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A License to Bean?

'Avila' broadens primary assumption of risk doctrine

By Peter Vestal

It takes extraordinary skill to launch a baseball at nearly 100 miles per hour across the 60-some-odd feet separating the pitcher's rubber from home plate and consistently place the ball within the strike zone. In-

Personal Injury

evitably, batters find themselves on the wrong end of a misthrown pitch. Devotees of the national pastime accept this fact and might say it adds a certain frisson. But should a pitcher enjoy immunity from the consequences of *intentionally* striking a batter? The California Supreme Court umpired just such a question earlier this year in a case that has caused the plaintiffs' bar to cry foul.

College baseball player Jose Avila was batting for the Rio Hondo

Roadrunners in 2001 when the pitcher for the Citrus Owls struck him in the head with a pitched ball. The impact cracked Avila's helmet and purportedly injured him. Avila claimed the pitch came in retaliation for one that hit an Owls player in the previous inning.

Supreme Court review in the resulting lawsuit was limited to negligence claims against the Citrus Community College District. (*Avila v. Citrus Community College*, 38 Cal. 4th 148 (2006))

Among other findings, the court declared that the common law doctrine of primary assumption of risk shields a pitcher who intentionally throws

a ball at a batter. It said a pitcher owes no duty to a batter under tort principles and is not liable for the injuries he might intentionally cause, even though the rules of

baseball expressly prohibit the practice of "beating" a batter, and a batter hit by a ball can suffer serious injury or even death.

THE KNIGHT BEFORE

People have a general duty to exercise reasonable care to avoid injuring others, but voluntary participants in a sporting or recreational activity impliedly assume the risks inherent in the activity. This is because conduct

that might be tortious in other contexts is often an integral part of sporting or recreational pursuits; an ordinary football tackle could qualify as assault if performed off the gridiron. California's doctrine of primary assumption of risk relieves co-participants from the duty to use ordinary care and skill to avoid injuring each other in the course of sporting or recreational activities; the doctrine acts as a complete bar to recovery in a negligence action.

The doctrine assumed its modern form in *Knight v. Jewett*, 3 Cal. 4th 296 (1992), and its companion, *Ford v. Gouin*, 3 Cal. 4th 339 (1992). The *Knight* plaintiff alleged the defendant knocked her over during an informal touch football game and injured her finger, necessitating its amputation. *Ford* concerned a water skier who sued the driver of the boat that was towing him after he was injured when his head struck a tree limb extending over the



waterway.

Applicability of the primary assumption of risk doctrine under *Knight* depends on the nature of the sporting or recreational activity and the relationship of the litigants to the activity. Co-participants owe no duty to each other to decrease or eliminate inherent risks. *Knight* instructs trial courts to decide whether the risk of a particular harm is inherent to the sport and if so whether the defendant unreasonably increased the risk of the harm occurring. Even where the defendant's actions increase the probability of injury inherent to the activity, the plaintiff's knowing and voluntary acceptance of the risk functions as a so-called secondary assumption of risk. In such cases, the doctrine does not completely bar recovery; the principle of comparative fault will instead operate to assist the trier of fact in establishing the respective liabilities of the parties.

INTENT ALONE WON'T GET YOU TO FIRST BASE

Knight provided that "a participant in an active sport breaches a legal duty of care ... only if the participant *intentionally* injures another player *or* engages in conduct that is so reckless as to be totally outside the range of the ordinary activity involved in the sport" (emphasis added). The *Avila* court might therefore have decided the Owls pitcher increased the inherent risk of injury to Avila and categorized his case as a question of secondary assumption of risk. Instead, Justice Kathryn Mickle Werdegar, writing for a 6-1 majority, found it unnecessary to inquire into the pitcher's intentions. The court acknowledged *Knight's* language regarding intentional conduct, but reformulated its view: "[A]n athlete does not assume the risk of a co-participant's intentional or reckless conduct when it is 'totally outside the range of the ordinary activity involved in the sport.'" The court determined that "for better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball," so even if the Owls pitcher intentionally aimed his pitch at Avila, his deed still fell within the range of ordinary activity involved in the game.

Avila therefore clarifies that a defendant's intentions alone will not remove a sports-injury claim from the reach of primary assumption of risk; the behavior must also lie totally outside the range of the ordinary activity of the sport. The court illustrated such out-of-the-ordinary behavior citing a 1999 incident where Wichita State University's pitcher hit a University of Evansville player waiting in the on-deck-circle for his turn at bat. Jose Avila, however, was fair game once he stepped into the batter's box. Indeed, the court noted that Avila could not have amended his complaint to allege battery because he manifested his consent to the inherent risk of being intentionally struck by the ball when he chose to go onto the field.

