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LIABILITY FOR INJURIES TO SPECTATORS

GARY E. SISKIND*

Spectator sport has been a part of our culture and history almost as long as there have been people to witness the playing of games. Similarly the problem of legal liability has been with us since early civilizations. In Roman times it was written:

If persons are throwing javelins by way of sport and a slave is killed, the Aquilian action lies: but if when others are throwing javelins in a field, a slave crosses it, the Aquilian action fails, because he ought not to have made his way at an inopportune time across the field used for javelin throwing.¹

It would seem from this that the Romans recognized the right of spectators to recover in the event of injuries suffered while observing a sport so long as they were in their proper place. It is only when the slave has wandered from this spot that he is not allowed to pursue his remedy. This has been interpreted to mean that the second slave is denied recovery on the basis of voluntary assumption of risk.² From this rather liberal view of liability the law has evolved to the point where authors can state without fear of contradiction

If a person watches a dangerous sport, it can hardly be doubted that he will be deemed to have consented to the inevitable risks involved whether or not he actually knew of or consented to them.³

What caused such a transformation? One can only speculate that as time wore on and sports became more and more popular, the courts felt a need to protect those engaged in developing and promoting athletics. A love of heroes, and especially sports heroes, seems to be an integral part of our culture and perhaps this feeling permeated our attitudes until athletics became so sacrosanct as to bar recovery except in cases of gross negligence. With this in mind let us look at a recent example.

Bill Hewitt, at the recent All-Star Game of the National Hockey League played at Maple Leaf Gardens in Toronto, described how Bobby Baun crossed the blue line and caromed the puck off the goal post into the crowd where another lucky fan had a souvenir of that 21st annual All-Star Game. To anyone listening at home the incident was simply another exciting moment in the game. But to the "lucky" fan, 7 year old Larry Grafstein, the episode included the permanent loss of one and possibly two teeth, a swollen mouth, some loss of blood, and a worried mother and father. This mishap was hardly an isolated occurrence⁴ and with more and more leisure time

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¹ ULPAN, ROMAN DIGEST L. ix. 2.9.4

² Burnett, *Dann v. Hamilton Revisited* (1960) 38 CAN. B. REV. 107, 111.

³ Payne *Assumption of Risk and Negligence* (1957) 35 CAN. B. REV. 950, 953-54.

⁴ In an interview with Stan Obodiak, Public Relations Director of Maple Leaf Gardens, it was discovered that approximately 12-15 pucks find their way into the crowd in an average game. That is about 500 pucks a season at the Gardens alone.

becoming available the result can only be more participants, more games, more spectators, and inevitably more injuries. Whether people like Larry Grafstein are granted recovery will be of growing importance for the future and will furnish the subject-matter of this paper.

Generally we are concerned with the hapless fan who suddenly finds himself the target of such diverse objects as hockey pucks, baseballs, racing cars and even wrestlers. Obviously the subject is of particular importance for sports such as hockey, baseball, auto-racing and golf around which the majority of cases brought to court have centred.

THE PRESENT POSITION

Basically, the courts have stringently adhered to the doctrine of *volenti non fit injuria*. When a spectator buys a ticket to watch a sporting event, be it hockey, baseball, auto-racing, or horse shows, the general belief is that the person does so at his own risk. He is presumed to accept the risk of being injured as the price he pays for being allowed to watch the particular event. It is relevant to our search for a remedy for the Larry Grafsteins to examine how three different jurisdictions approach the problem.

England: One of the leading English cases in this field is *Hall v. Brooklands Auto-Racing Club*⁵ where two spectators were killed as a result of a racing car crashing into the crowd. The English Court of Appeal, basing their decision on the aforementioned doctrine, held that there was no liability. This attitude towards the problem is best exemplified by the statement:

No-one expects the persons receiving payment to erect such structures or nets that no spectator can be hit by a ball kicked or hit violently from the field of play towards the spectators. The field is safe to stand on, and the spectators take the risk of the game.⁶

The extent to which the absence of liability has gone is aptly shown in the case of *Murray v. Harringay Arena*.⁷ In this case a 6 year old boy was hit by a puck while attending a hockey match at the defendant arena. In holding that there was no liability, the court emphasized two important facts: first, that the *volenti* doctrine provides a valid defence in such cases and second, that the test under that maxim is as to the reasonable spectator, and not the particular one, for consent was found on the part of a 6 year old child. Further, in discussing hockey, the court pointed out the difficulties to be confronted by the plaintiff.

