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NOTE

THEATRES AND SHOWS—AMUSEMENTS—NEGLIGENCE.—In the recent New York case of *Sutherland v. Onondaga Hockey Club* [1] the plaintiff and her husband attended a hockey game played under the auspices and supervision of the defendant's club. A wire screen behind each goal protected the spectators from the danger of a flying puck. During an intensive part of the game the puck, after being hit by one of the players, flew off the ice and struck the plaintiff in the face thereby causing injuries for which she sued the defendant. The court, in ruling in favor of the defendant, stated that the plaintiff here was an invitee who was on the premises of the defendant for the mutual business benefit of the parties and was on the premises of the defendant either through an express or implied invitation. The general rule in regard to invitees is that the owner of land must protect invitees against "unreasonable risks due to the condition of the premises which he did not know but should have known had he employed reasonable care and diligence to discover. Toward such persons, he owes the affirmative duty to inspect his premises and either make them safe or give adequate warning so that the invitee may exercise an intelligent judgment as to whether he will deliberately and voluntarily assume such risks. If he thus elects with full knowledge to assume them, the possessor of course owes no further duty with respect thereto."[2] The majority of the court in the *Sutherland* case maintained that there was an assumptoin of risk on the part of the plaintiff. The owner of the hockey club had

1 281 N. Y. S. 505 (1935).
2 HARPER, LAW OF TORTS 229.

made his premises reasonably safe for the purposes for which they were going to be used. It is a matter of common knowledge that during baseball games baseballs are thrown and hit wildly and that during hockey matches the puck frequently flies off the ice. So when these occurrences are known and a person attends these sports he assumes the risk of being struck by a foul ball or a flying puck. And the general rule is that the owner or keeper of a place of public amusement is not liable to invitees with respect to ordinary and obvious risks incident to and characteristic of the amusement offered and that the invitee assumes such risks. In concluding that there was an assumption of risk on the part of the plaintiff, the court referred to cases in which a spectator at a baseball game, who, while not sitting behind the screen, was struck by a wildly thrown or a foul ball. The case relied upon by the court and a case which is considered one of the leading cases on the subject is that of *Crane v. Kansas City Baseball and Exhibition Co.*[3] In that case the plaintiff was a spectator at a baseball game being sponsored by the defendant. The plaintiff occupied a seat in the unenclosed portion of the stands. During the game a foul ball was hit and it struck the plaintiff, who thereupon brought an action for the resulting damage. The Missouri court, in denying recovery, stated that "where a patron had the choice of sitting in the grandstand and behind the screen or outside in the open and chose the latter doubtless for the purpose of avoiding the annoyance of the slight obstruction to vision offered by the netting the plaintiff voluntarily chose an unprotected seat and thereby assumed the risk of such position." Then in the case of *Kavafian v. Seattle Baseball Club Association,*[4] in which a spectator was struck by a foul ball while seated in the unenclosed section of the stand, the court said that one familiar with baseball who, instead of taking a seat in the grandstand protected by a screen to which his ticket entitled him, took a seat outside the screened area, was guilty of contributory negligence or assumed the risk so as to be precluded from recovery for injury.[5] It matters not whether one designates his act in this regard contributory negligence or views it as in the nature of assumption of risk as the result is the same. Now the New York court, in the *Sutherland* case, concluded that a spectator at a hockey game is in the same status as the spectator at a baseball game. Their status is analogous in that both spectators have a choice of sitting either behind the screen or occupying a seat which is not so protected. And when the spectator at the hockey game chooses a seat which is in an unenclosed portion of the stands, such spectator assumes the risks which are characteristic of

3 168 Mo. App.. 301, 153 S. W. 1076 (1913).

4 105 Wash. 215, 181 Pac. 679 (1919).

