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petition for damages was filed in the proceeding and was met with an exception to the court's jurisdiction, which was maintained because of the previous final judgment. The petition, it was argued, was a new suit for damages to which the state had not consented. A second suit was also dismissed. On appeal, the Fourth Circuit rejected the plea to the jurisdiction, holding failure to caption a pleading "supplemental" should not be fatal to the court's jurisdiction to hear a later claim for damages resulting from an expropriation;⁵⁷ the constitutional provision against taking or damaging "has long been held to permit recovery against the state, without the necessity of the state's consenting to suit, for damages resulting to property beyond that actually expropriated." However, having found jurisdiction, it sustained other exceptions and remanded the cases to permit amendment of the pleadings; a cause of action for damages, if it could be stated, would lie only against the United States under the federal-state agreement which provides only for indemnification from the state in the event of successful suits against the United States.⁵⁸

TORTS

*Leah S. Guerry**

From the many tort cases decided by the Louisiana appellate courts during the past term, the writer has selected for discussion a few which represent new interpretations of the law or applications of recent tort theory, or which present an occasion for discussing new trends in other jurisdictions.

Defamation of a Public Official

In March 1964 the United States Supreme Court decided the case of *New York Times v. Sullivan*,¹ holding that the first amendment to the United States Constitution "prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves the statement was made with 'actual malice'—that is, with knowledge that

57. *Id.* at 813.

58. *Id.* at 814.

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1. 376 U.S. 254 (1964).

it was false or with reckless disregard of whether it was false or not."² In so doing, the court elevated to constitutional status the rule of a respectable minority of state jurisdictions which allowed a qualified privilege for nonmalicious misstatement of fact on matters of public interest.³ (The majority view granted a qualified privilege only for "fair comment" on public matters, and the facts had to be truthful.)⁴ The minority rule, however, had limited the privilege to statements made with an honest or reasonable belief in their truth, while the *Sullivan* decision introduced a new basis for determining liability — proof of actual malice, as defined in the opinion,⁵ and as further explained in *Garrison v. Louisiana*.⁶ The *Garrison* case applied the *Sullivan* rule to criminal libel and offered the Court another opportunity for elaborating on its interpretation of "actual malice." The opinion used such language as: "reasonable-belief standard . . . is not the same as the reckless-disregard-of-truth standard,"⁷ "only those false statements made with the high degree of awareness of their probable falsity . . . may be the subject of either civil or criminal sanctions";⁸ and "erroneous statement is inevitable in free debate."⁹

Last term the Supreme Court considered another libel suit, *Rosenblatt v. Baer*,¹⁰ which was brought by the former manager

2. *Id.* at 279-80.

3. The leading case for the minority view is *Coleman v. MacLennan*, 78 Kan. 711, 98 Pac. 281 (1908), which presented an extensive analysis of arguments for and against liberalization of libel law concerning matters of public interest. The minority view was enforced in approximately fifteen other states: *Phoenix Newspapers v. Choisser*, 82 Ariz. 271, 312 P.2d 150 (1957); *Snively v. Record Pub. Co.*, 185 Cal. 565, 198 Pac. 1 (1921); *Charles Parker Co. v. Silver City Crystal Co.*, 142 Conn. 605, 116 A.2d 440 (1955); *Pearce v. Brower*, 72 Ga. 243 (1884); *Salinger v. Cowles*, 195 Iowa 873, 191 N.W. 167 (1922); *Gough v. Tribune-Journal Co.*, 75 Idaho 502, 275 P.2d 663 (1954); *Lawrence v. Fox*, 357 Mich. 134, 97 N.W.2d 719 (1959); *Clancy v. Daily News Corp.*, 202 Minn. 1, 277 N.W. 264 (1938); *Lafferty v. Houlihan*, 81 N.H. 67, 121 Atl. 92 (1923); *Ponder v. Cobb*, 257 N.C. 281, 126 S.E.2d 67 (1962); *Jackson v. Pittsburgh Times*, 152 Pa. 406, 25 Atl. 613 (1893); *Boucher v. Clark Publishing Co.*, 14 S.D. 72, 84 N.W. 237 (1900); *Williams v. Standard Examiner Publishing Co.*, 83 Utah 31, 27 P.2d 1 (1933); *Posnett v. Marble*, 62 Vt. 481, 20 Atl. 813 (1889); *Bailey v. Charleston Mail Ass'n*, 126 W.Va. 292, 27 S.E.2d 837 (1943).

