

You're in the Game - Hayden v. Notre Dame

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YOU'RE IN THE GAME
HAYDEN V. NOTRE DAME

Dan Laughlin

As I entered Notre Dame Stadium to watch the Fighting Irish play the University of Michigan Wolverines, I read the following words on the back of my college football game ticket: "The holder of this ticket voluntarily assumes all risks of property loss and personal injury arising during its use." Therefore, by the time I passed through the turnstile, I assumed all risk of injury that I may conceivably suffer amongst 80,000 other rabid football spectators. I believed my assumption of risk to pertain only to foreseeable injuries-not to something unexpected like the scoreboard falling down into the stands and crushing me. Foreseeable injuries include anything involving the field of play or fan reactions to the field of play.

However, my assumption of risk may not have been as broad. Due to the 1999 ruling in *Hayden v. Notre Dame*, Notre Dame may have been responsible for any injury I suffered during the game. [EN 1] Universities may have a heightened level of liability for their fans' actions at their sporting events. While the game ticket disclaimers may be a new addition, the idea that an attendee is responsible for his or her own safety should not strike readers as a novel concept. However, some courts have recently challenged this view.

In *Hayden v. Notre Dame*, the plaintiff sued the University of Notre Dame after she suffered injuries as a result of aggressive fans' actions during a 1995 football game at Notre Dame Stadium in South Bend, Indiana. [EN 2] In the plaintiff's case-in-chief, the plaintiff's husband testified that the net placed behind the goalposts in the end zone of Notre Dame Stadium failed to catch fifty percent of the balls that were kicked through the uprights during field goals and extra points after touchdowns. [EN 3] As a result, the balls would fly over the net and into the crowd. Fans would rush to catch the ball. [EN 4] During the course of one such incident, the fans' scramble for the football sent the plaintiff from her seat to the ground. The plaintiff suffered a shoulder injury. [EN 5]

In an effort to sue the party with the deepest pockets, the plaintiff sued the University for its alleged failure to protect her from the fans' reaction to the ball soaring into the crowd. She alleged that the University had prior knowledge that the end zone net failed to catch a large portion of kicked balls. [EN 6] Therefore, the University failed to protect its fans from incidences that the University knew created a risk to the fans. [EN 7] She based her complaint on the logic that as a fan, she was Notre Dame's invitee because the university sold her the ticket. [EN 8] As an invitee, she argued that Notre Dame owed her a duty of care that protected her from certain risks that are inherent in attending a football game. [EN 9] This argument centered on the totality of circumstances standard, which has been implemented to require landowners to take reasonable precautions to prevent foreseeable criminal actions against invitees on the landowner's property. [EN 10] Because the rush of fans to a ball kicked over the protective nets was a risk that the University could have foreseen, the plaintiff claimed the University breached its duty of care by not taking reasonable action to prevent the risk. [EN 11]

Although the trial court initially granted the University's motion for summary judgment, the Court of Appeals of Indiana for the Third District reversed the trial court's decision and ruled that the plaintiff established a valid issue. [EN 12] While the parties eventually settled the case out of court, the decision by the Court of Appeals established a dangerous precedent that hardly reflects the character of sports.

The extent of protection that a team or University owes its fans has been a topic of discussion for years in the sporting world and the judicial system. Often the issue involves a baseball or hockey puck that a player hits into the stands, which injures or kills a spectator. [EN 13] In almost all of those cases, the object sent into the stands resulted from an accidental circumstance that occurred during the course of play on the field. Whether or not the fans put themselves at risk or whether the team or University stands at risk for the liability for fan injuries is the issue in question.

The logic sported in *Hayden* was extended even further in *Telega v. Security Bureau, Inc.*, a Pennsylvania case that resulted from an incident at a Pittsburgh Steelers football game in 1992. [EN 14] In *Telega*, the plaintiff sued the firm responsible for fan security at the game due to its failure to prevent other fans from tackling him when he caught a ball that soared over the protective netting during a field goal attempt. [EN 15] The plaintiff contended that the security firm breached its duty when it failed to control fans from attacking him when he caught the ball. [EN 16] Although the trial court granted the defendant's motion for summary judgment on the basis that no duty was owed to the plaintiff for such an incident, the Superior Court of Pennsylvania reversed and ruled that the "no duty" rule was inapplicable, because the rule only applied to risks inherent in attending the game. [EN 17] The Superior Court ruled that the fans' attack was a risk not inherent in attending a football game and hence, the plaintiff could not anticipate it. [EN 18]

