INSURANCE LAW GLOBAL

The Sports Bulletin

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Welcome to the 3rd Edition of The Sports Bulletin brought to you by ILG member firms.

The Summer of 2024 is providing many great sporting memories with wins for Spain in the Euros , Argentina in the COMEBOL Cope America and an imperious victory for Pogacar in the Tour de France plus Lewis Hamilton returning to the top of the podium in F1. Now we have the Paris Olympics which after a decidedly soggy start have burst in life with Marchand taking the 400M freestyle in a world record time. The presence of the legendary Simone Biles reminds us however that sport does have its issues , an understatement in respect of what was revealed about the world of gymnastics in the USA. There are numerous reminders of the role the law plays in sport much as many argue that the law should stay out of the sporting arena. Manchester City taking an action against the Premier League whilst facing over 100 charges under the FFP regime comes immediately to mind. The courts in England & Wales have seen actions commenced against the governing bodies in football, rugby union & rugby league by former players contending head injuries purportedly sustained in their playing careers have led to neurodegenerative decline in later life.

In this 3rd Bulletin of the ILG Sports Group we have commentaries ranging from the latest development on the concussion front “Down Under” to an analysis of the risks deemed to be accepted by those brave souls in the Netherlands who decide swimming pools are too tame as well as articles flagging issues governing bodies, and organisers of sport , should have on their agenda certainly in the UK as well as North & South America.

We trust you will find these articles of interest. The ILG Sports Group is made up by a “team” of lawyers across a number of jurisdictions who all love sport . If you have a sporting query do not hesitate to get in touch.

We are now preparing a webinar on the array of challenges facing those running recreational activities and our 4th bulletin will be released before the end of the year. For now, let’s enjoy the Olympics!

Bruce Ralston

Chair ILG Sports Law committee

Weightmans

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By Rebecca Stevens, Carter Newell Lawyers

If In Doubt, Sit Them Out | Concussions and Repeated Head Trauma in Contact Sports

In September 2023, the Senate Community Affairs References Committee released their Report into concussions and repeated head trauma in contact sports. The stated purpose of the inquiry and subsequent Report was "*to explore the current evidence and challenges regarding contact sport-related concussion and repeated head injuries, and consider measures to improve the identification and prevention of these injuries, as well as reduce their short and long-term impacts*". Importantly, the Report recognises that there is a causal link between repeated head trauma and contract sports.

Notably, the Report outlined 13 key recommendations, summarised as follows:

1. The committee recommended that the Australian Government establish the National Sports Injury Database as a matter of urgency, allowing for greater sports injury data, including at the community level of sport.

2. Professional sporting codes collect data on concussions and identified sub-concussive events and share this data with the National Sports Injury Database.

3. The Australian Government consider establishing independent research pathways, including through a newly created body or through existing bodies, that is dedicated to supporting and coordinating research into the short and long term the effects of head trauma (including Chronic Traumatic Encephalopathy (CTE)) sustained during participation in sport.

4. The Australian Government and sporting organisations continue to fund research into the effects of concussion and repeated head trauma on at-risk cohorts.

5. The Australian Government consider measures to encourage Australians, in the event of their death, to donate their brain to a brain bank for scientific research into brain health and disease, including CTE.

6. The Australian Government consider a coordinated and consolidated funding framework for ongoing research regarding sport-related concussions and

repeated head trauma, to be undertaken by a variety of relevant stakeholders.

7. The Department of Health and Aged Care in consultation with relevant stakeholders, consider how best to improve community awareness and education regarding concussion and repeated head trauma.

8.The Australian Government, in partnership with state and territory governments consider how best to address calls for:

(a) the development of standardised, evidence-based, and easy-to-access concussion and head trauma guidelines for GPs;

(b) suitable general practice consultations for people with concussion, repeated head trauma and other complex care needs; and

(c) increased training for first aid responders at sporting venues that focuses specifically on treating concussion and head injury.

9. National sporting organisations in Australia explore further rule modifications for their respective sports in order to prevent and reduce the impact of concussions and repeated head trauma.

10. The Australian Government, in collaboration with medical experts, develops return to play protocols, adaptable across all sports, for both children and adults that have incurred a concussion or suffered a head trauma.

11. The Australian Government consider developing a national strategy to reduce the incidence and impacts of concussion, including binding return to play protocols and other rules to protect sport participants from head injuries.

12. Professional sporting codes and players associations consider ways for a best practice model to provide ongoing support, financial and otherwise, to current and former players affected by concussions and repeated head trauma.

13. Professional sports organisations ensure their athletes have insurance coverage for head trauma. State and territory governments are also encouraged to engage with professional sporting organisations to explore how the general exclusion of professional sports people from various state and territory workers' compensation schemes could be removed.

In addition to handing down the abovementioned Recommendations, the Committee heard from various stakeholders, including personal accounts from retired athletes, and families of same, who suffered head trauma during their careers.

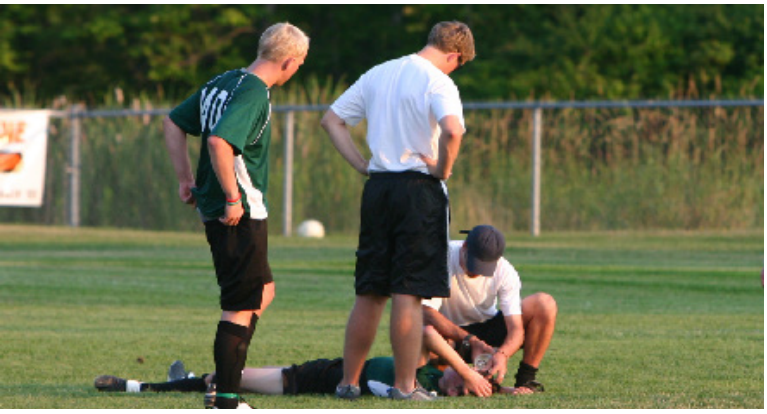
The Committee also heard various submissions from sporting and medical organisations, government bodies, disease foundations, and health professionals regarding their observations and opinions in respect to the topic of head trauma in contact sports.

