THE LIABILITY OF THE PROPRIETOR OF A BASEBALL PARK FOR INJURIES TO SPECTATORS STRUCK BY BATTED OR THROWN BALLS

In the United States the almost unanimous holding of the cases considering the liability of the proprietor of a baseball park to a patron injured while seated in the stands by a wayward ball either batted or thrown into the stands during the course of a game, is that the plaintiff cannot recover. There appears in the decisions, however, considerable confusion as to the basis of the lack of liability on the part of the defendant. In the somewhat analogous situation where the plaintiff is struck by a flying puck while attending a hockey game, there is a greater amount of disagreement among the cases, with the majority of the few cases[1] considering the question allowing recovery. It is the purpose of this note to consider the grounds on which recovery is either denied or granted.

In any discussion of the liability of the proprietor of a ball park three questions arise: Was the defendant negligent? Did the plaintiff assume the risk of being injured by the wayward baseball? Was the plaintiff guilty of contributory negligence?

The normal baseball park is constructed so that the diamond is surrounded on two sides by seats for the patrons to occupy, the distance between the diamond and the seats varying with each park. In many ball parks, the seats extend beyond the diamond along the left and right field lines, and some parks provide seats in the outer extremities of left, center and right fields. Normally the portion of the stands immediately behind home plate is protected by screening, and in some ball parks screening is provided for other portions of the park.

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1. In the following cases the plaintiff recovered: Shurman v. Fresno Ice Rink, Inc., 91 Cal. App.2d 469, 205 P.2d 77 (1949); Thurman v. Clune, 51 Cal. App.2d 505, 125 P.2d 59 (1942); Thurman v. Ice Palace, 36 Cal. App.2d 364, 97 P.2d 999 (1940); Lemoine v. Springfield Hockey Ass., Inc., 307 Mass. 102, 29 N.E.2d 716 (1940); Shanney v. Boston Madison Square Garden Corp., 296 Mass. 168, 5 N.E.2d 1 (1936); Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N.W.2d 90 (1943); James v. Rhode Island Auditorium, Inc., 60 R.I. 405, 199 Atl. 293 (1938). In the following cases recovery was denied: Modec v. City of Eveliht, 224 Minn. 556, 29 N.W.2d 453 (1947); Hammel v. Madison Square Garden Corp., 156 Misc. 311, 279 N.Y.S. 815 (2nd Dept. 1935); Ingersoll v. Onondaga Hockey Club, 245 App. Div. 137, 231 N.Y.S. 505 (3rd Dept. 1935); Elliot & Elliot v. Amphitheatre, Limited, 3 West. Week. Rep. 225 (K.B. Man. 1934).

The most common situation is that in which the injured plaintiff is seated in a seat not protected by screening and is struck by ball from the playing field either batted or thrown into the stands. The usual ground of negligence alleged is failure to screen the seats immediately in front of him, although in some cases it is alleged that there was negligence in failing to warn the plaintiff that he might be struck by a ball propelled into the stands.[2] In this class of cases, the courts are unanimous, with but one exception, in denying recovery.

In reaching this conclusion, the courts rely on one or more of three grounds: lack of negligence on the part of the defendant,[3] contributory negligence by the plaintiff,[4] or assumption of risk

2. Other grounds of negligence are occasionally alleged. In Hudson v. Kansas City Baseball Club, 349 Mo. 1215, 164 S.W.2d 318 (1942) plaintiff alleged, in addition to the usual grounds, that defendant was negligent in offering seats for sale without classifying them as protected or unprotected, in offering reserved seats for sale of both classes creating a reasonable but false impression that a "reserved seat" was a screened seat, and in seating the plaintiff, a person of advanced years and impaired eyesight, in an unscreened seat without informing him that there was no screen between him and home plate. The court did not consider these specific allegations separately, but held that plaintiff could not recover, putting its major emphasis on the risk of injury due to balls driven into the stand and the alleged negligence in failing to screen the seats in front of the plaintiff and to warn him of the danger. In Brummerhoff v. St. Louis National Baseball Club, 149 S.W.2d 382 (Mo. App. 1941) the plaintiff alleged negligence in that "the defendants negligently directed and permitted their players to bat out said balls when they knew, or by the exercise of ordinary care should have known, that such balls were likely to strike and injure the spectators." The court found that there was no negligence. In Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949) the plaintiff alleged negligence in the manner in which the ball players on the field handled the ball. The court held that the plaintiff assumed the risk of the injury, indicating however that they would apply the doctrine in the same way in which the Missouri courts do (see note 29 *infra*) which means that they are in effect finding that this was not negligence. In Curtis v. Portland Baseball Club, 130 Ore. 93, 279 Pac. 277 (1929) the plaintiff was occupying a seat flush with the edge of the screen. He was hit when a foul ball curved around the screen and brought suit alleging negligence in failing to erect wings on the screen to prevent this type of accident. The court held that there was no negligence.

3. Anderson v. Kansas City Baseball Club, 231 S.W.2d 170 (Mo. 1950); Brummerhoff v. St. Louis National Baseball Club, 149 S.W.2d 382 (Mo. App. 1941); Paxton v. Buffalo International Baseball Club, Inc., 256 App. Div. 887, 9 N.Y.S.2d 42 (4th Dep't. 1939); Cates v. Cincinnati Exhibition Co., 215 N.C. 64, 1 S.E.2d 131 (1939); Hull v. Oklahoma City Baseball Co., 196 Okla. 40, 163 P.2d 982 (1940); Curtis v. Portland Baseball Club, 130 Ore. 93, 279 Pac. 277 (1929).

