

Negligence - Liability of Proprietor of Place of Amusement for Injury to Patrons caused by Acts of Third Persons

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contemplation of the federal act. The Court was careful to point out that this was not a case in which a collective bargaining agreement was in conflict with a local health or safety regulation. If such a conflict did exist between a local health or safety regulation and the terms of a federally sanctioned collective bargaining agreement, which one would take precedence?²⁵ The Court leaves this question unanswered. The real basis for the decision in the instant case seems to be that if any sort of limitation is to be placed on the arrangements that unions and employers may make pursuant to the National Labor Relations Act it is for Congress to make and not the states.

Aubrey McCleary

NEGLIGENCE — LIABILITY OF PROPRIETOR OF PLACE OF
AMUSEMENT FOR INJURY TO PATRONS CAUSED BY
ACTS OF THIRD PERSONS

Two recent decisions have dealt with the duty of proprietors of places of public amusement to their patrons. In an Arizona case plaintiff sued for personal injuries sustained when she was run over by an automobile while attending defendant's drive-in theater. The seven-year-old plaintiff had been allowed by her mother to sit on a blanket in front of their car to view the movie. No signs warned patrons not to sit outside their cars and no attendants of the defendant requested the plaintiff to return to her car. The aisles were not lighted and a sign at the entrance required patrons to drive with their lights out while in the theater. Upon a jury's finding that the defendant was negligent, the Superior Court entered judgment for plaintiff. On appeal to the Supreme Court, *held*, affirmed. The proprietor of a drive-in theater is under a duty to protect patrons sitting outside their cars against the danger of being run over by other automobiles, where, because of the condition of the premises, such danger is foreseeable. *M.G.A. Theaters Inc. v. Montgomery*, 83 Ariz. 339, 321 P.2d 1009 (1958). In a second case, plaintiff, a spectator at a baseball game, sued the baseball club for personal injuries sustained when she was pushed from her chair and trampled upon by spectators scrambling for a foul ball. The usher assigned to

25. The court has said, however, that the "intention of Congress to exclude States from exerting their police power must be clearly manifested." *Allen-Bradley Local v. Wisconsin Board*, 315 U.S. 740, 749 (1942).

her box section had withdrawn to the front of the box in order that he could go onto the playing field to perform certain duties as soon as the game was over. The Civil Court entered judgment for plaintiff. On appeal to the Supreme Court, *held*, affirmed. The proprietor of a baseball park is under a duty to use reasonable care to protect patrons against the danger of other patrons scrambling for a foul ball batted into the stand. *Lee v. National League Baseball Club of Milwaukee*, 4 Wis.2d 168, 89 N.W.2d 811 (1958).

It is well settled that the proprietor of a place of business who holds it open to the public owes a duty to protect patrons from defects in his premises which he knows of or by the exercise of reasonable care could discover.¹ In addition, because of his control over the premises and his power to restrain or expel offenders against the peace and safety of his premises,² he owes a duty to use reasonable care to protect patrons against foreseeably dangerous conduct of third persons,³ not only where their conduct is intentional or negligent, but also where it is accidental.⁴ He is not absolutely liable, but is held to reasonable care commensurate with the circumstances.⁵ This duty to guard against the conduct of third persons arises only where there is sufficient indication prior to the injury of conduct or conditions from which a reasonable man would have anticipated resulting harm.⁶ On this issue of foreseeability the courts have accepted a variety of circumstances prior to the injury which will serve to give the proprietor knowledge of possible danger and a consequent duty to take reasonable precautions to guard against it. Thus, the courts have found sufficient notice in fights⁷ or con-

1. RESTATEMENT, TORTS § 343 (1934) ; PROSSER, TORTS 459 (2d ed. 1955).

2. *Winn v. Holmes*, 143 Cal. App.2d 501, 299 P.2d 994 (1956).

