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Tort Law: McEnroe tries a Different Court: No Injury from a Big Mac Attack

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TORT LAW: McENROE TRIES A DIFFERENT COURT: NO INJURY FROM A BIG MAC ATTACK

John McEnroe has had a great deal of success on the tennis court, and in September of 1985, McEnroe discovered that his center court success carried over to a court of law. McEnroe appeared for a set (of cases, this time), and he still managed to win the one that had the high stakes on the line. In *Schneider v. McEnroe,*[1] (*"McEnroe"*) the court dismissed a tort suit against McEnroe which alleged six million dollars in damages. However, in *USAA Casualty Insurance Co. v. Schneider,*[2] (*"USAA Casualty"*) McEnroe lost an indemnity suit against his insurance company. But due to the first victory, this decision had no real practical significance.

Both cases arose out of the same tennis match on August 30, 1983, in a preliminary round of the U.S. Open Championship at Flushing, New York. McEnroe was playing tennis against Trey Waltke, but Christopher Schneider, a spectator who heckled McEnroe throughout the match, became McEnroe's verbal opponent.[3]

LOVE-LOVE

McEnroe was having difficulty against Waltke, which was a surprise to the majority of spectators present at the stadium. Waltke had taken a two-sets-to-one lead, and the crowd thought that they were about to witness a great upset.[4] Spectator Schneider anticipated a McEnroe upset, and was loudly cheering for Waltke. His cheering reached McEnroe loud and clear due to his close proximity to the tennis court.[5]

After McEnroe double-faulted[6] at a critical moment in the fourth set, Schneider began to cheer very loudly. McEnroe turned toward the area where Schneider was seated and inquired, "Don't you have anything better to do than cheer for my opponent all afternoon?" Schneider retorted, quite frankly, "No." McEnroe retaliated with an extremely un-

1. No. 25911/83 (N.Y. Sup. Ct. Sept. 6, 1985) (cited in 7 ENT. L. REP. 11 (1985)).

2. 620 F. Supp. 246 (E.D.N.Y. 1985).

3. *McEnroe,* 7 ENT. L. REP. at 11.

4. *Id.* at 12.

5. *Id.*

6. A tennis term used to describe the failure of a server to get his two attempted serves into the proper area of the court. *See, e.g.,* JOAN D. JOHNSON & PAUL J. XANTHOS, TENNIS at 49 (1976).

couth response.[7] —Point McEnroe.

McEnroe 15-Love

McEnroe's poor performance continued and so did the verbal volleying. After McEnroe lost another point, Schneider repeated his cheering for Waltke. McEnroe became aware once more of Schneider's presence, and he asked Schneider whether he was going to root for Waltke all day. Schneider reaffirmed his previous response, and again McEnroe repeated his crude comment.[8]— Point McEnroe.

McEnroe 30-Love

Play continued, but McEnroe was still not performing up to his renowned tennis ability. Waltke won another point, and Schneider again applauded Waltke's performance. McEnroe turned toward Schneider and proceeded toward him shouting, "You are sick, you are sick, you are ill, you are ill. I want to fight you, fight me now, meet me later. I am going to get you."[9]—Point McEnroe.

McEnroe 40-Love

McEnroe started back toward the court, but quickly turned around and headed straight for Schneider again. When he was approximately three feet from Schneider, McEnroe pivoted to his right and threw his left arm up in the air, to a ninety-degree angle. While his arm was moving, some rosin, apparently used by McEnroe to keep his hands dry while playing, flew from his hand. McEnroe then proceeded back to the tennis court and defeated his opponent Waltke three sets to two.[10]—Game McEnroe.

Service Schneider

Unknown to McEnroe, some rosin particles from his hand had apparently landed on Schneider. Within one week after the tennis match, Schneider brought suit against McEnroe for "grievous physical and mental injuries" alleging six million dollars in damages.[11] Schneider argued that his case was valid on any of three legal theories: (1) intentional

7. McEnroe's response was, "Well, you're a fuckin' asshole." *McEnroe,* 7 ENT. L. REP. at 12.

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

infliction of emotional distress; (2) assault; or (3) battery.[12]

Judge Becker of the New York Supreme Court heard the case and quickly decided that Schneider had no cause of action based on intentional infliction of emotional distress.[13] Judge Becker stated that the defendant's conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community."[14] Although Judge Becker viewed McEnroe's behavior as childish and unnecessary, he ruled that such conduct was not actionable.[15]

