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NOTES

THE LIABILITY OF A SPORTS EXHIBITOR TO HIS PATRONS FOR INJURIES ARISING OUT OF THE SPORT

The liability of a proprietor exhibiting a sports event depends not only upon the jurisdiction in which the injury occurs, but also upon the particular form of contest the participants are engaged in. Injuries growing out of the sport itself result in liability from rules peculiar to that type of injury. Although at times these same rules are applicable to other types of injuries incurred at these performances, that phase of the problem will not be considered in this paper. We are here primarly concerned only with injuries resulting from batted baseballs, flying pucks at hockey games, golf balls which leave the course, and other similar occurrences.

The spectator, having paid an admission price, is a business invitee,[1] and the proprietor is bound to exercise reasonable care for the invitee's protection.[2] This is not to say, however, that the proprietor is an insurer for the invitee's safety.[3] Rather, before liability can be imposed on the exhibitor it must be shown that he was negligent. Conversely, the defendant can avoid liability by showing freedom from negligence. Thus, the proprietor's primary defense is showing that he has fulfilled his duty.

The duty required of the defendant in this respect has become rather well established. Even though the danger may be apparent, as in the case of batted baseballs, the proprietor needs to do more than just sit back and let the spectator look out for himself. A certain portion of the seats must be protected by screening before it can be said the exhibitor has performed his duty. Some courts set up as a standard screening sufficient to provide seats of this type for such a number of spectators as may reasonably be expected to call for them.[4] Other courts merely point out that the defendant need only conform to common practice.[5] This is to say he is not being negligent if he has provided as much screening as do other similar ballparks. It is evident that if the proprietor provides the amount of screening required in the jurisdiction, he has fulfilled his duty, unless something more is required of him.

The defendant's second mode of defense is that of contributory negligence. This does not differ from contributory negligence as applied in other tort cases. It is simply a matter of the jury finding mutual negligences in which case the defendant is excused.[6] This varies with the facts of each partciular case, what the defendant did or failed to do constituting negligence, and the plaintiff's action in relation to the injury. No particular generalization regarding sports events themselves can nor need be made.

The third and only remaining form of defense available to the proprietor is that of assumption of risk on the part of the plaintiff. Speaking generally, and not having regard to any particular type of situation, assumption of risk means that plaintiff, who knows or should know of the dangerous circumstances, has consented to relieve the defendant of his duty by voluntarily placing himself in a position where injury can result from the dangerous condition, and agreeing usually by implication that he will look out for the dangers himself. Having reference to plaintiff's state of mind and his knowledge, the defendant is relieved of his legal duty of conduct.[7]

1. Restatement, Torts sec. 332 at 897 (1934).
2. Id. sec. 343 at 942; Prosser, Torts sec. 79 at 642 (1941).
3. Prosser, Torts sec. 79 at 635 (1941); Hall, Voluntary Assumption of Risk—Contributory Negligence—Injuries to Patrons at Places of Amusement, 10 So. Cal. L. Rev. 70 (1937).
4. Quinn v. Recreation Park Ass'n., 3 Cal.2d 725, 46 P.2d 144 (1935).
5. Hudson v. Kansas City Baseball Club, Inc., 349 Mo. 1215, 164 S.W.2d 318 (1942); Ratcliff v. San Diego Baseball Club of the Pacific Coast League, 27 Cal.2d 733, 81 P.2d 625 (1938).
6. Prosser, Torts sec. 52 at 393 (1941).
7. Id. sec. 51 (1941); Restatement, Torts sec. 893 (1934).

The adopted rule in baseball cases is that where one chooses an unprotected seat, he assumes the risk of being injured by a ball batted either during practice or during the main event.[8] This rule, as practical as it is in baseball cases, becomes a minority rule in other sports injury cases. The reason for the distinction is that it is of common knowledge that baseballs are batted into the grandstand,[9] while this is not true, for example, of pucks in hockey games.[10] But even in this latter type of case the recovery is limited to those cases where the spectator is attending for the first time. After witnessing one event where the dangers are not of common knowledge, the spectator cannot rely on the rule because he may then be charged with actual knowledge. And as for that matter, a plaintiff might be barred by actual knowledge even at the first game if the danger becomes apparent to him, or should have become apparent to him as a prudent person.[11]

