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A newsletter brought to you by the Sports Law Group at Proskauer.

Welcome to *Three Point Shot*, a newsletter brought to you by the Sports Law Group at Proskauer. *Three Point Shot* brings you the latest in sports law-related news and provides you with links to related materials. Your feedback, thoughts and comments on the content of any issue are encouraged and welcome. We hope you enjoy this and future issues.

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Motions Denied: Netflix Still Going Head-To-Head With Chess Grandmaster

After more than a month of waiting, moves have finally been made in the match between Nona Gaprindashvili and Netflix, Inc. [For extensive background on the case, see "The Law Is Not Black and White: The Queen's Gambit Faces Chess Grandmaster," a piece published in the December 2021 issue of *Three Point Shot*.]

As a quick refresher, Nona Gaprindashvili ("Gaprindashvili" or "Plaintiff"), a 80-year-old Georgian woman and also the first female chess player to be awarded the title of Grandmaster in 1978, filed a complaint in a California district court in September 2021 against Netflix, Inc. ("Netflix" or "Defendant") for false light invasion of privacy and defamation *per se* as a result of an alleged "manifestly defamatory" line (the "Line") of dialogue about her in the final episode of the hit miniseries *The Queen's Gambit*. The scene at issue takes place while the main character, Elizabeth Harmon, plays at the fictional Moscow Invitational of 1968. There, a tournament announcer speculates that Harmon's male opponents likely would not have adequately prepared to compete against her. The announcer explains:

"As far as they knew, Harmon's level of play wasn't up to theirs. […] Elizabeth Harmon's not at all an important player by their standards. The only unusual thing about her, really, is her sex. And even that's not unique in Russia. **There's Nona Gaprindashvili, but she's the female world champion and has never faced men**. My guess is Laev was expecting an easy win, and not at all the 27-move thrashing Beth Harmon just gave him." [emphasis added]

Plaintiff alleged the language is false and "manifestly defamatory" – as she claims she had played matches against the world's best male chess players by the year 1968, the year of the fictional Moscow Invitational, and thus the dialogue impugns her.

Following the filing of plaintiff's complaint, in November 2021, and in defense to Gaprindashvili's claims, Netflix filed a motion to dismiss or, in the alternative, a motion to strike under California's anti-SLAPP (strategic lawsuits against public participation) statute. Both Gaprindashvili and Netflix slid some pieces around the board in December 2021, with Gaprindashvili filing opposition papers and Netflix its reply.

After considering the parties' arguments, the Court ultimately denied Netflix's dismissal bid and allowed Gaprindashvili's defamation claim to proceed. If Netflix was looking for a game of speed chess, the Court's order indicated that it best remain seated. (*Gaprindashvili v. Netflix Inc.*, No. 21-07408 (C.D. Cal. Jan. 27, 2022)).

Netflix gained an early advantage when the Court dismissed Gaprindashvili's claim for false light invasion of privacy. Under California law, a false light invasion of privacy claim "must relate to the plaintiff's interest in privacy." In this case, and to the contrary, the Court reasoned the problematic Line had little to do with Gaprindashvili's private life; rather, it directly and utterly related to her very public and professional life. Thus, because Gaprindashvili failed to plead the publication of the Line "intrudes" into her private life, the Court dismissed the false light invasion of privacy claim.

At this early point in the litigation, however, Netflix's defense was not stout enough to repel Gaprindashvili's defamation cause of action. To establish a claim for defamation *per se*, a plaintiff must meet different criteria, none having to do with privacy. For example, the Court noted that under California law, a "[p]laintiff must plead (a) a publication that is (b) false, (c) defamatory, and (d) unprivileged and that (e) has a natural tendency to injure or that causes special damage." Lastly, if a plaintiff is a public figure, a litigant "must also plead the requisite constitutional malice" to have their claim upheld.