I do not think it can be said upon the evidence that the game of ice hockey is intrinsically dangerous to spectators.⁸

⁵ [1933] 1 K.B. 205 (C.A.).

⁶ *Id.*, at 215 per Scrutton, L.J.

⁷ [1951] 2 K.B. 529 (C.A.).

⁸ *Id.*, at 534 per Singleton, L.J.

This line of thinking culminated in the recent decision of *Wooldridge v. Sumner*.⁹ Here a photographer at a horse show was injured by a horse in one of the equestrian events. He had been standing off the course but the horse was going too fast and was unable to turn away in time. Despite the photographer's lack of knowledge and experience with horses, it was held that there was no liability either on the part of the rider or the organizers. The court was split however, on why liability was denied. Lord Justice Sellers and Lord Justice Diplock both held for the defendant on the basis that there was no prima facie tort of negligence and denied that *volenti* applied, while Lord Justice Danckwerts reached the same conclusion respecting liability but did so by applying the *volenti* doctrine. The *Wooldridge* decision is important also for the emphasis placed on allowing competitors to go all-out to attain victory.

A reasonable spectator attending voluntarily to witness any game or competition knows and presumably desires that a reasonable participant will concentrate his attention upon winning, and if the game or competition is a fast-moving one, will have to exercise his judgment and attempt to exert his skill in what, in the analogous context of contributory negligence, is sometimes called 'the agony of the moment'.¹⁰

Thus the basic view taken in England of the problem of injuries to spectators can be summed up in these words discussing the *Wooldridge* case:

A person attending a game or competition takes the risk of any damage caused to him by any act of a participant done in the course of and for the purpose of the game or competition notwithstanding that such act may involve an error or judgment or a lapse of skill, unless the participant's conduct is deliberately intended to injure someone whose presence is known, or is reckless and in disregard of all safety of others so that it is a departure from the standard which might reasonably be expected in anyone pursuing the game or competition.¹¹

Canada: In Canada a similar result has been reached. Two cases are of importance in this regard, the first being *Elliott v. Amphitheatre Ltd.*¹² Here the plaintiff, who was allowed to select his own seat, was hit by a puck while attending a hockey game. Recovery was denied him on the basis that there was no breach of duty.

Reasonable care is held to be the measure of duty, and the proprietor is held not to be an insurer and spectators assume the risk peculiar to that form of amusement.¹³

Again we notice the emphasis placed on assumption of risk.

The second case is *Payne v. Maple Leaf Gardens Ltd.*¹⁴ Here the plaintiff, a season ticket holder and hence familiar with the sport, while attending a Maple Leaf hockey game was struck, not by a puck, but by the stick of one of the players who was grappling with an

⁹ [1963] 2 Q.B. 43 (C.A.).

¹⁰ *Id.*, at 67 per Diplock, L.J.

¹¹ Dworkin *Injuries to Spectators in the Course of Sporting Activities* (1962) 25 Mod. L. R. 738, 740/1.

¹² [1934] 3 W.W.R. 225 (Man. S. Ct.).

¹³ *Id.*, at 228 per MacDonald, C.J.

¹⁴ [1949] 1 D.L.R. 369 (Ont. C.A.).

opposing player in front of the plaintiff. The plaintiff recovered against the player who hit her but not against the Gardens. In reaching this conclusion Mr. Justice Laidlaw reaffirmed the *volenti* defence but held that it did not apply to the particular facts of the case before him.

