State Court Upholds Questionable Bystander Liability Claim

August 1, 2011 by Sean Wajert

The Montana Supreme Court recently upheld the imposition of liability on a bat manufacturer for allegedly failing to warn about the dangers of aluminum bats. Patch v. Hillerich & Bradsby Co., d/b/a Louisville Slugger, No. DA 10-0051 (Mont. 7/21/11). Bad facts made bad law here.

Many people consider The Natural to be one of the greatest sports movies of all time, and those that think deep thoughts have asserted that the screenplay (presumably not the book too?) was based in part on the story of Sir Percival from the Arthurian myths, with the broken bat "Wonderboy" taking the part of the knight's broken sword. Had Roy Hobbs used an aluminum bat, that aspect of the story would have been lost. Since their introduction in the early 1970's, aluminum bats have become quite popular in youth and amateur adult baseball and softball markets. The new bats are often touted as having a wider sweet spot, more power, better feel, or higher performance. It is pretty much accepted that balls come off metal bats faster than they do from wood bats, but this aspect of performance has fueled an ongoing metal/wood issue in some circles.

While pitching in an American Legion baseball game on July 25, 2003, eighteen year-old plaintiff was struck in the head by a batted ball that was hit using H&B's model CB-13 aluminum bat. Tragically, plaintiff died from his injuries. In 2006, Brandon's parents sued H&B, claiming H&B's model CB-13 aluminum bat was in a defective condition because of the alleged enhanced risks associated with its use: It increased the velocity speed of a batted ball when it left the bat, thus decreasing infielders' reaction times and resulted in a greater number of high energy batted balls in the infield.

The matter was tried in October 2009, and the design defect and failure to warn claims were submitted to the jury, which concluded that the model CB-13 aluminum bat was not designed defectively, but determined the bat was in a defective condition due to H&B's failure to warn of the enhanced risks associated with its use. They awarded Plaintiffs an $850,000 verdict on their failure to warn claim. Defendant appealed.

The first issue was whether a failure to warn claim can be brought by a bystander. H&B asserted that only the individual batting (actual user) and the individual who purchased the bat (actual consumer) could assert a failure to warn claim. The court disagreed, saying this interpretation of the terms user and consumer is contrary to the definition of the terms as contained in the Restatement (Second) of Torts § 402A. This state court's products liability jurisprudence recognized that a failure to warn claim may be brought by persons who are not actual purchasers or users of a product; previous plaintiffs included those who are passively enjoying the benefit of the product, as in the case of passengers in automobiles or airplanes, as well as those who are utilizing it for the purpose of doing work upon it. "The realities of the game of baseball" supported, said the court, the decision to submit the failure to warn claim to the jury. The bat was deemed an indispensable part of the game. The risk of harm accompanying the bat's use extends beyond the player who holds the bat in his or her hands.

A warning of the bat's risks to only the batter standing at the plate inadequately communicates the potential risk of harm posed by the bat's increased exit speed. In this context, all of the players, including plaintiff, were users or consumers placed at risk by the increased exit speed caused by H&B's bat.

Defendant also argued that plaintiff could not establish causation - reading and heeding the warning. The court held that H&B's argument erroneously assumed that placing a warning directly on the bat is the only method to provide a warning. While placing a warning directly on a product is one method of warning, other methods of warning exist, including, but not limited to, issuing oral warnings and placing warnings in advertisements, posters, and media releases. Davis v. Wyeth Laboratories, Inc., 399 F.2d 121, 131 (9th Cir. 1968) ("[O]ther means of communication such as advertisements, posters, releases to be read and signed . . . or oral warnings . . . could easily have been undertaken . . . ."). Such warnings, if issued by H&B in this case, said the court, could have communicated to all players the potential risk of harm associated with H&B's bat's alleged increased exit speed.

What the court called a "flexible" approach to causation really eviscerates one of the fundamental elements of the claim. The court allowed the jury to infer without any basis in fact that plaintiff would have heeded a warning had one been given apparently because he was deceased, and thus real proof of causation was hard to find. There is no basis to allow a jury to express sympathy for a tragic accident victim,as here there was not sufficient proof that the plaintiff would have adjusted his behavior after receiving the warning to avoid the injury. The decision puts this court in a tiny minority of states that recognize some kind of bystander failure to warn liability, which most agree is unworkable and contrary to the reality of modern commerce.

The concurrence correctly noted that plaintiff did not articulate specifically what a warning should have contained and what message should have been given. Statements to the effect that the bat would hit balls at unusually fast speeds or unusually far distances are the kind of messages accompanying usual product advertising and are not likely to change a plaintiff's behavior. Moreover, they are precisely the qualities in a bat which baseball teams and players **seek out**. Plaintiff could not articulate specifically how a warning would have changed the result here, in other words, how the failure to warn caused this accident.

H&B also argued that because plaintiff had been hit by batted balls before, he knew he could be hit and, therefore, assumed the risk when he continued playing baseball. The court explained that assumption of the risk defense is inapplicable as a matter of law without evidence the victim actually knew he or she would suffer serious injury or death, and, knowing that, the victim voluntarily exposed himself or herself to the danger. Lutz v. Natl. Crane Corp., 267 Mont. 368, 379-80, 884 P.2d 455, 461-62 (1994). What the victim actually knew is evaluated using a subjective standard in Montana. Here, said the court, there was no evidence that plaintiff actually knew he would be seriously injured or killed when pitching to a batter using one of H&B's model CB-13 aluminum bats

Plaintiff's apparent theory, as articulated in closing argument, was that H&B should have advertised that its bat “could kill.” and the inference which plaintiff asked the jury to draw in order to establish causation was that, following the publishing of a warning “that this bat could kill,” they as parents would have prohibited Brandon from playing baseball. That tells you how unworkable the theory is. This was a terrible accident on a baseball field, the kind of accident that has also occurred with wood bats. The bat was not defective. It was made in accordance with the rules approved for play by baseball's organizing and governing bodies. Bad facts make bad law.