In its defense, Netflix argues Gaprindashvili fails to plead all the elements of her claim. First, Netflix contends the Line is not false, "as a reasonable viewer would not believe the Line conveyed an objective fact." To support this contention, Netflix points to the fictional nature of the work and the presence of a disclaimer that runs during the end credits of every episode. Second, Netflix avers "the Line is not defamatory because it contains no defamatory implication." Rather than implying the Line to mean Gaprindashvili was inferior to men at the time, Netflix argues the Line merely implies Gaprindashvili had "never faced men" because of the structural barriers in place during the 1960s Cold War era. Third, Netflix asserts the Line is privileged, as it "falls under the 'substantial truth' defense." Although the Line may not have been entirely accurate, Netflix argues Gaprindashvili's participation in high-level chess tournaments against men largely occurred in the 1970s, a few years after the portrayed fictional Moscow Invitational. Fourth and finally, Netflix proclaims Gaprindashvili "cannot plead the requisite 'actual malice,'" as the network conducted diligent research and even hired two chess experts to confirm historical details.

The Court, in considering the elements, ruled "the fact that the series was a fictional work does not insulate Netflix from liability for defamation if all the elements of defamation are otherwise present … The test is whether a reasonable viewer would understand the character to be the person identified and to have the characteristics as described." The Court further elaborated "the context in which the statements were made and … the content of the statements themselves" can be helpful in determining what the reasonable viewer might understand when hearing the Line. Throughout the miniseries, real people and events are referenced. Gaprindashvili's name is spoken not only at the Moscow Invitational of 1968, a clear contextual reference to her real life career as a professional woman chess player, but in a moment where the camera fixates on an actress who bears a physical resemblance to her. As a result, the Court ruled the Line "is reasonably susceptible of an interpretation which implies a provably false assertion of fact" and viewers may reasonably have believed the Line to be a historical detail incorporated into the series.

Furthermore, the Court determined, in its consideration of the elements, it is plausible for the Line to have a defamatory implication. The Court stated, at a minimum, the Line is "dismissive of the accomplishments central to Plaintiff's reputation" and, given Plaintiff's allegations, it not only tends to diminish Gaprindashvili's historical accomplishments, but also may plausibly harm her reputation and negatively affect her ongoing professional chess career.

The Court was unconvinced of Netflix's "substantial truth" defense as well. The "substantial truth" defense protects a party from the consequences of making an allegedly defamatory statement if the statement is slightly inaccurate in its details but conveys the same "gist or sting" as an accurate statement would have conveyed. The Court found Netflix misapplied the defense in this case, as an accurate account of Gaprindashvili's accomplishments would have had "an entirely different 'effect on the mind of the reader.'" Viewers would have envisioned "Plaintiff as a trailblazer that [main character and rising champion] Beth Harmon followed, or another woman chess player on a parallel path" as Harmon.

Lastly, as to the actual malice standard, the Court agreed with Gaprindashvili that evidence showed Netflix might have known the Line was false or "acted in reckless disregard of whether it was false or not," rejecting Netflix's lack of malice argument. The Court was ultimately swayed by Plaintiff's allegations that anyone with knowledge of chess history knows of Nona Gaprindashvili's achievements and "[a]ny simple Google search" would have revealed the truthful information.

Another of Netflix's pieces fell when the Court similarly rejected its anti-SLAPP motion to strike. Here, the Court denied the motion to strike because it found Plaintiff had stated a legally sufficient defamation claim and made a prima facie factual showing that she had a reasonable probability of success on the merits, evidence which Netflix failed to overcome at this stage of the litigation.

With the Court having declined to dismiss the case, stay tuned to see this match escalate. At the beginning of the month, Netflix appealed the district court's ruling to the Ninth Circuit. Gaprindashvili may not be the protagonist of *The Queen's Gambit*, but at least for now, her early strategy and pawn structure have placed Netflix in a bind.

California Court of Appeal Cries Foul over Application of "Baseball Rule"

A three-justice panel of the California Court of Appeal's Fourth District declined to apply the "Baseball Rule", and refused to dismiss injury claims asserted by a college baseball spectator who was struck by a foul ball, finding multiple issues precluded summary judgment. (*Mayes v. La Sierra University*, No. E076374 (Cal. App., 4th Dist. Jan. 7, 2022)). The Baseball Rule, originally an outgrowth of the contributory negligence and assumption of risk tort law doctrines, limits the duty owed by stadium owners and operators to spectators hit by foul balls. The Rule is based on the premise that the risks of batted and flying balls are so obvious that they must be perceived by those who attend the game, and, therefore, such risks are assumed as a matter of law by such persons. But while the Rule can provide a strong backstop against claims by injured spectators at the ballpark, its citation by defendants often spurs debate as to when and how much spectators assume risk at sporting events.

