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Theaters and Shows - Limitation on Liability for Injury to Persons Attending - Assumption of Risk at Hockey Games

Douglas B. McClellan

THEATERS AND SHOWS — LIMITATION ON LIABILITY FOR INJURY TO PERSONS ATTENDING — ASSUMPTION OF RISK AT HOCKEY GAMES.— While attending her first hockey game the plaintiff was struck and injured by a flying puck. She brought suit to recover damages. The defense was that by occupying an unscreened section of the arena, the plaintiff voluntarily assumed the risks of that position as an incident of the game. The court *held* that the plaintiff could not be said as a matter of law to have assumed the risk of being struck by the puck. *Morris v. Cleveland Hockey Club*, 105 N.E.2d 419 (Ohio 1952).

Assumption of risk, as a defense to actions of tort, is generally found to be present where an injured person either knew or should have known of dangers inherent in a situation or instrumentality, and acquiesced to being exposed to such peril.[1] It is essential that the plaintiff have knowledge of the inherent dangers [2] and have voluntarily entered into the situation.[3] If these elements concur, recovery is denied. In applying this doctrine to cases involving hockey spectators, the courts of the seven states in which the question has arisen have split. It has been held that, regardless of the state of the injured person's subjective knowledge, he assumes the risk of being hit by a puck flying into an unscreened area. This rule was first laid down in a New York case [4] which compared hockey to baseball and invoked the rule applied to spectators at baseball games.[5] Because of the popularity of baseball, the inherent dangers of watching the game from an unscreened area [6] are generally held to be a matter of public knowledge, and spectators therefore assume the risk of being struck by a batted or thrown ball. A later New York decision, *Ingersoll v. Onondaga Hockey Club*,[7] reached the same result in a case where the plaintiff had never seen a hockey game and knew nothing of its characteristics. She had obtained seats in an unscreened area by asking at the ticket window for "the best you have." A dissenting opinion argued that since the plaintiff had no choice between screened and unscreened seats, she could not have assumed the risk voluntarily.[8] In a Minnesota case where the plaintiff had previously attended hockey games, it was said, "Hockey is played to such an extent in this region and its risks are so well known to the general public that there is no difference in fact between baseball

1. Prosser, Torts §51 (1941); Restatement, Torts §893 (1939).

2. DeGraf v. Anglo California National Bank, 14 Cal.2d 87, 92 P.2d 899 (1939); Alexander v. Great Northern Ry., 51 Mont. 565, 154 Pac. 914 (1916); Bruce v. Young Men's Christian Association, 51 Nev. 372, 277 Pac. 798 (1929).

3. *See* Miner v. Connecticut River Ry., 153 Mass. 398, 26 N.E. 994, 995 (1891); Fay v. Thrasher, 77 Ohio App. 179, 66 N.E.2d 236, 240 (1946).

4. Hammel v. Madison Square Garden Corp., 156 Misc. 311, 279 N.Y.S. 815 (1935) (no mention of Plaintiff's knowledge of hockey).

5. See, e.g., Brisson v. Minneapolis Baseball & Athletic Ass'n., 185 Minn. 508, 240 N.W. 903 (1932); Blackhall v. Capitol District Baseball Ass'n., 154 Misc. 640, 278 N.Y.S. 649 (1935). *Contra*, Cincinnati Baseball Club Co. v. Eno, 112 Ohio 175, 147 N.E. 86 (1925).

6. When a spectator at a baseball game is sitting in a screened area and is struck by a ball coming through a hole in the screen or by a ball curving around the screen, the primary question is whether the park owner was negligent in not keeping the screen in repair or in not adequately screening seats where experience has shown the ball likely to go. Pollan v. City of Dothan, 248 Ala. 99, 8 So.2d 813 (1942) (ball through screen); Edling v. Kansas City Baseball & Exhibition Co., 181 Mo.App. 327, 168 S.W. 908 (1914) (ball through screen); Curtis v. Portland Baseball Club, 130 Ore. 93, 279 Pac. 277 (1929) (baseball curved around screen).

7. 245 App. Div. 137, 281 N.Y.S. 505 (1935).

8. The case is discussed in Note, 11 Notre Dame Law. 95 (1935).

and hockey as far as liability for flying baseballs or pucks is involved." [9] The court accordingly, following the decisions in prior cases involving baseball,[10] held that the plaintiff had assumed the risk. Michigan has arrived at the same result.[11] In Canada, two decisions [12] have asserted that a spectator assumes the risk of injury due to a flying puck, but both involved plaintiffs familiar with the game.

An opposing view has been adopted by decisions in Massachusetts,[13] Rhode Island,[14] California,[15] and Nebraska,[16] as well as by the United States Court of Appeals in the District of Columbia.[17] These opinions have recognized a distinction between hockey and baseball, acknowledging not only the different characteristics of the two sports but also the greater popularity and general acceptance accorded baseball. It is held in these jurisdictions that the question of assumption of risk is an issue of fact rather than law, to be decided by the jury on the basis of evidence concerning such issues as the local popularity of the game, the injured person's previous knowledge of the sport, and the dangers a reasonably prudent man would have anticipated under the circumstances. Thus, in Massachusetts, in a case involving a first-time spectator, it was ruled that the danger of a puck flying into the crowd could not be deduced from knowing the object of the game since the only apparent means of moving the puck was sliding it along the ice.[18] In the Nebraska case of *Tite v. Omaha Coliseum Corp.*,[19] the court reached a similar conclusion although the plaintiff had previously attended hockey games. In the District of Columbia it has been held that the question of assumption of risk is for the jury.[20] The case involved a spectator who had not previously attended hockey games.