3. *Lyric Amusement Co. v. Jeffries*, 58 Ariz. 381, 120 P.2d 417 (1941) ; *Worcester v. Theatrical Enterprises Corp.*, 28 Cal. App.2d 116, 82 P.2d 68 (1938) ; *Shayne v. Coliseum Building Corp.*, 270 Ill. App. 547 (1933) ; *Hawkins v. Maine and New Hampshire Theaters Co.*, 132 Me. 1, 164 Atl. 628 (1933) ; *Johnson v. Amphitheatre Corp.*, 206 Minn. 282, 288 N.W. 386 (1939). *Contra*, *Peter Anderson & Co. v. Diaz*, 77 Ark. 606, 92 S.W. 861, 4 L.R.A. (N.S.) 649, 113 Am. St. Rep. 180 (1906) (saloon-keeper does not hold himself out to public as protector of those who may be patrons of his saloon).

4. RESTATEMENT, TORTS § 348 (1934) ; *Boardman v. Ottinger*, 161 Ore. 202, 88 P.2d 967 (1939) ; *Rawson v. Massachusetts Operating Co.*, 328 Mass. 558, 105 N.E.2d 220, 29 A.L.R.2d 907 (1952).

5. *Dickinson v. Eden Theatre Co.*, 360 Mo. 941, 231 S.W.2d 609 (1950) ; *Fimple v. Archer Ballroom Co.*, 150 Neb. 681, 35 N.W.2d 680 (1949) ; *Reilly v. 180 Club, Inc.*, 14 N.J. Super. 420, 82 A.2d 210 (1951) ; *Peck v. Gerber*, 154 Ore. 126, 59 P.2d 675 (1936).

6. *Porter v. California Jockey Club*, 134 Cal. App.2d 158, 285 P.2d 60 (1955) ; *Worcester v. Theatrical Enterprises Corp.*, 28 Cal. App.2d 116, 82 P.2d 68 (1938) ; *Anderson v. Ocean Sport Fishing Inc.*, 28 Cal. App.2d 712, 83 P.2d 515 (1938).

7. *Adamson v. Hand*, 93 Ga. App. 5, 90 S.E.2d 669 (1955) (fight in bar, later

tinued boisterous activity of patrons,⁸ in reckless conduct of patrons for a period of time prior to the injury,⁹ in bringing onto the premises a crowd larger than usual,¹⁰ in the proprietor's combining his patrons and premises in such a way as to create a dangerous situation,¹¹ and in knowledge of the dangerous propensities of patrons admitted.¹² However, if the evidence does not disclose any proof of circumstances that would indicate an unreasonable risk of injury the courts will rule for the defendant since there is no duty to guard against unforeseeable dangers.¹³ These cases are best exemplified in situations where patrons are

moved outside); *Moone v. Smith*, 6 Ga. App. 649, 65 S.E. 712 (1909), later appealed, 7 Ga. App. 675, 67 S.E. 836 (1910) (quarrel in barroom 10 or 15 minutes prior to injury).

8. *Rawson v. Massachusetts Operating Co.*, 328 Mass. 558, 105 N.E.2d 220, 29 A.L.R.2d 907 (1952) (young patrons had been creating disturbance in theater for a long time); *Fimple v. Archer Ballroom Co.*, 150 Neb. 681, 35 N.W.2d 680 (1949) (boisterous activity of young men at dance hall had been going on for over an hour); *Reilly v. 180 Club, Inc.*, 14 N.J. Super. 420, 82 A.2d 210 (1951) (argument erupted into a fight); *Molloy v. Coletti*, 114 Misc. Rep. 177, 186 N.Y.S. 730 (1921) (complaint alleged continued offensive, boisterous, and unlawful conduct of patron in defendant's bar). *Cf. Shayne v. Coliseum Building Corp.*, 270 Ill. App. 547 (1933) (boisterous conditions present were normal to boxing matches).

