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Injured Hockey Player Could not Sue

SUMMARY: An injured high school hockey player, who was checked from behind into the boards against league rules, could not recover from the players who struck him or the hockey league. The Illinois Supreme Court decided Karas v. Strevell on February 22, 2008.

BACKGROUND: Benjamin Karas played junior varsity hockey for Barrington High School. In a January 2004 game against the Naperville Redhawks, two opponents checked Karas in his back while he was near the boards and leaning forward. He went into the boards head first, injuring his head and neck.

Checking from behind is prohibited by Amateur Hockey Association Illinois, which operates the league in which both Barrington and Naperville play. In addition to the league's prohibition, the back side of league players' jerseys displays the word "STOP" as a reminder not to strike another player from behind.

Karas sued Russell Zimmerman and Joseph Strevell, the two players who struck him, as well as the Redhawks team, the hockey association, and the officials association. The defendants moved to dismiss and the trial court dismissed all claims. Karas appealed and the appellate court allowed claims against the players and the hockey organizations to proceed. The defendants appealed and the Illinois Supreme Court took review.

ANALYSIS: Karas brought negligence claims against the players and negligence and civil conspiracy claims against the hockey and officials associations. He based his claim on a prior decision by the Illinois Supreme Court discussing sports injuries. In that case, called Pfister, the court had said that players cannot be held liable for ordinary negligence resulting in injury to others because physical contact is inherent in many sports. However, a sports participant can be held liable for conduct that intentionally or willfully or wantonly injures a co-participant.

Under Pfister, willful and wanton conduct required actual or deliberate intent to harm, or if the conduct was not intentional, an utter indifference to or conscious disregard for a person's safety. In that case the court was addressing sports in which contact was possible. In Strevell, the Illinois court realized that a standard of utter indifference to or conscious disregard of other players' safety was inappropriate for contact sports like football and hockey. In those sports, hard or intentional physical contact is an essential part of the game. Smashing into other players to try to stop them or keep them away from the ball or puck requires a certain indifference to one's safety and one's opponents' safety. They are not sports for the timid. In these sports, the court reasoned, liability was appropriate only where a participant intended to cause injury.

Karas' complaint stressed that Zimmerman and Strevell had violated the league's rule against checking from behind. That violation, he argued, supported his claims that the players should be liable for injuring him and the associations should be liable for failing to enforce the rules. The court rejected this contention. Violations of the rules—or fouls—are part of the game and are frequently called against players or teams. The fact that conduct constitutes a foul is not enough to hold a player liable in court. Instead, the challenged conduct must be "totally outside the range of the ordinary activity involved in the sport."

Karas had not alleged conduct by the players or the associations that met these standards. Thus, the court reversed the appeals court and dismissed all of his claims. Because the court was altering the standards it created in Pfister, however, it granted Karas leave to amend his complaint to demonstrate that the defendants had violated the new standards if he could do so.

EXCERPTS FROM THE COURT'S OPINION (By Justice Burke): "Pfister defined willful and wanton conduct as 'a course of action which shows actual or deliberate intent to harm or which, if the course of action is not intentional, shows an utter indifference to or conscious disregard for a person's own safety or the safety or property of others.' The appellate court below concluded that plaintiff had pled conduct on the part of the player defendants that met [the latter] standard. According to the appellate court, because plaintiff alleged that the player defendants knowingly violated a rule against bodychecking from behind, and because they knew that Benjamin was in a position near the edge of the rink, or boards, when he was struck, plaintiff sufficiently pled a 'conscious disregard' of Benjamin's safety by the player defendants. Before this court, plaintiff repeats this line of reasoning.

"We note that Pfister did not consider the application of the traditional willful and wanton standard to full-contact sports such as ice hockey and tackle football where physical contact between players is not simply an unavoidable byproduct of vigorous play, but is a fundamental part of the way the game is played. In these sports, holding participants liable for consciously disregarding the safety of co-participants is problematic.

"Striking or bodychecking a person who is standing on two thin metal blades atop a sheet of ice is an inherently dangerous action. Even a cleanly executed body check, performed according to the rules of ice hockey, evinces a conscious disregard for the safety of the person being struck. Yet, in an ice hockey game where bodychecking is permitted, players are struck throughout the game. This conduct is an inherent, fundamental part of the sport. Similarly, in tackle football players must necessarily disregard the risk of injury to others, simply because of the way the game is played:

'The playing of football is a body-contact sport. The game demands that the players come into physical contact with each other constantly, frequently with great force. The linemen charge the opposing line vigorously, shoulder to shoulder. The tackler faces the 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.'

"Moreover, imposing liability under the conscious disregard of safety standard would have a pronounced chilling effect on full-contact sports such as ice hockey and football. If liability could be established every time a body check or tackle resulted in injury–because that conduct demonstrates a conscious disregard for the safety of the opposing player–the games of ice hockey and football as we know them would not be played.