Since the release of the Report, many of the contributing bodies, who of which provided submissions for the purposes of the report, have commented following its publication.

The Australian Football League (**AFL**) welcomed the report and have fully cooperated with the Committee's inquiry. They will consider all the recommendations and what improvements can be made, noting that many of the recommended actions are already being progressed. Stephen Meade, the AFL's General Counsel and General Manager Legal and Regulatory, said "*We [AFL] have in place our concussion research and management strategy that is overseen by the AFL Concussion Steering Group and Working Groups, … formulating and implementing practical measures to advance each of our objectives as to improved education, prevention, detection, recovery, support and innovation*". Mr Meade added that "*the response to concussion*

and head trauma sustained in contact sports is the collective responsibility of many in the community, including participants at all levels, the governing bodies sports including the AFL, health professionals and Government".

Sports Medicine Australia (**SMA**) provided commentary in response to the Report, opining the recommendations made by the Committee ought to help keep sports participants safer. They specifically supported the Recommendations around research and gathering reliable data that can help guide future policy and treatment options, particularly as sporting organisations have historically found it difficult to collect data for all sports injuries. SMA noted they are committed to working with other stakeholders to find the best solution for data collection and interpretation.



Dementia Australia similarly welcomed the recommendations made by the Senate, strongly supporting the recommendation for improved community awareness and education relating to the consequences of concussions and repeated head trauma. Ms Maree McCabe, CEO of Dementia Australia, stated the Report highlights the importance of action to help reduce the risk posed by CTE.

Finally, the Royal Australian College of General Practitioners (**RACGP**) echoed similar views to the AFL, SMA, and Dementia Australia welcoming the Recommendations handed down in the Report. The RACGP particularly supported the establishment of a National Sports Injury Database to assist with tracking the impact of sports related head injuries. Dr Nicole Higgins, president of the RACGP, described the Report as '*a wake-up call*' with '*many promising recommendations*. However, Dr Higgins noted the report "*did not contain a full recommendation for the development of standardised, evidence-based concussion and head trauma guidelines for GPs. Instead, it suggests the Federal Government should consider how best to address calls for the guidelines along with state and territory governments…The RACGP called for more intervention from Government and sporting bodies to limit the long-term impacts of concussion in its submission to the Senate inquiry…*".

Interestingly, following the Committee's Report, the Australian Institute of Sport (AIS) published their Youth and Community Sport Guidelines, providing concussion protocols and guidelines primarily targeted at the grassroots level of community sport. The AIS tokens the phrase "if in doubt, sit them out" when considering an athlete who has a possible concussion. Updates to the Guidelines include the requirement that children aged 19 or under be symptoms free for 14 days prior to returning to contact training, whilst also expanding the mandatory minimum shutdown period following an incidence of a sports-related concussion to 21 days from the date of incident until the resumption of competitive sport. The Guidelines also address professional athletes over the age of 19, recommending those with daily access to health care professionals should not return to contact activities until being symptom free for ten days. These updates bring Australia's Guidelines in line with those recommended by the United Kingdom and New Zealand's leading sporting institutions. Mr Kieren Perkins, CEO of the Australian Sports Commission praised the Committee's Recommendations as being "*a significant step in the right direction…*", thanking "*the Australian Government for its continued support regarding this serious issue*".

Whilst the AIS does not have the authority to mandate major bodies adopt the recommendations outlined in their Guidelines, media in Australia have reported many major codes have, including Baseball Australia, Disability Sports Australia, Gymnastics Australia, Hockey Australia, and Touch Football Australia. However, some major codes have rejected the AIS recommendations including the AFL, Rugby

Australia, and the National Football League (**NRL**), they argued their protocols are already making the game safer. Dr David Hughes, Chief Medical Officer stated the Guidelines are applicable to everyone playing sports, no matter if you're playing at the grass roots level, or in a major sporting organisation, "*…everyone should have access to the same information,*". There is no timeframe for which sporting organisations are required to adopt the recommendations outlined in the Youth and Community Sport Guidelines, and so it will be interesting to see if prominent codes such at the AFL, NRL and Rugby Australia make further changes to their protocols in the future.

As can be seen from the stakeholder submissions, the Committee's Recommendations represented a change in the perception for the broader community regarding the risk that head trauma plays in sporting activities. Naturally, these Recommendations may impact Insurers and Underwriters to the extent that they suggest that injuries ought to be compensable under state and territory workers' compensation schemes. However, the defendants to such claims will have a number of defences potentially available to them, for example voluntary assumption of risk, participation in obvious and/or dangerous recreational activity, application of exclusion clauses and waivers and questions relation to causation where it's arguable symptoms have been caused by other life style factors (eg drugs and alcohol consumption). This will no doubt be an interesting space to watch going forward as we see how the legal landscape adapts to the Committee's Recommendations.

CARTER NEWELL

Contact Person

Rebecca Stevens

Partner

E: rstevens@carternewell.com

By Jonathon E. Cross, Marshall Dennehey

“No-duty” Rule is Key to the Successful Defense of Sports Injury Lawsuits in Pennsylvania, U.S.A.

When defending a lawsuit involving sporting activities in Pennsylvania, U.S.A., defendants would be wise to argue the no-duty rule. The “no-duty” concept involves a finding that the defendant had no duty to the plaintiff and, therefore, was not negligent. The defendant is not liable regardless of whether the defendant could successfully raise the assumption of the risk defense. In an assumption of risk defense, the defendant owed a duty but may be relieved of liability because the plaintiff assumed the risk. However, when inherent risks of the sport are involved, negligence principles are irrelevant because there is no-duty and, therefore, there can be no recovery based on a negligence claim.

Recently, the no-duty rule was the focus in a federal court lawsuit which analyzed Pennsylvania state law. *Barrett v. New American Adventures, LLC et al.,* 2023 WL 4295807 (W. D. Pa. June 30, 2023). The *Barrett* lawsuit arose out of an injury while the plaintiff was participating on an obstacle course.

