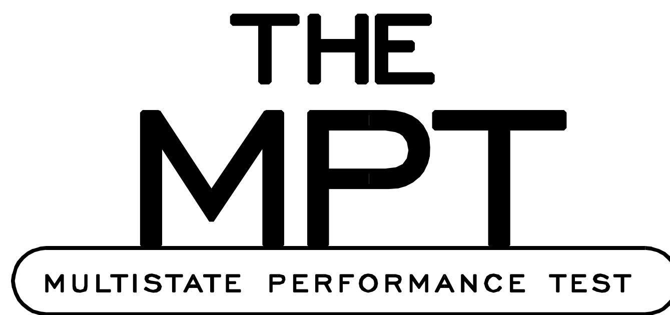

Alexander v. BTI and Bell

February 1997, Test 1

Preface

The National Conference of Bar Examiners inaugurated the Multistate Performance Test (MPT) in 1997. This publication is a reprint of one of the first two MPTs, which are administered in February 1997 in four states: Georgia, Hawaii, Iowa, and Missouri.

The instructions for the test appear on the back cover. For further information regarding the test, see the **MPT Information Booklet**.

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Alexander v. BTI and Bell

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FILE

Calomen & Sanchez
2714 Meadowood Drive - Suite 100
Weston Hills, Franklin 33332

MEMORANDUM February 25, 1997

TO: Applicant

FROM: Armand Calomen

RE: Alexander v. Briarwood Tennis, Inc. and Bell

We represent Briarwood Tennis, Inc. (BTI) and its Tennis Director, Sandy Bell, in a personal injury action for negligence brought by Linda Alexander, a BTI member and the top female player on the BTI team that was entered in last year's Franklin Amateur Championship Tournament. Alexander alleges that she suffered an eye injury after being struck by a ball hit by Bell, an International Lawn Tennis Association (ILTA) certified professional player and instructor. The injury occurred during a final warm-up that preceded what was supposed to be a set of games at the conclusion of the warm-up session.

The injury caused the retina in Alexander's right eye to become detached. She experienced a form of temporary blindness that was eventually relieved by surgery. Because of increased risk of permanent blindness, Alexander now uses protective eyewear when playing tennis and other sports. She claims that the new sport safety glasses she must wear interfere with her ability to play high-level competitive tennis, preventing her from participating in major amateur events such as the Franklin Championships.

I intend to file a motion for summary judgment on the theory of assumption of the risk. As you know, the standard for summary judgment in Franklin is that there must be no disputed material facts. I believe that the undisputed material facts support our argument that Alexander and Bell were co-participants in a tennis game when this injury occurred, that neither BTI nor Bell owed Alexander a duty of care, and that, therefore, primary assumption of the risk is a complete legal defense. I want you to prepare a persuasive brief supporting that argument. The file includes the medical summary we received in discovery and selections from the depositions of Bell and Alexander. I have attached two recent Franklin appellate decisions on assumption of the risk in sports cases. Please prepare the brief in accordance with the guidelines set forth in the attached office memorandum.

Thanks for your assistance.

Calomen & Sanchez
2714 Meadowood Drive - Suite 100
Weston Hills, Franklin 33332

MEMORANDUM September 8, 1995

TO: All Lawyers

FROM: Director of Litigation

RE: Persuasive Briefs

All persuasive briefs, including Briefs in Support of Motions (also called Memoranda of Points and Authorities), shall conform to the following guidelines.

All briefs shall include a Statement of Facts. The aim of the Statement of Facts is to persuade the tribunal that the facts support our client's position. The facts must be stated accurately, although emphasis is not improper. Select carefully the facts that are pertinent to the legal arguments. In the case of a motion for summary judgment, our arguments must be based on undisputed facts.