"Finally, the conscious disregard of safety standard is unfair to defendants in full-contact sports such as ice hockey. As one commentator has noted, ice hockey, like football, is an example of a sport 'in which body checking and physical play may foreseeably result in frequent injuries. It would be *** unjust to predicate participant liability upon the participant's knowledge that a tough check or collision could result in injury. This type of conduct is inherent in the sport itself.' In full-contact sports, such as ice hockey where bodychecking is allowed, and tackle football, the traditional willful and wanton standard is both unworkable and contrary to the rationale underlying Pfister. To remain consistent with the reasoning of Pfister, a standard of care must be employed that more accurately accounts for the inherent risks associated with these sports. In considering the appropriate standard of care to be followed, we note that a majority of courts have concluded that 'rules violations are inherent and anticipated aspects of sports contests' and, thus, insufficient to establish liability by themselves.

[T]he Supreme Court of California [has]... stated that a participant breaches a duty of care to a coparticipant '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.' Other authorities have adopted similar standards. Regardless of the precise wording, these standards all draw a line in a way that permits recovery for extreme misconduct during a sporting event that causes injury, while at the same time foreclosing liability for conduct which, although it may amount to an infraction of the rules, is nevertheless an inherent and inevitable part of the sport. We agree with the standards set forth in the above authorities, and conclude that, in a full contact sport such as ice hockey or tackle football, a participant breaches a duty of care to a coparticipant only if the participant intentionally injures the coparticipant or engages in conduct 'totally outside the range of the ordinary activity involved in the sport.'"

COMMENTS & QUESTIONS

1. What happened to Benjamin Karas?
2. Whom did he blame?
3. What legal standard of conduct did he say the defendants had breached?

In addition to his negligence claims, Karas had sued the Illinois hockey and referee organizations for civil conspiracy. Conspiracy arises when two or more individuals act in concert to violate the law. In this case the law or rule violated was that against checking players from behind. In order to show civil conspiracy, there must be more than an agreement—some harm must arise from actions taken pursuant to the conspiracy.

Checking a player from behind is a league rule violation and Karas was injured as a result of Zimmerman's and Strevell's hitting him into the boards. The court gave Karas an opportunity to demonstrate that the hockey organizations had acted in concert to ignore the checking-from-behind rule, but his lawyer informed the court that they had no evidence of such behavior. Without showing that defendants acted in concert to advance a common plan, there was no civil conspiracy to allow checking from behind.

Assault and battery are disruptive, disrespectful, and may cause injury. They are prohibited in society at large. If we recognize these behaviors as wrong in the streets and parks and halls and countryside, why do we allow them on athletic fields? Do assault and battery fairly describe the shouting and hitting that takes place in sports?

Do school kids who sign up for sports also sign up to be injured? The court says liability will arise only when one player intentionally injures another. How do you show this? When one player crashes into another with the intent to knock him or her out of the play, isn't that an intent to cause injury? Can you both intend to strike other players and not intend to injure them?

Being struck hurts. Is there some sort of legal line between hurting someone acceptably and injuring them in a way that makes you liable for damages? How do you draw this line?

The other standard for liability is doing something "totally outside the range of normal activity in the sport." Would punching someone in the face count? Is this totally outside the normal activity in the sport in hockey, where fights are common? Does it make sense to allow some forms of violence in some sports and not others?

Do you think the court's new standard will reduce sports lawsuits in Illinois?

If you sign up for a physical sport, should you be allowed to sue anybody if you're hurt playing? Should members of karate clubs be allowed to sue if they're kicked or punched too hard? What about the same behaviors on a swim team?

There was no evidence of the leagues efforts to enforce the no-check rule. If there was evidence that the referees continually failed to enforce the rules, could the league and referees be liable? What if a coach sent a player out to intentionally hit a player? Could the coach be laible?

I Plead the Fifth!

SUMMARY: When a murder suspect said, "I plead the Fifth," he made an unambiguous request to remain silent under the Fifth Amendment. Therefore, the police failure to honor that request and stop questioning him rendered a subsequent confession inadmissible. A new trial was ordered. The United States Court of Appeals for the Ninth Circuit decided Anderson v. Terhune on February 15, 2008.

BACKGROUND: On the morning of July 9, 1997, Patricia Kuykendall discovered that her car had been stolen. She suspected that Robert Clark had taken it. Later that morning, she confronted Clark about it at her home. Jerome Anderson, who was Clark's friend, was also present. Kuykendall yelled at Clark, who denied taking the car, but he seemed nervous. When Kuykendall went to call the police, Clark left. Anderson and Kuykendall's roommate, Abe Santos, left the house a short time later, saying they were going to follow Clark.

That afternoon, someone discovered Clark's body by the roadside. He had been shot four times. Beside his body was a methamphetamine pipe. There were also shell casings, a cigarette lighter and a partially eaten hamburger at the scene.

On July 11, police asked Anderson to come in for an interview. He told them that he had seen Clark at Kuykendall's house on the 9th, but that he and Santos had left to buy some hamburgers and had later gone to Santos's father's house and then a car wash.

The next day, police took Anderson into custody on a parole violation. While he was in police custody, they interviewed him about the events on July 9th. During the course of that questioning, Anderson said, "I don't even wanna talk about this no more" and "Uh! I'm through with this." About two hours into their interview, he said, "I plead the Fifth." An officer questioning him responded, "Plead the Fifth. What's that?" and continued to question him. Finally, Anderson said, "I'd like to have a lawyer present."

