COURT OF APPEALS AFFIRMS COLLEGE BASEBALL PLAYER'S "ASSUMPTION OF RISK"

New York State jurisprudence is riddled with a long list of cases in which various defendants have been held to be free of liability in the sporting arena. Nevertheless, plaintiffs continue to test new theories in attempts to recover for injuries sustained while participating in both organized and pick-up sporting events.

The most recent case comes from the sport of baseball. In *Bukowski v. Clarkson University*, 2012 NY Slip Op 04274**,** decided 6/5/2012, the Court of Appeals heard a case regarding a baseball player who was injured during indoor batting practice.

Plaintiff had played organized baseball since he was five years old and pitched at the varsity level in high school for three years. He was recruited by Clarkson University to play on their Division III baseball team as a pitcher. During his freshman year, Bukowski began indoor training in February and was informed by his coaches that he would be practicing "live" in a nylon cage, meaning the pitcher would throw from an artificial mound at regulation distance to the batter and catcher. On the day before his accident, Bukowski observed pitchers throwing "live" practice without an L-screen in the indoor facility. Despite never having practiced "live" indoors and without an L-screen, Bukowski entered the cage on March 2, 2006, threw about six pitches without batter contact, and then threw a fast ball which the batter hit directly back at him, striking Bukowski in the jaw and breaking his tooth.

Plaintiff brought suit against Clarkson University and head coach James Kane to recover damages for injuries sustained. After discovery, the Supreme Court of New York State denied defendants' motion for summary judgment. Plaintiff's theory at trial was that the risk of being hit by a batted ball was enhanced due to the multi-colored backdrop and low lighting at the indoor facility, which made it harder to see the white ball, and the failure to use an L-screen. At the close of evidence, the trial court granted defendants' motion for directed verdict on the ground that plaintiff assumed the commonly appreciated risk in baseball of being hit by a line drive. The Appellate Division affirmed, and the appeal followed based on the two-Justice dissent in the court (see CPLR 5601[a]). The Court of Appeals subsequently affirmed the decision.

The Court began by reciting the doctrine of assumption of rick, stating that a participant in sporting and amusement activities has assumed the risks inherent in that activity where the participant "is aware of the risks; has an appreciation of the nature of the risks; and voluntarily assumes the risks." Id., citing *Morgan v. State*, 90 NY2d 471, 484 (1997). The Court reiterated that being struck by a ball is an inherent risk in a sport such as baseball.

The Court went on to note that the assumption of risk doctrine extends to the playing of sports in "less than optimal conditions." (citing *Sykes v. County of Erie*, 94 NY2d 912, 913 (2000); and specifically such conditions in the sport of baseball (player playing on wet and muddy field. *Martin v. State of New York*, 64 AD3d 62, 64 (3d Dept. 2009), lv denied 13 NY3d 706 (2009).)

Here the Court held that the plaintiff was able to observe the open and obvious conditions of the facility and fully appreciated the risk of being struck by a line drive, which is an inherent risk for any pitcher in a game setting. Further, the plaintiff did not offer evidence that the college was bound by a league or other standard to use an "L-screen." Lastly, the Court stated that there is a

distinction between accidents resulting from defective sporting equipment, which may unreasonably increase the risks associated with an activity, and those resulting from sub-optimal playing conditions which are readily observable and accepted by the participant, such as was the case here.

So again, the Court of Appeals has affirmed the uniquely high standard of negligence/recklessness necessary to place liability in a sporting accident case. Nonetheless, plaintiffs will surely continue to attempt to bring such cases, which should be defended aggressively.