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WALTER T. CHAMPION, JR.

RECREATIONAL INJURIES

Cases, Documents, and Materials

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To Charles Henry Champion—both of them,
my son and my grandfather, who hit his age . . . and died (happy)

PREFACE

I have taught torts, sports law, recreational injuries, amateur sports, boxing law, and baseball and the law. I was also there at Connie Mack Stadium in Philadelphia in 1957 when the late great Hall of Fame baseball player, Ritchie Ashburn, hit two foul balls that struck the same little old lady spectator twice—once when she was on the stretcher. Even then at the tender age of negative 20, I knew that I would write on recreational injuries. As Justice Cardozo would say, "The timorous may stay at home." But, we don't stay at home, do we? We recreate. Recreational injuries is torts on steroids.

Since this is a legal casebook, I tried to make it just that. But, I could not help adding a complaint or two, or a statute or two, so this book might ever be useful after the course is over. It can be used in law schools and in sports management programs.

There is a lot of ambiguity around recreational injuries. For example, when we sign that ubiquitous health club waiver, if the signature line is on a different page than the waiving language, the agreement is probably voidable. To lend some clarity to the subject, I have tried to mix legal topics (negligence, assumption of risk, sovereign immunity, etc.) with practical areas of concentration (coaches, racket sports, air-born sports, etc.).

I repeat: "The timorous may stay at home," but don't be afraid. Read this book.

July 2015
League City, Texas

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ACKNOWLEDGMENTS

I am going through a mid-life crisis, but instead of buying a Harley Davidson, I have been writing books. (It's not as dangerous.) So far, I am the author of Fundamentals of Sports Law (West), Sports Law in a Nutshell (West), Gaming Law in a Nutshell (West), Business Laws of Columbia (West), Baseball and the Law: Cases and Comments (Cognella), Intellectual Property Law in the Sports and Entertainment Industries (ABC-CLIO), Sports Law: Cases, Documents, and Materials (Aspen), Sports Ethics for the Sports Business Professional (Jones Bartlett), Entertainment Law: Cases, Documents, and Materials (forthcoming, Aspen), and this book, Recreational Injuries: Cases, Documents, and Materials (Aspen).

I have also been named Dean of International Programs with ISDE (Instituto Superior de Derecho y Economia), where we offer both LL.M.s and Masters in International and Comparative Sports Law.

Kudos go to my publishers, ISDE's Los Hermanos Pinto, and my family and friends, especially Nick C. Nichols, who won for Rudy Tumjanovich in his successful lawsuit against the Los Angeles Lakers, which launched a sea change in the legal perception of recreational injuries.

I would also like to give kudos to my research assistant and student at Texas Southern University School of Law, Nicoya Hogan, for two years of hard work and dedication.

As my son often says, "Mors ante ignobiles (death before dishonor)."

SUMMARY OF CONTENTS

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Chapter 1
Negligence; Applicability to Recreational Injuries

In torts, actions in recreation, and sports-related scenarios, the most frequent claim for relief is based on negligence. Usually, the plaintiff is either a participant or spectator in sports or recreational activities. Health club or playground injuries are the classic example of "recreational injuries." Negligence is conduct that falls below the particular facts and circumstances present in that particular case. In an action for negligence, the burden is on the plaintiff to show that there was a negligent act or omission by the defendant and that it was the proximate cause of the plaintiff's injury. There must be an established duty of care, a breach of that duty, a proximate cause or causal connection between defendant's action or lack of action and the injury, and damages that resulted from the breach.

In *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (N.Y. 1929), Justice Cardozo stated his maxim for recreational injuries:

> One who takes part in such a sport accepts the dangers that where 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 a contact with the ball. The antics of the chance are not the poses of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff [injured when he was thrown from an amusement device called the 'Flopper'] was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fate. The timorous may stay at home.

In *Vendrel v. School Dist. No. 26C*, 376 P.2d 406, 412-413 (Or. 1962), the alleged negligent instruction of a football player was insufficient to show that the coach failed to exercise reasonable care for his players and that the injury was a result of that failure.

The Supreme Court of Oregon in *Vendrel* avers that

> [t]he playing of football is a body-contact sport. The game demands that the players come into physical contact with each other constantly, frequently by with great force. The lineman charge the opposing line vigorously, shoulder to shoulder. The tackler faces that risk of leaping at the swiftly moving legs of the ball-carrier and the latter must be prepared to strike the ground violently. Body contacts, bruises, and clashes are inherent in the game. There is no other way to play it. No prospective player need be told that a participant in the game of football may sustain injury. The fact is self-evident. It draws to the game the manly, they accept its risks, blows, clashes, and injuries without whimper.

It was assumed that one voluntarily embraced any danger that might occur. However, the courts began to understand in *Nabozny v. Bainhill*, 334 N.E.2d 258 (Ill. App. 1975), that "some...restraints of civilization must accompany every athlete onto the playing field." In *Nabozny*, the injured participant was a soccer goalkeeper who was able to recover on the grounds that the striker violated the safety rule that the goalkeeper was entitled to protection from contact while in the penalty area. This safety rule strictly prohibits contact and defendant violated this rule and kicked plaintiff in the head causing severe injuries. Defendant countered that he was free from negligence on the grounds that he did not owe any duty to the injured recreational plaintiff, and that the defendant was contributorily negligent as a matter of law.

As a matter of law, the initial inquiry in a negligence lawsuit for injuries is to ascertain whether the defendant owed a duty to the plaintiff. However, whether that duty has been breached or whether there is a causal connection between the breach and the injuries are questions of fact. In *Wicina v. Streaker*, 242 Kan. 278, 747 P.2d 167 (1987), plaintiff sued for injuries suffered in a high school football game on the basis of the school's failure to provide adequate disability insurance coverage and the failure to advise students of this failure. The court held that under the prevailing state insurance statute, the school had no duty to provide that type of insurance. Another point is that there was no causal connection between the alleged negligence and the football injury itself.