I think the misadventure was of so unusual and unexpected a kind that it could not reasonably have been expected.¹⁵

and further:

But, while they had such knowledge and assumed such risk, it cannot be properly held that either of them assumed the risk of injuries resulting directly from negligence or improper conduct on the part of the player.¹⁶

Thus the difficulty of establishing liability is as evident in Canada as it is in England and no doubt accounts for the lack of litigation on the subject.

United States: In the United States liability is founded upon a sport by sport distinction which is based on what the court feels is the extent of knowledge of the sport by the public. For instance the general rule respecting baseball (often referred to as America's National Pastime¹⁷) is that the public is presumed to know that at certain times batted balls will be hit into the stands and therefore is presumed to have accepted the risk.

It is common knowledge that in baseball games hard balls are thrown and batted with great swiftness, that they are liable to be thrown or batted outside the lines of the diamond, and that spectators in positions which may be reached by such balls assume the risk thereof.¹⁸

But hockey, not having the exposure that baseball has (particularly before this year's expansion in the United States) is therefore not subject to as stringent a set of rules. In *Morris v. Cleveland Hockey Club*¹⁹ the plaintiff was allowed recovery after being hit by a puck.

In emphasizing this distinction the court stated:

Although hockey is becoming ever more popular, it is not nearly so universally played as is baseball, and as we have pointed out, its dangers are certainly not so obvious to a stranger to the game as would be the dangers incident to baseball.²⁰

There are many other cases affirming this view.²¹

However the distinction is not based so much on the different sports as the extent to which the area involved is held to be familiar

¹⁵ *Id.*, at 371.

¹⁶ *Id.*, at 373.

¹⁷ There is even judicial mention of this view. See, *Morris v. Cleveland Hockey Club* 105 N.E. (2d) 419, 426 (1952) where Stewart, J. states simply that "Baseball is the national pastime of the United States".

¹⁸ *Cincinnati Baseball Club v. Eno* 147 N.E. 86, 87 (1925) (Ohio Supreme Court) per Allen, J.

¹⁹ 105 N.E. (2d) 419 (1952) (Ohio Supreme Court).

²⁰ *Id.*, at 426 per Stewart, J.

²¹ See e.g. *Shanney v. Boston Madison Square Garden Corpn.* 5 N.E. (2d) 1 (1937) (Mass. S. Ct.).

James v. Rhode Island Auditorium, Inc. 199 Atl. 293 (1938) (Rhode Is. S. Ct.).

with the sport. For example in Minnesota, a hockey-playing area, it was stated:

Hockey is played to such an extent in this region and its risks are so well known to the general public that as to the question before us there is no difference in fact between the two games so far as liability for flying baseballs and pucks is involved.²²

Thus despite the fact that the chances of recovering in the United States are greater than in either the United Kingdom or Canada, the basis for such recovery does not give spectators in either jurisdiction cause for rejoicing. As the exposure of different sports through television becomes ever increasing, the present arguments on which successful American plaintiffs have been basing their claims will become increasingly less valid.

THE DEFENCE OF VOLENTI

Implied Assumption of Risk

The maxim *volenti non fit injuria* is a terse expression of the individualistic tendency of the common law, which, proceeding from the people and asserting their liberties, naturally regards the freedom of individual action as the keystone of the whole structure. Each individual is left free to work out his own destinies; he must not be interfered with from without, but in the absence of such interference he is held competent to protect himself.²³

These words express the philosophy of *volenti* but it can be better explained by reference to some well-known authors.

For instance it has been said that the maxim means that there is no longer any duty of care owing to the plaintiff. That is, that the

Plaintiff agrees to absolve the defendant from the duty of care that would otherwise be his due, with the result that the latter's carelessness would not qualify as a breach of duty at all.²⁴

Similarly Dean Prosser explained *volenti* in this way:

The plaintiff has consented to relieve the defendant of an obligation of conduct toward him, and to take his chance of injury from a known risk.²⁵

From these general outlines, more specific requisites emerge, the most important being that the risk assumed must be comprehended.

