Products Liability

Playing sports can be dangerous, as well as fun. Some sports, such as football, mandate physical collisions that foreseeably cause injury. Other games, like baseball, have a minimum of contact, but the risk remains with a game ball as hard as a rock hit by a bat that can harm those in the environs. With the advent of actions based on product liability after World War II, sports law was certain to gain a share of this litigation.

In the following case, parents filed suit against the manufacturer of an aluminum baseball bat that batted a ball which fatally struck their child in the head causing his demise. The claim was based on the absence of an adequate warning of the risks associated with the bat, as well as asserted defects in manufacturing and design.

PATCH v. HILLERICH & BRADSBY CO.

361 Mont. 241 (2011)

Justice MICHAEL E. WHEAT delivered the Opinion of the Court.

A jury in the First Judicial District Court, Lewis and Clark County, found Hillerich & Bradsby Company ("H & B") liable in strict products liability for failing to warn Brandon Patch (Brandon) and his parents of the risks associated with its model CB–13 aluminum baseball bat. H & B appeals. . .

BACKGROUND

While pitching in an American Legion baseball game on July 25, 2003, eighteen-year-old Brandon was struck in the head by a batted ball that was hit using H & B's model CB–13 aluminum bat. Tragically, Brandon died from his injuries. In 2006, Brandon's parents, individually and as representatives of Brandon's estate, sued H & B in strict products liability for survivorship and wrongful death damages, asserting manufacturing and design defect and failure to warn claims. Patches claimed H & B's model CB–13 aluminum bat was in a defective condition because of the 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.

Before trial, the District Court granted H & B's motion for summary judgment on Patches' manufacturing defect claim, but denied summary judgment on Patches' design defect and failure to warn claims. The District Court granted Patches' motion in limine, excluding H & B's assumption of the risk defense. The matter was tried in October 2009, and Patches' design defect and failure to warn claims were submitted to the jury. The jury concluded 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 and awarded Patches an $850,000 verdict on their failure to warn claim. Post-trial, the District Court denied H & B's Rule 50(b) motion for judgment as a matter of law.

DISCUSSION

Issue 1: *Did the District Court properly deny H & B's summary judgment motion on Patches' failure to warn claim?* The District Court denied H & B's motion for summary judgment on the basis that failure to warn claims are available to bystanders, such as Brandon. H & B concedes that users and consumers may bring failure to warn claims, but argues it is entitled to summary judgment because failure to warn claims are not available to bystanders. In other words, H & B asserts that only the individual batting (actual user) and the individual who purchased the bat (actual consumer) can assert a failure to warn claim in this case. H & B's narrow interpretation of the terms user and consumer is contrary to the definition of the terms as contained in the *Restatement (Second) of Torts* § 402A and is incongruent with this Court's products liability jurisprudence [which allows bystanders "who are passively enjoying the benefit of the product" to recover.]

This Court's products liability jurisprudence recognizes that a failure to warn claim may be brought by persons who are not actual purchasers or users of a product. . . The realities of the game of baseball support the District Court's decision to submit Patches' failure to warn claim to the jury. The bat is 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 Brandon, were users or consumers placed at risk by the increased exit speed caused by H & B's bat. H & B is subject to liability to all players in the game, including Brandon, for the physical harm caused by its bat's increased exit speed. We conclude the District Court did not err in denying H & B summary judgment and submitting Patches' failure to warn claim to the jury.

In addition, H & B argues that summary judgment is appropriate because (1) providing a warning to bystanders is "unworkable," and (2) Patches could not produce causation evidence establishing that they could have seen, read, and heeded a warning on the bat in a manner to prevent Brandon's death. H & B's first argument fails because the "workability" of providing a warning is a jury question.

H & B's second argument incorrectly limits the scope of the warning by erroneously assuming 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. ("[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, would have communicated to all players the potential risk of harm associated with H & B's bat's increased exit speed. H & B's false assumption fails to establish the absence of genuine issues of material fact. Because genuine issues of material fact exist regarding the scope of the warning and because the "workability" of providing a warning is a jury question, the District Court properly denied H & B summary judgment on its causation argument.