4. Crane v. Kansas City Baseball and Exhibition Co., 168 Mo. App. 301, 153 S.W. 1076 (1913); Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56 (Sup. Ct. 1941), Cincinnati Base Ball Club Co. v. Eno, 112 Ohio St. 175, 147 N.E. 86 (1925); Kavafian v. Seattle Baseball Club, 105 Wash. 219, 181 Pac. 679 (1919).

by the plaintiff.[5] In discussing the cases, the purpose is to analyze these grounds in order to determine their validity as bases for decision.

Before the plaintiff can hope to recover from the defendant, he must establish some conduct on the part of the defendant which can be characterized as negligent, for it is well settled that the defendant is not an insurer of those who attend the game.[6] To find negligence, a duty owed by the defendant and a breach of the duty must be found. This leads to the first inquiry: What is the duty that the proprietor of a baseball park owes to a patron attending the game?

It has been several times stated that the duty of the baseball park proprietor to the patron is the same as that of any landowner to an invitee on the proprietor's land.[7] The Restatement of Torts has declared the duty of the latter to be as follows:

> A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he (a) knows, or by the

5. Quinn v. Recreation Park Association, 3 Cal.2d 725, 46 P.2d 144 (1935); Brown v. San Francisco Ball Club, 222 P.2d 19 (Cal. App. 1950); Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949); Emhardt v. Perry Stadium, Inc., *et al.*, 113 Ind. App. 197, 46 N.E.2d 704 (1943); Lorino v. New Orleans Baseball and Amusement Co., 16 La. App. 95, 133 So. 408 (1931); Shaw v. Boston American League Baseball Co., 325 Mass. 419, 90 N.E.2d 840 (1950); Brisson v. Minneapolis Baseball and Athletic Association, 185 Minn. 507, 240 N.W. 903 (1932); Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56 (Sup. Ct. 1941); Blackhall v. Capitol District Baseball Association, 154 Misc. 640, 278 N.Y.S. 649 (Albany City Ct. 1935); Hummel v. Columbus Baseball Club, Inc., 71 Ohio App. 321, 49 N.E. 773 (1943); Ivory v. Cincinnati Baseball Club, 62 Ohio App. 514, 24 N.E.2d 837 (1939); Hoke *et ux.* v. Lykens School District *et al.*, 69 D & C 422, 60 Dauph. 226 (1948); Williams *et al* v. Houston Baseball Ass'n., 154 S.W.2d 374 (Tex. Civ. App. 1941); Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941); Kavafian v. Seattle Baseball Club, 105 Wash. 219, 181 Pac. 679 (1919).

6. Brown v. San Francisco Ball Club, 222 P.2d 19 (Cal. App. 1950); Anderson v. Kansas City Baseball Club, 231 S.W.2d 170 (Mo. 1950); Blackhall v. Albany Baseball & Amusement Co., Inc., 157 Misc. 801, 285 N.Y.S. 695 (Albany County Ct. 1936); Ivory v. Cincinnati Baseball Club, 62 Ohio App. 514, 24 N.E.2d 837 (1939); Curtis v. Portland Baseball Club, 130 Ore. 93, 279 Pac. 277 (1929); Hoke *et ux.* v. Lykens School District *et al.*, 69 D & C 422, 60 Daugh. 226 (1948); Williams *et al.* v. Houston Baseball Club, 154 S.W.2d 874 (Tex. Civ. App. 1941).

7. Anderson v. Kansas City Baseball Club, 231 S.W.2d 170 (Mo. 1950); Hudson v. Kansas City Baseball Club, Inc., 349 Mo. 1215, 164 S.W.2d 318 (1942); Hull v. Oklahoma Baseball Co., 196 Okla. 40, 163 P.2d 982 (1940). See Brown v. San Francisco Ball Club, 222 P.2d 19 (Cal. App. 1950); Ivory v. Cincinnati Baseball Club, 62 Ohio App. 514, 24 N.E.2d 837 (1939); Shaw v. Boston American League Baseball Co., 325 Mass. 419, 90 N.E.2d 840 (1950).

> exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and (b) has no reason to believe that they will discover the condition or realize the risk involved therein, and (c) invites or permits them to enter or remain upon the land without exercising reasonable care (1) to make the condition reasonably safe, or (2) to give a warning adequate to enable them to avoid the harm without relinquishing any of the services which they are entitled to receive, if the possessor is a public utility.[8]

This rule has been put in another way: the proprietor of the premises must use reasonable care to keep the premises reasonably safe and give warning of latent or concealed perils, but he is not liable for injury to an invitee resulting from a danger which was or should have been observed in the exercise of reasonable care.[9] Under either statement of the rule, it would appear that the defendant baseball park would be under no duty to protect or warn his patrons of the danger of being hit by a wayward ball finding its way into the stand. In view of the common knowledge of the game of baseball throughout this country, it quite reasonably could be said that the defendant has reason to believe that the patron will discover the condition and realize the risk involved, or, that the danger is one which should be observed by the patron, thus satisfying the duty of the defendant, however that duty may be stated.

However, the decision in only one case seems to be based on that express ground without any discussion of assumption of the risk of contributory negligence.[10] In most of the other cases through the evolution of judicial decision, a crystallization of the duty of the defendant has developed in terms of screening. Although the defendant need not screen all of the seats in the ball park,[11] he must screen some part of the park to accommodate

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8. RESTATEMENT, TORTS § 343 (1939).

9. Brown v. San Francisco Ball Club, 222 P.2d 19 (Cal. App. 1950).

10. Hull v. Oklahoma City Baseball Co., 196 Okla. 40, 163 P.2d 982 (1940). See Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949); Hudson v. Kansas City Baseball Club, 349 Mo. 1215, 164 S.W.2d 318 (1942). There the court said that the general rules applicable to the relationship of a proprietor of land and a business invitee are applicable to a case where the plaintiff is injured while attending a ball game in the defendant's park, that the rules governing the land proprietor's duty to his invitee presuppose that the defendant has no reason to believe that the invitee will discover the condition or realize the risk involved but that the plaintiff assumes the risks of the obvious dangers.