The defence is predicated upon full knowledge of the risk to be encountered.²⁶

It is this point that makes the decision in *Murray v. Harringay Arena Ltd.*²⁷ even more difficult to understand for if complete comprehension is needed, surely it must be subjective and if subjective it would seem

²² *Modoc v. City of Eveleth* 29 N.W. (2d) 453, 456 (1947) (Minn. S. Ct.) per Olson, J.

²³ Bohlen, *Voluntary Assumption of Risk* (1906-07) 20 HARV. L. REV. 14.

²⁴ J. FLEMING, *AN INTRODUCTION TO THE LAW OF TORTS* (1st ed.) 1967, pg. 145.

²⁵ PROSSER ON TORTS (1st ed.) 1941, pg. 377.

²⁶ J. FLEMING, *THE LAW OF TORTS* (2nd ed.) 1961, 254.

²⁷ *Supra* note 7.

difficult indeed to impute such comprehension to even the most precocious six year old. The *Murray* decision states that the test of comprehension is that of the reasonable man²⁸ but it is fallacious to suggest that a 6 year old child should be held to have accepted any risk except to the extent that a reasonable 6 year old would have accepted such a risk. Thus, the test that should be adopted would be similar to that of the infant in negligence cases.²⁹

An American decision, *Aldes v. St. Paul Baseball Club, Inc.*,³⁰ adopts this point of view. In that case a 12 year old boy was hit by a baseball while attending a ball game. In holding that there was no assumption of risk on the part of such a youngster it was said:

I see no reason for holding him to the same standard of sober reflection which we would require of an adult.³¹

However, not everyone attributes the plaintiff's lack of success to *volenti*. It has been said that:

The implied consent of the spectators operates to lower the standard of care owing to them, not to provide a defence of *volenti non fit injuria*.³²

In fact the attack on *volenti* has reached the stage where academics such as Fleming can say that "the defence is today wellnigh moribund".³³ But if this is true then the news has not seeped through the walls of the chambers of the English Court of Appeal,³⁴ the Ontario Court of Appeal³⁵ and the Indiana Supreme Court.³⁶

One of the limitations often cited is that the defence is not applicable to cases involving negligence.³⁷ The theory behind this is that one consents only to those risks that are reasonably foreseeable and someone's negligence is not reasonably to be foreseen. More will be said of this limitation below.

EXPRESS ASSUMPTION OF RISK

The above discussion is concerned with implied assumption of risk but in many instances a spectator is denied recovery because of some clause written on his ticket or on a nearby sign. This is referred to as an express assumption of risk.

²⁸ *Supra*, note 7 at 536.

²⁹ See *Gough v. Thorne* [1966] 3 All E.R. 398 (C.A.); *Cowling v. G.T. Ry. Co.* (1921) 38 D.L.R. 423 (Ont. S. Ct.); *Charbonneau v. MacRury* 153 Atl. 457 (1931) (N.H.S.Ct.).

³⁰ 88 N.W. 2d 94 (1958) (Minn. S. Ct.).

³¹ *Id.*, at 97 per Dell, J.

³² Dworkin, *Injuries to Spectators in the Course of Sporting Activities* (1962) 25 Mod. L. R. 738, 740.

³³ *Supra*, note 24 at 146.

³⁴ *Wooldridge v. Sumner* [1936] 2 Q.B. 43 where the defence was recognized at least by Danckwerts, L.J.

³⁵ *Hambley v. Shepley* (1967) 63 D.L.R. (2d) 94 where Laskin, J.A. although holding that the defence was inapplicable on the facts of the particular case, nevertheless recognized that there was still such a defence available.

³⁶ *Hunsberger v. Wyman* 216 N.E. 2d 345 (1966) where Rakestraw, J. disallowed recovery partly on the basis of assumption of risk.

³⁷ See *Dann v. Hamilton* [1939] 1 K.B. 509 (K.B.D.) and also CHARLES-WORTH, *THE LAW OF NEGLIGENCE* (1st ed.) 1938, 160.