5 But an invitee in a pleasure resort does not assume the risks incident to a sport played in a part other than that set apart for it. Blakeley v. White Star Line, 154 Mich. 635, 118 N. W. 482, 19 L. R. A. (N. S.) 772, 129 Am. St. Rep. 196 (1908).

and incidental to the hockey game. Other jurisdictions adopting this rule are: Minnesota;[6] Maine;[7] Massachusetts;[8] and Michigan.[9]

The next point to be determined in applying the assumption of risk or contributory negligence doctrines is this: When is the spectator's choice of his seat voluntary and when is it involuntary? Justice Rhodes, who wrote the dissenting opinion in the *Sutherland* case, based his contention upon the theory that the injured plaintiff involuntarily occupied a seat in the unprotected portion of the stand. On the night the plaintiff attended the game she was a little late and most of the better seats had been sold whereupon she instructed the attendant to give her the "best seats he had." The dissenting opinion contends that because of the scarcity of good seats the plaintiff took a seat which she did not choose through any operation of her free will and volition but she occupied it because there was no other place to sit; hence the plaintiff could not assume the risk incident to a place which she involuntarily chose to occupy.

Before replying to the argument of the dissenting opinion it would be advisable to consider a hypothetical case in connection with our refutation of the argument. For example, suppose *A.* attends *B.'s* ball park and demands a seat behind the screen, but *B.* informs *A.* that all the seats behind the screen are occupied, and, as a result, *A.* takes a seat in the unprotected section of the stand. During the game *A.* is struck by a foul ball and incurs injuries for which he sues the defendant *B.* Now it is not logical to assert that *A.* voluntarily chose to sit in the open area of the stand and that he assumed the risk of being struck by a ball. Since it is asserted then that there was no voluntary assumption of risk in the hypothetical case, and in the dissenting opinion in the *Sutherland* case, on what theory or legal principle does the owner of the baseball park or hockey club escape liability? The injured person in these two situations is generally held to be guilty of contributory negligence, because[10] *contributory negligence consists in a knowledge of the probable consequences of a person's acts or omissions.* Proceeding further, where the risk is known, whoever encounters it unnecessarily and voluntarily cannot be regarded as exercising ordinary prudence and therefore does so at his own risk. Hence the person who must occupy a seat in the unprotected portions of the baseball stands or hockey arena, if he witnesses the performance, is well aware of the danger that baseballs will be hit and thrown wildly and that pucks frequently fly off the ice into the stands. The fact that these latter dangers are a

6 Wells v. Minneapolis Baseball & Athletic Ass'n, 122 Minn. 327, 142 N. W. 706, 46 L. R. A. (N. S.) 606 (1913).

7 Brown v. Rhodes, 126 Me. 186, 137 Atl. 58 (1927).

8 Sullivan v. Ridgway Const. Co., 236 Mass. 75, 127 N. E. 543 (1920).

9 Blakeley v. White Star Line, *op. cit. supra* note 5.

10 NEGLIGENCE, 20 R. C. L. 108.

matter of public knowledge negatives any proposition on the part of a person that he was unaware or ignorant of such dangers. Their ascertainability and obviousness operate to constitute an implied acquiescence in them on the part of the person who is injured. Now when the defendant pleads contributory negligence plus general denial he really asserts *that he is not guilty of the negligence charged; but that, if he is, then the plaintiff by his or her own negligence contributed to the resulting injury and for that reason cannot recover.* To further substantiate and solidify the principal case the case of *Wells v. Minneapolis Baseball & Athletic Association* [11] is very much in point. In that case the plaintiff had the choice of sitting either behind a high screen and be protected or of a seat without the screen. She chose the latter and during the game was struck by a batted ball and injured. The court, in denying recovery, stated that persons who *know and appreciate* the dangers from thrown or batted balls assume the risk and they cannot claim the management guilty of negligence when a choice is given between a seat in the open and one behind a screen of reasonable extent. The owner of a baseball ground or of a hockey club is not required by law to erect a screen in certain designated points in his park or arena but when such proprietor assumes the burden of maintaining a screen the law at that point casts upon him the duty and responsibility of keeping said screen in good repair. As to patrons who sit in that portion of the stands protected by a screen, the owner of the park is not required by law to insure them immunity against being struck by a foul ball. An illustration of this principle is well-exemplified in the case of *Edling v. Kansas City Baseball & Exhibition Co.*,[12] in which the plaintiff, a spectator in the defendant's baseball park, occupied a seat directly behind the screen in back of home plate. At one point of the game a foul ball hit the screen but instead of bouncing back on the field the ball traveled straight through a hole in the screen and struck the plaintiff severely injuring him. The hole in the screen was the direct result of the negligence of the defendant in permitting the screen to go into disrepair. The plaintiff brought an action and recovered, the Missouri court ruling that it was the duty of the defendant to exercise reasonable care to keep the screen free from defects and if he allowed the screen to become old, rotten and perforated with holes larger than the ball the jury was entitled to infer that the defendant did not properly perform the duty which the law placed upon him when he erected the screen.