At that point, the police turned off the tape recorder and stopped questioning him. Some time later, however, Anderson requested one of the officers and indicated his desire to talk more. Police asked him if this meant he did not need a lawyer present and he said yes, he wanted to talk. They questioned him for another three hours, during which period Anderson said that he shot Clark.

On trial for murder, Anderson argued that his confession was inadmissible because police had denied his request to remain silent. The state trial court ruled admitted the confession and Anderson was convicted. The state court of appeals affirmed the conviction. Anderson then filed a writ of habeas corpus in federal court which eventually made its way to the Ninth Circuit Court of Appeals.

ANALYSIS: The Constitution's Fifth Amendment provides that "No person...shall be compelled in any criminal case to be a witness against himself...." The government cannot compel us to speak about our potential involvement in a crime. The touchstone case in this area is Miranda v. Arizona, from which the well known "Miranda rights" arise. In that case, the Supreme Court commanded police to notify criminal suspects of various rights, including the Fifth Amendment's right to remain silent. In subsequent decisions, the Supreme Court has held that once a suspect makes a clear request to remain silent, all questioning must cease.

Anderson claimed that his request for Fifth Amendment protection had been unambiguous. While he was in police custody being interviewed by several officers, Anderson had told police, "I don't even wanna talk about this no more." He also said, "Uh! I'm through with this." About two hours into the interview, he said, "I plead the Fifth." The California appeals court had held that this request was ambiguous in light of their long conversation, and that the officer's response, "Plead the Fifth, what's that?" was merely a request for clarification. The appeals court looked at the subject of their discussion. When Anderson made this statement, they had been discussing his drug use, which included smoking from a pipe. That court reasoned that Anderson may have been talking about his drug use and indicating a desire to stop that line of conversation, not the whole interview.

Anderson argued that that was not his purpose. He was there as a murder suspect being questioned in police custody. His statement, "I plead the Fifth", was therefore an unequivocal request to stop speaking to police. A majority of the Ninth Circuit agreed. While criminal defendants often challenge convictions on the grounds that their confessions had been compelled against their expressed desire to remain silent, the words in those cases are usually subject to some interpretation given the context of the conversation. Here, the majority opined, there was no ambiguity. Because of the Miranda warning's widespread use in popular culture—TV shows, movies, books—most people know that they have the right to remain silent. "Pleading the Fifth" is equally well embedded in the popular consciousness as language to trigger this right. Moreover, it identifies the amendment granting the protection.

The government argued that the officer was seeking clarification on what it was Anderson sought to stop discussing. Was it just his drug use or Clark's murder? The majority rejected this argument. If the populace at large understands "I plead the Fifth" as an invocation of the right to cease speaking to police, certainly trained police officers know it. The context of the conversation likewise undercut this argument. The officer asked for no clarification as to subject. He said, "plead the Fifth, What's that?" and nothing more. The majority concluded that the officer was "playing dumb," not trying to determine what Anderson meant. What the officer hoped to achieve, he did achieve—keeping the conversation going until the officers could secure a confession.

The majority concluded that Anderson's request was clear to layperson and law and law-enforcement professional alike. In addition to saying in general language that he wanted to stop talking, he had referenced the Amendment guaranteeing his right not to be a witness against himself. It was unconstitutional for police to continue interrogating him at that point. The confession that follows was therefore invalid and the majority ordered a new trial.

Three judges dissented. They opined that even if police should have stopped questioning Anderson after his "plead the Fifth" statement, he waived this right and the right to counsel later when he requested to speak to an officer about the crime. The dissenters noted that Anderson had not confessed during the initial round of questioning up to the time he asked for a lawyer. He had confessed during the discussion that followed his request to speak to police again after they had stopped interrogating him. To the dissent, the confession was valid. If anything should be stricken from the record, it was limited to Anderson's statements after he pled the Fifth up to the point he began speaking to police again at his own request.

EXCERPTS FROM THE MAJORITY OPINION (By Judge McKeown): "The continued questioning violated the Supreme Court's bright-line rule established in Miranda. Once a person invokes the right to remain silent, all questioning must cease:

'If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.'

"Under [the Anti-terrorism and Effective Death Penalty Act], a writ of habeas corpus may not be granted unless the state court's decision (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Although this standard requires us to give considerable deference to the state courts, AEDPA deference is not a rubber stamp. The state court decision here collides with AEDPA on all grounds. It reflects both an unreasonable application of Miranda, which is clearly established federal law, and an unreasonable determination of the facts.

"Using 'context' to transform an unambiguous invocation into open-ended ambiguity defies both common sense and established Supreme Court law. It is not that context is unimportant, but it simply cannot be manufactured by straining to raise a question regarding the intended scope of a facially unambiguous invocation of the right to silence. As the Supreme Court has observed, in invoking a constitutional right, 'a suspect need not 'speak with the discrimination of an Oxford don.' Anderson would meet even this erudite standard. Miranda requires only that the suspect 'indicate[ ] in any manner . . . that he wishes to remain silent.'