9. *Thomas v. Studio Amusements Inc.*, 50 Cal. App.2d 538, 123 P.2d 552 (1942) (skater had been skating recklessly for three minutes in ice skating rink); *Easler v. Downie Amusement Co.*, 125 Me. 334, 133 Atl. 905, 54 A.L.R. 847 (1926) ("scrub" ball game with tent stakes on circus premises); *Blakeley v. White Star Line*, 154 Mich. 635, 118 N.W. 482, 19 L.R.A. (N.S.) 772, 129 Am. St. Rep. 496 (1908) (testimony from which jury might infer game of throw and catch had been going on for a sufficient length of time to give notice); *Johnson v. Amphitheatre Corp.*, 206 Minn. 282, 288 N.W. 386 (1939) (children playing tag in lobby of roller skating arena); *Boardman v. Ottinger*, 161 Ore. 202, 88 P.2d 967 (1939) (game of catch in careless and violent manner in swimming pool); *Hill v. Merrick*, 147 Ore. 244, 31 P.2d 663 (1934) (children playing on high dive ten to fifteen minutes prior to injury).

10. *Schubart v. Hotel Astor, Inc.*, 281 N.Y. 597, 22 N.E.2d 167 (1939) (hotel was headquarters for persons attending Army-Navy game).

11. *Higgins v. Franklin County Agricultural Society*, 100 Me. 565, 62 Atl. 708, 3 L.R.A. (N.S.) 1132 (1905) (while crossing race track to inner field, plaintiff injured by rapidly driven vehicle).

12. *Johnson v. Amphitheatre Corp.*, 206 Minn. 282, 288 N.W. 386 (1939) (jury could find defendant knew lads were prone to play tag in lobby of roller skating arena); *Reilly v. 180 Club, Inc.*, 14 N.J. Super. 420, 82 A.2d 210 (1951) (tavern-keeper should be aware of emotions of patrons while consuming intoxicating beverages); *Antinucci v. Hellman*, 5 App. Div.2d 634, 174 N.Y.S.2d 343 (1958) (children often unruly at movie matinees); *Peck v. Gerber*, 154 Ore. 126, 59 P.2d 675 (1936) (knowingly admitting a person with violent and dangerous propensities to restaurant).

13. *Carr v. Mile High Kennel Club*, 125 Colo. 251, 242 P.2d 238 (1952) (grown men playing hopscotch down aisle of racetrack); *Hawkins v. Maine and New Hampshire Theaters Co.*, 132 Me. 1, 164 Atl. 628 (1933) (small boy shot pellet at balloons given to other children); *Dickinson v. Eden Theatre Co.*, 360 Mo. 941, 231 S.W.2d 609 (1950) (nothing inherently dangerous in the customary conduct and activity of the news vendor in the lobby of the theater); *Hughes v. Coniglio*, 147 Neb. 829, 25 N.W.2d 405 (1946) (plaintiff injured by sudden and unexpected altercation between two customers of restaurant); *Hart v. Hercules Theater Corp.*, 258 App. Div. 537, 17 N.Y.S.2d 441 (1940) (no conduct by person to arouse suspicion that he would assault plaintiff in the ladies' room of theater).

injured by sudden and totally unpredicted assaults of third persons.¹⁴

In most of the cases which dealt with this duty to use reasonable means to guard patrons against danger, the proprietor had taken little or no action with reference to the particular situation. There was, therefore, relatively little difficulty in finding a breach of duty.¹⁵ These cases would seem to indicate that the proprietor, in order to discharge this duty to act, might be required to keep a close look-out on the activity of his patrons,¹⁶ and at the first sign¹⁷ of dangerous conduct interfere with those patrons, either to warn them to desist from such activity,¹⁸ to

14. *Wiersma v. City of Long Beach*, 41 Cal. App.2d 8, 106 P.2d 45 (1940) (wrestler suddenly jumped from ring and deliberately struck plaintiff over the head with a chair); *McDonald v. Chicago Stadium Corp.*, 336 Ill. App. 353, 83 N.E.2d 616 (1949) (plaintiff injured when struck by unidentified person during dispute between patron and a third party over seat).