Whether or not the spectator actually appreciated the dangers involved is a question of fact usually left for a jury to decide.[12] However, a rather radical view of this question was taken in the case of *Ingersoll v. Onoganda Hockey Club*.[13] There the plaintiff was attending her first hockey game and was injured the first time the puck left the ice. In spite of these extreme circumstances, the plaintiff was nonsuited in the court below and the Appellate Division of the New York Supreme Court in affirming held that plaintiff assumed the risk as a matter of law. Though this case is cited approvingly by some courts, they actually only adopt the rule of assumption of risk to the extent that the plaintiff had actual knowledge of the risk, or that it is a matter of common knowledge.[14] In *Thurman v. Ice Palace*[15] the facts were identical to those in the *Ingersoll* case and the trial court applied the strict rule of the latter case by directing a verdict. This was reversed on appeal, the court specifically stating that it was not a matter of common knowledge that hockey pucks left the ice, and that this is a matter for the jury.

Although courts in these cases speak of assumption of risk, there may actually be some confusion of that doctrine with contributory negligence. To better appreciate this fact a distinction of the two doctrines is necessary. Where there has been an assumption of risk the defendant is relieved of a

8. Hudson v. Kansas City Baseball Club, supra; Ratcliff v. San Diego Baseball Club, supra; Blackhall v. Capitol District Baseball Ass'n., 154 N. Y. Misc. Rep. 640, 278 N.Y. Supp. 649 (1935); Brisson v. Minneapolis Baseball & Athletic Ass'n., 185 Minn. 507, 240 N.W. 903 (1932); Lorino v. New Orleans Baseball & Amusement Co., 16 La. 95, 133 So. 408 (1931).
9. Quinn v. Recreation Park Ass'n., supra; Thruber v. Skouras Theatres Corporation, 112 N.J.L. 385, 170 A. 863 (1934); Blakeley v. White Star Line, 154 Mich. 635, 118 N.W. 482 (1908).
10. Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N.W.2d 90 (1943); Thruman v. Ice Palace, 36 Cal. 364, 97 P.2d 999 (1939), rehearing denied, 125 P.2d 59 (1942).
11. Tite v. Omaha Coliseum Corporation, supra.
12. Thurman v. Ice Palace, supra; Cincinnati Baseball Club Co. v. Eno, 112 Ohio 175, 147 N.E. 86 (1925).
13. 245 App.D iv. 137, 281 N.Y. Supp. 505 (1935).
14. Hunt v. Thomasville Baseball Co., 80 Ga. 572, 56 S.E.2d 828 (1949); Shurman v. Fresno Ice Rink, 91 Cal.2d 469, 205 P.2d 77 (1949).
15. 36 Cal. 364, 97 P.2d 999 (1939).

duty to protect the plaintiff. Hence, there can be no breach of duty which will place liability on the defendant.[16] In contributory negligence the duty is admitted ,but the liability is avoided by plaintiff's conduct.[17]

Assumption of risk is necessarily free and voluntary,[18] though the plaintiff need not be aware of the specific risk he is assuming.[19] Thus, if the doctrine is applied where the plaintiff is not aware of at least the geenral circumstances, he will be held to have assumed the risk involuntarily. This does not meet with the recognized requirements nor is it sound logic. Since courts are generally willing to place some affirmative duty on the defendant, it would seem that contributory negligence is the more applicable doctrine. Then it could be said that plaintiff was contributorily negligent by placing himself in a position which would make injury to him possible.[20] However, some courts specifically say that this does not constitute contributory negligence.[21]

A majority of the courts hold that assumption of risk is applicable to these cases,[22] while some say that it should be restricted to the contractual relationship of master and servant.[23] As the *Ingersoll* case shows some courts apply it to sports cases and enlarge it by saying in effect that the plaintiff is presumed to have knowledge of the risks involved, though in fact he does not. It is apparent that this class of cases departs drastically from those holding that assumption of risk is voluntary, and whether or not it has in fact been assumed is a question of fact for the jury.[24] This doctrine has not yet received widespread recognition outside of baseball cases, though some courts indicate by dictum that they might adhere to it.[25]