"This is not a case where the officers or the court were left scratching their heads as to what Anderson meant. Nothing was ambiguous about the statement 'I plead the Fifth.' Ambiguity means 'admitting more than one interpretation or reference' or 'having a double meaning or reference.' The New Shorter Oxford English Dictionary (1993). Even if the preliminary statements 'I don't even wanna talk about this no more' and 'I'm through with this. I'm through. I wanna be taken in custody,' were viewed as somewhat equivocal—a dubious conclusion at best—'I plead the Fifth' left no room for doubt.

EXCERPTS FROM THE DISSENTS (By Justices Bea, Tallman and Callahan): "Approximately two hours and fifteen minutes into the interview, after Anderson was shown the videotape of his codefendant Abe Santos saying Anderson was the one who shot Robert Clark, Anderson said, 'I'd like to have an attorney present.' The interrogating officers then did what they should have done back when Anderson first said, 'I don't even wanna talk about this no more': they stopped the interrogation and turned the tape recorder off. Anderson had not confessed to the murder of Clark at this point.

"But then Anderson changed his mind and re-initiated the conversation himself. The police advised Anderson four separate times that they could not speak with him because he had invoked his right to counsel, and five separate times Anderson insisted he wanted to talk to Lt. Harry Bishop.

"[T]he Shasta County trial court considered live testimony from the interrogating officers and heard the audiotapes of the confession. The California Court of Appeal then adopted the trial court's factual finding verbatim: Given the totality of the circumstances in this matter, the court concludes that while the defendant articulated words that could, in . . . isolation, be viewed as an invocation of his right to remain silent, the defendant did not intend to terminate the interview. The interrogating officer did not continue or reinitiate the interview by posing the question, 'Plead the Fifth. What's that?' The questions can reasonably be characterized as a request for clarification or confirmation that the defendant wished to assert his right to remain silent, and nothing more. What followed is important to a determination of the question. Specifically, the defendant launched off on a discourse and, ultimately, engaged in a debate without making any reference to an invocation of the right to remain silent. It was the defendant, not the interrogators, who continued the discussion. Accordingly, while words of invocation were spoken by the defendant, the court concludes that, in any case, he effectively waived the right to remain silent by what followed.

"Moreover, the California Court of Appeal took note of an interrogating officer's testimony during the hearing on the motion to suppress. '[T]he interrogating officer testified he believed that in saying, 'I plead the Fifth[,]' [Anderson] was simply indicating an unwillingness to discuss the details of his drug use, and not a desire to terminate the interrogation."

COMMENTS & QUESTIONS

1. Who is Patricia Kuykendall? Who was Anderson?
2. Before Anderson spoke to police, what evidence linked him to Robert Clark's murder?
3. What constitutional rights did Anderson assert during police questioning?

The Fifth Amendment's right against self-incrimination, or right to remain silent, is not a blanket prohibition on police speaking to potential suspects. This would gravely hinder criminal prosecutions. Rather, it is a right that must be asserted. Police may question potential suspects until they indicate a desire to stop the discussion. Often, potential suspects may wish to speak to police to remove themselves from suspicion.

The purpose of this provision is to prevent government from extracting forced confessions. The public wishes to minimize crime and catch criminals, particularly violent offenders. Government officials who do well in convicting criminals often do well in their careers. Therefore, there is an incentive to catch and convict offenders. The Fifth Amendment is designed to protect innocent people and those toward whom authorities may have some animosity, such as sharp critics, from overzealous prosecution and wrongful incarceration. Various governments throughout history have used forced confessions to silence adversaries or create the appearance of effectively protecting the public from crime.

Is "I plead the Fifth" a confusing statement? Can police say in response, "Are you sure you wish to do that?" How about, "don't you want to clear your name so you can go home?"

Police often use an interrogation tactic called "good cop/bad cop." One officer will play a mean, aggressive interrogator with no sympathy for the suspect; another will seem kind and understanding. The "good cop" endeavors to help the suspect deal with the bad cop by telling him what he wants to know. Does this sound fair? Is it coercive? Is being kind to a suspect unfair if your purpose is to secure a confession? Is being mean to a suspect for the same reason unjust? Is it fair to try to confuse a suspect or trick him into contradicting fake alibis?

When two or more authority figures—your parents, teachers, principals, coaches—have you in their space and are trying to get you to talk about wrongdoing, is it easy to hold your ground? Is it easy for them to get someone to say he or she did something if it isn't true—particularly if there are very harsh consequences? Have you ever admitted to wrongdoing you didn't do?

Anderson was a convicted felon who had violated his parole. He was also a user of powerful illegal drugs. How hard should society work to protect him from incarceration? Does this advance or hinder public safety? Is there any harm in being lax on constitutional rights when a person has a criminal record?

In this case, the defendant sought a writ of habeas corpus. The ancient writ of habeas corpus allows persons incarcerated in violation of their constitutional rights to secure judicial review. Without this right, once a criminal defendant has lost on his or her appeals, there is no way to secure further review of a sentence. "Habeas corpus" means to produce the body—that is, to bring the incarcerated person before a court. THe defendant in this case is saying that his federal constitutional rights have been violated by the state courts. How many chances do you think a defendant should get? Don't you think that the appeals in the state system should be sufficient? Why should he get a chance in federal court?