The Baseball Rule is nearly as old as the sport itself, tracing its origins to Missouri resident Samuel Crane's ill-fated 1910 trip to spectate the (now defunct) Kansas City Blues. Crane, sitting along the third base line, was injured by a foul ball and sued the team for negligence, but his suit was benched by the Missouri Court of Appeals. The court held that generally, so long as the ballpark offers at least some protected seating (*i.e.*, behind home plate), baseball fans sitting in areas unprotected by netting assume the risk of being struck by foul balls. *Crane v. Kansas City Baseball & Exhibition Co.*, 153 S.W. 1076 (Mo. App. 1913). As baseball's popularity grew, other states followed Missouri's lead (including California in 1935) and the Rule—and assumption of risk in recreational activities in general—became tort law gospel. Indeed, as was duly summed up by Judge Cardozo in the 1929 *Murphy* decision (involving an injury at an amusement park): The participant in a recreational activity "accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. … The timorous may stay at home."

Assumption of risk has had extensive application in a number of cases involving spectators at a sporting event, including those struck by foul balls, but some courts in the last decade have re-examined the Baseball Rule or adopted variations to it. These changes illustrate the evolution of tort law, and perhaps also reflect courts' reaction to the modern fan experience: free WiFi and

smartphone screens vie for spectators' undivided attention to the game action, while pitchers and hitters have upped their power. Still, unlike other sports, baseball involves a certain type of spectator participation, particularly with respect to fans' desire to catch balls that leave the field of play.

Of course, none of this was on plaintiff Monica Mayes's ("Plaintiff" or "Mayes") mind when, on a sunny spring day in 2018, she arrived at La Sierra University's ("La Sierra" or the "University") baseball field to watch her son pitch against the home team. Mayes, her complaint alleged, did not worry about danger from foul balls, since protective netting was ubiquitous at the college ballparks she had attended in the past. So, sitting behind the raised dugout with her view of the batter's box obstructed, she never saw coming the foul ball that sailed over the raised dugout and struck her in the face. Suffering skull fractures and brain damage, Mayes brought suit in October 2018 in California state court against La Sierra for negligence, citing advances in the manufacturing and affordability of see-through protective netting and claiming that La Sierra's field was "dangerous and substandard for a college baseball field."

The University, citing the Baseball Rule, moved for summary judgement. It argued that it did not sell tickets or charge admission to the game in question and did not mandate where spectators could sit at its games (allowing spectators to sit in a small portable bleacher or bring their own chairs). The University further claimed that Mayes willingly chose to sit in an unscreened area along the third-base line (where she could see her son pitching, but not the batters because of the raised dugout), and that she was cognizant of the risk of foul balls, having attended hundreds of games to watch her son play. La Sierra also pointed out that there had been no reported incidents of injured spectators at the field before Mayes's incident.

In 2020, the trial court granted the University's motion, calling the case "a textbook primary assumption of risk case." The court noted that the University had "no duty to protect plaintiff from risks inherent" in baseball, and that being struck by a foul ball was such a risk. The University had provided some shielded seating behind home plate, meeting the traditional minimum requirement dating back to the days of the Kansas City Blues.

But the ruling was merely strike one for Mayes. Undeterred, she appealed to the California Court of Appeal's Fourth District, where her claim found relief. In January 2022, a three-judge panel held that owners and operators of sports venues have a "duty to undertake reasonable steps or measures to protect their customers' or spectators' safety—if they can do so without altering the nature of the sport or the activity." The appellate court noted that while the primary assumption of risk doctrine attempts to avoid chilling vigorous participation in or sponsorship of recreational activities by limiting liability for certain inherent risks of harm, it does not "absolve operators of *any obligation* to protect the safety of their customers" [emphasis in original]. The appellate court found that the trial court took a "cramped" and "oversimplified" view of the Baseball Rule that was "out of step with California's primary assumption of risk doctrine." According to the appellate court, the lower court erred in granting summary judgment to the University because it applied the Baseball Rule without taking into account whether the University could have taken any reasonable steps to minimize the risk that spectators at its games would be injured by foul balls, or whether no such steps could have been taken without changing the nature of the game or adversely affecting spectators' enjoyment of the game.