The firm follows the practice of breaking the argument into its major components and writing carefully crafted subject headings that illustrate the arguments they cover. Avoid writing briefs that contain only a single broad argument heading. The argument heading should succinctly summarize the reasons the tribunal should take the position you are advocating. A heading should be a specific application of a rule of law to the facts of the case and not a bare legal or factual conclusion or a statement of an abstract principle. For example, improper: THE UNDERLYING FACTS ESTABLISH PLAINTIFF'S CLAIM OF RIGHT. Proper: BY PLACING A CHAIN ACROSS THE DRIVEWAY, BY REFUSING ACCESS TO OTHERS, AND BY POSTING A "NO TRESPASSING" SIGN, PLAINTIFF HAS ESTABLISHED A CLAIM OF RIGHT.

The body of each argument should analyze applicable legal authority and persuasively argue how the facts and law support our client's position. Authority supportive of our client's position should be emphasized, but contrary authority also should generally be cited, addressed in the argument, and explained or distinguished. Do not reserve arguments for reply or supplemental briefs.

The lawyer need not prepare a table of contents, a table of cases, a summary of argument, or the index. These will be prepared, where required, after the draft is approved.

ANDRE MOENSSENS, M.D.
Ophthalmology and Retinal Surgery
Worth Lakes Medical Plaza - 305
Worth Lakes, Franklin 33324

MEDICAL SUMMARY

PATIENT: Linda Alexander
REPORT DATE: August 23, 1996

This 32-year-old female was referred by Dr. Carole Henderson following a sports (tennis) injury that caused retinal detachment in the right eye. When seen, patient was in great pain with limited and cloudy vision. Intraocular hemorrhaging was apparent, with substantial amount of blood from capillaries leaking into the vitreous humor, the clear liquid that fills the center of the eye. Iritis, inflammation of the delicate membrane that forms the colored part of eye, was also present. Drug therapy was prescribed, and it reduced throbbing eyeball pain and photophobia.

Emergency laser surgery was scheduled to reattach patient's retina to the choroid. A highly focused laser beam was passed through the cornea to close off the broken blood vessels on the retina. The laser was then manipulated to indent the wall of the eyeball, causing the choroid to meet the retina tissue. Reattachment surgery was successful and normal vision was returned.

Prognosis is excellent. Following normal recovery period, patient will be able to return to usual work and other activities, including sports. In the past, patient has not been wearing safety lenses while playing tennis, a game in which a ball moves at high velocity, often in excess of 90 miles per hour. If patient had been wearing such protective eyepieces when she was struck by the ball, it is almost certain that she would not have experienced a detached retina. Patient has been cautioned to wear protective eyepieces during active sports such as tennis because another trauma of same or similar magnitude could cause permanent blindness. Patient is scheduled for routine follow-up examinations.

EXCERPTS FROM DEPOSITION OF SANDY BELL

****

1 **Q**: Were you ever a touring professional tennis player?

2 **A**: Yes, for three years I was a qualified ILTA touring pro. I attained a ranking of 22nd in
3 the world in doubles and 116th in singles before leaving the tour to become a teaching club
4 professional.

5 **Q**: What training have you received as a tennis teacher?

6 **A**: Well, I took a number of courses in college in sports management that provided the
7 fundamentals of operating a tennis pro shop, including organizing and managing a teaching program.
8 In addition, I completed several other courses in school on tennis instruction and served as a summer
9 teaching intern at the Weston Hills Country Club after my first and second years in college. When
10 I left the tour, I enrolled in the ILTA's six-month Club Professional Program held in Ft. Lauderdale,
11 Florida. At least forty percent of the program focused on the teaching function, from one-on-one
12 instructional techniques to the supervision of assistant teaching pros. In addition, I have taken
13 follow-up and advanced seminars on teaching over the last ten years. I am a fully certified ILTA
14 instructor with a Class A rating and have served as a visiting member of the faculty in ILTA's Club
15 Professional Program for the past three years.

16 **Q**: How long have you been on the staff of the Briarwood Tennis Club?

17 **A**: I've been at BTI for eight years, all as the Tennis Director, where one of my
18 responsibilities is to coach BTI-sponsored amateur teams. Before that, I spent two years as the
19 Assistant Pro at Weston Hills Country Club, which was my first teaching pro position after I
20 graduated from the ILTA program.