4. See PROSSER, *TORTS* 814 (3d ed. 1964).

5. 376 U.S. 254, 279-80.

6. 379 U.S. 64 (1964), holding the Louisiana criminal libel statute (R.S. § 14:47-49 (1950)) unconstitutional for two reasons: (1) it directs punishment for true statements made with actual malice, when truth is an absolute defense under the first amendment protection of free speech; (2) it punishes false statements about public officials if not made in the reasonable belief of their truth, thereby violating the "actual malice" standard established in the *Sullivan* case.

7. *Id.* at 79.

8. *Id.* at 74.

9. *Ibid.*

10. 383 U.S. 75 (1966).

of a county-owned recreation area against a newspaper columnist. The case was remanded, among other reasons, to allow new evidence as to whether the plaintiff was a "public official," with guidelines for such determination prescribed by the Court.¹¹ The opinion said that whether one is a public official should not be decided by state-law standards, and that the "designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."¹²

The unavoidable conflict raised by the law of libel between two legal policies—protection of an individual's reputation and the right of freedom of speech—is recognized by the Supreme Court when it says, "Whatever is added to the field of libel is taken from the field of free debate."¹³

The scope of the *Sullivan* rule and its effect on the law of libel have been the subject of much legal writing,¹⁴ and the courts are attempting to answer some of the questions left open: (1) Who is a "public official"¹⁵ and whether the decision also

11. *Id.* at 84.

12. *Id.* at 85.

13. *New York Times v. Sullivan*, 376 U.S. 254, 272 (1964), quoting *Sweeney v. Patterson*, 128 F.2d 457 (D.C. Cir. 1942). In *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966), the Court states it even more explicitly: "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. But in cases like the present, there is tension between this interest and the values nurtured by the First and Fourteenth Amendments. The thrust of *New York Times* is that when interests in public discussion are particularly strong, as they were in that case, the Constitution limits the protections afforded by the law of defamation."

14. Bertelsman, *Libel and Public Men*, 52 A.B.A.J. 675 (1966); *Constitutional Aspects of Libel or Slander of Officials*, Annot., 95 A.L.R.2d 1450 (1964); Comment, *Defamation of a Public Official: The New York Times Case in Perspective*, 15 DE PAUL L. REV. 376 (1966); Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1966); Comment, *Defamation a Deux: Incidental Defamation and the Sullivan Doctrine*, 114 U. PA. L. REV. 241 (1966); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191; Note, *Recent Developments Concerning Constitutional Limitations on State Defamation Laws*, 18 VAND. L. REV. 1429 (1965); Berney, *Libel and the First Amendment—A New Constitutional Privilege*, 51 VA. L. REV. 1 (1965); Comment, *The Scope of the First Amendment Protection for Good-Faith Defamatory Error*, 75 YALE L.J. 642 (1964).

15. *Pape v. Time, Inc.*, 354 F.2d 558 (7th Cir. 1965) (city deputy-chief of detectives); *Prosel v. Myers Publishing Co.*, 48 Ill. App.2d 402, 199 N.E.2d 73 (1964) (president of an Illinois village); *Matassa v. Bel*, 246 La. 294, 164 So. 2d 332 (1964) (candidate for office of constable who was former manager of city airport); *Tucker v. Kilgore*, 388 S.W.2d 112 (Ky. 1964) (police patrolman); *Nusbaum v. Newark Morning Ledger Co.*, 86 N.J. Super. 132, 206 A.2d 185 (App. Div. 1965) (former member of Board of Education); *Gilligan v. King*, 48 Misc.2d 212, 264 N.Y.S.2d 309 (Sup. Ct. 1965) (policeman); *Fegley v. Morthimer*, 204 Pa. Super. 54, 202 A.2d 125 (1964) (school board member). See