Subjecting the case to more traditional negligence analysis, the appellate court spotlighted several unresolved issues on which the negligence question hinged. Did a small university like La Sierra have a duty to install more protective netting, or at least warn of its absence? Similarly, was there a duty to provide crowd control at the well-attended playoff game, *i.e.*, to minimize distractions and obstructions that might leave spectators vulnerable to foul balls? Pondering these questions, the court noted that perhaps the "open and obvious" conditions at La Sierra's field might constitute a complete defense to Mayes's negligence claim. Ultimately, the court found that these issues were questions of fact too close for it to call—a reasonable jury could go either way—and so the case was sent back to the trial court. Mayes and La Sierra may meet at the

mound and settle, or they may decide to take the case to a jury, but regardless of the ultimate outcome for the litigants, it will be interesting to see how the trial court (and other courts) interprets the hoary Baseball Rule in this century.

English High Court Needs No Added Time to Award Damages to Premier League over Distribution Agreement

On January 11, 2022, a London High Court granted The Football Association Premier League Ltd. ("Premier League") a $213 million judgment following the collapse of its broadcast deal with Hong Kong's PPLive Sports International ("PPLive") for rights to air live matches and highlights packages in mainland China and Macau. After the 2020 Premier League season was temporarily interrupted due to the COVID-19 outbreak, which forced the Premier League to modify its scheduling of matches, PPLive missed two installment payments under the contract. Non-payment by PPLive led to the legal battle with the Premier League. In January, the judge ruled in favor of the Premier League at the summary judgment stage without the need to go into extra time, noting that the League had hit the high bar for summary judgment due to the strength of its case. (*The Football Association Premier League Ltd v PPLive Sports International Ltd*, [2022] EWHC 38 (Comm) (11 January 2022)).

The Premier League, formed in the 1990s, is the top division in English soccer, where the 20 teams play each other twice (home and away). As with many sports, the broadcast rights, both domestic and foreign, have increased in value over time given the growing popularity of the League and improvements in streaming technology. The deal in question included rights to air both live and delayed Premier League football games over three seasons (beginning in 2019) in mainland China and Macau under two separate contracts, namely a Live Package Agreement and a Clips Package Agreement. At the time the agreement was entered, it was the league's largest international TV deal. The broadcaster, PPLive, had already paid initial installments under the agreement for the 2019-2020 season. Thus, the deal was presumably moving along at a canter until the outbreak of COVID-19 in 2020, which forced the Premier League to blow the whistle on all games in March 2020 for three months.

When play resumed in June 2020, PPLive claimed there had been a "fundamental change to the format of the competition," as defined under the agreement, necessitating a renegotiation of the terms and payment structure. However, the Premier League declined to revisit the agreement. Following the three-month shutdown, the Premier League resumed its season, albeit with some changes that were familiar to many sports fans at the time. Spectators were no longer allowed into the stadium and, in order to fit the remaining games of the season into the truncated period of time remaining in the season, several adjustments were made to the formation of the schedule, including more midweek evening games, later kick-off times and fewer weekend matches. Among other things, this moved the goalposts for when some live matches would be streamed in China to times that were less convenient or desirable.

Despite PPLive's non-payment, the Premier League continued to provide PPL with the relevant feeds of matches under both agreements for the remaining 92 matches of the 2019/2020 season that ran from June to July 2020. During this time, PPLive missed a $210.3 million installment due at the beginning of March 2020, as well as a $2.7 million payment for highlights videos due in June 2020. With no installment payment forthcoming, the Premier League gave PPLive the "golden boot," of sorts, and eventually terminated the $700 million three-year deal with PPLive before the start of the 2020/2021 season. The Premier League claimed that it was entitled to suspend all live feeds and licensing agreements, without incurring any lability, due to PPLive's nonpayment. In October 2020, the Premier League brought suit for breach of contract against PPLive, seeking $213 million in damages.