The general rule in these cases is primarily that the clause is to be construed strictly and against the person relying on it.³⁸ Further, the contract must be "freely and deliberately entered into"³⁹ and contain "words that are clear and beyond the possibility of misunderstanding".⁴⁰ The purchaser must also have been reasonably able to read the ticket or see the sign.⁴¹

But the most important aspect of these clauses from our point of view centres on distinguishing between clauses explicitly exculpating liability in cases where the defendant is negligent and clauses where negligence is not mentioned. This distinction has been lucidly stated as follows:

Where the head of damage in respect of which limitation of liability is sought to be imposed by such a clause is one which rests on negligence and nothing else, the clause must be construed as extending to that head of damage, because it would otherwise lack subject-matter. Where, on the other hand, the head of damage may be based on some other ground than that of negligence, the general principle is that the clause must be confined in its application to loss occurring through that other cause to the exclusion of loss arising through negligence.⁴²

Thus if there is no mention of negligence on the ticket or sign the defence of express assumption of risk will be useless where the defendant is indeed negligent. The relevance of this will become obvious below.

When discussing such clauses, the phrase "public policy" immediately comes to mind for it seems at first glance that something should be done to prevent operators from writing tickets and contracts that are so complete as to disallow liability for all but criminal actions. However, the general rule is that "there is no public policy which prevents the parties from contracting as they see fit".⁴³ Coupled with this is the fact that in many cases the public either "plays the game according to the rules" or does without. These monopolistic overtones are difficult if not impossible to overcome and sporting events provide excellent examples of the public's being forced to accept stringent liability rules or do without attendance at the games.

The efforts by the courts to overcome this problem have not been as successful as they might otherwise be. Nowhere is it stated for instance, that these clauses should not be allowed where the purchaser's only option is doing without the subject-matter of the contract. There is a problem of over-regulation of free enterprise but this must be balanced by consideration of the impotence of one of the contracting parties compared to the other. More protection than is now possible should be given the weaker of these parties. After all, when you buy a ticket to a game or for a parking spot you surely

³⁸ *White v. John Warwick & Co. Ltd.* [1953] 1 W.L.R. 1285, 1292 (C.A.). per Singleton, L.J.

³⁹ *Id.*, at 1293 per Denning, L.J.

⁴⁰ *Id.*, at 1293.

⁴¹ *Olley v. Marlborough Court Ltd.* [1949] 1 K.B. 532, 549 per Denning, L.J.

⁴² *Alderslade v. Hendon Laundry Ltd.* [1945] 1 K.B. 189, 192 (C.A.). per Greene, M.R.

⁴³ PROSSER ON TORTS (1st ed.) 1941, 380.

must be entitled to more than just the space provided. At the least, protection from negligence should be granted no matter what the ticket states and in the absence of legislation, it is the court's duty to see that this is accomplished.

A LOOK AT AN INDIVIDUAL CASE AND SOME INTERESTING STATISTICS

The example of Larry's Grafstein⁴⁴ serves to illustrate what happens in cases such as those under examination here. He was sitting in the "blues" behind one of the goals and in Maple Leaf Gardens this puts him a relatively lengthy distance from the ice surface. The puck hit him just below the centre of his lower lip and as aforementioned knocked out one permanent tooth and there is a strong possibility another will have to be taken out. After the incident, Larry was taken to the Gardens' first aid room where the bleeding was stopped by the attendants. Nothing more was done to him nor was an offer made to take him to a hospital. The parents, on their own initiative took him to their dentist for a more thorough examination. Larry's father subsequently wrote the Gardens asking them to pay the medical bills. A refusal by phone was not long in coming. It is interesting to note also that the Grafsteins, who used to sit nearer the ice, intentionally moved to their present seats so as to be better protected from flying pucks.

The ticket purchased by the Grafsteins contained nothing whatsoever alluding to excluding liability on the part of the owners.⁴⁵ Further, there are no signs to the effect posted around the arena. Physically the rink is built with a ring of boards about 4½ feet high surrounding the ice surface with glass 5½ feet high on top of this at either end behind the goals. The other parts of the rink are protected by glass about 3 feet high but the two areas where the players of each team sit have no glass whatsoever.⁴⁶ The other arenas around the National Hockey League do not differ substantially but in many of the minor league arenas and in older facilities in most cities in Canada, there is simply a high net behind the goals with no protection along the sides.