To bring a claim of negligence under Pennsylvania law, a plaintiff must show that:

(1) the defendant had a duty or obligation recognized by law;

(2) the defendant breached that duty;

(3) a connection exists between the breach and the duty; and

(4) the breach created actual loss or damage. *Krentz v. Consol. Rail Corp.,* 910 A.2d 20, 27–28 (Pa. 2006). In *Barrett*, it was argued that the plaintiff could not show the first element - a legal duty recognized by law. Specifically, the defendants submitted that they had no duty to protect a plaintiff from the inherent risk of falling while running, climbing, jumping, and swinging on an obstacle course.

The "no-duty" rule provides that "an owner or operator of a place of amusement has no duty to protect the user from any hazards inherent in the activity." *Chepkevich v. Hidden Valley Resort, L.P.,* 2 A.3d 1174, 1186 (Pa. 2010), citing Restatement (Second) of Torts § 496A, CMTT c, 2 (where plaintiff has entered voluntarily into some relation with defendant which he knows to involve the risk, he is regarded as tacitly or impliedly agreeing to relieve defendant of responsibility, and to take his own chances); *Hughes v. Seven Springs Farm, Inc.*, 762 A.2d 339, 343-44 (citing *Jones v. Three Rivers Mgmt. Corp.,* 394 A.2d 546 (Pa. 1978)). "Where there is no duty, there can be no negligence, and thus when inherent risks are involved, negligence principles are irrelevant...and there can be no recovery based on allegations of negligence." *Chepkevich,* 2 A.3d at 1186, citing *Althaus ex rel. Althaus v. Cohen*, 756 A.2d 1166 (Pa. 2000). Pennsylvania applies the "no-duty" rule to sports, recreation, and places of amusement. *Chepkevich*, 2 A.3d at 1186.

The severity of the injury, whether minor or extreme, has no bearing on whether the "no-duty" rule applies. *Richmond v. Wild River Waterpark, Inc.*, No. 1972 MDA 2013, 2014 WL 10789957, at *1 (Pa. Super. 2014). Rather, to apply the "no-duty" rule in a lawsuit involving a sporting activity, there is a two-part inquiry:

(1) whether the participant was engaged in the sporting activity

(2) at the time of the injury; and

(3) whether the injury arose out of a risk inherent in the sporting activity.

See *Chepkevich*, 2 A.3d at 1186. When both questions are answered in the affirmative, summary judgment is warranted. Id. "If those risks are not inherent, traditional principles of negligence apply and [the Court] must determine what duty," if any, a defendant owes to a plaintiff, whether the defendant breached that duty, and whether the breach caused the plaintiff's injuries. *Quan Vu v. Ski Liberty Operating Corp.*, 295 F. Supp. 3d 503, 507 (M.D. Pa. 2018), aff'd sub nom. *Vu v. Ski Liberty Operating Corp.,* 763 F. pp'x 178 (3d Cir. 2019).

In *Barrett*, the court determined that there was no question that, at the time of the injury, the plaintiff was engaged in the sporting activity of an obstacle course. She was swinging from plank to plank when she slipped off and fell, injuring her knee. As to the second inquiry, the key question was whether the plaintiff's injury arose out of a risk inherent of an obstacle course. A risk that is "common, frequent, and expected" is an inherent risk. *Chepkevich,* 2 A.3d at 1187. Though a plaintiff's subjective awareness of a specific inherent risk is not required, *Quan Vu,* 295 F. Supp. 3d at 509, the *Barrett* court looked to plaintiff's own testimony. She admitted to experiences involving other sports and recreational activities, as well participating in other adventure courses. The plaintiff testified she knew there was a possibility that while running, climbing, jumping, and swinging on an obstacle course that she could slip, lose her grip, and/or not catch the second plank. She also testified that she understood that, if that happened, she would fall and could be injured.

Additionally, in *Barrett*, the plaintiff's expert stated that "[i]t is not unreasonable to expect that users will lose their grip and either unintentionally or intentionally fall." He further stated that a fall from an obstacle course "would not be unexpected." *Id.* at p. 13. In fact, the plaintiff acknowledged that participating in an obstacle course presents inherent risk of injury from a fall. Courts should adopt "a practical and logical interpretation of what risks are inherent to the sport....' *Vu*, 763 F. App'x at 181, quoting, *Chepkevich*, 2 A.3d at 1187-88. Applying the same, the *Barrett* court found that

falling from planks on an obstacle course and any subsequent injury arising therefrom is an obvious danger when engaging in an obstacle course and falling is an inherent risk.

The *Barrett* court opined there is no doubt that the risk of injury from falling into a pit while participating in an obstacle course is "a common, frequent, and expected" part of engaging in this activity. "Participating in an obstacle course contains a risk of injury, particularly from a fall." The court determined that a fall while on an obstacle course into the pit below "is more likely than not. It is a quintessential risk" of the obstacle course. It also found that the risk of falling from the planks is an "inherent risk" and a subsequent injury cannot be removed from the obstacle course without altering the fundamental nature of the activity. As set forth above, if the risk is inherent, an owner or operator has no duty to protect the user from it and the user cannot recover for any alleged negligence on the part of the owner/operator. See *Quan Vu*, 295 F. Supp. 3d at 507-509; *Chepkevich,* 2 A.3d at 1186. Accordingly, the "no-duty" rule applied in *Barrett* for any alleged negligence on the part of the owner/operator of the obstacle course.

In opposition, the *Barrett* plaintiff argued the "no-duty" rule does not apply because there is evidence that the defendants deviated "from established custom" by failing to meet industry standards. To that end, the plaintiff's experts opined that the obstacle course failed to meet industry standards and that the defendant failed to properly maintain and operate the obstacle course within the standards set forth in the operations manual for the obstacle course. For example, the plaintiff suggested that the defendants should have used a different type of padding system in the pit to minimize the risk, and that the defendants should have advised her not to land with a straight leg.