21 ********

22 **Q**: How long has Linda Alexander been a student of yours?

23 **A**: Off and on for the last eight years, ever since I arrived at BTI. When I started working
24 with her she already was a rated player in singles and she steadily improved in doubles. She was the
25 top-ranked woman at BTI and she had an outside shot at capturing the Franklin Amateur singles title
26 last year. Of course, that was before the accident. I wasn't her only teacher at BTI. She worked out
27 with some of the assistant pros, particularly Majel Stein.

28 **Q**: Describe the teaching session that you conducted on the day Ms. Alexander was injured.

1 **A**: Well, it was about three weeks before the Amateur and Linda wanted to work on her net
2 game, something that was giving her some trouble just then. We were both warmed up so we started
3 out by talking about the fundamentals of net play and then walking through the motions without
4 hitting the ball at all. Then we started in, Linda simulating a deep serve and rushing to the net to
5 take the return. I would hit it back as if I was returning her serve and Linda would try to pounce on
6 it at the net. We stopped between plays to discuss what she was doing well and poorly, correcting
7 techniques as we went along. Then we switched to other net play situations, like coming to the net
8 after an effective lob. We worked on the basics for about 30 or 40 minutes, I guess.
9 **Q**: What happened next?
10 **A**: She wanted to play an actual game to see if she could transfer what she was doing to a
11 game situation, so we started warming up to play a set. I said to her that when we started the actual
12 game, I'd try to draw her to the net as often as possible. As usual, we began with some baseline
13 rallying and moved into alternate net situations, first with me at the net, then with Linda up there.
14 We planned to finish off with some practice serves before starting the set. But with Linda at the net,
15 that's when the accident happened.
16 **Q**: What happened exactly?
17 **A**: OK. I was at the baseline hitting forehand and backhand volleys. Linda was at the net
18 in a ready position, holding her racquet with both hands. [Gesturing] She had just missed one of my
19 backhands and had said something like, "Damn!" And I said something like, "How about a couple
20 more and we'll go back to the baseline?" Then I hit a medium speed forehand that glanced off the
21 side of her racquet, bounced up, and hit her in the right eye. She screamed with pain, dropped her
22 racquet, grabbed her eye with both hands, and crumpled to the court. I rushed to her, calling Majel
23 to bring ice and the first aid kit. Linda said she couldn't see, so we rushed her to Weston Memorial's
24 emergency room. It was some time later that I learned about the detached retina.
25 ********
26 **Q**: How would you rate Ms. Alexander's level of play since her injury?
27 **A**: She's fallen off, well below the level of top-flight amateur players. She seems a little
28 gun-shy, worried about being hit again. And the safety glasses might be limiting her peripheral
29 vision. If she keeps on going this way, Linda won't be able to make the BTI amateur team.