But when the owner or proprietor of a public amusement grounds such as baseball parks or hockey clubs does not attempt to erect a screen but builds his stands so as to have all the seats in them unpro-

11 *Op. cit. supra* note 6.

12 148 Mo. 327, 168 S. W. 908 (1914).
908 (1914).

tected the spectator, when he attends the game, assumes all risks that are identical to and characteristic of the particular game.

In the situations involving theatres and shows the person who patronizes them is considered in law to be an invitee because he is in the theatre at the invitation of the owner and for the mutual benefit of both parties. The general rule is stated thus: "Where the public is invited to attend, it is the duty of the one who so invites to exercise all proper precaution, skill and care commensurate with the circumstances to put and maintain the place and every part of it in a reasonably safe condition for the uses to which it may rightly be devoted. A failure to comply with this duty may be negligence; and for an injury proximately caused by the negligence, the negligent party may be liable in damages, if the party injured is not guilty of contributory negligence."[13] This principle was applied in *Andre v. Mertens*.[14] The plaintiff, a girl of nineteen years of age, paid her admission price and was conducted to a seat in the balcony of the defendant's theatre. Then, on leaving, the plaintiff descended the steps of the balcony, and due to the fact that the steps were not lighted the plaintiff tripped and fell. She sustained painful injuries for which she sued the defendant. The court was of the opinion that the plaintiff acted as a reasonable and prudent person and that the defendant failed in his obligation to provide lights. In rendering a decision in favor of the plaintiff, the New Jersey court laid down the principle that the proprietor of a theatre conducted for reward or profit, to which the general public are invited to attend performances, must use ordinary care to make the premises as reasonably safe as is consistent with the practical operation of the theatre and, if he fails in this duty, he may be liable for personal injuries occasioned thereby; and this rule applies to the proprietor of a moving picture show. Other states following this rule are: California;[15] Connecticut;[16] Indiana;[17] Maryland;[18] Missouri;[19] New York;[20] Illinois;[21] Texas;[22] and Maine.[23]

In holding the owner of theatres liable for injuries suffered as a result of some defect in the defendant's show or theatre, the injured party must not be guilty of contributory negligence or assume the risk which

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13 THEATERS, SHOWS AND PUBLIC RESORTS, 26 R. C. L. 713.

14 88 N. J. LAW. 626, 96 Atl. 893 (1916).

15 Sharpless v. Pantages, 178 Cal. 122, 172 Pac. 384 (1918).

16 Glynn v. Lyceum Theatre Co., 87 Conn. 237, 87 Atl. 796 (1913).

17 Valentine Co. v. Sloan, 53 Ind. App. 69, 101 N. E. 102 (1913).

18 New Theater Co. v. Hartlove, 123 Md. 78, 90 Atl. 990 (1914).

19 Oakley v. Richards, 275 Mo. 266, 204 S. W. 505 (1918).

20 Dunning v. Jacobs, 36 N. Y. S. 453 (1895).

21 Hart v. Washington Park Club, 157 Ill. 9, 41 N. E. 620, 29 L. R. A. 402, 48 Am. St. Rep. 298 (1895).

22 Dalton v. Hopper, 168 S. W. 84 (Texas, 1914).

23 Hoyt v. Northern Maine Fair Ass'n, 121 Me. 461, 118 Atl. 290 (1922).

ultimately produced his injury. First of all in regard to theatres and shows assumption of risk means that the person so attending voluntarily assumes to sit and walk in a dark theatre beause the fact that a theatre has necessarily to be dark is a matter of universal knowledge and experience. There can be no liability on the part of the owner of a theatre for injuries to a patron which does not occur as a result of any negligence on the part of the owner. In the case of *Rosston v. Sullivan* [24] the plaintiff, while leaving her seat, tripped in the aisle and sustained injuries as a result. There were no defects in the aisle carpet and the plaintiff based her action on the negligence of the defendant in keeping the theatre too dark. The court refused to entertain her contention and, in holding for the defendant, said that while showing motion pictures the theatre owner violated no duty to patron if the lighting was that ordinarily used for a reasonably clear view of the picture. In other words, the plaintiff assumed the risks incident to the theatre being dark. The owner of a theatre is not an insurer of a patron's safety against obvious and incidental risks.