The *Barrett* court stated that "these arguments go to negligence principles, not as to salient question of whether the risk was inherent. The question of inherent risk must be determined first." *See Quan Vu, supra; Jones, supra; Telega, supra.* "When inherent risks are involved, negligence principles are irrelevant," the inquiry is over, and summary judgment is proper. *Quan Vu*, 295 F. Supp. 3d at 509. Therefore, the *Barrett* court concluded that the "plaintiff's arguments in this regard, and the evidence submitted to support them, fail to raise a genuine issue of material fact. In conclusion, the court stated it "is not unsympathetic to plaintiff's injury, but the extent of her injury is of no moment when considering the issue of whether the 'no-duty' rule applies." The court granted summary judgment to the defendants and dismissed the lawsuit.

When defending lawsuits involving sports injuries in Pennsylvania, if the injury was caused by the typical risks of the sport, such as falling down or being bumped by other participants, then defendants have no-duty and cannot be found negligent. If your jurisdiction does not have the no-duty rule, negligence principles may apply. Defendants then may argue under the assumption of risk defense, even if the defendant owed a duty to the plaintiff, the defendant may be relieved of liability because the plaintiff assumed the risk. The affirmative defense of assumption of risk requires that the defendant show that the plaintiff was subjectively aware of facts which created danger; the plaintiff appreciated the danger itself; and nature, character, and extent which made it unreasonable, and the plaintiff voluntarily encountered risk. Be mindful, when taking the deposition of the plaintiff, to seek key admissions to meet the legal elements so that the no-duty rule and/or assumption of risk defense can be successfully raised in a motion for summary judgment to dismiss the lawsuit.

MARSHALL DENNEHEY

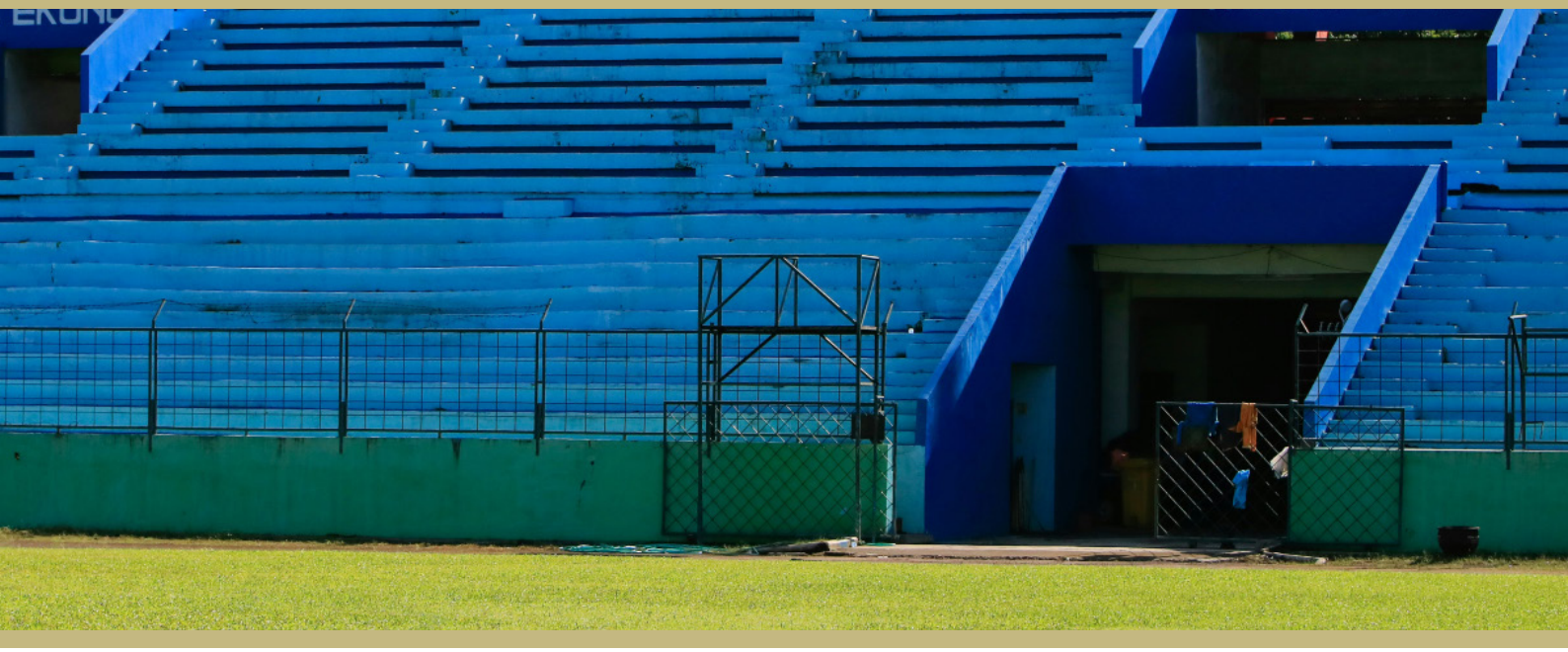
Contact Person

Jonathon E. Cross

Shareholder

E: JECross@mdwcg.com

By Paul Tarne, Weightmans



Sports venues must start preparing for Martyn's Law

22nd May 2017 will forever be etched into our memories as the deadliest terror attack on UK soil since the 2005 London bombing. With the city forever changed by this incident, it is incredibly important that we honour the lives lost seven years ago by ensuring we are as prepared as we can be for future attacks.

That is the aim behind the Terrorism (Protection of Premises) Bill, known as Martyn's Law after bombing victim Martyn Hett, whose mother - Figen Murray OBE – has campaigned tirelessly for better regulation around how venues are equipped to handle a terror incident.

Described by the Home Affairs Select Committee as the most far-reaching counter terror legislation in the world, Martyn's Law will have significant ramifications for event spaces -sports venues most definitely included.

How does Martyn's Law affect sport?

There is cross-party political support for the Bill which mandates a Protect Duty, requiring publicly accessible premises to actively prepare a response to terrorist incidents.

The Law sets out two distinctive requirements for qualifying premises. Standard-tier venues, described in the legislation as businesses, organisations and publicly available premises that have capacity for 100-799 individuals – this will include most small and mid-sized sports grounds, public swimming pools, gyms and leisure centres. And an enhanced tier for venues for over 800 individuals – stadiums, velodromes, golf courses to name some of the applicable sporting venues.