The court also decided that Schneider had no cause of action based on assault. To establish a cause of action for assault, Schneider had to prove that McEnroe intended to place him "in apprehension of imminent harmful or offensive contact."[16] Judge Becker reasoned that, since Schneider never pleaded or testified that he felt physically unsafe, Schneider had failed to meet his burden for proving an assault.[17]

Finally, the court concluded that Schneider failed to establish a cause of action based on battery. In order to prove a battery, there must have been an "intentional body contact which was harmful or offensive in nature."[18] Although the court believed that the rosin from McEnroe's hand did land on Schneider, the court held that this contact was not harmful or offensive because Schneider sustained no injury.[19]

Judge Becker concluded that Schneider's real injury was the result of being verbally humiliated by McEnroe. However, Judge Becker stated that "an action [for assault] cannot be premised on threats or mere words alone."[20] Furthermore, Judge Becker declared that the court's job was not to reward people for "doing an excellent job of 'bench jockeying' " and causing athletes to lose their temper.[21] Becker therefore granted McEnroe's motion to dismiss and entered judgment in McEnroe's

12. *Id.*

13. *Id.* at 11.

14. *Id.* at 12 (citing RESTATEMENT (SECOND) OF TORTS § 46(1) comment d (1965) (*cited with approval in* Fischer v. Maloney, 43 N.Y.2d 553, 557, 373 N.E.2d 1215, 1217, 402 N.Y.S.2d 991, 993 (1978))).

15. *McEnroe,* 7 ENT. L. REP. at 12.

16. *Id.* (citing Masters v. Becker, 22 A.D.2d 118, 119, 254 N.Y.S.2d 633, 634 (1964)).

17. *McEnroe,* 7 ENT. L. REP. at 12.

18. *Id.* (citing *Masters,* 22 A.D.2d at 120, 254 N.Y.S.2d at 635).

19. *McEnroe,* 7 ENT. L. REP. at 12.

20. *Id.* (citing Carroll v. New York Property Ins. Underwriting Ass'n., 88 A.D.2d 527, 527, 450 N.Y.S.2d 21, 22 (1982); Prince v. Ridge, 32 Misc. 666, 667, 66 N.Y.S. 454, 455 (1900)).

21. *McEnroe,* 7 ENT. L. REP. at 13.

favor.[22]

USAA Casualty, decided five days after *McEnroe,* was the second case resulting from the events of the August 30, 1983 tennis match. After discovering that Schneider was suing him, McEnroe contacted his insurance company, USAA Casualty ("USAA"), and requested that USAA defend and indemnify him.[23] USAA then brought this action in the Eastern District Federal Court of New York, for a declaratory judgment that it was not liable to indemnify McEnroe for losses arising from Schneider's injuries, should Schneider win his tort suit against McEnroe. The issue was whether McEnroe's homeowner's insurance policy[24] provided coverage for Schneider's damages. Although Schneider lost his case, making the impact of the decision in the second case moot, McEnroe's theory as to why his policy covered him merits discussion.

McEnroe argued that his homeowner's insurance policy covered him for any damages for which he would be legally liable arising out of the Schneider incident.[25] One of the policy's exclusions kept the insurance company from being personally liable for any injury "arising out of business pursuits of any insured." However, the exclusion did not apply to "activities which are ordinarily incident to non-business pursuits."[26]

USAA argued that Schneider's injuries arose out of a business pursuit; thus, the policy excluded the injuries from coverage.[27] McEnroe countered that Schneider had interrupted his business pursuit, a tennis match, with the confrontation; therefore, the confrontation became an activity "ordinarily incident to non-business pursuits . . . ."[28]

The court reasoned that McEnroe's tennis match was clearly a business pursuit, and that if Schneider was in fact injured, his injury was a

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22. *Id.*

23. 620 F. Supp. 246 (E.D.N.Y. 1985).

24. The homeowner policy stated:

> COVERAGE E PERSONAL LIABILITY
>
> If a claim is made or a suit is brought against any insured for damages because of bodily injury . . . to which this coverage applies, [USAA] will:
>
> a. pay up to [its] limit of liability for the damages for which the insured is legally liable;
>
> SECTION II-EXCLUSIONS
>
> 1. Coverage E-Personal Liability . . . do[es] not apply to bodily injury . . . :
>
> . . .
>
> b. arising out of business pursuits of any insured . . . .
>
> This exclusion does not apply to:
>
> (1) activities which are ordinarily incident to non-business pursuits . . . .

Id. at 247-48.

25. *Id.* at 247.

26. *Id.* at 247-48.