15. That this question of what constituted "reasonable means under the circumstances" may be most difficult can be seen from the somewhat analogous case of *Holly v. Meyers Hotel & Tavern, Inc.*, 15 N.J. Super. 381, 83 A.2d 460 (App. Div. 1951), reversed, 9 N.J. 493, 89 A.2d 6 (1952). There, a passerby was injured by a bottle thrown from a window of defendant hotel by a group of Canadian sailors. Earlier in the evening a guest had complained to the hotel that the sailors were noisy. The clerk telephoned the sailors and they assured him they would be quiet. About 20 minutes later there was another call to the clerk about the situation, and he went up to the suite. He told them they would either be quiet or be ejected and, being very nice about it, they told him they would be quiet. Nothing further happened until two hours later when the plaintiff, walking on the sidewalk, was struck by a bottle. The trial court in granting the motion for dismissal thought that the defendant was not put on any notice which would require it to take any further or more drastic action that it did. The appellate division held that the defendant owed to the plaintiff a duty of care and concluded that the factual issue as to whether the clerk had acted with reasonable prudence was one for the jury's determination. The Supreme Court reversed on the ground that during the two-hour period there had been no occasion for any affirmative action on his part and that under the admitted circumstances no inference of fault or neglect could reasonably be drawn from his inaction. And *cf. Swope v. Farrar*, 66 Ga. App. 52, 17 S.E.2d 92 (1941), in which the trial court's judgment of dismissal was reversed, the court holding that it was a question for the jury as to whether or not the efforts of the employees (two warnings to a reckless skater to desist) of a skating rink constituted ordinary care.

16. *Thomas v. Studio Amusements, Inc.*, 50 Cal. App.2d 538, 123 P.2d 552 (1942) (reckless skater at ice skating rink); *Rawson v. Massachusetts Operating Co.*, 328 Mass. 558, 105 N.E.2d 200, 29 A.L.R.2d 907 (1952) (children creating disturbance in theater); *Fimple v. Archer Ballroom Co.*, 150 Neb. 681, 35 N.W.2d 680 (1949) (boisterous young men at dance hall); *Antinucci v. Hellman*, 5 App. Div.2d 634, 174 N.Y.S.2d 343 (1953) (children in theater ignited another child's clothing); *Boardman v. Ottinger*, 161 Ore. 202, 88 P.2d 967 (1939) (rough game of catch in natatorium); *Peck v. Gerber*, 154 Ore. 126, 59 P.2d 675 (1936) (patron with known dangerous propensities admitted to restaurant).

17. *Edwards v. Hollywood Canteen*, 27 Cal.2d 802, 167 P.2d 729 (1946) (volunteer hostess at charity dance forced to dance boisterously by guest for three or four minutes before injury); *Thomas v. Studio Amusements, Inc.*, 50 Cal. App.2d 538, 123 P.2d 552 (1942) (ice skater had been skating recklessly for three minutes).

18. *Thomas v. Studio Amusements, Inc.*, 50 Cal. App.2d 538, 123 P.2d 552 (1942) (reckless ice skater); *Johnson v. Amphitheatre Corp.*, 206 Minn. 282, 288 N.W. 386 (1939) (children playing tag in lobby of roller skating rink);

control them,¹⁹ or to eject them.²⁰ If such a requirement were adopted by the courts, it doubtless would put the proprietor in a somewhat peculiar situation; for it is often quite difficult to tell beforehand when a particular situation will cause injury and constant interference with the patrons will only alienate them. It should be noted that in some situations a warning to the other patrons would apparently discharge the duty.²¹ These situations can be distinguished from those indicating that the proprietor might have to take some measures to control the actor in that the injury resulted more from the arrangement of the premises than from the action of the third parties.

Although courts frequently speak of assumption of risk as being an affirmative defense in these cases, an examination of the decisions shows that it is seldom of use to the proprietor. It has been held that patrons do not assume the risk of injury from misconduct or negligence of third persons which the proprietor could have prevented by the exercise of reasonable care;²² and in those cases which mention assumption of risk when recovery is denied, there usually exist ample grounds for the decision without invoking that doctrine.²³

In the drive-in theater case, the negligence of the proprietor

Molloy v. Coletti, 114 Misc. Rep. 177, 186 N.Y. Supp. 730 (1921) (boisterous activity in bar); Boardman v. Ottinger, 161 Ore. 202, 88 P.2d 967 (1936) (rough game of catch in natatorium); Hill v. Merrick, 147 Ore. 244, 31 P.2d 663 (1934) (children playing on high dive).