11. See cases cited in note 12, 13 and 14 *infra*.

at least some of those patrons who wish to sit behind a protective screen. There is a verbal conflict in the statement of the rule, some courts insisting that screened seats must be available for all those who apply for them,[12] and others insisting that screened seats must be made available for all who could reasonably be expected to apply for them on an ordinary day,[13] while other courts add to either of the above rules the requirement that the most dangerous portions of the ball park must be screened—*i.e.* that section immediately behind home plate.[14] However, in only four cases has this distinction between the statement of the rules become important and in only one did the court state the rule in terms of screening.[15] There the court

12. Lorino v. New Orleans Baseball and Amusement Co., 16 La. App. 95, 133 So. 408 (1931); Edling v. Kansas City Baseball and Exhibition Co., 181 Mo. 327, 168 S.W. 908 (1914); Olds v. St. Louis National Baseball Club, 232 Mo. App. 897, 104 S.W.2d 746 (1937); Grimes v. American League Baseball Co., 78 S.W.2d 520 (Mo. App. 1935); Crane v. Kansas City Baseball & Exhibition Co., 168 Mo. App. 301, 153 S.W. 1076 (1913). *But see* Wells v. Minneapolis Baseball and Athletic Association, 122 Minn. 327, 142 N.W. 706 (1913). The court held that the duty of the proprietor of a baseball park was something more than screening a portion of the stands, and left the question to the jury, indicating however that a sign posted where the patrons could see it warning them of the danger might be sufficient.

13. Brown v. San Francisco Ball Club, 222 P.2d 19 (Cal. App. 1950) (expressly rejecting the rule that screened seats must be provided for all who apply for them); Ratcliff v. San Diego Baseball Club, 27 Cal. App.2d 733, 81 P.2d 625 (1938) (same); Quinn v. Recreation Park Association, 3 Cal.2d 725, 46 P.2d 144 (1935) (same); Paxton v. Buffalo International Baseball Club, Inc., 256 App. Div. 887, 9 N.Y.S.2d 42 (4th Dep't. 1939) (same); Brisson v. Minneapolis Baseball & Athletic Association, 185 Minn. 507, 240 N.W. 903 (1932) (same); Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941) (same.)

14. Ratcliff v. San Diego Baseball Club, 27 Cal. App.2d 733, 81 P.2d 625 (1938); Cates v. Cincinnati Exhibition Co., 215 N.C. 64, 1 S.E.2d 131 (1939); Brisson v. Minneapolis Baseball & Athletic Association, 185 Minn. 507, 240 N.W. 903 (1932).

15. Brisson v. Minneapolis Baseball & Athletic Association, 185 Minn. 507, 240 N.W. 903 (1932). Plaintiff attended a ball game on a very crowded day. As a consequence he could not get a screened seat and was forced to take a seat in an unscreened portion of some temporary stands built out into the playing field where he was struck by a batted ball. The court, after stating the rule in terms of screening and finding that it had been satisfied, expressly left open the question of whether it was negligence to build the temporary stands into the playing field, and found that the plaintiff assumes the risk of the injury. In Paxton v. Buffalo International Baseball Club, Inc., 256 App. Div. 887, 9 N.Y.S.2d 42 (4th Dep't. 1939) the court in a summary opinion held that it was error to instruct the jury that they could find the defendant negligent if the plaintiff had looked for a screened seat and found none available, apparently on the ground that the defendant is not under a duty to screen sufficient seats to accommodate all those who apply for them. In Brummerhoff v. St. Louis National Baseball Club, 149 S.W.2d 382 (Mo. App. 1941) the

said that it was unnecessary to screen sufficient seats to accommodate all those applying for them. The duty was satisfied by supplying a sufficient number of seats to accommodate those who could reasonably be expected to request them on an ordinary day. After this duty has been satisfied, there is no additional duty to warn the patrons of the dangers involved.[16] If the defendant has supplied the necessary screening, it would follow logically that there could be no recovery by the plaintiff for the defendant, having satisfied his limited duty, would not be negligent, and there would be no basis for finding liability. Even if this duty were not fulfilled, if it could not be shown that the plaintiff was sitting in a section which should have been screened, or that he would have taken a seat in a screened portion if that portion were made available, there could be no recovery because there would be no factual causation between the negligence of the defendant and the plaintiff's injury—that is, even if the duty had been satisfied, the injury would have happened anyway.

Most of the decided cases could easily have been placed on this ground, for in practically every case there were facts from which the courts could have found that the defendant had not breached

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plaintiff bought a ticket entitling him to a screened or unscreened seat. Unable to locate a screened seat, he sat in one unprotected by a screen where he was hit. The court found that the defendant was not negligent, without referring to any rule of screening, apparently on the ground that the defendant need not furnish screened seats for all who apply for them. In Shaw v. Boston American League Baseball Co., 325 Mass. 419, 90 N.E.2d 840 (1950), the plaintiff was sitting in an unscreened box seat on a day when the ball park was sold out. The box contained four permanent chairs and the management had put two temporary chairs in the aisle which were occupied. In the plaintiff's suit, the only allegation of negligence was breach of a statutory duty not to block the aisles with temporary seats. The court found no causal connection between the plaintiff's injury and the negligence alleged. As to the general liability of the defendant the court said the plaintiff assumed the risks of all the hazards inherent in the game, including that of being hit with a foul ball. The court made no reference to the duty in terms of screening.