These figures become relevant in the light of the information that approximately once every five games someone is sufficiently injured by a puck to require medical attention.⁴⁷

This is always given without charge by the medical staff at the Gardens. At the above rate, about 7 people a year would be injured at the Gardens with more than 80 such injuries throughout the League in a year. Obviously the protection afforded is not as good as

⁴⁴ The facts concerning Larry's injury were obtained from an interview with Larry's father, Mr. Jerry Grafstein who, by coincidence, is a lawyer here in Toronto.

⁴⁵ There is an advertisement on the back of the ticket.

⁴⁶ A distance of approximately 60 feet.

⁴⁷ A figure obtained from the interview with Mr. Obodiak referred to *supra*, note 4.

it could be when that many people require medical aid. As of now there are no plans for either extension of glass protection or new safety innovations in the Gardens. It could thus be argued that the Gardens is negligent in not providing better safety features for their arena. However, this argument is diluted somewhat because of the lack of such plans in other arenas and thus the familiar defence of "custom" would prove difficult to overcome.

These are the facts and figures in hockey but similar statistics may be found in baseball.⁴⁸ Approximately 50 people per year require medical attention as a result of being hit by a baseball in the average major league baseball park.⁴⁹ Of course baseball injuries are relatively few in Canada as the sport is not nearly as popular nor are there as many stadiums as there are in the United States. The result in the United States, as mentioned above, is that recovery is denied and it has reached such a point there that judicial notice is taken that everyone is deemed to know of the dangers of baseball and therefore assumes the risk thereof.⁵⁰ It is not too difficult to imagine the extension of such judicial notice to hockey, our national sport.⁵¹

METHODS OF ATTACK

It was mentioned earlier that the *Wooldridge*⁵² case pointed out the problem of allowing a competitor to escape liability as long as he was doing that which would enable him to win the particular competition. Thus, in that case there was no liability partly because the error of judgment causing the accident was made with victory in mind and under those circumstances was entirely reasonable. The folly in this thinking however can be readily seen if it is extended more fully.

If H was entitled to go 'all out to succeed', what was to prevent the other competitors from doing the same, with the result that any spectator in the arena would be placed in imminent peril?⁵³

In recognizing this problem it should not be forgotten that different sports require different efforts. For instance, it is generally assumed that when a baseball player attempts to hit a baseball he does so with as much force as possible. Similarly in track and field a runner makes every effort to go as fast as he can. Obviously then there can be no negligence for trying to hit the ball too hard or running too fast. But where control is mandatory such as in horse shows,

⁴⁸ The baseball figures were obtained from an article by Bruno Colapietro in (1960-61) 46 CORN. L. Q. 140 titled *The Promoter's Liability for Sports Spectator Injuries*.

⁴⁹ Mr. Colapietro used figures from the 1959 baseball season but since there is no reason to assume that the incidence of injuries has changed to any great extent (especially since relatively few more protective devices have been installed even in the newer stadiums) the same figures would be relevant today.

⁵⁰ See *supra*, note 17.

⁵¹ Although lacross is technically our national sport, hockey is much more commonly played and closely followed and most Canadians think of hockey as our national game.

⁵² *Supra*, note 9.

⁵³ Goodhard *The Sportsman's Charter* (1962) 78 L.Q.R. 490, 495.

figure skating, and auto-racing, to exceed the limits of control should constitute negligence and where spectators are injured as a result of such excess, they should be entitled to recover. Control in such cases would be that which should be exercised by the reasonable competitor. As a direct corollary, where spectators are injured as a result of actions by competitors that are not recognized as part of the game, they should also be allowed to recover.

The basis for this opinion stems from the *Payne*⁵⁴ case. Liability was established there when a spectator was hit by the stick of one of the players while he was fighting with another player. It is important to note that the defendant was given a penalty by the referee for this fighting. Thus his actions could not be considered as part of the game for if they were they would not have been penalized. Since they were not part of the game, they were negligent actions and since these negligent actions resulted in injury to the plaintiff, the latter was allowed recovery.