Ultimately, if a facility is publicly accessible, or it houses public gatherings, it will likely fall into Martyn's Law's purview. Shared and grey spaces, such as communal areas in gyms and leisure centres are also included.

How can the sports industry best prepare themselves for these inbound legislative requirements

While the final of details of Martyn's law are yet to be confirmed, sporting venues should begin to take proactive steps to prepare for it now. They should conduct thorough risk assessments – enabling venue managers to identify potential vulnerabilities and friction points and act accordingly. This would involve considering the physical layout of the premises, existing security measures, and how easy it is for people to get in and out of the venue in an emergency.

Developing detailed response plans will also be a key requirement of the new law. These plans should include evacuation, invacuation and lockdown procedures tailored to the specific needs and layouts of each venue – favouring practicality and effectiveness above all else.

It is also important for staff to be appropriately trained. All employees must be adequately trained and aware of what their responsibilities would be in the event of a terrorist incident. This includes knowing how to recognise signs of a potential attack, knowing how to execute the response plan, and effectively communicating with emergency services and visitors during an incident.

It is still uncertain what the entirety of Martyn's Law will look like or when it will be implemented, but there is no questioning that it represents a seismic shift in how liability for responding to a terror attack is apportioned. The onus will be put on sports venues to have a plan in place that protects visitors and helps to limit the outcomes in the event of a terror attack.

Staying across the legislation as it evolves, and understanding what will be expected of them, will be essential for sports venues.

Contact Person

Paul Tarne
Partner

E: paul.tarne@weightmans.com

By Sara Mazzolla, Carla Candelario and Alicia Caridi, Marshall Dennehey

Negotiating the Call: What the Americans with Disabilities Act may demonstrate as trends in finding the line between equal participation and safety

The United States' legal landscape is often a trendsetter in litigation. However, the issue of insuring risk is global. Safety protocols are key considerations.

Avoiding suit is another consideration, which typically stemmed from personal injury but now has expanded to rights not to be discriminated.

What happens when safety protocols are perceived as discriminatory. As some operators have said, they would rather an ADA case than a wrongful case any day.

But ADA cases usually come in clusters or classes of actions and can be extremely expensive to defend and the duty has been placed on the operator to justify safety protocols in the light of being non-discriminatory.

In the United States, two theme parks in particular have been involved in some noteworthy developments from which we can learn and advise.

In the first case, Campbell v. Universal City Dev. Partners, Ltd, (11th Cir Jul7, 2023), a patron born with one hand sued claiming violation of the Americans with Disabilities Act. He was not permitted to get on a water ride known as the "Krakatua Aqua Coaster" because he was told he needed two hands in order to ride.

Originally, the District Court entered summary judgment in favor of Universal based on the argument that Universal did not violate the ADA because it followed the standards and recommendations set forth by the manufacturer. This was in adherence to the law of the State of Florida, that requires such adherence to the manufacturer recommendations.

On appeal however, the decision was vacated and remanded back for further hearing. The basis for the remand was that Universal could not demonstrate why the absence of a limb would pose any real risk for anyone riding the ride. While a prosthetic could come loose and strike someone, in this case , for two hands to

be required, there had to be a real risk as to not having two hands to hold on or steer, but none of those requirements were demonstrated.

This puts the proof of the need for manufacturers recommendations being necessary. One would not think that compliance with manufacturers recommendations and State law would subject the operator to Federal litigation, but indeed, it had.

This remand underscores the importance of the operator working with the manufacturer to clearly set forth the need for the safety protocol. It is the manufacturer that sets the requirements and often is the author of the required safety signs and protocols. However, it was the Park that denied access and as per this ruling, cannot merely rely on blanket recommendations but must demand and communicate the actual risk that justifies them.

This case also demonstrates the importance of ensuring eligibility criteria be in accordance with ADA's directives and the United States legal questions of State Safety laws versus Federal Discrimination Laws.

California is known for its Class Action suits including what we refer to as "drive by" suits.

In those cases, a person comes to a park with the purpose of measuring width of access or other ADA accessibility requirements and when finding discrepancies of even an inch, finds a class of persons who will claim discrimination.

Most of these cases can be thrown out based on standing to sue alone. However, a second case to watch is the case of I.L. v. Six Flags Entertainment Corp. and Magic Mountain, LLC.

This class action involved persons who sued for the Park's requirement of 48 hour notice to meet accommodation requests among other actions involving medical records and disclosures of disability for privacy reasons.

The Complaint for the case alleges the following as the discriminatory requirements:

> "Specifically, in 2020, Six Flags implemented its current procedures for making accommodation requests at Defendants' amusement parks in the United States, called the "Attraction Access Program." Under the Attraction Accessibility Program, Defendants require guests with disabilities to register ahead of their visits to Six Flags theme parks across the U.S. with the International Board of Credentialing and Continuing Education Standards ("IBCCES"). Despite its name, the IBCCES is a private, for-profit company that is not affiliated with any governmental agency or regulatory body… To obtain an accommodation at the Amusement Parks at issue, guests must register online with IBCCES and obtain an Individual Accessibility Card ("IAC") at least 48 hours in advance of their park visit. Further, as part of the online registration process, guests must disclose sensitive personal information and provide private medical documentation in support of their accommodation requests."

The lawsuit contests Six Flags' Attraction Access Program's prerequisites, maintaining that the prerequisites unduly burden persons with disabilities, violating the ADA.

The line to be negotiated for equal access to public accommodations can often butt up against safety protocols. The key is to focus on not just the what, but the why, of the protocol. If the necessity for it and the scope of it can be clearly defined, the chances of being sued for being "too safe" without reason are reduced.

Contact People

Sara W. Mazzolla, Shareholder
E: SWMazzolla@mdwcg.com
Alicia M. Caridi, Shareholder
E: AMCaridi@mdwcg.com
Carla D. Candelario, Associate
E: CDCandelario@mdwcg.com

By Diederik Hulsbergen, Ekelmans Advocaten

The risks of recreational wild swimming: personal injury and liability: An analysis of Dutch case law

In the Netherlands, there are more than 700 locations officially designated as safe places to swim. Many more places are expected to be unofficially used for recreational swimming. Although over 90% of the Dutch master the basics of swimming, swimming in outdoor areas has been proven to remain a risky activity. In this article I will share an insight in recent Dutch case law on liability for owners of outdoor areas that are used for recreational swimming.