The doctrine of contributory negligence commands a paramount position in the determination of the liability or nonliability of the owner of a theatre. In the recent case of *Loew's Nashville & Knoxville Corp. v. Durret* [25] the plaintiff entered the balcony of the defendant's theatre but ascertained that there was no usher present to assist her in finding a seat. Despite the fact that she knew and appreciated that there was a danger of falling if she attempted to descend the dark stair of the aisle alone, she commenced to feel her way down the steps. As a result she tripped and fell, incurring injuries for which she sued the defendant. The defendant was negligent in not providing an usher at such a dangerous spot, but it was not necessary for the plaintiff to attempt to descend the steps herself. So the court, in holding for the defendant, stated that she was guilty of contributory negligence in attempting to descend the dark stairway and such contributory negligence precluded her from recovery.

In most amusement parks there are many kinds of amusements, such as roller coasters, skyrockets and ferris wheels. These latter instruments are quasi-dangerous and their potential ability to inflict injury is known to all persons who seek that sort of entertainment. Persons who indulge in amusement park facilities are invitees and, in accordance with the well-settled rule that an owner or occupant of land or buildings who directly or by implication invites or induces others to go thereon or therein owes to such persons a duty to have his premises in a reasonably safe condition and to give warning of latent or concealed perils, one who maintains a public resort or place of amusement

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24 179 N. E. 173 (Mass. 1932).
25 79 S. W. (2d) 598 (Tenn. 1934).

is required by law to keep it in a reasonably safe condition for those who frequent the place.[26]

In the case of *Parker v. Cushman* [27] the plaintiff was a spectator at the defendant's amusement grounds. During a performance of an animal show a lioness escaped and attacked the plaintiff severely injuring her. The court held for the plaintiff and asserted that the keeper of wild animals for exhibition is bound to exercise a high degree of care to prevent injury by them to persons who attend such exhibitions. There was no ground here for the introduction of the assumption of risk doctrine due to the fact that the plaintiff had no knowledge or would not be legally bound to presume that the defendant would permit the animals to escape and assault spectators.

Contributory negligence occupies a preeminent position in ultimate determination of cases involving injuries arising out of amusement devices. And when an owner of a public place is able to show and prove contributory negligence on the part of the injured person he is not liable. In *Linthicum v. Truitt* [28] the plaintiff was a patron at the defendant's amusement park. During the progress of his visit the plaintiff attempted to board a moving merry-go-round but was unsuccessful and was thrown off thereby experiencing serious injury. The plaintiff was denied recovery and the court said that despite the fact that the defendant was slightly negligent in starting the merry-go-round before the plaintiff had time to board it, yet the plaintiff by attempting to get on the moving vehicle was guilty of contributory negligence which barred his recovery.

The proprietor of an amusement device is not an insurer of the safety of his patrons nor is he bound to protect them against such obvious risks that are necessarily incidental to such devices but he must use reasonable care to see that the device is properly constructed and maintained in a proper condition for the purposes for which it is used. His duty is fulfilled when he makes the place as little dangerous as such a place can reasonably be, having regard for the contrivances necessarily used in conducting such a place.[29]

If the proprietor of a place of public amusement neglects his duty to use ordinary or reasonable care to put and keep the premises, appliances and amusement devices in reasonably safe condition, ignorance of the

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26 THEATERS, SHOWS AND PUBLIC RESORTS, 26 R. C. L. 713.

27 195 Fed. 715 (C. A. A. 8th, 1912).

28 2 Boyce 338, 80 Atl. 245 (1911).

29 Scott v. University of Michigan Athletic Ass'n, 152 Mich. 684, 116 N. W. 624, 125 Am. St. Rep. 423 (1908); Williams v. Mineral City Park Ass'n, 128 Iowa 32, 102 N. W. 783, 111 Am. St. Rep. 184, 1 L. R. A. (N. S.) 427 (1905); Johnson v. Hot Springs Land & Improvement Co., 76 Ore. 333, 148 Pac. 1137, L. R. A. 1915F, 689 (1915).