16. Anderson v. Kansas City Baseball Club, 231 S.W.2d 170 (Mo. 1950), the court held that there was no duty to warn even though the plaintiff had erroneously taken a seat behind a screen while she held a ticket entitling her only to an unreserved unscreened seat and when she was requested by the usher to move she inquired as to the safety of the unscreened seats. Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941). *See* Hudson v. Kansas City Baseball Club, 349 Mo. 1215, 164 S.W.2d 318 (1942), Ivory v. Cincinnati Baseball Club, 62 Ohio App. 514, 24 N.E.2d 837 (1939), Williams *et al.* v. Houston Baseball Ass'n., 154 S.W.2d 874 (Tex. Civ. App. 1941).

this specialized duty and consequently wasn't negligent.[17] In the majority of cases in which this was spelled out in the opinion there was a finding of fact that part of the premises was screened, and either an express finding that some protected seats were available to the plaintiff if he had chosen to sit in them,[18] or no finding that had there been screened seats the plaintiff would have made use of them,[19] and hence even if there was a finding that the screening was inadequate, the result was the same as it would have been had adequate screening been provided. This would appear to be the most expedient and rational ground on which to place the decisions and would adequately dispose of the majority of the cases in accordance with the prevailing view. However, most courts, after stating this crystallized rule seem to ignore it, and go on to base their decision on the holding that the plaintiff either "assumed,"[20] "accepted"[21] or "incurred"[22] the risk, or was contributorily negligent,[23] in failing to sit behind a protective screen when the choice of such a seat was available to him.

The basic theory of the doctrine of assumption of risk includes three elements: (1) the conduct of the defendant, or the land or chattels of the defendant must be dangerous, (2) the plaintiff must have knowledge of the risk, and (3) the plaintiff must

17. Brown v. San Francisco Ball Club, 222 P.2d 19 (Cal. App. 1950); Blackhall v. Albany Baseball & Amusement Co., Inc., 157 Misc. 801, 285 N.Y.S. 695 (Albany County Ct. 1936). See also cases cited in notes 18 and 19 *infra*.

18. Quinn v. Recreation Park Association, 3 Cal.2d 725, 46 P.2d 144 (1935); Emhardt v. Perry Stadium, Inc. *et al.*, 113 Ind. App. 197, 46 N.E.2d 204 (1943); Hummel v. Columbus Baseball Club, Inc., 71 Ohio App. 321, 49 N.E.2d 773 (1943); Ivory v. Cincinnati Baseball Club, 62 Ohio App. 514, 24 N.E. 837 (1939); Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56 (Sup. Ct. 1935); Blackhall v. Capital District Baseball Association, 154 Misc. 640, 278 N.Y.S. 649 (Albany City Ct. 1935); Williams *et al.* v. Houston Baseball Association, 154 S.W.2d 874 (Tex. Civ. App. 1941); Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941).

19. Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949); Lorino v. New Orleans Baseball & Amusement Co., Inc., 16 La. App. 95, 133 So. 408 (1931); Shaw v. Boston American League Baseball Co., 325 Mass. 419, 90 N.E.2d 840 (1950); Adonnino v. Village of Mount Morris, 171 Misc. 383, 12 N.Y.S.2d 658 (Sup. Ct. 1939); Hoke *et ux.* v. Lykens School District *et al.*, 69 D & C 422, 60 Daugh 226 (1948).

20. See cases cited in note 5 *supra*.

21. Hudson v. Kansas City Baseball Club., 349 Mo. 1215, 164 S.W.2d 318 (1942).

22. Emhardt v. Perry Stadium Inc., *et al.*, 113 Ind. App. 197, 46 N.E.2d 704 (1943).

23. See cases cited in note 4 *supra*.

voluntarily enter into the area of the risk under such circumstances that he is not there as a matter of right. If these three elements are present and the plaintiff is injured by the danger created by the defendant, the plaintiff is denied recovery because he assumed the risk."[24]

However, in the application of the doctrine to the baseball cases it is not always clear what is meant by the courts. By applying the term in two essentially different types of situations the courts appear to be using the term to convey two different ideas: in some cases it seems to mean that where the defendant has engaged in conduct, which, absent assumption of risk, would be characterized as negligent there will be no recovery, even if such conduct was a factual cause of the plaintiff's injury, because of the plaintiff's voluntary assumption of the risk.[25] In other cases[26] it appears to mean that the defendant's duty is a limited one, that after that duty has been performed—and consequently the defendant not being negligent—there remains a hazard to the plaintiff to which it is not unreasonable for the defendant to expose him, and if injury results from the risk the defendant will not be liable. In the latest case[27] decided by the Missouri Supreme Court this latter meaning was clearly pointed out. There the plaintiff, while occupying a seat unprotected by a screen, was injured by a ball hit into the stands. The court, after pointing out the duty of the defendant in terms of screening, and finding that the duty was satisfied, proceeded to say that after a reasonable number of screened seats has been provided

> . . . there remains a hazard that spectators in unscreened seats may be struck by balls which are fouled or otherwise driven into the stands. This risk is a necessary and inherent

24. RESTATEMENT, TORTS § 893 (1939); PROSSER, TORTS 376 (1st ed., 1941); COOLEY, LAW OF TORTS 657 (Students ed., Throckmorton, 1930).

25. Adonnino v. Village of Mt. Morris, 171 Misc. 383, 12 N.Y.S.2d 658 (Sup. Ct. 1939); Brisson v. Minneapolis Baseball and Athletic Association, 185 Minn. 507, 240 N.W. 903 (1932); Kavafian v. Seattle Baseball Club, 105 Wash. 219, 181 Pac. 679 (1919).

26. Brown v. San Francisco Ball Club, 222 P.2d 19 (Cal. App. 1950); Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949); Blackhall v. Albany Baseball and Amusement Co., Inc., 187 Misc. 801, 285 N.Y.S. 695 (Albany County Ct. 1936); Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56 (Sup. Ct. 1935); Ivory v. Cincinnati Baseball Club, 62 Ohio App. 514, 24 N.E. 837 (1939); Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941); Williams *et al.* v. Houston Baseball Ass'n., 154 S.W.2d 874 (Tex. Civ. App. 1941).