19. Adamson v. Hand, 93 Ga. App. 5, 90 S.E.2d 657 (1955) (fight in bar); Moore v. Smith, 6 Ga. App. 649, 65 S.E. 712 (1909), later appealed, 7 Ga. App. 675, 67 S.E. 836 (1910) (fight in bar); Curran v. Olson, 88 Minn. 307, 92 N.W. 1124 (1903) (sleeping plaintiff ignited in bar with alcohol purchased from bartender); Antinucci v. Hellman, 5 App. Div.2d 634, 174 N.Y.S.2d 343 (1958) (children in theater ignited another child's clothing).

20. Martin v. Philadelphia Gardens, Inc., 348 Pa. 232, 35 A.2d 317 (1944) (drunken skater at roller skating rink).

21. Easler v. Downie Amusement Co., 125 Me. 334, 133 Atl. 905, 53 A.L.R. 847 (1926) ("scrub" ball game with tent stakes on circus premises); Blakeley v. White Star Line, 154 Mich. 635, 118 N.W. 482, 19 L.R.A.(N.S.) 772, 129 Am. St. Rep. 496 (1908) (game of throw and catch in vicinity of dancing pavilion).

22. Edwards v. Hollywood Canteen, 27 Cal.2d 802, 167 P.2d 729 (1946) (volunteer at charity dance who was forced to dance boisterously against her will by guest did not assume that risk); Fimple v. Archer Ballroom Co., 150 Neb. 681, 35 N.W.2d 680 (1949) (a tossed bottle is not an incident inherently characteristic of the activities of a crowd attending the occasion); Hill v. Merrick, 147 Ore. 244, 31 P.2d 663 (1934) (did not assume risk of being pushed off high dive by children playing there).

23. Carr v. Mile High Kennel Club, 125 Colo. 251, 242 P.2d 238 (1952) (patron at race track would assume whatever risk might be attendant on going onto crowded stairway); Futterer v. Saratoga Ass'n for Improvement of Breed of Horses, 262 App. Div. 675, 31 N.Y.S.2d 108 (1941) (a certain amount of jostling is an ordinary risk of attendance at such a sport); Whitfield v. Cox, 139 Va. 219, 52 S.E.2d 72 (1949) (plaintiff knew these wrestling matches were not quiet affairs).

consisted in allowing a perilous situation to arise — permitting patrons to sit outside their cars and requiring that cars negotiate the premises without lights while furnishing no lights or attendants to direct the drivers. That this was a situation involving a foreseeable danger and a consequent duty to act appears to be a reasonable conclusion; and, it is submitted, the court was correct in sustaining the jury's verdict in favor of the plaintiff. In the foul ball case two main issues are presented — the creation of the duty and causation.²⁴ The duty to provide guards to supervise crowds is not an absolute one, but rather one that arises where there are indications of foreseeable danger to patrons from the acts of the crowd.²⁵ In the instant case, the court was willing to base its finding of a duty on knowledge of the proprietor that patrons do scramble for foul balls and that he ought to have reasonably anticipated that some patron might sometime be injured as a result of such a scramble.²⁶ By so holding, the court imposed a duty on this proprietor to keep the usher provided for the particular box section in that section throughout the whole game.

The foul ball case presents a serious cause-in-fact problem — whether the removal of the usher from his place in the stands was a cause of the plaintiff's injury. When the defendant's negligent conduct consists of misfeasance, there is generally little difficulty with the causation problem. On the other hand, where the defendant is chargeable only with nonfeasance, *i.e.*, a failure to take action where a duty is owed, the problem is more diffi-

24. The court did discuss the question of assumption of risk, but held that it could not say as a matter of law that this kind of injury fell into the category of "matters of common knowledge," and that even if it did, a patron might assume that the proprietor had sufficient guards to protect her against this risk. The court's rather strained disposition of this issue would seem to bear out the contention that if the plaintiff has an otherwise strong case, assumption of risk will not bar him from recovery. For a discussion of this case on this issue, see Notes, 32 TEMP. L.Q. 127 (1958), 12 VAND. L. REV. 299 (1958).