Court of Limburg, 26 October 2023

A 16 year old boy sustained a high spinal cord injury after diving into shallow water in a lake in a nature reserve in the Dutch province Limburg. Het Landschap is the manager/ owner of the nature reserve. The boy, claimant in the following legal procedure, deems Het Landschap and its liability insurer Nationale Nederlanden (hereinafter: NN) liable for the damages he suffered. According to the claimant, Het Landschap and NN are liable on grounds of wrongful act (article 6:162 of the Dutch Civil Code). The Court of Limburg ruled in this case on 26 October 2023.[1] The verdict: the owner of the nature reserve and its liability insurer are liable and have to compensate the boys damages for 80%.

Facts and views of the matter

In this case, the claimant argued that Het Landschap and NN are liable because the owner of a wild swimming area has a duty of care to prevent endangering circumstances. According to the claimant, at the lake where he dived into the shallow water, swimming was frequent. At the time of the accident, because of the restrictions in place due to the COVID-19 pandemic, there was even more swimming than usual, as few other recreational opportunities existed. This was known to Het Landschap. It was also known that the water there was shallow in many places. The claimant argued that it is a fact of common knowledge that younger recreationists - due to their rash and inexperience - tend not to exercise ideal caution in their recreational activities. Therefore, there

was a high probability that a younger recreant would dive into the water without first checking how deep the water was. This was foreseeable to Het Landschap, the claimant argued.

Het Landschap argued that the nature reserve is not designed as a swimming recreation area, nor is it designated as a swimming location. Het Landschap also had not promoted the lake as a swimming location. As such, the conditions at the site do not create a hazard. Shallow water and swimming are both not hazardous in general and the likelihood of danger is low. Danger only occurs if someone decides to dive into the shallow water while running. At the accident site, there were no indicators to assume that diving could be done responsibly. If it were assumed that there was little objection to taking measures, it would mean that warning signs would have to be put up at all places in the Netherlands, including all nature reserves where water occurs. Het Landschap does not have the financial resources to provide signs on the approximately 9,000 hectares it currently owns and manages. So taking action was objectionable.

The court's considerations

The Court of Limburg rules in favor of the claimant and ruled that Het Landschap and NN are liable for the damages of the claimant, due to unlawful endangerment.

Established Supreme Court case law determines that the following circumstances must be tested to assess whether unlawful endangerment exists:

(i) the extent to which disregard for due caution is likely,

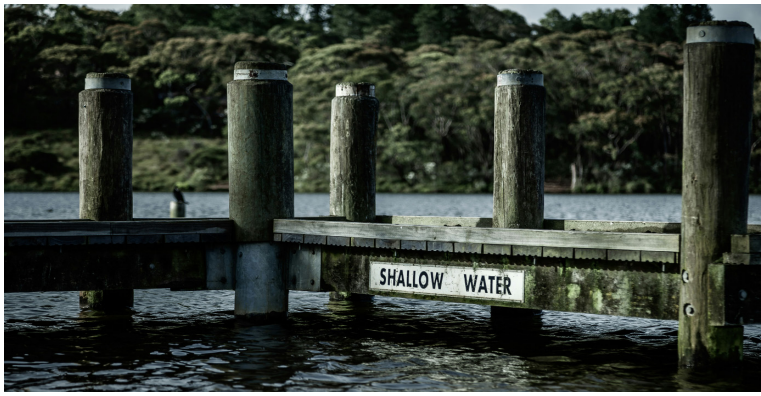
(ii) the likelihood of accidents occurring as a result,

(iii) the severity of the possible consequences, and

(iv) the extent to which taking safety measures would be objectionable.

The defense of Het Landschap and NN that Het Landschap does not have a duty of care because the nature reserve is not designed as a swimming recreation area fails. According to the court, the mere fact that this is so, does not relieve the owner of every duty of care.

The court considered to be a decisive factor that the lake was structurally used as an unofficial recreational swimming site. Also, a survey conducted by an expert showed that Het Landschap was aware of this fact. According to the court, it is to be expected that people do not always enter the water with caution and could therefore dive from the bank into the water. Given that the water is shallow for the first few metres and it is a fact of common knowledge that diving into shallow water can cause serious injuries, the likelihood of subsequent accidents with serious consequences is high. The court therefore held that there was a dangerous situation.



In the court's view, it is not inconvenient for Het Landschap to warn recreational users of the shallow water. This can easily be done by placing warning signs in the water at the spot, which are now missing. In view of the above, the court finds that Het Landschap breached its duty of care by failing to post warning signs. In doing so, Het Landschap committed a wrongful act towards the claimant. Het Landschap and NN are therefore liable for the damages caused by the sustained injury.

The court however also acknowledges that the claimant should have been more careful himself, and that he is half (50%) at fault for the accident. Since he did not know the spot where he dived and it was not an official swimming location, he should have first checked how deep the water was.

Because he did not do so, he did not exercise the caution he should have exercised and thus contributed significantly to his accident. After weighing the circumstances of the case, the court applies a so called 'fairness correction', such that the extent of the liability of Het Landschap and NN is set at 80%. Such a correction can be applied, inter alia, because that the liable party has liability insurance and therefore has greater capacity to pay the financial damages.

A comparison with other recent case law: Court of Amsterdam, 31 march 2022

The prevalent view in Dutch case law is that the owner of a site that – in theory – could be used for recreational swimming, should anticipate unthoughtful and inattentive swimming behavior of visitors.[2] On 31 march 2022, the Court of Amsterdam remarkably ruled very opposite to this view.[3]

Facts and views of the matter

In this case, the municipality of Amsterdam was held liable when a visitor of the city suffered a severe lower spinal cord injury from diving head first into a shallow part of the IJ Harbor, located in Amsterdam. The water of the IJ harbor is surrounded by a quay on one side, a building on the other side and - between them - a stone terrace. The last step of this terrace is underwater, overflowing into a concrete slab. This makes this part of the water in the IJ harbor very shallow. The same question as the one in the case discussed above, was assessed by the court of Amsterdam: is the owner of the water liable for the claimant's damages due to the lack of warning for the shallow water, causing an unlawful endangerment?