While the logic of this holding may appear to have some merit in its initial application to the particular case, it suffers when compared to the rulings in other negligent cases involving team and University liability. Courts have repeatedly held that balls or pucks that enter the stands off the bat or stick of a player are foreseeable and inherent risks that result from the course of play on the field. [EN 19] As long as there is sufficient fencing or protective glass in a sufficient area of the stadium, the liability of the stadium operator does not extend to fans who choose to sit in areas of the stadium that are not fenced. [EN 20] However, the rulings of *Hayden* and *Telega* challenge this legal logic.

Hayden and *Telega* deal with team or University liability not when a ball hits a fan, but when fans hit another fan in an attempt to catch a ball sent off the field of play. Whereas in the former cases, stadium operators do not owe a duty of protection so long as there is sufficient protective covering, courts seek to establish a duty of protection in the latter cases that would require such netting throughout the entire stadium. Although *Hayden* and *Telega* involved incidences in which a ball flew over already existing protective netting, the logic of the ruling would allow fans to bring suits for incidences that involve balls flying into all areas of the stadium. Whenever a ball flies out of play into any area of stadium seating in any sport and a fan suffers an injury from the ensuing rush of fans to the ball, the injured fan could sue the stadium operator for the fans' action. According to the courts, fans have the ability to foresee a ball flying out of play into the stands. It is a matter of common knowledge. Therefore, fans assume the risk of such an incident.

Courts assume that fans lack the capability of foreseeing a group of enthusiastic spectators pursuing the ball hit out of play during the course of which the fan in question may suffer an injury. Even in cases in which a fan may foresee such an event due to his regular attendance at games, courts excuse the assumption of risk factor and claim that the stadium operator's foreseeability outweighs the fan's, because it does not constitute a matter of common knowledge. [EN 21] Ultimately, this conclusion insults fan knowledge. The fan pursuit of a foul ball during a baseball game or a kicked football during a football game is a documented event

that cameras often capture for the viewer at home. Therefore, for a court to rule that a fan could not foresee such an event at a game he or she attends makes little logical sense.

While one may argue that not all fans have familiarity with certain sports to foresee such a crowd reaction, courts have continually held that the factor of unfamiliarity does not relieve the fan of assumption of risk. [EN 22] However, this issue did not even apply in *Hayden* and *Telega*. In both cases, plaintiffs were season ticket holders who were not only familiar with the sport but with the environment of attending a football game. Therefore, the question resonates, how does the court remove the element of assumption of risk?

Apparently, the courts have concluded that in weighing a fans' assumption of risk and a stadium operators' foreseeability of preventing crowd reactions, a stadium operator stands in a better position to assume the liability due to its decision to operate such a facility and its ability to cover the costs of an injury that results from its decision. [EN 23] Although many may argue that the courts' holdings make financial sense in that a stadium operator has the ability to more easily cover the costs of an injury sustained by a fan, it neglects to focus on the real element of the case: the fan decided to enter a sports arena that houses a sporting event with balls that sometimes soar into a crowd of thousands of rowdy fans. In reality, the issue should not be who has the ability to cover costs, but the "choice" a spectator makes when entering an environment that houses an aggressive sport and passionate fans.

The past decisions of the courts to extend the liability for third party "criminal actions" to teams and universities who operate the stadiums and firms who provide stadium security fail to properly apply the theory of legal liability to sports. Courts appear all too eager to hold teams and universities liable for third party actions by rendering foreseeable events as unforeseeable, which results in a misapplication of the duty of care. The plaintiff in *Hayden* conceded her knowledge of fan rowdiness when she noted that she had observed aggressive fan behavior at previous games she had attended. [EN 24] Despite this knowledge, she continued to attend games and to sit in the seats where such balls landed until during the course of a game, she finally suffered an injury. While she may contend that the University of Notre Dame should have taken actions to prevent such an injury, she assumed the risk. However, the court quickly obliged the plaintiff by applying a totality of circumstances test that determined that the University's ability to foresee the event made the university liable despite the plaintiff's ability to foresee the same event.