Issue 2: *Did the District Court properly deny H & B's Rule 50(b) motion for judgment as a matter of law?*

H & B argues the District Court erred in applying a "read and heed" inference when it denied H & B's Rule 50(b) motion for judgment as a matter of law. . . In a failure to warn case, the plaintiff has the burden of proving (1) the product was sold in a defective condition due to the lack of or an inadequate warning, (2) the defect caused the injury, and (3) the defect is traceable to the defendant. The policy underlying products liability—protecting the consuming public by requiring manufacturers to bear the burden of injuries caused by defective products—requires courts to apply a flexible standard of proof. The nature and quality of evidence used in products liability cases to demonstrate causation varies, and the death or inability of the plaintiff to testify is one of the factors influencing the requisite standard of proof. . . .

[We maintain adherence to] the flexible standard of proof in products liability cases. . . Brandon is deceased. . . The District Court recognized this and . . . properly allowed the jury to infer that Patches would have heeded a warning had one been given:

> In certain situations ... where the consequences ... are severe, the lack of warning is undisputed, and the person ... is dead, the jury may be permitted to infer that a warning would have been heeded and that the failure to warn was a proximate cause of the injury. Not only would it be virtually impossible to prove what the decedent would have done had he been warned, but, as a practical matter, nothing more is added in this case by having a witness merely state that, had the danger been known ... he would have acted to avoid the danger.

Issue 3: *Did the District Court properly grant Patches' motion in limine regarding H & B's assumption of the risk defense?*

The District Court concluded Brandon's voluntary participation in the game did not make assumption of the risk applicable. H & B argues that because Brandon had been hit by batted balls before, he knew he could be hit and, therefore, assumed the risk when he continued playing baseball.

[The Montana statute on product liability] permits a manufacturer to assert the affirmative defense of assumption of the risk where "[t]he user or consumer of the product discovered the defect or the defect was open and obvious and the user or consumer unreasonably made use of the product and was injured by it." [T]he 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. What the victim actually knew is evaluated using a subjective standard.

Assumption of the risk was not applicable here because there is no evidence that Brandon 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. In other words, H & B failed to show that Brandon was aware of the enhanced risks associated with the model CB–13 aluminum bat, and, knowing that, he

voluntarily proceeded to pitch to a batter using that bat. The District Court did not abuse its discretion in granting Patches' motion in limine.

We affirm.

Justice JIM RICE, concurring:

I remain troubled by the evidentiary basis for the failure to warn claim. Patches 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 precisely the qualities in a bat which baseball teams and players seek out. Neither did Patches articulate specifically how a warning would have changed the result here, in other words, how the failure to warn caused this accident. During oral argument before this Court, when Patches' counsel was asked to articulate Patches' theory of causation—or how a warning would have prevented the accident—he was vague, offering only what the jury may have concluded.

The closing argument Patches made to the jury seemed to reflect the stretch which they asked the jury to make:

> They don't have warnings on these bats. There's nothing said on these bats about what these bats can do. And that your child, whether he's 15, 16, 17, 18, 19—if your child is playing and he's a pitcher, he could be killed, as what happened here July 25, 2003.
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> ...
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> Now I ask you this—I ask you-all this: If you had a child 17 or 18 years old and he wanted to be a pitcher and the bat that the kid was bringing up to the plate warned—warned—that this bat could kill—Mr. [a]nd Mrs. Patch didn't have the benefit of any warning.

Patches' apparent theory, as articulated in closing argument, was that H & B should have advertised that its bat "could kill," or that players engaged in the game of baseball "could be killed" if their bat was used. As alluded to in testimony, the inference which Patches 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, and could have, prohibited Brandon from playing baseball that day.

As the Court notes, "the 'workability' of providing a warning is a jury question." There is no doubt that the jury in this case was given a difficult task. Because the law gives to the jury the duty of determining whether the plaintiff presented a viable theory of warning and causation in this case involving a baseball bat, I defer to the jury's judgment and likewise affirm their verdict.