applies to the "public man"?¹⁶ (2) What constitutes "actual malice"?¹⁷ (3) How the protection of the first amendment affects other categories of speech, e.g., obscenity?¹⁸ (4) Whether the qualified privilege also immunizes defamation of a private party that is involved with or incidental to the defamation of a public official?¹⁹

these two Supreme Court decisions post-dating *Sullivan*: *Henry v. Collins*, 380 U.S. 356 (1965) (chief of police, an appointed officer, held to be a public official); *Rosenblatt v. Baer*, 383 U.S. 75 (1966), discussed in text *supra*.

16. *Butts v. Curtis Pub. Co.*, 242 F.Supp. 390 (N.D. Ga. 1964), *aff'd* 351 F.2d 702 (5th Cir. 1965), lower court held Director of Athletics and football coach at state university not a public official; appellate court affirmed, but held that issue not before it; dissenting opinion would apply *Sullivan* rule; *Pauling v. News Syndicate Co.*, 335 F.2d 659 (2d Cir. 1964), *cert. denied*, 379 U.S. 968 (1965), involved participant in public debate on an issue of grave public concern; *Walker v. Courier-Journal & Louisville Times Co.*, 246 F.Supp. 231 (W.D. Ky. 1965), former major general and person of political prominence; *Parson v. Fairbanks Pub. Co.*, 33 U.S.L. Week 2307 (unreported, Superior Ct. of Alaska, 4th Dist., Nov. 25, 1964) (nationally-known columnist occupies same standing as senatorial candidate he publicly supported); *Lorillard v. Field Enterprises, Inc.*, 65 Ill. App.2d 65, 213 N.E.2d 1 (1965) (rule extended to prominent socialite); *Dempsey v. Time, Inc.*, 43 Misc.2d 754, 252 N.Y.S.2d 186 (1964), *aff'd*, 254 N.Y.S.2d 80 (1964) (published "public affairs of a public hero"); *Faulk v. Aware, Inc.*, 14 N.Y.S.2d 954, 202 N.E.2d 372, 253 N.Y.S.2d 990 (1964), *cert. denied*, 380 U.S. 916 (1965) (radio and television personality); *Spahn v. Julian Messner, Inc.*, 43 Misc.2d 219, 250 N.Y.S.2d 529 (Sup. Ct. 1964), *aff'd*, 260 N.Y.S.2d 451 (1965) (major league baseball pitcher — invasion of privacy suit); *Harper v. National Review, Inc.*, 33 U.S.L. Week 2341 (N.Y. Sup. Ct., Dec. 22, 1964) (private individual involved in a public debate); *Associated Press v. Walker*, 393 S.W.2d 671 (Tex. Civ. App. 1965) (no mention of *Sullivan* case, but protection by 1st and 14th amendments denied in suit brought by former general). See also *Linn v. United Plant Guard Workers of America*, 383 U.S. 53 (1966); *Meyer v. Joint Council 53, Int'l Brotherhood of Teamsters*, 416 Pa. 401, 206 A.2d 382 (1965), *cert. dismissed*, 382 U.S. 897 (1965), concerning jurisdictional problems arising out of libel suits involving participants in labor disputes.

17. Further definition is supplied by the Court in *Henry v. Collins*, 380 U.S. 356 (1965), where no actual malice was found from a "showing of intent to inflict harm, rather than an intent to inflict harm through falsehood."