EXCERPTS FROM DEPOSITION OF LINDA ALEXANDER

****

1 **Q**: Can you give us a candid evaluation of your tennis skills before your injury?
2 **A**: I held an ILTA Expert rating, the highest ranking available to an amateur. In the five
3 years prior to my injury, I reached the finals of eleven singles and two doubles events. That's
4 metropolitan, state, and regional amateur tournaments. I expected to be either the second or third
5 seed among the women in last year's Franklin Amateur. I didn't get to play, of course.
6 **Q**: And in the aftermath of the eye injury?
7 **A**: I'm a completely different player. The sport safety glasses I've been ordered to wear to
8 protect myself from another injury and possible blindness limit my vision and make it difficult to
9 pick up the ball in flight. As a result, I'm slower by a step or more. That's the difference between
10 a top amateur and an also-ran. I doubt I'll even qualify for ILTA Expert at next year's renewal test.
11 ********
12 **Q**: Take us through the lesson with Sandy Bell on the day you were injured.
13 **A**: Well, I wanted to work on my net game in preparation for the Franklin Championships.
14 I had been hesitating a fraction in going to the net, both on serves and groundstrokes. And then
15 when I got to the net, I felt uncomfortable, not in control. Sandy started out slowly, talking me
16 through the decision making and walking me through the approach and the stroke. I really felt we'd
17 made a lot of progress but I wanted to see how I'd do under game conditions. Sandy said he'd adjust
18 his play, as much as possible, to provide me with opportunities to come to the net. We began our
19 usual pregame warm-ups. I was at the net and Sandy was hitting groundstrokes to me. I'd returned
20 most but missed some so there were a number of loose balls around my feet at the net. After I
21 missed a backhand, Sandy said, "Let's move back to the baseline," or something like that. At that
22 point, something on the sideline distracted me, when all of a sudden I got smacked in the right eye
23 with one of Sandy's patented 80-mile-per-hour forehands. A searing pain and a blinding light
24 exploded in my head and I collapsed. The next thing I remember was Weston Memorial and Dr.
Moenssens talking to me in pre-op about a detached retina.

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Galardi v. Seahorse Riding Club, et al.

Franklin Court of Appeal (1995)

Leslie Galardi sustained personal injuries when she fell from a horse while training for an upcoming horse show. She sued the stables, Seahorse Riding Club, and the instructor, Lisa Jacquin, complaining that they had "negligently instructed, supervised, and controlled plaintiff's activities by advising her to jump over fences that were unreasonably high and improperly designed, located, and spaced." The trial court granted defendants' motion for summary judgment, which was based upon the doctrine of primary assumption of risk, and the plaintiff appealed.

On the day of her injury, Galardi was preparing for an upcoming horse show with her horse, Tomboy, by practicing one-stride jump combinations at the Seahorse Riding Club. The jump combination consists of two individual fence jumps set up so that the horse takes a single stride between each jump. Galardi, an experienced equestrian, had ridden Tomboy for several years in "A-rated" shows involving performance jumps and obstacles of various types, had on many occasions ridden horses that had either balked at a jump or missed a stride when taking a jump, had observed more than 50 horse-related injuries, and understood that jumping a horse creates a greater risk of injury to the rider than does riding on flat terrain.

During the practice, Lisa Jacquin, an instructor at the riding club, twice raised the height of the jumps without lengthening the distance between each obstacle. Deposition testimony reveals Galardi was aware of Jacquin's actions and understood they made subsequent jumps "more difficult and more dangerous." When Galardi attempted the maneuver, her horse successfully jumped the first obstacle. However, the horse landed too close to the second jump, was unable to take a stride, and consequently popped up into the air, knocking down the second jump and causing plaintiff to lose her balance and fall. She sustained injuries to her coccyx and two vertebrae.

In *Knight v. Jewett* (Franklin Supreme Court, 1993), our highest court explained the distinction between primary and secondary assumption of risk cases. Primary assumption of risk cases are those in which the defendant has no duty to protect the plaintiff from a particular risk. In contrast, in instances of secondary assumption of risk, the defendant does owe a duty of care to the plaintiff and,

if there is a breach of duty, some liability attaches even though "the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty." The *Knight* case, like ours, arose from a summary judgment granted in favor of defendant. The plaintiff was a young woman who had engaged in a vigorous game of tag football. Defendant, a player on the opposing team, ran into her, knocked her down, and stepped on her hand. This resulted in an injury to a finger that eventually led to its amputation. The plaintiff, who had played tag football on other occasions, claimed that she cautioned defendant just before the play in which she was injured to "take it easy and not act so rough." Defendant denied hearing such admonition. The *Knight* court concluded that the defendant tag football player owed no duty to plaintiff beyond avoiding reckless and intentionally harmful conduct. Since the case turned on whether defendant owed a duty of due care to plaintiff, it was not necessary to examine the plaintiff's subjective awareness of the danger involved, or whether she impliedly agreed to relieve defendant of a duty. It thus found the case to be one of primary assumption of the risk and affirmed the grant of summary judgment in defendant's favor.