27. Anderson v. Kansas City Baseball Club, 231 S.W.2d 170 (Mo. 1950).

> part of the game and remains after ordinary care has been exercised to provide the spectators with seats which are reasonably safe. It is a risk which is assumed by the spectators because it remains after due care has been exercised and is not the result of negligence on the part of the baseball club . . .[28]

The use of the doctrine of assumption of risk without considering the plaintiff's negligence has been recognized by the Nebraska Supreme Court in a case[29] involving the liability of the proprietor of a hockey rink for injuries incurred by being struck by a puck driven from the rink into the crowd. In analyzing the baseball cases the court, after pointing out the "definite trend" toward denying recovery in such cases, said that the basis of the denial "seems to be predicated on the principle that the spectator with knowledge of the dangers incident to the playing of the game assumes the risk of being injured thereby, *and this without regard to any negligence on the part of the operator.*"[30]

It is apparent from reading the Missouri cases on the point that the view expressed in the *Anderson* case is the meaning referred to by them, and that little more is present than another verbalization of the rule that the defendant is not liable because there was no negligent conduct causing the injury complained of on which to base recovery. In fact, in Missouri, the courts will not use the doctrine in the first sense suggested above—for once negligence by the defendant has been established and a factual causation between the negligence and the injury exists, assumption of risk cannot be used to defeat recovery.[31] As stated in *Edling v. Kansas City Baseball and Exhibition Co.:* "where one person owes a duty to another, the person for whose protection the duty exists cannot be held to have assumed the risks of injury created solely by a negligent breach of such duty . . .[32]

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28. *Id.* at 173.
29. Tite v. Omaha Coliseum Corporation *et al.*, 144 Neb. 22, 12 N.W.2d 90 (1943).
30. *Id.* at 31, 12 N.W.2d at 95.
31. Hudson v. Kansas City Baseball Club, 349 Mo. 1215, 164 S.W.2d 318 (1942); Edling v. Kansas City Baseball & Exhibition Co., 181 Mo. 827, 168 S.W. 908 (1914); Olds v. St. Louis National Baseball Club, 232 Mo. App. 897, 104 S.W.2d 746 (1937); Grimes v. American League Baseball Co., 78 S.W.2d 520 (Mo. App. 1935); Crane v. Kansas City Baseball and Exhibition Co., 168 Mo. App. 301, 153 S.W. 1076 (1913).
32. 181 Mo. App. 327, 332, 168 S.W. 908, 910 (1914).

and in *Grimes v. American League Baseball Co.* that "upon proof of defendant's negligence, it (assumption of risk) fell out of the case."[33] Hence where the plaintiff could show that the screening was inadequate and either that the plaintiff was sitting in a portion which should have been screened, and was unable to obtain a screened seat, or that he would have occupied a screened seat had it been available but didn't because of the lack of them, the defendant could not rely on the doctrine of assumption of risk to defeat liability.

However, in other states, the courts will allow assumption of risk to defeat recovery even where there are facts from which there could be a finding of negligence on the part of the defendant had assumption of risk not been present. In *Kavafian v. Seattle Baseball Club,* in the original hearing of the case,[34] there was evidence showing that defendant supplied only 60 feet of screening, that it should have supplied 120 feet, that plaintiff was injured while occupying a seat which would have been protected had 120 feet of screening been supplied, but which was not protected when only 60 feet was furnished; and that there were screened seats available on the day of the injury to which the plaintiff was entitled with the ticket he had purchased. The court affirmed the jury finding for the plaintiff, holding that the questions of negligence, contributory negligence, and assumption of risk were properly for the jury. On rehearing,[35] the decision was reversed and the complaint dismissed. Apparently accepting its original finding of negligence on the part of the defendant, the court held that the plaintiff either assumed the risk or was contributorily negligent in sitting in an unscreened section of the stands when he could have taken a seat in the screened portion. The court added that whether plaintiff's conduct was termed assumption of risk or contributory negligence, the result would be the same.

It is apparent that by applying the doctrine of "assumption of risk" in two essentially different types of situations, the courts are using it in two different senses. In the first sense, its application adds nothing to awarding or denying recovery to the plaintiff, for its use assumes a sufficient ground—lack of negligence—

33. 78 S.W.2d 520, 525 (Mo. App. 1935).
34. 105 Wash. 215, 177 Pac. 776 (1919).
35. 105 Wash. 219, 181 Pac. 679 (1919).

on which recovery may be denied; in the second sense, its use would be justified if proper facts were presented, but only in an exceptional case will sufficient facts be found to call forth its use—*i.e.* negligence plus causal relation. It matters not whether the application of the doctrine is considered as negating the duty of the defendant,[36] and thus—theoretically at least—denying recovery because there has been no negligent conduct on the part of the defendant, though, absent it, negligence would be found, or as defeating recovery even though the court finds a duty and the defendants breach thereof,[37] because in any case, before the doctrine can become important in any substantial sense, there must be facts showing negligence, omitting the question of assumption of risk. The use of the language of assumption of risk generally by the courts leads only to confusion of thought in cases which could be decided on the simple grounds, either (1) the defendant was not negligent, or (2) even though the defendant was negligent, the injury would have occurred any way—*i.e.* no factual causation.[38]

An essential element of the assumption of risk doctrine is knowledge by the plaintiff of the risk, and as a result of this element and the emphasis on assumption of the risk as a means of denying recovery, the courts have often gone to great lengths either to find that the plaintiff actually knew of the risks involved in sitting in the unscreened seats or that the risks of the game were of such common knowledge that the court was willing to impute the knowledge of them to the plaintiff.[39] Other

