

A basketball player suffered a serious injury while participating in an impromptu basketball game at a public park. The injury occurred when the player and an opponent each tried to obtain possession of the ball when it rebounded from the backboard after a missed shot at the basket. During that encounter, the opponent swung his elbow to strike the player and injured him. The player now seeks compensation from the opponent.

At the trial, evidence was introduced tending to prove that the game had been rough from the beginning, that elbows and knees had frequently been used to discourage interference by opposing players, and that the player had been one of those making liberal use of such tactics.

In an action by the player against the opponent for battery, will the player likely prevail?

- A. No, because the opponent did not intentionally use force that exceeded the player's consent.
- B. No, because the player impliedly consented to rough play.
- C. Yes, because the opponent intended to cause a harmful or offensive contact with the player.
- D. Yes, because the opponent intended to strike the player with his elbow.

Explanation:

Battery occurs when a defendant intends to inflict harmful or offensive contact (or imminent apprehension of such contact) and causes contact that harms or offends the plaintiff. **Consent** (actual, apparent, or implied) is a **defense** to battery. **Apparent consent** exists when a reasonable person would have understood the plaintiff's **conduct or custom**—ie, accepted behavior in the community—to indicate consent. However, consent is **ineffective** if the defendant's conduct **exceeds** the **scope of consent**.

Here, the opponent intentionally struck the player with his elbow, causing an injury (battery) **(Choices C & D)**. However, the opponent reasonably understood that the player had consented to kneeling and elbowing that customarily occurred during the game (apparent consent) and the opponent's conduct (elbowing) did not exceed the scope of the player's apparent consent. Therefore, the opponent is *not* liable for battery.

(Choice B) It is only implied that the player consented to *customary* rough play (eg, kneeling and elbowing)—not *all* rough play. Therefore, this question turns on whether the opponent's rough play was intentional and whether it exceeded the scope of the player's consent.

Educational objective:

Apparent consent is a defense to battery when consent can be reasonably implied from the plaintiff's conduct or from custom. However, consent is only a defense when the defendant's conduct falls within the scope of the plaintiff's consent.

References

Restatement (Second) of Torts § 13 (Am. Law Inst. 1965) (battery by harmful contact).

Restatement (Second) of Torts § 18 (Am. Law Inst. 1965) (battery by offensive contact).

Restatement (Second) of Torts § 892A (Am. Law Inst. 1979) (effect of consent).

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