The *Knight* court noted that, at least with the more active sports, players and operators owe no duty to co-participants for injuries that are considered to be inherent risks of the sport. It pointed out, however, that "although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport." And the court emphasized that the scope of a defendant's legal duty in the sports context will depend not only on the nature of the sport itself, but also on the defendant's "role in, or relationship to, the sport" and that "in the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue in a given case."

In *Tan v. Goddard* (California Court of Appeal, 1995), the court held that although co-participants in a sport ordinarily owe no duty to each other, "coaches and instructors often owe a duty of due care to persons in their charge." In *Tan*, a student horse jockey and novice horse rider fell from a horse during training and sued the horse racing school and his coach. The injured jockey complained that he had been given an unsuitable horse to ride, that he had not received sufficient instruction, and that the condition of the track was unsafe. The court reversed the trial court's granting of summary

judgment, finding the doctrine of primary assumption of the risk inapt, because the defendant's role "as a riding instructor to an inexperienced rider was such that he owed a duty of ordinary care."

In the instant case, in deciding whether summary judgment is warranted, we must determine whether, in light of the nature of the sporting activity in which defendants and plaintiff were engaged, defendants had a legal duty of care to plaintiff.[1] In applying this analytical framework, we must look both to the nature of the sport and to the roles and relationship of the parties. Clearly, the sport of horse jumping has the inherent risk that both horse and rider will fall and suffer injury. The basic character of the sport involves engaging increasingly higher jumps and at shorter intervals until at some point the competitors can no longer clear the obstacles without substantial contact. Collisions with the jumps and ensuing falls are thus an integral part of the sport. Riders may also fall from the horse as the result of other conditions such as a balking or stumbling mount. Such risks were clearly among those which Galardi knowingly encountered during her training, when the jumps were raised and intervals became more hazardous.

Here, the occasion of Galardi's fall and injury was not during competition with other riders. Instead, she had placed her training in the hands of defendants, who were employed to instruct and coach her. Their responsibilities were directly to her. Other riders, as co-participants, would not have any special duty of care to Galardi during competition to insure she did not fall. However, the defendants, who, we may infer, had knowledge and experience concerning the sport of horse jumping superior to that of Galardi, certainly had a duty to avoid an unreasonable risk of injury to her and to take care that the jumping array was not beyond the capability of horse and rider.

Having determined that defendants had a duty of care, a breach of which was a possible cause of plaintiff's injury (a matter which ultimately must be decided by the trier of fact), this case necessarily falls into the category of secondary assumption of risk. In such circumstance, it is for the trier of fact

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[1] In reviewing a motion for summary judgment, we first determine whether there are disputed material facts. There may be disputed facts, but if they are not material, they will not prevent the granting of a motion for summary judgment.

to determine the cause of the injury and to apportion the loss resulting from the injury; in so doing it may consider the relative responsibility of the parties. Hence, in this case the motion for summary judgment should have been denied.

Watt v. Cincinnati Reds, Inc., et al.

Franklin Court of Appeal (1996)

Jeffrey Watt, a 17-year-old high school baseball player, read in the *Plantation Herald* that the Cincinnati Reds major league baseball team would hold local "tryouts" for experienced amateur players between the ages of 16 and 21. Having pitched for his high school baseball team the last two seasons, Watt wanted to fulfill his youthful dream and become a pitcher for the Reds.

Watt arrived at the appointed playing field and signed in along with dozens of other young players. Don Zimmerman, the Reds' Supervisor of Scouts, gave an orientation talk in which he introduced his assistants and explained the procedures for the day. During this talk, Zimmerman asked pitchers when they had last thrown and asked all participants if they had any injuries. Injured players were not permitted to participate fully in the tryout. After the orientation, participants were timed in a 60-yard dash. Balls were then hit to infielders and outfielders at their respective positions, and they fielded them and made throws. All of this was observed by the Reds' representatives in attendance who would, on occasion, provide advice to individual players on proper techniques.