Nurse Stuck with HIV Needle Could Recover

SUMMARY: A nurse negligently stuck by an HIV-infected needle could recover damages for pain, suffering and emotional distress experienced after six months even though tests after six months showed she most likely was not infected with the virus. The New York Court of Appeals decided Ornstein v. New York City Health and Hospitals Corp. on February 7, 2008.

BACKGROUND: Helen Ornstein was a nurse at New York City's Bellevue Hospital. When she went to move an AIDS patient in September 2000, she was stuck by a syringe an intern had left in the patient's bed. Because the needle contained blood, Ornstein was treated for two months with anti-viral medication. The medicine had side effects that continued for several months afterward.

Ornstein began getting regular HIV/AIDS tests. Although the tests came back negative, she had great fear that she had contracted the virus. Her anxiety prompted her to get psychological treatment and to give up patient care for fear that she might be exposed to the virus again.

In May 2001, she sued the hospital and the intern for negligence for exposing her to this potentially fatal virus. For relief, she sought lost wages as well as damages for her pain and mental anguish. The defendants argued that the window within which infection manifests itself in a person stuck with an infected needle is six months. Therefore, any damages awarded to Ornstein should be limited to a six-month period following the incident, after which a reasonable person who had tested negative consistently could be sure she had not contracted the virus.

The hospital and intern filed a motion to dismiss that portion of Ornstein's complaint seeking damages for the period beyond six-months from the needle puncture. The trial court dismissed the motion, finding that Ornstein had submitted adequate evidence to support ongoing anxiety and suffering beyond that period, and defendants appealed. The Appellate Division reversed and ruled that damages should be limited to the six-month priod following the needle puncture. When the case went to trial, the jury awarded damages for pain and suffering and lost wages, limited to the sixth month post-exposure period. Ornstein appealed to the New York Court of Appeals (that state's highest court).

ANALYSIS: The lower courts had relied on an Appellate Division decision from 1996 that had limited damages to six months for a nurse stuck with an HIV/AIDS-infected needle. The nurse in that case had an initial test, which was negative, and then refused additional testing for 15 years, after which she sued. The defendant hospital submitted evidence showing that only 3 to 5 people per 1000 stuck with an AIDS-infected needle will contract the virus, and that infection could be determined with 95% accuracy after six months.

While the court in that case refused to compel the nurse to take an AIDS test, something her treating psychiatrist said would be harmful to her because of her fear of the results, it agreed to limit her damages to six months. The court reasoned that because infection could be determined to a high degree of accuracy by that point, it was unreasonable to hold the hospital liable for her pain and suffering beyond that date because she could have allayed her fears with a simple AIDS test.

The intern and hospital had argued that that case, involving a plaintiff nurse named Brown and the same hospital system Ornstein had sued, controlled the outcome here. Ornstein had taken regular tests. The tests had come back negative. Therefore she could not claim to have suffered over the fear of contracting the virus beyond that point.

The New York Court of Appeals rejected that reasoning. Ornstein claimed that her doctors had not informed her that a negative test at six months would be an accurate assessment of her HIV/AIDS status. In addition, her psychiatrist had indicated that she still suffered fears of re-exposure and anxious memories of the incident. The defendants offered no evidence to rebut her assertion that she was still suffering. Therefore, stating as a matter of law that she had not suffered past the six-month point was improper. The court therefore reversed and ordered a new trial on the issue of damages.

EXCERPTS FROM THE COURT'S OPINION (By Judge Graffeo): "In opposition to defendants' motion, plaintiff submitted evidence that she had continued to experience mental anguish relating to the incident long after the initial six-month period had passed and, in fact, expected to suffer permanently from posttraumatic stress disorder. At her deposition, plaintiff testified that she had not been advised by a physician that her fear of contracting HIV should have been allayed after six months. She stated that her anxiety over whether she had been infected with the virus continued until she tested negative in June 2002, about a year-and-a-half after the incident. Even after her fear about testing positive dissipated, plaintiff asserted that she continued to suffer emotional distress in the form of posttraumatic stress disorder, a condition that caused her to experience sleep disturbances and 'flash backs' relating to the incident. She developed such a significant fear of future needle-stick incidents that she changed the nature of her work from patient care to office work and, later, to teaching, ultimately accepting a position that did not require any patient contact. Plaintiff explained that she had undergone psychiatric therapy and taken anti-depressant medications to alleviate her emotional injuries but, despite these efforts, her symptoms persisted. In addition to her deposition testimony, plaintiff provided the report of a psychiatrist who opined that, as a result of the needle-stick incident, plaintiff suffered from chronic posttraumatic stress disorder warranting additional treatment for the foreseeable future....