No cases involving injury to spectators at hockey contests have yet arisen in North Dakota. A previous discussion of this problem in the *North Dakota Law Review* [21] came to the conclusion that the North Dakota court would probably follow the lead of Minnesota, which has held that assumption of risk exists as a matter of law in cases where a spectator at a hockey game takes a seat in an unscreened area. It would seem, however, more practical and just to inquire into the actual knowledge of

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9. Modec v. City of Eveleth, 224 Minn. 556. 29 N.W.2d 253 (1927), 25 N.D. Bar Briefs 274 (1949).
10. Brisson v. Minneapolis Baseball & Athletic Ass'n., 185 Minn. 509, 240 N.W. 903 (1932); Wells v. Minneapolis Baseball & Athletic Association, 122 Minn. 331, 142 N.W. 706 (1913).
11. Wolf v. Olympia Stadium, Nos. 247-609, 247-610, Wayne County Cir. Ct. Mich. (1949), cited in Uline Ice v. Sullivan, 187 F.2d 82, 85 n. 8 (D.C. Cir. 1950).
12. Elliot v. Amphitheater, 3 Western Weekly Reports 225 (Manitoba 1934); *see* Payne v. Maple Leaf Gardens, 1 D.L.R. 369, 373 (1949).
13. Lemoine v. Springfield Hockey Ass'n., 307 Mass. 102, 29 N.E.2d 716 (1940); Shanney v. Boston Madison Square Garden Corp., 269 Mass. 168, 5 N.E.2d 1 (1936).
14. James v. Rhode Island Auditorium, 60 R.I. 405, 199 Atl. 293 (1938).
15. Shuman v. Fresno Ice Rink, 91 Cal. App. 2d 469, 205 P.2d 77 (1949); Thurman v. Ice Palace, 36 Cal. App.2d 364, 97 P.2d 999 (1939).
16. Tite v. Omaha Coliseum Corp., 144 Neb. 22, 12 N.W.2d. 90 (1943).
17. Uline Ice v. Sullivan, 187 F.2d 82 (D.C. Cir. 1950).
18. Shanney v. Boston Madison Square Garden Corp., 269 Mass. 168, 5 N.E.2d 1 (1936).
19. 144 Neb. 22, 12 N.W.2d 90 (1943).
20. Uline Ice v. Sullivan, 187 F.2d 82 (D.C. Cir. 1950).
21. 25 N.D. Bar Briefs 274 (1949).

the plaintiff in each situation, leaving to the jury the question of whether the plaintiff understood and assumed the risk.

DOUGLAS B. MCCLELLAN

TRIAL — SEVERANCE AND APPORTIONMENT OF DAMAGES — INCONSISTENT VERDICTS. Plaintiff brought an action for false imprisonment and malicious prosecution against defendant Fox and his corporate employer Montgomery Ward & Co. Judgments were entered upon a jury verdict against Fox and the company for $300 and $2,500, respectively, on the charge of false imprisonment. On appeal it was *held* that Plaintiff could not collect both verdicts, but was entitled to elect which verdict should be satisfied. He could not be compelled to accept the lesser verdict. *Aldridge v. Fox*, 108 N.E.2d 139 (Ill. 1952).

This case is one of the most recent examples of a situation which has been the source of much legal discussion.[1] Essentially it concerns the propriety of permitting the apportionment of damages between persons jointly liable for the same wrongful act. When confronted by the problem in an early case, the Supreme Court of Tennessee ably enunciated the judicial thought up to that time.[2] The court said that when an irregular verdict is rendered there are four lines of procedure which may be followed: (1) the verdict may be set aside and a new trial awarded; (2) where the jury finds the amount of the plaintiff's damages and each of the defendants liable in varying amounts, the plaintiff's right to recover the full amount against the guilty parties may be regarded as fixed and the jury's efforts to apportion damages may be regarded as mere surplusage; (3) the plaintiff may elect the best award of damages and enter judgment for this sum against all the defendants found jointly guilty; or (4) the plaintiff may select which defendant he will take judgment against, enter a *nolle prosequi* as to others, and have his judgment against the designated defendant in the amount the jury awarded against him. More recently it has been held in California and Oklahoma that when a several verdict is returned the plaintiff must take the lowest assessment as the measure of damages.[3] Although many decisions still reflect the adoption of one of these procedures,[4] other courts have employed different means in an effort to find a more equitable solution to the problem.[5] The Minnesota court has held that where a jury enters an inconsistent verdict the trial court must send them back to reconsider the case and return a single verdict.[6]

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1. Notes, 45 Harv. L. Rev. 1230 (1932); 26 Minn. L. Rev. 730, 734 (1942); 45 Harv. L. Rev. 939 (1932); 22 Minn. L. Rev. 569 (1938).
2. Nashville Ry. and Light Co. v. Trawick, 99 S.W. 695 (1907).
3. Aitken v. White, 93 Cal. App.2d 134, 208 P.2d 788 (1949); Whitney v. Tuttle, 178 Okla. 170, 62 P.2d 508 (1936).
4. Bell v. Riley Bus Lines, 57 So.2d 612 (Ala. 1952) (statute required single verdict; new trial awarded after improper assessment of damages); Atherton v. Crandlemire, 140 Me. 28, 33 A.2d 303 (1943); Bakken v. Lewis, 223 Minn. 329, 26 N.W.2d 478 (1947); Ferne v. Chadderton, 363 Pa. 191, 69 A.2d 104 (1949) (where liability rests on doctrine of respondent superior, apportionment of damages is indefensible; new trial awarded).
5. Kelly v. Schneller, 148 Va. 573, 139 S.E. 275 (1927); Zebnik v. Rozmus, 81 N.H. 45, 124 Atl. 460 (1923).
6. Cullen v. City of Minneapolis, 201 Minn. 102, 275 N.W. 414 (1937).