See *Butts v. Curtis Pub. Co.*, 242 F.Supp. 390 (N.D. Ga. 1964), *aff'd*, 351 F.2d 702 (5th Cir. 1965), plaintiff was not held to be a public official, but both courts stated evidence would justify a finding of reckless disregard; *Walker v. Courier-Journal & Louisville Times Co.*, 246 F.Supp. 231 (W.D. Ky. 1965), reliance upon national news gathering agencies insufficient to establish reckless disregard; *Keogh v. Pearson*, 244 F.Supp. 482 (D. D.C. 1965); *State v. Browne*, 86 N.J. Super. 217, 206 A.2d 591 (App. Div. 1965); Note, *Recent Developments Concerning Constitutional Limitations on State Defamation Laws*, 18 VAND. L. REV. 1429 (1965), which considers whether "reckless disregard" is closely analogous to concept of "gross negligence."

18. Previously, the "redeeming social value" test has usually been employed to inhibit obscenity; Brennan, *The Supreme Court and the Meiklejohn Interpretation of the First Amendment*, 79 HARV. L. REV. 1 (1966); Kalven, *The New York Times Case: A Note on "The Central Meaning of the First Amendment"*, 1964 SUP. CT. REV. 191.

19. *Gilberg v. Goffi*, 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (1964), *aff'd, mem.*, 15 N.Y.S.2d 1023, 207 N.E.2d 610, 260 N.Y.S.2d 29 (1965), law partner of mayor precluded from recovering from aldermanic candidate who made statements about mayor's law firm; Comment, *Defamation a Deux: Incidental Defamation and the Sullivan Doctrine*, 114 U. PA. L. REV. 241 (1966).

Last term the Louisiana appellate court was confronted with a case²⁰ requiring application of the *Sullivan* rule. During the 1962 campaign for United States Senator, one of the candidates as part of a television appearance read an affidavit that made broad accusations about Mr. E. G. Partin, a local official of the Teamsters Union. The candidate then sought to show a political connection between his opponent, Senator Russell Long, and the union official—all of which was given wide publicity by the press.

In discussing Mr. Partin's activities, the affidavit also mentioned one Herman Thompson, a deputy sheriff, who sued the candidate for libel and slander. The gist of the allegedly libelous portion of the affidavit was that Partin and others were going to steal the union's safe to avoid having documents in it made subject to an investigation, and that affiant and others were hoping to prevent the theft. The affidavit continued, "Imagine our predicament knowing of Ed's connection with the sheriff's office through Herman Thompson who made recent visits to the hall to see Ed. We also knew of money that had passed hands between Ed and Herman Thompson, from Ed to Herman."²¹

The trial court considered plaintiff a public official, citing Louisiana statutes, cases, and the Constitution to support its definition,²² but defendant was held to have acted with reckless disregard of whether his statements were true.²³ The appellate court affirmed the holding on the public-official question and also held that the statements spoke of plaintiff in his official capacity, since the affidavit dealt "with the fears of the affiant concerning the manner in which the plaintiff would or would not discharge his duties if the mentioned safe was stolen."²⁴ The court rejected plaintiff's contention that his conduct was unofficial, that is, soliciting funds for charitable organizations,²⁵ properly holding that this was not the conduct criticized.

A more difficult issue for the appellate court was whether the candidate's statements were made within the "reckless disregard" concept. Defendant testified that plaintiff was not in

20. *Thompson v. St. Amant*, 184 So.2d 314 (La. App. 1st Cir. 1966).

21. *Id.* at 316.

22. *Id.* at 320.

23. *Id.* at 321.

24. *Id.* at 322.

25. Evidence was given that part of plaintiff's duties was participating in various fund-raising drives, so the action described could have been considered "official conduct" from either position.

his thoughts when he read the affidavit; that he did not consider plaintiff would be harmed thereby; that he would "let the public draw the conclusion that they might from the remark." The court found the facts surrounding the disputed exchange of money such as could have made a union member suspicious of the relationship, and concluded that "the use of the quoted statement could not be said to have been used with reckless disregard as to whether false or true." The court apparently did not consider the point raised by the affidavit: Is one who relies on a sworn statement less likely to be guilty of a "reckless disregard" than one who relies on a signed letter or on the mere reputation of the transmitter of information? This case seems to be the first application of the *Sullivan* rule involving reliance on an affidavit.