"First, as the facts here demonstrate, a rule that restricts recovery of emotional distress damages for all plaintiffs as a matter of law based only on scientific and medical statistics — no matter how reliable those statistics may be — makes little sense if the probabilities identified by researchers were not known to the plaintiff during the relevant time frame. Plaintiff claimed that none of her physicians advised her that her risk of testing positive in the future would dramatically decrease, if not virtually cease, once she tested negative at the six-month juncture and that she was unaware of this from her own medical training. Nor is there any allegation in this case that plaintiff avoided acquainting herself with the pertinent facts. Rather, she obtained medical care on a timely and consistent basis yet she testified that her fear of contracting HIV from the needle-stick incident continued until she tested negative in June 2002, about a year-and-a-half after exposure. Thus, in contrast to Brown where the plaintiff alleged that her fear of infection would not be alleviated until 15 years had elapsed, this is not a case where a plaintiff is seeking AIDS phobia damages for a protracted period of time. In assessing credibility, the jury is, of course, free to reject plaintiff's testimony but, for purposes of defendants' motion to restrict damages, her assertions were sufficient to raise a triable issue of fact concerning the duration of her fear of infection.

"Second, limitation of all categories of damages based on the statistical probability of testing positive for HIV within a particular time frame does not account for the fact that a plaintiff exposed to HIV may suffer injuries that are distinct from the fear of contracting the virus. In this case, in response to defendants' motion to dismiss, plaintiff offered medical proof that she continued to suffer from posttraumatic stress disorder, a recognized psychiatric condition requiring treatment with medication and therapy, even after her concern that she had contracted the virus was alleviated. Plaintiff testified that she lost income because she was never able to return to per diem hospital work after the incident due to her fear of similar future exposure incidents. In addition, while her HIV status was uncertain, she was unable to engage in direct patient care [and] had to confine her duties to office work. She stated that, after it was determined that she had not contracted the virus, she continued to suffer from posttraumatic stress disorder and that this condition was a contributing factor in her decision to permanently change the nature of her employment from direct patient care to teaching. If it credited this evidence, a rational jury could find that plaintiff's psychiatric condition and resulting loss of income were directly related to the exposure incident, warranting monetary recovery.

"Defendants contend that damages should be curtailed in negligent infliction of emotional distress cases stemming from HIV exposure due to the 'still-prevalent ignorance and subjective, irrational fears surrounding' AIDS, arguing that public policy considerations support 'taking emotions out of the equation of AIDS cases at a fixed point in time so as to ensure fairness and consistency.' Assuming defendants' assertions relating to the current state of public awareness about AIDS to be true, we are nonetheless unpersuaded that emotions can appropriately be removed from the damages equation in a negligent infliction of emotional distress claim. Nor have defendants shown that a bright-line restriction of damages rule such as the six-month demarcation — an approach that appears to be unprecedented in our common law tort jurisprudence — is necessary to avoid unreasonably high verdicts in this genre of tort cases; no such pattern of inappropriate judgments has been identified. If an occasional excessive, idiosyncratic award does issue, it can be corrected by the Appellate Division through exercise of its power to set aside judgments that deviate materially from what would be reasonable compensation.

"We stress that, just as in any personal injury case, trial judges can assess the viability of damages claims in HIV exposure cases before submission to the jury by evaluating whether such claims are supported by legally sufficient evidence. Defendants here do not dispute that, in opposition to their motion papers, plaintiff presented prima facie evidence of continuing posttraumatic stress disorder. But where supporting medical evidence is lacking, a trial court might well preclude a plaintiff from pursuing recovery for that component of psychic distress."

COMMENTS & QUESTIONS

1. What happened to Helen Ornstein?
2. What effect did this have on her?
3. Did the incident upset her for only a short time? If not, why did the defendants seek to limit her damages? For what length period did they feel damages were appropriate?

A claim for negligence has four parts. If a plaintiff fails to show any one or more of the required elements, a defendant will file a motion to dismiss the case and the court will grant it. (A court can dismiss an inadequate claim on its own, too.) To demonstrate negligence, a plaintiff must show 1) a duty owed by the defendant to look after the plaintiff's well being—usually described as a "duty of care"; 2) a breach, or failure to uphold, that duty; 3) causation, meaning that the breach must be the reason plaintiff was injured; and 4) damages in the form of monetary losses or physical suffering.

Ornstein met the first three elements. The hospital and intern had a duty to take reasonable care not to expose nurses and others to syringes infected with the human immuno-deficiency virus. The defendants breached that duty by allowing an infected syringe to sit in a patient's bed and that activity caused Ornstein's injury. The battle here was over the extent of the damages. That the plaintiff was entitled to some recovery was clear. The question was, how much, over what time period.

Ornstein never had a positive or ambiguous test result. Every time she was tested, the results were negative. Is society served by allowing people to recover for suffering from exposure to a deadly illness when tests prove they have not contracted it?

Trials are very costly and time consuming, not only to the parties, but also to the state or federal government supporting the court system. If we know it's negligent to leave AIDS-infected needles in a patient bed, do we need a trial at all? Would it make more sense for states simply to create damage tables, under which awards could be made through an application process rather than a lengthy trial?

The appeals court was willing to allow damages until Ornstein could reasonably be sure she didn't have HIV/AIDS. Why was the state's highest court willing to let her recover beyond that point? Do you think it is reasonable for Ornstein to receive compensation for emotional injuries beyond the six month time period? If she did not get the virus, why should she be able to recover?

