pfister v. Shusta, 657 N.E.2d 1013, 1017 (Ill. 1995).

[2] Id.

[3] See Karas v. Strevell, 884 N.E.2d 122, 134 (Ill. 2008).

[4] Id. (holding amateur hockey association had no ordinary duty of care to participant injured by aggressive "body check" by another player); Pierscionek v. Illinois High School Ass'n, No. 14 CH 19131, 2015 WL 6550826 (Cook Cty. Cir. Ct. Oct. 27, 2015) (slip opinion).

[5] 884 N.E.2d at 137.

[6] Id. at *1.

[7] Id. at *3.

[8] Id.

[9] McCullough v. World Wrestling Entm't Inc., 172 F. Supp. 3d 528, 558 (D. Conn.), reconsideration denied, No. 3:15-CV-001074 (VLB), 2016 WL 3962779 (D. Conn. July 21, 2016), appeal dismissed, 838 F.3d 210 (2d Cir. 2016).

[10] Id.

[11] Id.

[12] Mehr v. Féderation Internationale de Football Ass'n, 115 F. Supp. 3d 1035, 1063 (N.D. Cal. 2015) (citing Knight v. Jewett, 834 P.2d 696, 708 (Cal. 1992)).

[13] Id.

[14] Id.

[15] McKichan v. St. Louis Hockey Club LP, 967 S.W.2d 209, 213 (Mo. Ct. App. 1998).

[16] Allen v. Dover Co-Recreational Softball League, 807 A.2d 1274, 1286 (N.H. 2002).

[17] Gvillo v. DeCamp Junction Inc., 959 N.E.2d 215 (Ill. App. Ct. 2011).

[18] Id. at 219.