25. *Schubert v. Hotel Astor, Inc.*, 281 N.Y. 597, 22 N.E.2d 167 (1939) (hotel was headquarters for patrons attending Army-Navy game); *Antinucci v. Hellman*, 5 App. Div. 634, 174 N.Y.S.2d 343 (1958) (Saturday matinee with unruly children); *Mears v. Kelley*, 59 Ohio App. 159, 17 N.E.2d 386 (1938) (unusual number of people present at theater).

26. In cases involving factual situations very similar to the instant case, courts have denied recovery on the ground of no notice of foreseeable danger and hence no duty to take precautions. Thus, the fact that patrons at racetracks are known to run to betting windows at the last minute has not been accepted by some courts as giving adequate notice of foreseeable danger. *Porter v. California Jockey Club*, 134 Cal. App.2d 158, 285 P.2d 60 (1955); *Futterer v. Saratoga Ass'n for Improvement of Breed of Horses*, 262 App. Div. 675, 31 N.Y.S.2d 108 (1941). Nor has the fact that patrons in the past had left a grandstand by climbing over seats been allowed to serve as such notice would require precautions. *Dabna v. Clay County Fair Ass'n*, 232 Iowa 984, 6 N.W.2d 843 (1942).

cult. In this situation the courts often seem quite willing to allow a jury readily to infer causation from the evidence presented and, in doing so, will use such language as "no inference can be proved to a certainty. It is enough that it is reasonable" or "more than a possibility."²⁷ This technique was used by the court in the instant case.²⁸

It should be noted that in certain nonfeasance cases there is at times a curious intermingling of the cause and duty issues. This occurs most obviously in situations where the negligence charged is the failure to provide adequate supervision. Here it is quite difficult to determine whether the omission was a cause without determining in the same operation what the defendant ought to have done. For example, if a proprietor has three guards present on his premises and an accident occurs nevertheless, it is not possible to determine whether his omission, *i.e.*, his failure to provide more guards, is a cause of the accident without first determining the number of guards that he should have had. The courts have sometimes disposed of this question by handing it to the jury.²⁹

In the instant case the court was willing to impose on this proprietor, who maintained a staff of ushers in the stands, the duty of not removing an usher from a particular box section until the end of the game.³⁰ One might wonder whether this decision implies that a ball park proprietor who does not maintain a staff of ushers is under a duty to supply ushers to protect patrons against the risk of being trampled by patrons scrambling for a foul ball. As this duty to protect is one of reasonable care under the circumstances, it is submitted that such a duty would not be imposed on all such proprietors.

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27. RESTATEMENT, TORTS § 432, Comment (c) (1934); 2 HARPER & JAMES, TORTS 1113 (1956); PROSSER, TORTS 223 (2d ed. 1955); *Lindsay v. De Vaux*, 50 Cal. App.2d 445, 123 P.2d 144 (1942); *Rovegno v. San Jose K. of C. Hall Ass'n*, 108 Cal. App. 591, 291 Pac. 848 (1930); *Malone, Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956).

28. Thus, in refusing to nonsuit, the court said: "[T]here was testimony from which the trier of fact could reasonably infer that, if the usher had been present at his customary station in the box, either his presence there, or his command to the spectators in the vicinity of the batted ball to keep their seats, might have been effective to have prevented plaintiff's injury." 4 Wis.2d 168, 89 N.W.2d 811, 815 (1953).

29. *Stockwell v. Board of Trustees of the Leland Stanford Junior Univ.*, 64 Cal. App.2d 197, 148 P.2d 405 (1944); *Crammer v. Willston Operating Co.*, 19 N.J. Super. 489, 88 A.2d 630 (App. Div. 1952).

30. See RESTATEMENT, TORTS § 298, Comment (c) (1934).