Now let us extend this to the more common occurrence of pucks being shot into the crowd. There is a penalty in the National Hockey League for intentionally throwing or shooting a puck into the crowd.⁵⁵ Following through on the analogy: where a spectator is injured by such a puck he should be allowed recovery on the same basis as in the *Payne* case; namely the negligence of the player. This argument is weakened somewhat from a practical viewpoint because the penalty is rarely, if ever, called,⁵⁶ perhaps because the league office realizes the danger and instructs their officials not to make such calls.⁵⁷ This view of liability was recognized to some extent in the *Wooldridge* case as indicated in the following proviso:

But provided the competition or game is being performed within the rules and the requirements of the sport and by a person of adequate skill and competence the spectator does not expect his safety to be regarded by the participant.⁵⁸

RECOMMENDATIONS AND CONCLUSIONS

As the situation exists now, recovery for Larry Grafstein will be difficult if not impossible to obtain. This result is one which our society should not condone. But one only has to look as far as the *Murray*⁵⁹ decision to discover the extent to which the court will go so as not to impose liability. As mentioned earlier, a child of less than a certain age (e.g. 13) should not be held to have consented to

⁵⁴ *Supra*, note 14.

⁵⁵ Rule 50 (a) of the National Hockey League Rule Book states: "No player or goalkeeper shall delay the game by deliberately shooting or throwing the puck out of the playing area".

⁵⁶ The writer can recall only one such penalty while watching approximately 40 games this season.

⁵⁷ When I suggested this to Mr. Obodiak he stated that it was classified information and only the President would be able to answer me. I assumed the President would not admit to such a league decision and therefore did not contact him.

⁵⁸ *Supra*, note 9 at 56.

⁵⁹ *Supra*, note 7.

the risks of attending a sporting event. Nor should this consent be imputed to a parent accompanying the child. There are sufficient numbers of children in attendance at such events that it could be argued that the "reasonable spectator" should take account of these youngsters. Also it is the child who suffers the physical damage and it is the child who must attempt to get out of the way of the flying object. Thus more protection than is presently provided should be given the spectator and if the courts will not provide that protection (and as of now they will not) then it is up to the legislature to do so.

In Canada, where hockey is so highly regarded, there is a reluctance to restrict our national game in any way. But this is not sufficient reason to refuse to impose liability. Thus my proposal that where the participant-defendant can be held negligent, recovery should be allowed, is an initial step in extending liability to the degree needed. But surely 7 year old Larry Grafstein should not be denied recovery simply because Bobby Baun did not receive a penalty (and therefore was not negligent) when the puck slammed into his mouth. One solution would be to grant recovery on the basis of strict liability with the owners being held liable for injuries such as those under examination here. These are jurisprudential solutions to the problem but in the complete rejection of such interpretation of the present law by the courts an alternative must be found.

The scheme here proposed is that a fund be established from the proceeds of the purchase of tickets to the event. It is to this fund that a spectator can turn if he is injured while watching the event for which he has paid. This plan would operate on similar basis to that of the Workmen's Compensation Board. A panel would be formed to which application would be made by the injured spectator. The panel would take into account actual out-of-pocket expenses plus any expenses resulting from loss of wages and any general damages that the members felt were warranted. Thus the result would be the same to the spectator had his case been successfully resolved in the courts.

Such a scheme would no doubt result in slightly higher admission prices and would in effect amount to a loss distribution plan, which would be a less expensive and more summary procedure than the present resort to the courts. Notwithstanding such plans being anathema to many people the fact remains that there is present in today's life considerable difficulty caused by non-recoverable accidents such as Larry Grafstein's. It is no answer to say that "the timorous may stay at home".⁶⁰ The timorous will not stay at home, nor should they and if the courts will not recognize this fact then it is up to the legislature to provide the protection needed.

⁶⁰ *Murphy-Steeplechase Amusement Co.* 166 N.E. 173, 174 (1929) (N.Y. Court of appeals) per Cardozo, J.