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Torts in Sports: Exploring the Boundaries of Assumption of Risk

BY BEN GROSS / ON NOVEMBER 14, 2023

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In the thrilling world of sports, we are accustomed to witnessing athletes push their bodies to the limits, seeking glory on the field, court, or rink. Alongside these incredible feats, however, come the inevitable injuries.[1] Whether it's a bone-jarring tackle, a slide into home base, or a body check in ice hockey, the risk of injury is part and parcel of competitive sports.[2] Injuries can manifest in numerous forms and under diverse circumstances, spanning from physical environmental factors to those stemming from the actions of fellow participants. Yet, when is an injury just an unfortunate consequence of the game, and when might it lead to tort liability? The answer lies in the complex legal doctrine known as "assumption of risk."

Assumption of risk is a fundamental concept in tort law, especially within the context of sports and other high risk recreational activities. It is a legal principle that recognizes that participants in sports and recreational activities acknowledge and accept the inherent risks associated with those activities. In other words, when you choose to engage in a sport, you also choose to assume the risks that come with it. Thus, an individual is barred from recovery for injuries resulting from an activity in which they realized the potential dangers, implicitly or expressly, and nevertheless voluntarily participated. As Judge Cardozo stated, "[o]ne who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and

necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball."[3]

Tort law is a doctrine that often relies on "reasonableness" as its central criterion.[4] Reasonableness hinges on whether the cost of not taking certain precautions outweighs the potential harm.[5] Plaintiffs who are injured while engaging in high-risk recreational activities do not seem to fit within that doctrine. The underlying rationale behind the assumption of risk doctrine is rooted in a principle of public policy.[6] It aims to encourage active engagement in sports by eliminating the potential for legal action in cases involving simple negligence or injuries inherent to the activity itself.[7] The doctrine of "assumption of risk" also reflects a common-sense approach.[8] If someone willingly participates in a sport or activity where risks are intrinsic and known, it may not be reasonable to hold others liable for injuries that result from these innate risks. For this defense to be applied, the defendant needs to demonstrate that the plaintiff was aware of the potential risks and willingly accepted them. This voluntary acceptance essentially releases the defendant from their obligation to adhere to a specific standard of conduct toward the plaintiff.

Assumption of risk can be either implied or express.[9] Implied assumption of risk is the more common and fundamental form of this legal doctrine. It presumes that individuals who voluntarily participate in sports or recreational activities understand and accept the inherent risks associated with those activities. This understanding is often implied because it's assumed that participants are aware of the usual risks that come with the game. Determining the scope of an activity, however, is a matter reserved to the discretion of judges and can pose a significant legal challenge.[10] Express assumption of risk, on the other hand, is a more explicit form of assumption of risk. In this case, individuals provide clear and written consent to assume specific risks associated with a sport or activity. It involves a formal agreement, often through a waiver, release, or contract, in which the participant acknowledges and accepts the risks they are about to encounter.

Assumption of risk limits tort liability when injuries occur during the normal course of play. Common sports injuries like sprains, fractures, or concussions are often shielded under this doctrine. But what about those instances that stretch the boundaries of this legal principle? There are three categories where the boundaries of the doctrine become interesting and complex: (1) Gross Negligence or Recklessness; (2) Conduct Outside the Norm; (3) Inadequate Protective Measures.

Now let's evaluate these categories. First, in cases involving gross negligence or recklessness, if a player's actions go beyond the accepted standards of sportsmanship and involve gross negligence or recklessness, assumption of risk may not be a sufficient defense.[11] Deliberate and dangerous conduct, such as an unprovoked vicious tackle or an intentional attempt to harm an opponent, can potentially result in legal liability. In such cases, courts may hold

individuals accountable for their reckless behavior, even within the context of a sporting activity.

Second, while there's an implicit understanding in sports that physical contact can lead to injuries, it does not mean that any kind of behavior is fair game. Acts that deviate from established norms in sports and infringe on personal boundaries may not fall under the umbrella of assumption of risk. Such conduct might include harassment, assault, or other forms of inappropriate behavior. For example, during the 2017-2018 NHL playoffs, one player began distracting his opponents by licking them on the face (and had kissed opponents in an unwanted manner in the past). He was told to stop doing this by the league, yet he continued doing it.[12] Although no charges were pressed, conduct like this, which is definitely not the norm, could potentially lead to tort liability.

Third, the presence of inadequate protective measures or safety standards can challenge the effectiveness of the assumption of risk. If reasonable precautions were not taken to protect participants from foreseeable harm, individuals responsible for ensuring safety may not be shielded from liability.[13] Negligence in maintaining safety measures can be a crucial factor in these cases. For example, if a league ignores safety rules and regulations, resulting in an injury, assumption of risk may be set aside. Since 2011, former players have filed over two hundred complaints against the NFL regarding its duties to protect players from the chronic risks created by concussive head injuries.[14]

To conclude, the assumption of risk in sports is not an absolute defense, and its application can be influenced by various factors, including the nature of the conduct, the presence of safety measures, and the level of recklessness or deviation from sports norms. Each case should be evaluated individually to determine the extent to which the assumption of risk doctrine is applicable.

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1. Linda Searing, Over 5 million high school sports injuries recorded in 4-year period, Wash. Post (Mar. 27, 2023) https://www.washingtonpost.com/wellness/2023/03/27/high-school-sports-injury-research/ [https://perma.cc/CF8S-9PGM].
2. See William Powers, Sports, Assumption of Risk, and the New Restatement, 38 Washburn L.J. 771 (1999).
3. Murphy v. Steeplechase Amusement Co., Inc., 166 N.E. 173 (N.Y. 1929).
4. See generally Gregory C. Keating, Reasonableness and Rationality in Negligence Theory, 48 Stan. L. Rev. 311 (1996).
5. See, e.g., United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

6. 16 California Points & Authorities § 165.412 (2023).
7. See Kahn v. East Side Union High School Dist., 31 Cal. 4th 990, 1011 (2003) (stating "the object to be served by the doctrine of primary assumption of risk in the sports setting is to avoid recognizing a duty of care when to do so would tend to alter the nature of an active sport or chill vigorous participation in the activity".).
8. See Swigart v. Bruno, 13 Cal. App. 5th 529, 539.
9. See Restatement (Second) of Torts § 496A.
10. See Alexander J. Drago, Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases, 12 Fordham Intell. Prop. Media & Ent. L.J. 583 (2002).
11. See, e.g. Dotzler v. Tuttle, 234 Neb. 176,183 (1990) (Where a plaintiff injured in a pick-up basketball game could not recover against his opponent without a showing of intentional, reckless, or willful conduct.).
12. Nick Schwartz, A history of Brad Marchand licking players, Usa Today (May 5, 2018), https://www.usatoday.com/story/sports/ftw/2018/05/05/a-strange-history-of-brad-marchand-kissing-and-licking-nhl-players/111160262/ [https://perma.cc/G8B8-NA5U].
13. See Ramsey W. Fisher, Evaluating a "Concussion Clause": Why the NFL's Assumption of Risk Defense Fares No Better As Time Goes On, 21 Vand. J. Ent. & Tech. L. 653.
14. See In re Nat'l Football League Players' Concussion Injury Litig. (In re Nat'l Football League I), 301 F.R.D. 191, 195 (E.D. Pa. 2014).