The fact that Ornstein won this case does not assure her of a recovery. At this point in the case, Ornstein will be required to go back to court and let the jury determine the amount of damages, if any, that she is entitled to. What she won in this case was the right to go back to the jury and have them decide the issue of damages.

Mean-Spirited Advertising Did Not Violate Law

SUMMARY: A discount clothing store's large newspaper ad belittling its competition was not specific enough to violate commercial law. The Supreme Court of Illinois decided Imperial Apparel v. Cosmo's Designer Direct on February 7, 2008.

BACKGROUND: Cosmo Laduadio operates a discount men's clothing store in the Chicago area. He has built a reputation around his "3 for 1" pricing, whereby customers can buy three items of clothing, such as suits, for the price of just one such item at regularly priced stores.

Cosmo's primary competition in this market is Imperial Apparel, owned by Paul Rosengarten and located in Lincolnwood, east of the Edens Expressway and north of Chicago. Imperial believed that it was capable of beating Cosmo's 3-for-1 prices. Imperial therefore began advertising some of its own 3-for-1 deals.

In response to Imperial's ads, Cosmo's took out a full-page ad in the Chicago Sun-Times on Friday, October 15, 2004. The ad proclaimed an "8 Day Blowout Sale" at which they would be liquidating $3,000,000 of inventory. The ad was super-imposed over a 3-tiered photo of men's suits. A sidebar to the ad appeared under a headline, "WARNING! Beware of Cheap Imitators Up North...." The text continued,

"We all know, there is only one 'America' in the world and only one '3 for 1' in the Midwest ... and in both cases it was the original thinking of an Italian that made them famous. So to the shameless owners of Empire rags center, east Eden and south of quality, we say ... 'Start being kosher ... Stop openly copying and coveting your neighbor's concepts or a hail storm of frozen matzo balls shall deluge your 'flea market style warehouse.'...

"It is laughable how with all the integrity of the 'Iraq Information Minister', they brazenly attempt pulling polyester over your eyes by conjuring up a low rent 3 for imitation that has the transparency of a hooker[']s come on ... but no matter how they inflate prices and compromise quality, much to their dismay, Cy and his son Paul the plagiarist still remain light years away from delivering anything close to our '3 for 1' values."

Rosengarten sued Cosmo's and the Sun-Times for defamation, commercial disparagement and consumer fraud. The trial court dismissed the suit and Rosengarten appealed. The appeals court upheld the defamation dismissals but reversed and granted relief on other claims. Cosmo's appealed.

ANALYSIS: Imperial argued that the ad damaged the store's and the Rosengartens' reputations and falsely disparaged their merchandise. They believed Cosmo's purchased the ad to harm Imperial's business and lure customers to Cosmo's under false pretenses. As proof, they presented evidence showing that Cosmo's sales went up following the advertised sale, while Imperial's sales were weaker in the following months compared to the previous year.

The trial court reasoned that while the ad may have been in poor taste, its contents were protected First Amendment expression. Therefore, Imperial could not recover under any of its legal theories. The appeals court agreed that some of the ad was protected speech, but disagreed with respect to the third paragraph. Its assertions that Imperial had the integrity of the Iraq Information Minister, attempted to pull polyester over its customers' eyes, offered low-rent "3 for imitations," inflated prices and compromised quality were injurious false statements the First Amendment did not cover.

The Illinois Supreme Court noted that businesses have a right to compete against one another. The issue was whether Cosmo's ad crossed the line between fair competition and unfair practices. The trial court had reasoned that Cosmo's assertions were lawful because they were mere statements of opinion and not fact. The Illinois Supreme Court did not quite buy this logic—phrasing a defamatory statement as an opinion does not protect it if the statement is still false and damages its subject's reputation. What is really at issue, the Supreme Court stated, is whether the speaker intends to make specific false assertions. The justices opined that no reasonable reader would take Cosmo's ad as presenting actual facts. The language used was figurative, not factual. Therefore, while the ad may have been in poor taste, it did not constitute an unlawful attack on Rosengarten or his store.

The Supreme Court therefore reversed the appellate court and upheld dismissal of the suit.

EXCERPTS FROM THE COURT'S OPINION (By Justice Karmeier): "When the circuit court granted the motions to dismiss filed by Cosmo's and the Sun-Times in this case, ... it focused on the character of the assertions contained in the ad to discern whether they constituted statements of actual fact or were merely expressions of opinion. The court took this approach on the assumption that opinions are protected by the first amendment and cannot serve as the predicate for defamation claims.

"The circuit court's analysis was not entirely correct. There is no separate constitutional privilege for opinion. Accordingly, ... the fact that a statement is phrased in the form of an opinion does not cloak it with first amendment protection. Even when presented as apparent opinion or rhetorical hyperbole, a statement may constitute actionable defamation.

"While the circuit court's analysis was imperfect, the basis for its approach was sound. In addition to governing standards regarding fault, falsity, and punitive damages, the first amendment does impose limits on the type of speech which may be the subject of state defamation actions. Specifically, the first amendment prohibits defamation actions based on loose, figurative language that no reasonable person would believe presented facts.