The last part of the tryout was conducted under conditions simulating an actual game. The pitchers, including Watt, each took a turn throwing to several batters. Before his turn, Watt threw a number of warmup pitches to get his arm ready. On his third pitch to a batter, he felt his arm "pop" but experienced no particular pain. He stepped off the pitcher's mound and informed the Reds' personnel, including Zimmerman, that his arm had popped. Receiving no response, Watt returned to the mound and threw another pitch.[1] He immediately experienced severe pain in his arm and quit pitching. A subsequent medical examination revealed a portion of the bone and tendons in Watt's arm had been pulled away due to the force of contraction of his tricep muscle during pitching.

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[1] Whether or not the Reds' representatives responded to Watt's statement is a matter of dispute. It is undisputed, however, that Watt heard no response.

Watt initiated this action against the Reds and Zimmerman claiming negligence in permitting him to throw a fourth pitch after they knew or should have known this would cause severe injury. Defendants moved for summary judgment claiming that plaintiff's injury is one inherent in the sport of baseball, that hence they owed him no duty of care, and that the plaintiff assumed such a risk when he voluntarily participated in the tryout. The trial court granted the motion.

In *Knight v. Jewett* (1993), the Franklin Supreme Court explained that assumption of risk is of two types, primary and secondary. Secondary assumption of risk is where a defendant breaches a duty of care owed to the plaintiff but the plaintiff nevertheless knowingly encounters the risk created by the breach. Secondary assumption of risk is not a bar to recovery, but it requires the application of comparative fault principles. Primary assumption of risk occurs where a plaintiff voluntarily participates in a sporting event or activity involving certain inherent risks. For example, an errantly thrown ball in baseball or a carelessly extended elbow in basketball are considered inherent risks of those respective sports. Primary assumption of risk is a complete legal defense and bars any recovery.

Primary assumption of risk is merely another way of saying that no duty of care is owed as to risks inherent in a given sport or activity. The overriding consideration in the application of this principle is to avoid imposing a duty which might chill vigorous participation in the sport and thereby alter its fundamental nature. In *Knight,* for example, the defendant, a participant in a touch football game, knocked over the plaintiff, another participant, and then stepped on her hand and injured it. The court held the defendant owed no duty to the plaintiff under these circumstances: "In the heat of an active sporting event like baseball or football, a participant's normal energetic conduct often includes accidentally careless behavior. Even when a participant's conduct violates a rule of the game and may subject the violator to internal sanctions prescribed by the sport itself, imposition of legal liability for such conduct might well alter fundamentally the nature of the sport by deterring participants from vigorously engaging in activity that falls close to, but on the permissible side of, a prescribed rule." Thus, *Knight* stands for the proposition that negligent conduct of a participant in an active sport is an inherent part of the game.

There can be little question that an arm injury such as that suffered by Jeffrey Watt is a risk inherent in the sport of baseball. Watt was a pitcher. In baseball, the objective of a pitcher is to throw the ball with such accuracy and velocity and along such trajectories as will tend to inhibit batters from hitting it. This activity naturally causes great strain on the pitching arm. The injury Watt suffered was a direct result of the natural strain caused by the pitching motion of the arm.

Had Watt stopped after his third pitch of the simulated game, we would have no difficulty finding primary assumption of risk a bar to recovery. Up to that point, defendants did nothing more than provide an opportunity for Watt to do what he had been doing for the last two years, i.e., to pitch. Whatever injury occurred on the third pitch was an inherent risk of the pitcher's unremitting contest with the batter. However, the incident did not end with the third pitch. Defendants initially directed Watt to pitch and then permitted him to continue after he informed them his arm had "popped." It is reasonable to infer that when Watt, a 17-year-old, informed the Reds' personnel his arm had "popped," he was seeking guidance as to how to proceed. Hearing nothing to countermand the original instruction to pitch, and obviously anxious to please and impress the scouts, Watt threw another pitch, thereby causing further injury.