Another point should be raised. This case illustrates libel arising from what could be called a "side-angle" attack. (It has been previously mentioned as incidental defamation;²⁶ defendant directs his words at one person, incidentally defaming another.) In one case, the language was primarily directed at a public official, incidentally referring to his law partner.²⁷ In the *Thompson* case, the defendant apparently meant to report on the activities of a private person, and by inference to attack his opponent—a public official. Incidentally, in so doing, he was alleged to have defamed another public official—the plaintiff. Many more cases will have to be decided before the final delineation of the *Sullivan* rule is achieved. *Since the foregoing comments were written, the Court of Appeal's decision in Thompson v. St. Amant has been reversed by the Louisiana Supreme Court. The Supreme Court decision will be discussed in the next annual symposium appearing in this Review.*

DUTY TO TRESPASSING CHILDREN — ATTRACTIVE NUISANCE

In the last installment of this symposium, there is a thorough explanation of the evolution of the law concerning trespassing children and of the modern trend abandoning the so-called "attractive nuisance" doctrine in favor of a special duty of care owed to young trespassers.²⁸ Louisiana, in *Stanley v. Missouri*

26. See note 20 *supra*.

27. *Gilberg v. Goffi*, 21 App. Div. 2d 517, 251 N.Y.S.2d 823 (1964), *aff'd*, *mem.*, 15 N.Y.S.2d 1023, 207 N.E.2d 620, 260 N.Y.S.2d 29 (1965).

28. *The Work of the Louisiana Appellate Courts for the 1964-65 Term — Torts*, 26 LA. L. REV. 510, 524 (1966). A lengthy discussion of the trend is found in Prosser, *Trespassing Children*, 47 CALIF. L. REV. 427 (1959).

Pac. R.R.,²⁹ has joined the trend. In an opinion affirming a dismissal for no cause of action where a six-year-old boy was injured by a fall from the ladder of a freight car, the court said it was referring to the "so-called attractive nuisance doctrine for the sake of convenience, since the appeal was briefed with reference to such nomenclature," but it recognized that the "basis of liability is neither 'nuisance' nor an 'attraction', but simply negligence, i.e., the maintenance on the premises of a foreseeable and unreasonable hazard to children whose presence should be anticipated."

In another case, *Frensley v. Gravity Drainage District No. 5*,³⁰ the court continued to refer to the attractive nuisance doctrine, but, in making its decision, it relied on the factors listed in section 33, *Restatement, Torts, 2d*, which outlines the theory previously referred to. The *Frensley* case involved the drowning of a six-year-old boy in a drainage ditch which was part of the drainage system for the entire community, and the court necessarily held the utility of the canal outweighed the danger to children. Three other cases involving trespassing children, but not decided under the special-duty-to-trespassing-children rule, are cited in the footnote.³¹

PRODUCT LIABILITY

Implied Warranty for Wholesomeness of Food

In *Musso v. Picadilly Cafeterias, Inc.*,³² plaintiff broke her denture by chewing on a cherry pit contained in a slice of cherry pie purchased from defendant's cafeteria. Recognizing that past Louisiana decisions impose an implied warranty of wholesomeness upon the server of foods, the court nevertheless held this piece of pie was fit for human consumption because the cherry pit was "natural" to the ingredients in the pie. Having thus denied liability on the basis of implied warranty, the court proceeded to hold that the defendant was not negligent in the manner in which it inspected the cherries for pits, applying as its standard of care that which a "reasonably prudent man skilled

29. 179 So.2d 490 (La. App. 3d Cir. 1965).

30. 180 So.2d 743 (La. App. 3d Cir. 1965).

31. *Wannage v. Marcantel*, 176 So.2d 5 (La. App. 3d Cir. 1965); *Lafont v. Maryland Cas. Co.*, 182 So.2d 562 (La. App. 1st Cir. 1966); *Louviere v. Great Am. Corp.*, 183 So.2d 766 (La. App. 1st Cir. 1966).