While some may claim that stadium operators can more easily cover the costs of fan injuries, and others may make the policy argument that increased liability encourages stadium operators to increase stadium safety standards, the courts' decisions affect sports far beyond the financial and legal impacts. Ultimately, the decisions affect the quality of attending a sporting event for every fan. Increased fan "protection" leads to a decrease in field visibility with increased netting and an increase in ticket prices as stadium operators attempt to financially cover the costs of fan lawsuits. These factors will decrease the value of viewing a sporting event in person. Decreased visibility will lead fans to stay home and watch games on television and increased ticket prices will make it harder for some fans to afford to attend a sporting event.

In an era in which few accept responsibility for their actions, courts are making it easier for people to assume a risk, suffer an injury, and then to blame another. This case note does not advocate unruly activity by fans, but it does respect the spirit of sport and realizes the risks one assumes when he or she chooses to cheer for his or her team or school in person. If one fears that he or she will suffer an injury as a result of attending a sporting event, then that person should stay home and watch the game on television. One should not take a seat in a stadium that

seats thousands of fans and expect the same elements of safety that he or she experiences in the comforts of a home. Ultimately, what true sports fans have long realized, but what courts in *Hayden* and *Telega* failed to recognize, is that when you are at the game, you are in the game.

[EN 1] 716 N.E.2d, 603, 604 (Ind. App. 1999).

[EN 2] *Id.*

[EN 3] *Id.* at 607.

[EN 4] *Id.* at 606.

[EN 5] *Id.* at 604.

[EN 6] *Id.* at 607.

[EN 7] The push by the fans, which sent the plaintiff to the ground, constituted a criminal action in that one could argue it constituted criminal assault. Section 211.1 (1)(a) of the Model Penal Code states “A person is guilty of assault if he attempts to cause or purposefully, knowingly, or recklessly causes bodily injury to another.” Plaintiff’s tort suit concerns the University’s negligence for failing to decrease the possibility that an assault may occur.

[EN 8] *Hayden*, 716 N.E.2d at 605.

[EN 9] *Id.*

[EN 10] *Id.* (citing *Delta Tau Delta v. Johnson*, 712 N.E.2d 968, 973 (Ind. 1999)).

[EN 11] *Id.* at 607.

[EN 12] *Id.*

[EN 13] However, courts have extended liability to teams when a bat is thrown into the crowd and strikes a spectator. Such incidents are ruled to be unforeseeable. Whereas a foul ball off the bat occurs in the normal play of the game, a thrown bat is not the result of a usual play.

[EN 14] 719 A.2d 372 (Pa. Super. 1998).

[EN 15] *Id.* at 374.

[EN 16] *Id.*

[EN 17] *Id.* at 375.

[EN 18] *Id.* at 376.

[EN 19] *See Brown v. San Francisco Ball Club, Inc.*, 222 P.2d 19 (Cal. App. 1950) (Woman hit by foul ball assumed reasonably foreseeable risk inherent in the game); *Gunther v. Charlotte Baseball, Inc.*, 854 F. Supp. 424 (D.S.C. 1994) (Patron assumed risk of batted or thrown balls); *Pestalozzi v. Philadelphia Flyers, Ltd.*, 576 A.2d 72 (Pa. Super. 1990) (Fan hit by errant puck assumed reasonably foreseeable risk inherent in the game).

[EN 20] *See Davidoff v. Metropolitan Baseball Club*, 463 N.E.2d 1219 (N.Y. 1984); *Brown*, 222 P.2d 19.

[EN 21] *Telega*, 719 A.2d at 377.

[EN 22] *See Brown*, 222 P.2d 19 (ruling that unfamiliarity with a baseball game does not eradicate the fan's assumption of risk from attending the game).

[EN 23] This statement represents the opinion of the author in his analysis of the decisions by the courts in *Hayden* and *Telega*. In both cases, the courts ruled that while plaintiffs assumed risk of attending the sporting events, the stadium operators could have foreseen the plaintiffs' injuries due to other fans' actions. Therefore, it appears that the courts balanced the foreseeability of both parties and in both cases ruled for plaintiffs. Such decisions were likely based on the ability of the defendants to more easily cover the costs of injuries rather than the individuals who suffered injuries.

[EN 24] *Hayden*, 716 N.E.2d at 603.