In *Galardi v. Seahorse Riding Club* (1995), an experienced rider was injured when she fell from a horse during training. She sued her instructor and the owner of the stables for negligence claiming they caused her to jump over fences which were unreasonably and unnecessarily high and improperly designed, located, and spaced. We reversed summary judgment for the defendants. While recognizing the risk of injury from a fall cannot be eliminated and in fact creates the challenge which defines the sport, i.e., is an inherent part of the sport, we concluded these defendants owed a duty to avoid an unreasonable risk of injury to plaintiff and to take care that the jumping array was not beyond the capability of horse and rider. Like the defendant in *Galardi,* defendants here were not co-participants in the sport or activity but were instead in control of it.[2] Defendants decided what would be done and when. They controlled the simulated game in the sense of determining who would play what positions, including pitcher, and for how long. They supplied necessary equipment,

[2] Defendants' argument that they were participants in the tryout because both player and observer are integral parts of a tryout is in error. Under the reasoning of *Knight*, participants are limited to those actively engaged in the game or other activity.

such as bats and batting helmets, and took it upon themselves to restrict the participation of players with injuries. They also gave a limited amount of instruction on techniques. Under these circumstances, defendants owed a duty to plaintiff and the other participants not to increase the risks inherent in the game of baseball. Thus, for example, they owed a duty not to supply faulty equipment such as batting helmets or catching gear.

Various policy considerations support imposition of a duty here. It requires no depth of analysis to recognize that, when one injures himself, further use of the injured member will likely exacerbate the condition. This is especially pertinent where, as here, the further use is in connection with a tryout for a professional sports team. It cannot be lost on defendants that the tryouts they conduct are the only opportunity for many boys and young men to demonstrate they have the potential to play major league baseball, and perhaps to command the astronomical salaries and enjoy the universal celebrity that are identified with the sport. Under such circumstances, it is likely a participant will attempt to push his body beyond its capabilities.

While we attach no moral blame to defendants' conduct, it is nevertheless true the tryout was conducted for their benefit. Defendants' objective was to discover talented players who could improve the Reds' future prospects. Imposition of a duty to protect participants from aggravating an existing injury would help to prevent future harm. At the same time, such a duty would not unduly burden either defendants or injured players. Neither is served by permitting a player to participate in a tryout where such participation is necessarily constricted by an injury. For the foregoing reasons, summary judgment was improperly granted.

NOTES

INSTRUCTIONS

1. You will have 90 minutes to complete this session of the examination. This performance test is designed to evaluate your ability to handle a select number of legal authorities in the context of a factual problem involving a client.

2. The problem is set in the fictitious state of Franklin, in the fictitious Fifteenth Circuit of the United States. In Franklin, the trial court of general jurisdiction is the District Court, the intermediate appellate court is the Court of Appeal, and the highest court is the Supreme Court.

3. You will have two kinds of materials with which to work: a File and a Library. The File contains factual information about your case. The first document is a memorandum containing the instructions for the task you are to complete.

4. The Library contains the legal authorities needed to complete the task. Any cases may be real, modified, or written solely for the purpose of this examination. If the cases appear familiar to you, do not assume that they are precisely the same as you have read before. Read them thoroughly, as if all were new to you. You should assume that cases were decided in the jurisdictions and on the dates shown. In citing cases from the Library, you may use abbreviations and omit page references.

5. Your response must be written in the answer book provided. In answering this performance test, you should concentrate on the materials provided. What you have learned in law school and elsewhere provides the general background for analyzing the problem; the File and Library provide the specific materials with which you must work.

6. Although there are no restrictions on how you apportion your time, you should probably allocate at least 45 minutes to organizing and writing after you have studied and digested the materials. You may make notes anywhere in the test materials; blank pages are provided at the end of the booklet.

7. This performance test will be graded on your responsiveness to instructions regarding the task you are to complete given to you in the first memorandum in the File and on the content, thoroughness, and organization of your response.