32. 178 So.2d 421 (La. App. 1st Cir. 1965). Note that action was dismissed as to the packer and distributor of the cherries.

in the culinary art would exercise in the selection and preparation of food for his own table."³³

There are a number of cases holding there is no breach of the implied warranty of wholesomeness where food substances constituting a natural part of the ingredients or finished product are left in food served to patrons, but a reasonable expectation theory should be applied in all such decisions. If the foreign matter is not usually found in the item served, and the consumer could not reasonably be expected to anticipate the object, then an injury resulting therefrom should be actionable.³⁴ Thus, a reasonable expectation test would demonstrate that one should be on guard against fish bones when served whole fish, but it is doubtful if a customer expects to find a chicken bone in chicken soup or a cherry pit in cherry pie.

Defective Product Due to Negligent Assembling

One case before the appellate court this past term involved the type of product liability problem that is evoking a change in the law in many jurisdictions.³⁵ The suit was brought against the manufacturer of a dressing table stool, the retailer-assembler, and the motel-purchaser for injuries sustained when a guest at the motel was injured by the collapse of the stool on which she was standing. Apparently the suit was tried on a negligence basis, with no claim being made under implied warranty or strict liability. The manufacturer offered evidence of tests made on similar stools and was released from liability on the grounds that the stool's collapse could not be attributed to improper manufacture or design, and that the stool would fail only if improperly assembled. The retailer was held liable, apparently for negligent assembly of the product, and the motel was liable for failure to discover the defect; the defense of abnormal use of the stool by standing thereon was rejected.

In a recent issue of this *Review*, there is a discussion of the emerging strict liability doctrine in product liability cases,³⁶ and the legal periodicals are replete with articles on the subject.³⁷

33. *Id.* at 427.

34. See Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 809 (1966).

35. *Nettles v. Forbes Motel, Inc.*, 182 So. 2d 572 (La. App. 1st Cir. 1966).

36. Note, *The Emergence of Strict Liability in Products Cases*, 26 LA. L. REV. 447 (1966).

37. For an excellent discussion of the history and evolution of the doctrine, see Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966).

Before a suit such as this could be decided under this evolving theory, certain issues must be determined: (1) Should the case be tried on the basis of negligence, implied warranty, or strict liability in tort? (2) Where should the responsibility for the risk be placed—on the manufacturer who can insure against the risk and include the cost thereof in his purchase price, or on the consumer? (3) When is a product considered “defective”—when it leaves the manufacturer or when it is delivered to the consumer?

In the *Nettles* case just discussed, other questions arise concerning the manufacturer's delegation of responsibility in shipping an unassembled product, knowing that if it is improperly assembled, it may be dangerous: Are we going to put the responsibility on every manufacturer who ships an unassembled product for injury caused by faulty assembly? Does it matter if the product is difficult or simple to assemble? What if the manufacturer omits certain screws from the package that are necessary to assemble the product? In today's business world, it seems the manufacturer must be able to rely on the middleman. However, the trend is toward strict liability in tort for an article which the manufacturer places on the market, and he cannot escape liability by tracing the defect to a part of the manufacturing or assembling process which he delegated to a third person. It remains to be seen when, or if, Louisiana will apply strict liability in this type of products case.³⁸

LIABILITY OF BUILDING OWNER

Defective Equipment in Leased Premises

The absolute liability of the building owner in Louisiana to guests of his tenant for injuries sustained because of defects in the premises is based upon the provisions of Louisiana Civil Code article 2322. In *Fontenot v. Sarver*³⁹ the court held that an unguarded window fan is a vice or defect within the meaning of the article and allowed recovery for damages arising from amputation by the fan of a two-year-old child's finger. The fan was found to be in place when the house was rented, though defendant denied ownership of the fan or knowledge of its installation in the house. The court's extension of the owner's

38. See Note, 26 LA. L. REV. 447 (1966), for discussion of application of the doctrine in food and beverage cases and in actions involving products intended for intimate bodily use.

39. 183 So.2d 75 (La. App. 3d Cir. 1966).

liability to a defective piece of equipment installed in the building prior to the tenant's taking possession seems logical and correct.