36. RESTATEMENT, TORTS § 893, com. a (1939), PROSSER, TORTS 376 (1st ed. 1941).

37. COOLEY, LAW OF TORTS 657 (Students ed., Throckmorton 1930).

38. *See* Brown v. San Francisco Ball Club, 222 P.2d 19 (Cal. App. 1950). Plaintiff attended a ball game and was injured an hour after the game began, while occupying an unscreened seat. In affirming a directed verdict for the defendant the court, after stating the rule that the defendant's duty was to provide a sufficient number of screened seats to accommodate those who might reasonably be expected to call for them on an ordinary day and finding that plaintiff's injury "did not flow from, was not caused by, any failure of performance by respondent of any duty owed to her, and did not give rise to a cause of action in her favor against respondent for damages for such injuries," went to great effort to impute knowledge of the risk to the plaintiff and find that she voluntarily assumed the risk of injury, in order to refute the plaintiff's attempt to "take this case out of the rule upon the theory that she was ignorant of the game of baseball and attendant risks, hence cannot be said to have knowingly assumed the risk."

39. In Brown v. San Francisco Ball Club, 222 P.2d 19 (Cal. App. 1950) the court imputed to the plaintiff knowledge of the risk in spite of her

courts seem to be not interested in the knowledge of the plaintiff, and are satisfied to say that one who attends a baseball game assumes the risk of being injured by a ball thrown or batted into the stands, apparently on the ground that rule of law is "well-established."[40] As indicated above, this concern with the plaintiff's knowledge is completely unnecessary to the decision in the majority of cases, for if the theory suggested were adopted, it would be unnecessary to consider the question of as-

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claimed ignorance thereof from the facts that she was a mature woman of 46 years of age, that she had seen one baseball game played before although this game was not played in a ball park but on a large field at which time she observed the game from an automobile and had not observed balls fly into the crowd, that she had attended this game for an hour before the injury "which should have apprised her of the risk of being struck by a ball," even though she had not been paying attention to the game, but had been conversing with a friend, that she had seen children playing in the streets and that the game of baseball was of wide spread knowledge. The court indicated that it wasn't concerned with her actual knowledge of the risks by saying that "we find nothing here to take appellant outside the usual rule (that patrons at a ball park assume the risk of injury by a wayward ball), whether it be said that this 'common knowledge' of these obvious and inherent risks are imputed to her or that they are obvious risks which should have been observed by her in the exercise of ordinary care." In Brisson v. Minneapolis Baseball and Athletic Ass'n., 185 Minn. 507, 240 N.W. 903 (1932) the court found that the plaintiff had knowledge of the risks in spite of his claimed ignorance of them, because he had attended ball games when he was a youth, had seen one ball game recently, and had witnessed the game at which he was injured for six innings before the injury. In Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941) the court found knowledge of the risks from the facts that the plaintiff had attended one ball game previous to the one in which she was injured, that she attended the ball game with her son who was a baseball "fan" and had been in the habit of attending ball games in the past, and that the son had handled baseballs under the watchful eye of the plaintiff. "This history, coupled with a universal common knowledge, was bound to have acquainted plaintiff with the potential dangers inherent in a baseball in play." In Lorino v. New Orleans Baseball and Amusement Co., Inc., 16 La. App. 95, 133 So. 408 (1931) the plaintiff took a seat in the bleachers which was protected by a screen five feet in height. While he was looking for a seat, he was injured when a ball travelled over the screen and struck him. The court, however, held that he assumed the risk, finding his knowledge of the risk from his familiarity with the game coupled with the common knowledge of the game of baseball, in spite of his contention that he assumed that a five-foot screen in front of the bleachers which were 168 feet from the plate was sufficient to protect him from balls driven into the stand.

40. In Hunt v. Thomasville Baseball Company, 80 Ga.App. 572, 56 S.E.2d 828 (1949) the court found that the plaintiff assumed the risk even though there were no facts indicating that he had knowledge of the risks, on the ground that "he must be presumed to know that there is a likelihood of wild balls being thrown and landing in the grandstand and other unprotected areas." Hummel v. Columbus Baseball Club, Inc., 71 Ohio App. 321, 49 N.E.2d 773 (1943); Hoke *et ux.* v. Lykens School District *et al.* 69 D & C 422, 60 Dauph 226 (1948).

sumption of risk at all; hence the common knowledge of the game, at least in so far as the question of assumption of risk is concerned, would be immaterial. However, because the courts do in fact consider the question of knowledge, it will be discussed here. There is no question that when the plaintiff actually knew of the risks involved in the game, this requirement would be satisfied.[41] There would be few cases, it seems, in view of the common knowledge of the game, where the plaintiff did not actually know that balls are batted into the stands and that he might be hit by them. Apparently, with this in mind, the courts regularly point out the widespread knowledge of the game and the fact that a person watching the game for any length of time cannot help but realize the danger of being struck by a baseball which might cause serious injury.[42] In *Cincinnati Baseball Club Co. v. Eno*[43] the court said that:

> it is common knowledge that in baseball games hard balls are thrown and batted with such great swiftness they are liable to be thrown or batted outside the lines of the diamond and spectators occuping positions which may be reached by such balls assume the risk of injury therefrom.[44]

And in *Brisson v. Minneapolis Baseball and Athletic Assn.*[45]

> No one of ordinary intelligence could see many innings of the ordinary league game without coming to a full reali-

41. Quinn v. Recreation Park Ass'n., 3 Cal.2d 725, 46 P.2d 144 (1935); Hudson v. Kansas City Baseball Club, 349 Mo. 1215, 164 S.W.2d. 318 (1942); Ivory v. Cincinnati Baseball Club, 62 Ohio App. 514, 24 N.E.2d 837 (1939); Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56 (Sup. Ct. 1941); Blackhall v. Albany Baseball and Amusement Co., Inc., 157 Misc. 801, 285 N.Y.S. 695 (Albany County Ct. 1936); Blackhall v. Capitol District Baseball Ass'n., 154 Misc. 640, 278 N.Y.S. 649 (Albany City Ct. 1935); Williams *et al.* v. Houston Baseball Ass'n., 154 S.W.2d 874 (Tex. Civ. App. 1941); Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941); Kavafian v. Seattle Baseball Club, 105 Wash. 219, 181 Pac. 679 (1919).

