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Willful and wanton conduct with kids gets clearer reading

Much ink has been spilled highlighting the hundreds of cases filed by retired professional athletes against professional sports organizations.

Certainly, these high-profile cases on behalf of the thousands of NFL and NHL retirees suffering from permanent, progressive brain disease are novel and interesting. But, what about youth sports?

It is estimated that approximately 1.35 million young people suffer from sports-related injuries each year. (Safe Kids Worldwide, based on hospital ER records, 2012 Janet Loehrke, USA Today)

These injuries include traumatic brain injuries, acute orthopedic injuries, injuries related to overexertion and, in the most tragic circumstances, death.

Some sports injuries are natural and inherent risks of the game. But, when kids' injuries are caused by the negligent or willful and wanton conduct of teachers, coaches, trainers, participants, organizers or facilitators of the event, liability will be imposed.

Indeed, Illinois jurisprudence is robust regarding liability for injuries sustained by athletes. In sum, if the defendant is a private entity or citizen, ordinary negligence principles will apply. But, where public schools are named as defendants, the burden of proof often requires a demonstration of willful and wanton conduct due to potential implications of the Local Governmental and Governmental Employees Immunity Act. 745 ILCS 10/3-108.

Recently, the 1st District Appellate Court again addressed the scope of willful and wanton conduct in this context. *Barr v. Cunningham*, 2016 IL App (1st) 150437. In *Barr*, a Conant High School student was injured while playing floor hockey in gym class. Id. During the game, the ball being used as a puck bounced up and hit Evan Barr in the eye, causing injury.

Laurel Cunningham, the instructor facilitating the game at the Hoffman Estates school, admitted that there were goggles in the school's supply closet which would provide protection from this sort of injury. Id. Nevertheless, Cunningham "decided not to require the use of goggles because she did not believe that a serious injury would occur given the other equipment the students were using."

The trial court denied the school district's summary judgment motion based upon its perceived application of the immunities granted by Sections 2-201 (discretionary immunity) and Section 3-108 (supervisory immunity), stating "genuine issues of material fact exist for the trier of fact to decide whether the acts were discretionary and rise to [the] level of willful and wanton conduct."

But, at the conclusion of evidence at trial, it granted the defendants' motion for directed verdict, finding that the student had failed to prove willful and wanton conduct as a matter of law.

On appeal, the granting of a directed verdict was reversed. The 1st District held that the facts adduced at trial required the trier of fact to resolve the case as the teacher's conduct "involves the sort of conduct that a jury could find amounts to a conscious disregard for the safety of her students."

Significant to the court's decision in this case was the fact that Cunningham knew that the specific injury was possible; she knew that the equipment necessary to mitigate that injury was available for her use; she knew that none of the safety precautions she had implemented would mitigate that particular risk; yet, she made the "conscious decision to forego the use of already available safety equipment."

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The court explained that a jury's finding of willful and wanton conduct could be reasonable because, although the injury could be considered "inherent" in the game, "Cunningham's failure to apprehend a potentially dangerous situation exacerbated the inherent risks of this athletic activity ... "

In short, the *Barr* court held that "willful and wanton conduct involves failure to take reasonable precautions despite having notice that substantial danger was involved." This conceptual underpinning is consistent with our Supreme Court's finding in *Murray v. Chicago Youth Center*, 224 Ill.2d 213 (2007).

In *Murray*, a 13-year-old student was paralyzed after attempting to perform a flip off a mini-trampoline during a tumbling class. The plaintiff, Ryan Murray, argued that willful and wanton conduct was based on the evidence that the teacher allowed students to use the mini-trampoline to "free lance" without instruction or supervision and to perform flips without spotters or safety harnesses and without appropriate trampoline mats. 224 Ill.2d at 244.

According to the *Murray* court, "willful and wanton" includes mental states ranging from a deliberate intent to cause harm, to an indifference for the safety and property of others, to a conscious disregard for the safety of others or their property.

Our Supreme Court determined that genuine and material triable issues of fact existed on the question of whether the defendants were guilty of willful and wanton conduct where the evidence demonstrated that the risk of spinal cord injury from improperly executed somersaults was well known, that the defendants did not adequately supervise or teach the students to ensure safety and failed to provide trained spotters and safety equipment.

Injuries will happen in sport. As our Supreme Court reminded us in *Karas v. Strevell*, when we sign our kids up for a sport, we are also signing them up for its inherent risks. *Karas v. Strevell*, 227 Ill.2d 440, 456 (2008). But, when kids are injured while participating in sports due to the negligence, or recklessness, of those organizing, facilitating, or providing equipment for the game, the law will hold the tortfeasors responsible.

Barr v. Cunningham provides some further clarity on the expectations of facilitators and supervisors of youth sports and recreation as well as the relationship between the facilitator's conduct and the inherent risk of injury.