Glass Doors

With the prevalence in contemporary architecture of glass panels and glass doors, many courts are having to decide the question of liability from injury caused by a person's walking into the glass.⁴⁰ Two divergent theories are found in the decisions: (1) recovery is denied on the basis of lack of negligence, or no breach of duty, on the part of the building owner; or (2) the building owner is held responsible under what has been called an "illusion of space" theory.⁴¹ Some jurisdictions have distinguished the duty owed to a child from that owed to an adult, holding the glass could constitute a physical hazard to the child.⁴²

In the first "glass door" case reported in this state, the court took the position that the building owner, a church, was not negligent in having a glass door, unmarked by decals or some other design, even though the particular building was frequently used as a gathering place for children.⁴³ The decision also held the church had no duty to give warnings about the glass door to persons using the building as the door was not a trap or a hidden danger.

Variations in the "glass door" case are illustrated by the situation where a construction worker is not warned that the glass sections of a partially constructed building have been installed⁴⁴ and by the breaking or shattering of a glass door or panel, not due to plaintiff's mistaken attempt to walk through the glass.⁴⁵

40. Annot., 68 A.L.R.2d 1204 (1959).

41. *National Bank of Alaska v. McHugh*, 416 P.2d 239 (Alaska, 1966); *Personal Injury: Actions, Defenses, Damages, Building*, § 3.06[6] (Matthew Bender & Co.).

42. *McCain v. Bankers Life & Cas. Co.*, 110 So.2d 718 (Fla. App. 1959); *Waugh v. Duke Corp.*, 248 F.Supp. 626 (M.D. N.C. 1966).

43. *Sullivan v. Birmingham Fire Ins. Co. of Pa.*, 185 So.2d 336 (La. App. 4th Cir. 1966).

44. *Fisher Constr. Co. v. Riggs*, 320 S.W.2d 200 (Tex. Civ. App. 1959).

45. See Appleman, *Plate Glass Door Cases; Liability of Contractor After Work Completed and Accepted*, in 1959 TRIAL AND TORT TRENDS 32.

SPECTATOR INJURED AT FOOTBALL GAME

An example of the injured-spectator-at-sporting-event cases is afforded in *Turner v. Caddo Parish School Board*.⁴⁶ A seventy-one year old grandmother of a junior high football player attended a regularly scheduled game to watch her grandson play. It was the first football game she had ever attended. No accommodations were provided for the 1,500-2,000 spectators, no playing areas restricted or delineated, nor was any attempt made to control the crowd. During the game, a play was run out of bounds of the playing field, the spectators in front of plaintiff moved aside, and she was knocked down by the players, receiving injuries. The court reversed a judgment sustaining defendant's exception of no cause and no right of action, remanding the case for trial.

After determining that plaintiff was at least an implied invitee, the court considered the question of defendant's negligence and its argument that it had no obligation to "rope off spectator areas." The court traced the history of injured spectators as it began in the baseball cases and developed in suits involving injuries at hockey games, wrestling matches and even soap-box derbies. In this type of action, the real issue for determination is the extent of defendant's duty: Would further efforts by the management to minimize the peril be impossible or impracticable?⁴⁷ In the baseball cases, it is not reasonable to expect the management to completely screen the stands and bleachers, nor would the public be willing to view the game in this restricted manner; therefore a defendant is not negligent when a spectator sitting in an open area is injured by a batted ball. The defendant in this case, however, was apparently guilty of actionable negligence in failing to make provision for spectator accommodations or to provide safeguards for the crowd. The court was obviously influenced by the duty owed by the defendant, but its discussion of the rationale of assumption of risk interjects an element of confusion.⁴⁸

46. 179 So. 2d 702 (La. App. 2d Cir. 1965).

47. Malone, *Contributory Negligence and the Landowner Cases*, 29 MINN. L. REV. 61 (1945).

48. For a multi-faceted discussion of the rationale, see *Symposium: Assumption of Risk*, 22 LA. L. REV. 1 (1961).