42. See Brown v. San Francisco Baseball Club, 222 P.2d 19 (Cal. App. 1950); Hunt v. Thomasville Baseball Co., 80 Ga.App. 572, 56 S.E.2d 828 (1949); Lorino v. New Orleans Baseball and Amusement Co., 16 La.App. 95, 133 So. 408 (1931); Hummel v. Columbus Baseball Club, Inc., 71 Ohio App. 321, 49 N.E.2d 773 (1943), Ivory v. Cincinnati Baseball Club, 62 Ohio App. 514, 24 N.E.2d 837 (1939); Williams *et al.* v. Houston Baseball Ass'n., 154 S.W.2d 874 (Tex. Civ. App. 1941); Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941). *But see* Wells v. Minneapolis Baseball and Athletic Ass'n., 122 Minn. 327, 142 N.W. 706 (1913). (The court expressly rejects the concept that baseball is of such common knowledge).

43. 112 Ohio St. 175, 147 N.E. 86 (1925).

44. *Id.* at 180, 147 N.E. at 87.

45. 185 Minn. 507, 240 N.W. 903 (1932).

> zation that batters cannot, and do not, control the direction of the ball which they strike and that foul tips or liners may go in an entirely unexpected direction. He could not hear the bat strike the ball many times without realizing that the ball was a hard object. Even the sound of the contact of the ball with the gloves or mitts of the players would apprise him of that. It is our opinion that the plaintiff, notwithstanding his alleged limited experience, must be held to have assumed the risk of the hazards to which he was exposed.[46]

Because of this common knowledge of the game the courts have in several cases imputed knowledge of the risks to the plaintiff in spite of his claimed unfamiliarity with the game.[47] It appears that this is stretching the application of assumption of risk to meet a contingency, for if the plaintiff did not in fact have knowledge of the risk, the doctrine is not properly applicable, actual knowledge of the risk being required.[48] Furthermore,

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46. *Id.* at 509, 240 N.W. at 904.

47. See cases cited in note 39 *supra*. In the cases involving the liability of the proprietor of a hockey rink to a person injured by a puck, the courts do not as readily apply the doctrine of assumption of the risk, apparently on the ground that the plaintiff did not realize the risk involved. Where the plaintiff claimed to be ignorant of the game, the courts gave to the jury the question of whether or not he assumed the risk. Shurman v. Fresno Ice Rink Inc., 91 Cal.App.2d 469, 205 P.2d 76 (1949); Thurman v. Ice Palace, 36 Cal.App.2d 364, 97 P.2d 999 (1940); Lemoine v. Springfield Hockey Ass'n., Inc., 307 Mass. 102, 29 N.E.2d 716 (1940); Shanney v. Boston Madison Square Garden, Corp., 296 Mass. 168, 5 N.E.2d 1 (1936); Tite v. Omaha Coliseum Corp., 144 Neb. 22, 12 N.W.2d 90 (1943); James v. Rhode Island Auditorium, Inc., 60 R.I. 405, 199 Atl. 293 (1938). However, in four cases the courts have denied recovery on the ground the plaintiff assumed the risk. In two of these cases there was a fact finding that plaintiff actually was familiar with the game and knew of the risks. Modec v. City of Eveleth, 224 Minn. 556, 29 N.W.2d 453 (1947); Elliot & Elliot v. Amphitheatre, Limited, 3 West.Week.Rep. 225 (K.B. Man. 1934). In Hammel v. Madison Square Garden Corp., 156 Misc. 311, 279 N.Y.S. 815 (2d Dep't. 1935) the court in a memorandum decision dismissed the plaintiff's complaint on the ground that he assumed the risk by analogy to the baseball cases. In Ingersol v. Onandaga Hockey Club, 245 App.Div. 137, 281 N.Y.S. 505 (3d Dep't. 1935) the court affirmed the lower court's granting of a non-suit on the ground that the plaintiff assumed the risk, saying that the risks were of common knowledge and assumed by the spectators. Apparently confusing the doctrine of assumption of the risk with the duty of the defendant in the first instance the court held that it didn't matter that the plaintiff had never seen a game before or that she did not know of the risks, because it would be unreasonable to require the defendant to make inquiry of each patron as to whether or not he had witnessed a game before. Clearly these last two cases cannot be supported on the ground of assumption of the risk, because one of the essential elements—realization of the risks by the plaintiff—is missing.

48. See note 24 *supra*.

if the courts are merely finding the knowledge by the plaintiff from the evidence presented, they are deciding a question which is usually for the jury.