In *Brosko v. Hetherington*, the court looked at an injury to a minor caddy in an attempt to find a duty to use reasonable care based on the relationship or situation of the parties. The classic example would be a judo instructor to a student. Or, in the case of *Kleinknecht v. Gettysburg College*, 989 F.2d 1360 (3d Cir. 1993), a duty to provide emergency medical services for an intercollegiate athlete was based on the fact that there was a relationship, in that the college recruited the athlete.

BROSKO v. HETHERINGTON
Common Pleas Court of Pennsylvania, Delaware County
16 Pa. D & C. 761 November 5, 1931

Motions for judgment n.o.v. and for new trial. MACDADE, J., November 5, 1931.—The present proceedings were instituted by the minor plaintiff and his father to recover damages occasioned by the minor plaintiff's loss of an eye, caused by a sliced golf ball striking said organ of vision. Nicholas Brosko, the minor, was employed as a caddy on June 30, 1925, at the golf course of the Delaware County Golf Course (formerly the Aronimink Course) in Drexel Hill, Delaware County, Pa. While so engaged as a caddy he was struck in the left eye by a golf ball driven by the defendant from the first tee. The minor was caddying for one person of a foursome (four players), one of whom was the defendant. However, he was not attending this defendant, but a player thereof who teed off before the defendant attempted to do so, as hereinafter related.

The jury found in favor of the plaintiffs, awarded $625 to the minor and $435 to his father, very reasonable verdicts indeed.

The defendant has filed motions for judgment n.o.v. (having presented a written point at the trial for binding instructions) and for new trials. The minor plaintiff testified that, on June 30, 1925, when he was eleven years of age, he went to the golf course and, after waiting for some time, was engaged as a caddy, being assigned to his employment by the caddy master of the golf course, with no direct contractual relation with the defendant or employment by him, except such as may be inferred by said assignment of caddying for a third person who was in the same foursome with the defendant. Evidently this boy was engaged by the caddy master. Prior to that day he had never acted as caddy, though he had been to the course to seek employment as a caddy on several other occasions. He testified that he, Buddy Feehan, Billie Feehan and a fourth boy were assigned by the caddy master as caddies for the members of a foursome of which the defendant was one; that he took a position about twenty-five feet to thirty feet to the right of the first tee and about six feet in front of it before the members of his foursome began to drive; that the golfer for whom he was caddying, who was not the defendant, drove his ball, and that he watched the course of the ball until it came to rest and fixed its position; and then, as he was turning to look again toward the first tee, he was struck in the left eye by the ball driven by the defendant and as the former's head was turning.

Buddy Feehan testified that at the time of this occurrence he was twelve years of age and went to the golf course in company with his cousin Billie and the minor plaintiff, and these three, together with the fourth boy, were assigned as caddies to the foursome. That the four boys went toward the first tee and took the position assigned to them by the club professional. He further testified that the defendant swung once at the ball and missed it and on the second stroke hit the ball in such a manner as to cause it to slice or veer very

sharply to the right, striking the minor plaintiff in the eye. Buddy Feehan was at the time caddy for the defendant.

Billie Feehan testified that he accompanied his cousin Buddy and the minor plaintiff to the golf course on the day of this occurrence and that he was at that time nine years of age. That he was one of the caddies for the foursome of which the defendant was a member. He was unable to state for which man he was caddy.

William C. Filz testified that he was not watching the defendant when he drove; that he was conscious there were people in and among the bushes where the plaintiff was struck; that he is uncertain whether the minor plaintiff, the two Feehan boys and the fourth boy were caddies for his foursome or not.

The trial judge (MacDade) charged the jury that the laws of ordinary care and of ordinary negligence applied to the case and submitted to the jury as a question of fact (1) (a) whether the boy had assumed the risk of being struck and (b) contributed to the accident by his negligence; (2) whether it was the (duty of the defendant to give warning of his intention to strike or drive the ball and (3) whether the defendant was negligent in failing to strike the ball properly in attempting to drive it.

Golf, from its very nature, is a game requiring some skill. It must be remembered that the driver or brassie is a club with a long handle and a solid wooden head reinforced and weighted with lead; the golf ball is a small ball of tightly wound rubber, covered with gutta-percha, and is so constructed that it attains a terrific velocity upon being struck. It is readily seen that a player, when striking the ball, sets in motion certain forces which are capable of causing great damage if improperly directed. The fact the defendant improperly directed the force in this case by an improper posture and an incorrect swing appears directly from the testimony of O'Donnell and from the physical evidence that the ball did take an improper course. It must be conceded that the game of golf is no different from any other game or occupation in which man puts in motion a force likely to cause injury, and that if he intentionally puts such a force in motion, he must use ordinary care to put it properly in motion and in a direction in which it will cause no injury to another.

It is conceded that the ball which thus veered or sliced caused the minor plaintiff's injuries. Under the testimony, the question of whether or not the defendant took the correct posture and struck the ball correctly was an issue of fact. The testimony may have been conflicting, but that was for the jury to reconcile as arbiters of the facts. As to the second question involved, in considering whether or not the defendant was negligent in failing to give warning, the defendant contends that, if the plaintiff relies upon the theory that the ball was improperly struck, there was no necessity of a warning being given. That is fallacious for the reason that had the warning been given, the minor plaintiff's attention would have been attracted to the defendant's driving and would have so enabled him to protect himself by dodging when the ball came in his direction, or moved out of danger.