ARE RULES MADE TO BE BROKEN?

Major League Baseball rules specifically forbid pitchers from intentionally throwing at a batter. Such conduct "is unsportsmanlike and highly dangerous. It should be — and is — condemned by everybody." (Official Rules of Major League Baseball, rule 8.02(d), comment.) Violators are subject to sanctions, including ejection from the game. Similar rules govern play at the intercollegiate level, and the court could have chosen to rely on them when defining the range of inherent risks and acceptable conduct among the boys of summer.

Rule 26 in Baseball Digest's 1986 "The Book of Unwritten Baseball Rules" says, "If one of your players gets knocked down by a pitch, retaliate." *Avila's* majority dwelt on similar pronouncements by various luminaries of the game, including one-time Oakland Athletics manager Tony La Russa, former Dodgers pitcher Don Drysdale and New York Giants pitcher Sal "The Barber" Maglie, all of whom referred to the tactical importance of "brushback pitches," "bean balls" and "chin music." Viewing baseball's rules in this context, the majority reasoned that even if the pitcher may be subject to internal sanctions, imposition of legal liability "might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in ac-

tivity that falls close to, but on the permissible side of a prescribed rule." No matter whether the behavior in question intentionally violated a stated rule, the court evidenced its satisfaction that sufficient authority recognized throws both close to and at batters as fundamental tactics to disrupt opponents.

Baseball Hall of Famer Billy Herman, who worked for several Major League clubs in California, once said, "Rules are made to be broken, so there won't be any rules." The Owls pitcher may have broken the written rules of the game, but his throw to Avila's head — even if intentional — did not fall outside the range of ordinary activity in the sport. In this case, the commentators and their colorful vernacular trumped the black and white rules of the game and sent them packing to the cheap seats.

NOT QUITE A WHOLE NEW BALL GAME

Justice Joyce Kennard's dissent voices her concern that *Avila's* expansion of the assumption of risk doctrine distorts the negligence concept of due care to encompass reckless and intentional conduct. Whether or not one agrees with Justice Kennard's assessment, *Avila* unquestionably alters the rights and obligations of participants in recreational and sports activities. It most obviously effects a broadening of the assumption of risk doctrine by diminishing the significance of both a defendant's intent and the rules of the game. Secondarily, in raising the bar for sports-injury victims, the decision somewhat simplifies the job of the trial courts who in theory will find it easier to dismiss such cases. Trial court judges nevertheless remain stuck with the unenviable task of applying the doctrine to particular circumstances to determine whether defendants' conduct falls sufficiently outside the ordinary activity involved in the sport.

For those who believe a robust tort system ultimately encourages safer practices and products, *Avila* arguably reduces the pressure on athletic organizations either to make and enforce safety-promoting rules or to introduce safety-oriented equipment. The decision also begs the question whether

certain sports might become more dangerous over time as the result of a gradual but insistent and unchecked pushing of the envelope of acceptable behavior.

On the other hand, many sports fans have no doubt cheered the *Avila* decision because it reduces the likelihood athletes will incur liability for the consequences of their energetic — if sometimes harmful — efforts on the playing field. They would argue *Avila* balances the twin goals of promoting vigorous participation and preserving the fundamental nature of each sport against giving carte blanche to athletes whose behavior clearly goes out of bounds.

French soccer player Zinedine Zidane's infamous and intentional headbutt to the chest of Italian defender Marco Materazzi during the 2006 world soccer championship match il-

lustrates the point. Post-*Avila*, Zidane's eruption would likely qualify as a secondary assumption of risk situation, since the ball was nowhere near him at the time, and his action was unrelated to the fundamental nature of the sport. Liability would probably not attach, however, if Zidane had intentionally speared his opponent while challenging him for possession of the ball.

FACTORS TO CONSIDER IN EVALUATING A SPORTS INJURY CASE

When evaluating the applicability of the doctrine of primary assumption of risk to a particular case, bear in mind the relationship of the parties to each other and to the sporting or recreational activity at the time of the incident, and whether eliminating the risk at issue would alter the fundamental nature

of the activity or somehow chill vigorous participation. Violation of a rule of the game will likely bear little relevance, particularly if the injury-producing conduct is so frequent or ingrained in the sport as to have acquired the status of custom. In this regard, consider whether the conduct has a nickname or is accepted and discussed by influential members of the sports world, who legitimize it with specific tactical rationales.

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