Very notably, the court of Amsterdam starts its ruling by considering it facts of common knowledge that diving into shallow water can cause serious injuries and that it is dangerous to dive into water of which one does not know how deep it is. In the case reviewed above, the court of Limburg considered that these common knowledges explicitly urged a warning from the owner of the lake. The court of Amsterdam however considers oppositely that these common knowledges make the probability that a visitor is not cautious when diving from the quay in the harbor, to be small. The descending terrace into the water should have been an indication for the claimant that the water was shallow. In this context, the court stated that the probability of someone entering the water in this area of the harbor without checking the depth is very low. This is a very small chance of a great danger.

Apparently, the court also considers as equally relevant that it is forbidden to swim in this area. This factor was put forward by the municipality. For this reason, the municipality is not obliged to take safety measures, the court ruled. The municipality is therefore not liable for the damages of the claimant. As will become clear below, the key consideration of the court appears to be:

"The person who jumps or dives into the water at the present location, where it is forbidden to swim, relatively close to the stone terrace steps, (…) is not behaving as visitors to that location generally tend to behave. In any case, that behavior is not foreseeable to the extent that the municipality should have taken measures."

An unexpected turn of events: the ruling is overturned by the same court

The ruling mentioned above was an interlocutory judgment. In general, interlocutory rulings are binding: the court cannot depart from this ruling at a later stage of the proceedings. The claimant however initiated proceedings on the merits based on new facts, which would shed a different light on the matter. The claimant obtained internal documents from the municipality, which proved that the municipality was aware that people regularly swim there. The documents also showed that there was no ban on swimming at the site and that the area was identified as a place where people often swim recreationally.

On 21 February 2024, the court of Amsterdam overrules the interlocutory judgement with a revised judgement.[4] The court rules that the distinction between a no-swimming spot and a wild swimming spot is relevant to the duty of care to be observed by the municipality. The municipal documents that have become available show that the municipality was aware of safety risks at wild swimming spots in the

city and that it is taking measures to improve physical safety at these spots.

In the interlocutory judgment, the court ruled that the likelihood of a careless visitor diving into the shallow part of the water and thereby failing to meet the required degree of caution was very low. It now reverses that assessment. The visual material (photos and videos) showed by the claimant during the proceedings, show dozens of people jumping or diving into the water from the quay on busy summer days. Therefore, the likelihood of accidents arising from that behavior in this area is considered high. On these grounds, the municipality is liable after all. Nonetheless, the court held that there was also fault on the part of the claimant, resulting in 20% of the dameges remaining at his own expense.

Relevant insights

Despite the court of Amsterdam overruling its own previous judgment, these rulings still provide some interesting insights.

Common knowledge as a factor for (not) being liable

Both courts use 'common knowledges' for their assessment of the existence of unlawful endangerment. What is conspicuous is how the courts attribute these circumstances to the different parties. Noteworthy is the insight that a very present likelihood of accidents occurring, as well as a high severity of the possible consequences of those accidents, seem to be able to decrease the extent to which disregard for due caution is likely. And the lesser the extent to which disregard to caution is likely, the smaller the chance of the owner being liable. Looking at other similar case law, this reasoning seems rather unique. The tendency in most case law is for owners of recreational swimming areas to be under a strict duty of care, and are often deemed liable in court. Despite this judgement later being overruled, the court of Amsterdam's method of thinking is quite innovative and might even be used to defendants advantage in future cases.

Other factors considered (equally) important

What becomes clear from the overruling, is that whether the owner of a water is liable for personal injury can also highly depend on the circumstance that it is forbidden to swim in the particular area, as well as whether or not the owner reasonably could be aware of the presence of recreational swimmers. The importance of this latter factor was also emphasized by the court of Limburg. Furthermore, both courts ruled that part of the damages remain at the expense of the claimant, due to their own carelessness. The amount of damages remaining at own expense can vary, and depends on the circumstances of the case.

Conclusion

The duty of care for owners of recreational waters has proven to be a strict one. It does seem to matter whether or not the area has a prohibiton of swimming. Even then, the scope of the duty of care must be assessed according to the circumstances of the case. Nonetheless, the claimants own responsibility will always remain a factor in the assessment of the case.

[1]Court of Limburg, 26 October 2023, case no. ECLI:NL:RBLIM:2023:6252.

[2] For example: Court of Northern Netherlands, 14 February 2017, case no. ECLI:NL:RBNNE:2017:951; : Court of Northern Netherlands, 7 July 2022, case no. ECLI:NL:RBNHO:2022:5915.

[3] Court of Amsterdam, 31 March 2022, case no. ECLI:NL:RBAMS:2022:1755.