PPLive's strongest defense centered on one contractual point: following the interruption of the 2019/2020 season, the conditions under which it resumed were "fundamentally" different from a typical season, as defined under the agreement, thereby excusing its nonpayment. PPLive's main contention concerned certain warranties in the Live Package Agreement,

specifically, Clause 12.1(d), which provides, in pertinent part:

"[T]he Premier League hereby warrants and undertakes that: during the Term *the format of the Competition will not undergo any fundamental change which would have a material adverse effect on the exercise of the Rights by the Licensee*…." and that "If any such fundamental change to the format of the Competition occurs during the Term, then…*the Licensee shall be entitled to enter into a period of good faith negotiations with the Premier League in order to discuss a possible reduction of the Fees*…." [emphasis added]

Citing this provision, PPLive's main argument was that the COVID-19 outbreak "fundamentally" changed the format of the Premier League competition it had contracted for during the term of the agreement and that, as a result, the Premier League was obligated to renegotiate the fees owed by PPLive (an action that the Premier League refused to do since it believed the requirements of clause 12.1(d) were not triggered by the changes). According to PPLive, the Premier League's rescheduling of matches following the three-month shutdown meant that the proportion of matches broadcast during prime-time weekend slots in China declined significantly and more matches fell in less desirable mid-week or early morning time slots, thereby impacting viewership, subscriptions and advertising revenue, In short, PPL contended that the interrupted season and the conditions under which it resumed were very different to what PPL imagined when the contract was signed in February 2017.

Among other issues, the court had to make its own interpretation of Clause 12.1(d) as applied to the facts of the dispute. Thus, much of the court's decision looked at whether the conditions under which the interrupted 2019/2020 season resumed in June 2020 could be characterized as a "fundamental change" to "the format of the competition," such that PPL could potentially rely upon the contractual warranties, and compel the court to consider whether such changes had a "material adverse effect on the exercise of the Rights" by PPLive.

On this point, the Premier League's strong defense yielded no goals, winning a clean sheet in the courtroom. The Premier League tackled this argument by emphasizing that there were no changes to the "format" of the competition (still less any "fundamental changes"). The Premier League pointed to the fact that the matches were played in the same way, under the same rules, the number of clubs did not change, and that the "competition" remained the same – games played between top professional Premier League football clubs in England and Wales.

Agreeing with the Premier League's interpretation, the judge found that the conditions under which the season resumed did not amount to "fundamental changes" that would entitle PPLive to renegotiate a reduction of fees with the Premier League. In the court's view, there was no change to the format of the League matches:

"Format of the competition does not include kick off times, the days when matches are played, or whether there are fans. Format of the competition refers to the way that the competition is undertaken between the 20 member clubs competing that season. How many times they play one another; the number of matches between all of them…; the fact they play one another home and away; how many points are awarded for different results; how the league table is organised. These are all elements of the format of the competition. None of these were changed when the season resumed."

In the court's view, "the risk of profitability in broadcasting to the audience in mainland China and Macau rested with PPLive" under the terms of the Live Package and Clips Package agreements. The interruption to the season, and the way matches in the resumed season were played, did not change that risk calculation. As the court stated: "In many commercial contracts events may transpire other than as anticipated by one, or even both, contracting parties. That does not mean that the court will re-write the parties' bargain and impose different terms upon them to suit those later events. That is not the function of the law of contract."

Having concluded there was no change to the format of the competition, the court went on to find that no trial was required as to whether the changes that had occurred had a material adverse effect on the exercise of the rights by PPLive. In the remaining pages of its opinion, the court rejected PPLive's counterclaims or additional defenses to non-payment (e.g., unjust

enrichment, force majeure), as well as PPLive's argument that the Premier League breached the contract by refusing to enter into good faith negotiations to reduce the rights fees under Clause 12.1(d) following the temporary shutdown of the League in 2020 – here, the court found that since there was no "fundamental change" to the "format of the competition" then the obligation to negotiate did not arise under the terms of the contract.

In the end, the court held that the Premier League was entitled to terminate the agreements and awarded summary judgment with respect to PPLive's breach of the agreement and unpaid installment payments under the Live Package Agreement and the Clips Package Agreement that were due in 2020. Whether and how the Covid-19 pandemic, and this litigation, might impact future sports rights negotiations and related contractual provisions remains to be seen but, at least in this instance, the Premier League took home the trophy.

Proskauer has more than 50 years of experience counseling the world's premier sports organizations on their most critical and complex matters.

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