27. *Id.*

28. *Id.*

result of McEnroe's business pursuit.[29] The court disagreed that an interruption took place in McEnroe's business pursuit and ruled that the altercation did not fall under the policy's coverage.[30]

McEnroe further argued that his confrontation with Schneider qualified as a "frolic and detour" from his business pursuit.[31] Citing *State Farm Fire & Casualty Company v. National Union Fire Insurance Company,*[32] (*"State Farm"*) McEnroe argued that a "momentary deviation from . . . 'business pursuits' . . . should be classified as an activity ordinarily incident to non-business pursuits . . . ."[33]

The court, however, distinguished *USAA Casualty* from *State Farm* because of the occupations of the parties and the manner in which the parties deviated from their occupations. The court reasoned that tennis players expect the audience to participate in the event and that "a tennis player plies his trade and gains an audience not only by gracefully executing lobs and passing shots, but also by graciously accepting the cheers of the crowd after a hard fought victory."[34] Consequently, the court granted USAA's motion for summary judgment, concluding that any possible injury to Schneider clearly arose out of McEnroe's business pursuit.[35]

Both *McEnroe* and *USAA Casualty* have important implications for professional athletes. *McEnroe* concluded that one cannot sue for mere words alone, or for being humiliated in front of a large crowd. The court felt that Schneider provoked the altercation with McEnroe and that Schneider should have foreseen McEnroe's response, which was merely a release of some steam. More important to the court's conclusion was the fact that Schneider never found himself in fear of physical danger.[36]

However, it seems difficult to interpret McEnroe's remarks as "mere words." An extremely hostile man, who glares at someone while waving a tennis racket in his hand, and who screams that he wants to fight, would put a reasonable person in fear. One might foresee McEnroe jumping over the railing in order to quiet his heckler for the rest of the match. In fact, most hockey enthusiasts are well aware of the numerous times that professional hockey players have gone into the stands to quiet

29. *Id.*
30. *Id.*
31. *Id.*
32. 87 Ill. App. 2d 15, 230 N.E.2d 513 (1967).
33. *USAA,* 620 F. Supp. at 248 (citing *State Farm,* 87 Ill. App. 2d at 19, 230 N.E.2d at 515).
34. *USAA,* 620 F. Supp. at 249.
35. *Id.*
36. *McEnroe,* 7 ENT. L. REP. at 12.

a spectator.[37] Baseball fans have likewise seen similar events.[38] Thus, it would not be so unusual for someone with a temper like McEnroe's, not wearing cleats or ice skates, to hop over the railing and silence Schneider.

One must wonder if the fact that the defendant was John McEnroe had something to do with the court's decision. Although McEnroe has shown his childish behavior many times on the tennis court, he has never harmed anyone. Thus, the court may have realized that McEnroe's bark was worse than his bite. One must ask whether another person accused of the same offense would receive the same verdict. Or does *McEnroe,* like *USAA Casualty,* put athletes, especially famous ones, on a different level?

If McEnroe had actually harmed Schneider, the court's decision might very well have been different. But the court was very clear in its statement that it would not squander judicial resources by hearing cases that involve spectators who agitate athletes to the point where they lose their tempers.[39] Judge Becker should have borrowed a basketball cliché: No harm, no foul.

In *USAA Casualty,* the court clearly placed athletes on a different level than other individuals when deciding if a business pursuit exists. The court held that no time-outs from the business venture would occur once the athlete begins the competition. The athlete entertains and performs for the crowd, and any time spent interacting with them is all part of the job.[40]

For John McEnroe, the importance of *McEnroe* clearly outweighed the significance of *USAA Casualty*. Perhaps *McEnroe* will be equally important to other athletes. Athletes will often find themselves in a confrontation with a spectator, and words may be exchanged. As long as athletes stay within *McEnroe*'s acceptable level of conduct, they need not worry about paying tort damages.

In addition, both cases have great significance for professional athletes, since these decisions place athletes under a different standard than the average person. The court will tolerate more outrageous behavior by an athlete toward a private person than the other way around. Also, the court frowns upon an individual who tries to take advantage of a famous athlete, who happens to get a little hot under the collar. Yet, for the

37. *See, e.g.,* Reed, *Week of Disgrace on the Ice,* SPORTS ILLUSTRATED, Apr. 26, 1976, at 22.

38. *See, e.g.,* Fimrite, *Take Me Out to the Brawl Game,* SPORTS ILLUSTRATED, June 17, 1974, at 10.

39. *McEnroe,* 7 ENT. L. REP. at 13.

40. *USAA,* 620 F. Supp. at 249.

athlete, the interaction with the audience is all part of the job. If athletes want to spar with a spectator, they must remember that neither the referee, nor the judge, will blow the whistle for a time-out.

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