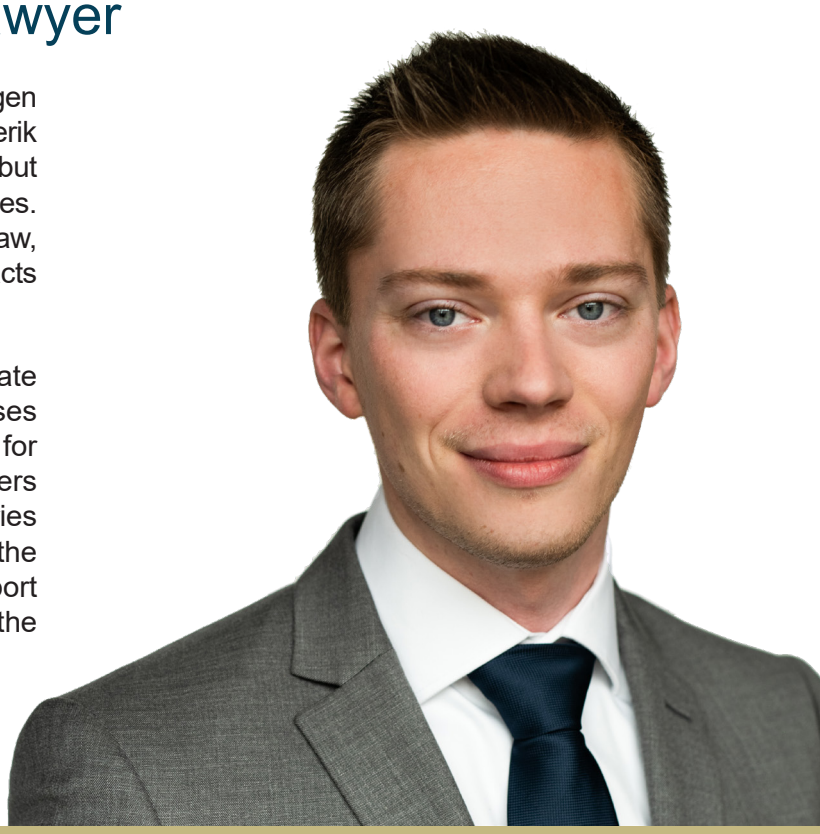
[4] Court of Amsterdam, 21 February 2024, case no. ECLI:NL:RBAMS:2024:1019.

ekelmans
advocaten / insurance & corporate

Contact Person

Diederik Hulsbergen
Lawyer
E: hulsbergen@ekelmansadvocaten.com

Diederik Hulsbergen - Lawyer



Both on the pitch and in his work, Diederik Hulsbergen has a great passion for sports. As a lawyer, Diederik not only deals with various insurance law issues, but also advises and litigates in various sports law cases. He has experience in sports-related association law, employment law, liability, personal injury, contracts and disciplinary law.

In 2021, Diederik completed his Master's in Private Law at the University of Amsterdam, with focuses on liability law and sports law. Out of passion for football and law, he wrote a thesis on employers liability for traumatic and chronic brain injuries in professional football. For this, he received the Thesis Award of the Dutch Association for Sport and Law. Diederik has been a member of the association since 2021.

E: hulsbergen@ekelmansadvocaten.com

P: +31 70-374-63-26"

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By Pilar Penna, Nicholson y Cano Abogados

Passion for football and the behaviour of spectators

Football In Argentina is a popular spectacle, which represents the celebration of sport and joy and involves individual and collective passions. Without the blessed folklore, football would cease to be the passion it is and become a joyless spectacle. But chasing passions leads individuals to engage in reckless behavior and incidents can occur. To what extent are the organizers liable for such reckless conduct?

Relevant Legislation

The Law of Sports Events regulates the liability for the acts occurred in the occasion of a sports show, before, during or after it, establishing that the entities participating in an event are jointly and severally liable for the damages and losses that may occur in the stadiums. The law provides for the strict liability of the organizers of the sporting event on the understanding that a duty of care and safety is imposed on them with respect to the attendees.

The previous version of this law contained certain exemptions to liability of organizers, which have not been included in the law currently in force. Consequently, it has been discussed whether this meant that organizers can never be exempted of liability, having the courts resolved that the Law of Sports Event is not independent of the general system of liability regulated by the Argentine Civil and Commercial Court.

Thus, in order to determine the exemptions for strict liability it is necessary to resort to the provisions of the Civil and Commercial Code, which admits that an exonerating factor can be configured when there is an extraneous cause (i.e, negligence or reckless conduct of an injured person, or an event of force majeure).

Cases in Argentina

Two tragedies occurred during different events in the same stadium, each of which resulted in the death of a spectator who fell from the stadium.

In the first case, which occurred in May 2018, a soccer match was played between 9pm and 11pm. A man went to see the match and after it finished his friends could not find him: he had passed out in a bathroom stall inside the stadium and regained consciousness several hours later. He tried to leave the club's facilities, without success. He attempted to leave the stadium by climbing the wall and , fell into the void from the stand where he was and died on the sidewalk of the stadium.

Years later, in June 2023, in the same stadium, another person died in the first minutes of the match between Club Atletico River Plate and Defensa y Justicia, after falling from one stand to another, without apparently any violent situation. Both autopsies showed that the victims were under the influence of alcohol.

In the first case, a claim from the family of the victim was filed against the club owner of the stadium and the Argentine Soccer Professional Super League Civil Association (AFA), responsible for organizing the event, alleging that the organizers had failed to comply with the duty of care, having closed the stadium without an adequate survey that no person was remaining inside and leaving the victim unattended for hours.

Both defendants rejected the claim, alleging the deceased was responsible for his own actions since, under the influence of alcohol, he was the one who chose not to wait for someone to open the stadium, and assumed a risk that placed himself in a situation of danger. The consequence of a closed door is to be locked in and suffer a temporary confinement; falling from a grandstand was -in this case- the consequence of the reckless conduct of the victim. Both defendants presented a very thorough description of sweeping protocols that had been carried out to verify the total vacating of the sports facility, and concluded that, in any event, there was no adequate causal link between an eventual breach of duty of the organizers of the event, and the death of the individual, which occurred on the following day and exclusively due to his actions.

A discussion was also raised regarding the insurance policy that would eventually have to cover the incident. The club's policy excluded coverage during the professional football matches organized by AFA. The insurer of AFA which provided coverage for the football match rejected to cover the claim, alleging that the death had occurred long after the event had concluded.

The court rejected the action for being time-barred, since it was filed after statutes of limitation had operated. However, and considering the conclusions of the criminal investigation, it is reasonable to presume that in the civil proceedings the defendants´ liability would have been excluded.

The outcome of the second case is still pending, but this fall occurred during the match. Thus, it will be relevant to understand how the subject ended up in the stands 15 meters down and if there is any conduct of the victim, including his drunkenness, that may result in an exclusion to the strict liability imposed to organizers by the provisions of the Sports Event Law.

N C | Nicholson y Cano ABOGADOS

Contact Person

Pilar Penna

Lawyer

E: pilarpenna@nyc.com.ar

insurancelawglobal.com

Insurance Law Global

@InsLawGlobal