Though the discussion has been centered chiefly around baseball and hockey, the same rules are applicable in other sporting events. Golf spectators, for example, are in the same position. Here, it has been held that the proprietor does not owe a duty to the spectators in regard to "sliced" balls.[26] The majority rule, however, appears to be that the golf spectator can only be charged with assumption of risk where he can be found to have actual knowledge of the dangers from sliced balls.[27]

16. James, Assumption of Risk, 61 Yale L. J. 141 (1952); Thomas, Liability of Exhibitors to Spectators at Public Exhibitions: Assumption of Risk, 24 Cal. L. Rev. 431 (1936).
17. Prosser, Torts sec. 51 at 378 (1941); Thomas, supra note 16.
18. Prosser, Torts sec. 51 at 388 (1941).
19. Id. at 387.
20. Hall, supra note 3, at 69.
21. Platt v. Erie County Agricultural Society, 164 App. Div. 99, 149 N.Y. Supp. 520 (1914); Arnold v. State of New York, 163 App. Div. 253, 148 N.Y. Supp. 479 (1914); Barrett v. Lake Ontario Beach Imp. Co., 174 N.Y. 310, 66 N.E. 986 (1903).
22. Potts v. Crafts, 5 Cal.2d 83, 85, 42 P.2d 87, 88 (1935).
23. Bouchard & Sons Co. v. Keaton, 9 Tenn. 467, 481 (1928).
24. Morris v. Cleveland Hockey Club, 157 Ohio 225, 98 N.E.2d 49 (1951); 105 N.E.2d 419 (1952); Thurman v. Ice Palace, supra.
25. Falk v. Stanley Fabian Corporation of Delaware, 115 N.J.L. 141, 178 A. 740 (1935); Thurber v. Skouras Theatres Corporation, supra; Pointer v. Mountain Ry. Const. Co., 269 Mo. 104, 189 S.W. 805 (1916).
26. Benjamin v. Nernberg, 102 Pa. Super. 471, 157 A. 10 (1931).
27. Alexander v. Wrenn, 158 Va. 486, 164 S.E. 715 (1932).

This apparent freedom from liability is subject to some criticism. At every sports event, regardless of kind or where staged, a small percentage of the spectators are witnessing such an event for the first time. This happens either because parents are taking a child to the event for the first time or because an adult has never before had an opportunity to attend. This is especially true of such localized events as rodoes which attract some tourists at almost every performance who have never before seen one. Although presently there do not appear to be any cases holding that the possibility of a rampaging Brahma bull at a rodeo is a matter of common knowledge, this result could be reached if reference is made only to a restricted geographical locale. At least it is safe to assume that a large part of the people in the West, and especially regular rodeo attenders, recognize such an event as a possibility.

A second criticism is that in each instance the proprietor is in the best position to know of the incident dangers. It would seem that he should be liable if he permits his patrons to get into a place where injury is possible. It is only natural for a spectator to want to have the seat nearest the performance so that he can see as much as possible. In taking such a seat the patron has a right to assume the place is safe, and in making this ssumption, he is relying on the knowledge of the proprietor. A spectator at a wrestling match would be very apt to choose a ringside seat if it was available and he could pay the price. Yet, if this was his first attendance, he might not know that at times one of the contestants is thrown out into the audience. As a matter of fact, such an incident might not take place even after this spectator has attended several matches. But merely because up to this time he has seen the participants pick each other up, and has seen them dropped to the floor, he is on notice that one might throw the other into the audience. To charge the patron with knowledge under these circumstances does not appear equitable especially since a simple warning of the proprietor would give the patron actual notice, and operate as well to preclude recovery.[28]

Of course it would put an undue burden on the exhibitor to ask each person whether he knows of the dangers, or if he is attending for the first time. But it would not be asking too much to have the proprietor put up a few clearly visible signs in conspicuous places to warn of the dangers. In at least one hockey case the court has placed such a duty upon the defendant.[29] Naturally, under the law as it presently exists, the proprietor is under no compulsion to do anything of this kind since in a majority of the instances he will avoid liability.

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28. Prosser, Torts sec. 79 at 642 (1941).
29. Shanney v. Boston Madison Square Garden Corp., 296 Mass. 168, 5 N.E.2d 1 (1936).