"The test for determining whether a statement is protected from defamation claims under the first amendment is whether it can reasonably be interpreted as stating actual fact. In applying this test we are guided by several criteria: (1) whether the statement has a precise and readily understood meaning, (2) whether the statement is verifiable, and (3) whether the statement's literary or social context signals that it has factual content. The statement is evaluated from the perspective of an ordinary reader, but whether or not a statement is a factual assertion that could give rise to a defamation claim is a question of law for the court.

"We turn then to the language of the ad itself to ascertain whether it can reasonably be interpreted as stating actual fact. Contrary to the appellate court, we believe that the answer to that question is no. The text is artless, ungrammatical, sophomoric and sometimes nonsensical. It is also a shameless appeal to ethnic prejudice.... We do not believe, however, that an ordinary reader would perceive it as making objectively verifiable assertions about plaintiffs' business.

"The gist of the ad, taken as a whole, is simply this: plaintiffs copied Cosmo's '3 for 1' sale idea, plaintiffs were wrong to do so and should stop, and while most customers realize the difference between the

companies offering the sales, those who might not should not be deceived–you get more for your money in Cosmo's 3 for 1 sale. To be sure, the language Cosmo's used to convey these concepts was unflattering. The ad employed terms such as 'rags,' 'flea market style warehouse,' 'dried cream cheese,' 'low rent,' and 'a hookers come on.' It also likened plaintiffs to the Iraqi Information Minister and claimed they 'inflate prices and compromise quality.' In our view, however, these are merely subjective characterizations lacking precise and readily understood meaning. In the context of discount clothing sales, no reasonable person would regard them as anything other than colorful hyperbole aimed at capturing the reader's interest and attention.

"The appellate court thought a reasonable reader might interpret the ad as stating actual facts about the plaintiffs themselves, but did not specify what those actual facts might be. The appellate court also believed that a reasonable reader might interpret the ad as stating actual facts about the originality of the goods Imperial sold. In reality, the ad says nothing whatever about the originality of the clothing Imperial sells. When the ad refers to imitators, imitations, plagiarism and 'coveting your neighbor's concepts,' it is talking about Imperial's appropriation of Cosmo's '3 for 1' sales concept. That Imperial got the idea for its '3 for 1' sale from Cosmo's is a verifiable fact. Because it is undisputably true, however, it cannot be the basis for a defamation claim. Consistent with the first amendment, a statement is not actionable unless it is factual and false.

"In their brief, Imperial and the Rosengartens express profound resentment for what they perceive as the anti-Semitic tone of Cosmo's ad. While we fully appreciate why Imperial and the Rosegartens would find the language offensive, their arguments on this point do not affect our resolution of the appeal. No matter how distasteful they may be, epithets aimed at ethnic or religious groups fall within the protection of the first amendment. No circumstances are alleged in this case that would strip the language used in the ad here of that protection.

"A... determination that language is not actionable under the first amendment not only is fatal to plaintiffs' defamation claims, it precludes them from obtaining recovery under any of the other common law and statutory claims they asserted in their complaint."

COMMENTS & QUESTIONS

1. What business are Cosmo Laduadio and Paul Rosengarten in?
2. By what major city are their stores located?
3. What type of sale did Cosmo's build its business on?
4. What did Cosmo's do when Imperial ran ads touting the same deal?

The Constitution primarily addresses the relationship between the people and the government. Constitutional protections and freedoms are rights the government cannot infringe. At the heart of the First Amendment's free speech guarantee is the right to speak out against the government and to address issues of public concern. The people have a broader right to criticize government officials and public figures than private individuals.

Defamation protects a person's reputation and good name. Without this protection, people who disliked us or wished to benefit at our expense could spread false stories and claims about us, causing us to lose standing in the community. Defamation is sometimes broken down into libel for written statements, and slander for spoken ones. While defamation is designed to punish injurious falsehoods, it does not protect us from all criticism. If the offensive statement is true, it cannot be defamatory. Other laws, such as commercial disparagement and consumer fraud statutes address what businesses may say to the public and about one another. Commercial disparagement applies defamation's principles to statements about a business. Consumer fraud statutes protect the public from false sales tactics. In all cases, these legal protections do not apply if the underlying statements are true.

The appeals court felt that Cosmo's had crossed the line between competition and false claims. What statements did it feel were improper?

Did Cosmo's ad say that Imperial's clothing was no good? Did it say Imperial was trying to cheat its customers? If Cosmo's sidebar had said, "Empire rag center deceives its customers," would that be lawful?

You are reasonable readers. (Paul Rosengarten's father is named Cyril; he goes by "Cy.") Does Cosmo's ad say that the Rosengartens inflate prices and compromise quality? What does it mean for a retailer to compromise quality of goods it does not produce? Does that sound defamatory?

Do you understand Cosmo's ad to be saying that Italian merchants sell better clothing than Jewish retailers? Should major US newspapers foster ethnic rivalries by printing ads with such messages? Did the Sun-Times break the law?

What do you think of Cosmo's ad? Would you go there for clothing? Do you think Cosmo's should be punished for the ad? Did this court arrive at a fair result?

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