On the other hand, apart from the duty of the landowners to a business invitee generally, pointed out above, which the courts apparently do not follow in establishing the particularized duty of the proprietor of a baseball park, the common knowledge of the game is important in considering the defendant's negligence in the first instance. Undoubtedly the widespread knowledge of the game plays an important role in the determination of the duty established for the defendant in terms of screening. Since liability rests primarily on the unreasonable conduct of the defendant, the fact that the plaintiff and all those attending a ball game are treated as being fully aware of the dangers incident to the game, and enter the ball park generally with the expectation that balls will be hit into the stands, the conduct of the defendant in screening only a portion of the stands is more reasonable than if the patrons had no knowledge of the risks, for generally the defendant is not the plaintiff's keeper. The reasons usually assigned for limiting the duty of defendant are that the danger is not that great;[49] that most patrons do not want to sit behind a screen;[50] that it would be unreasonable to expect the defendant to announce the danger in front of the ball park since most patrons would resent it;[51] and that the defendant has no way of picking out from a crowd the patrons who do not know of the danger in order to warn them.[52] But undoubtedly, underlying all these reasons is that fact that knowledge of the game is widespread and it is up to the plaintiff to keep his eyes on the ball during the game and dodge when it is hit towards the stands.[53]

The remaining element of assumption of risk, besides the de-

49. Grimes v. American League Baseball Co., 78 S.W.2d 520 (Mo. App. 1935).

50. Lorino v. New Orleans Baseball and Amusement Co., Inc., 16 La.App. 95, 133 So. 408 (1931); Grimes v. American League Baseball Co., 78 S.W.2d 520 (Mo. App. 1935); Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941).

51. Anderson v. Kansas City Baseball Club, 231 S.W.2d 170 (Mo. 1950); Cates v. Cincinnati Exhibition Co., 215 N.C. 64, 1 So.2d 131 (1939); Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941).

52. Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941).

53. Anderson v. Kansas City Baseball Club, 231 S.W.2d 170 (Mo. 1950).

fendant's "dangerous" conduct, is the plaintiff's voluntary entry into the area of risk. From the nature of the case, it is apparent that the area of risk is the unscreened portion of the stands surrounding the baseball diamond and the plaintiff's taking a seat in such portion of the stadium is an entry into that area. The only questionable point is whether his entry into such area is voluntary, especially where he is ignorant of the seating arrangement and protected portions provided. It is clear that where the plaintiff holds a ticket entitling him to a protected or an unprotected seat at his election, his choosing the latter type is a voluntary entry.[54] Clearly also where the plaintiff buys a ticket and takes a seat in the unscreened stands with full appreciation of the screening arrangements, the entry of the plaintiff into the area is voluntary.[55] Although it has been contended to the contrary,[56] where the plaintiff does not have the choice between an unscreened and screened seat with the ticket he possesses and holds a ticket for a seat outside the screening provided (1) because he does not know of the seating arrangements,[57] or (2) because the seats protected by screens are more expensive than those not so protected,[58] the action of the plaintiff in entering the unscreened area of the stands is a voluntary entry into the area of the risk. The defendant is not a public utility, and as a consequence the plaintiff does not have a right that he be allowed to remain on the premises. The defendant merely offers this form of amusement to the plaintiff who can view it or not at his own choice, but he cannot demand it. The only right or privilege which the plaintiff has is one derived from the defendant's consent.[59] Consequently he cannot claim that his action in accepting the seat to which his ticket entitles him was not voluntary where he is given his choice between sitting in the screened seats, or turning his ticket

54. Kavafian v. Seattle Baseball Club, 105 Wash. 219, 181 Pac. 679 (1919); Quinn v. Recreation Park Ass'n., 3 Cal.2d 725, 46 P.2d 144 (1935).

55. Williams *et al.* v. Houston Baseball Ass'n., 154 S.W.2d 874 (Tex. Civ. App. 1941); Brown v. San Francisco Ball Club, 222 P.2d 19 (Cal. App. 1950).

56. Note, 11 Notre Dame Law. 93 (1935).

57. Brisson v. Minneapolis Baseball and Athletic Ass'n., 185 Minn. 507, 240 N.W. 903 (1932); Keys *et al.* v. Alamo City Baseball Co., 150 S.W.2d 368 (Tex. Civ. App. 1941).

58. Lorino v. New Orleans Baseball and Amusement Co., 16 La.App. 95, 133 So. 408 (1931); Ivory v. Cincinnati Baseball Club, 62 Ohio App. 514, 24 N.E.2d 837 (1939).

59. RESTATEMENT, TORTS, § 893, comment *b* (1939).

in for a refund and leaving the premises, or if screened seats are available, exchanging his ticket for a seat in the screened portion of the stands.[60]

The final basis on which recovery is denied is that of contributory negligence. At the outset, it should be pointed out that in practically every case denying recovery on the ground of contributory negligence, the court did not need to discuss the question because the ground either that the defendant was not negligent or that there we no causal relation between defendant's conduct and the injury was readily available to the court. However, in some cases courts ignore those grounds and proceed to consider contributory negligence, just as courts consider assumption of risk after finding no negligence.

Negligence, whether by the defendant and hence the foundation of a cause of action, or by the plaintiff and hence a defense to a cause of action, is conduct which is unreasonable under the circumstances, *i.e.* conduct in which a reasonably prudent man would not have engaged out of respect for his own or others' safety. The question then arises: Is the plaintiff's conduct in viewing the game from an unscreened portion of the stands unreasonable under the circumstances? To find contributory negligence, the majority of the cases considering the question look to the plaintiff's action in taking a seat in the unscreened portion of the stands, when he knows or should

60. Quinn v. Recreation Park Ass'n., 3 Cal.2d 725, 46 P.2d 144 (1935). The court held that plaintiff's taking a seat in an unscreened portion of the stands was voluntary when she took the seat temporarily while the usher was trying to find her a seat in the screened section along the first base line, where there were screened seats available to her back of home plate which she did not wish to occupy because she preferred to sit on the first base side of home plate. Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56 (Sup. Ct. 1941). Plaintiff, who had attended ball games before and was familiar with the risks, bought seat in an unscreened section. After noticing several balls being driven into the stands she decided to move to a safer place. While in the process of moving, she was hit. Held: She voluntarily assumed the risk. Hunt v. Thomasville Baseball Co., 80 Ga. App. 572, 56 S.E.2d 828 (1949); Brisson v. Minneapolis Baseball and Athletic Ass'n., 122 Minn. 327, 142 N.W. 706 (1913); Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56 (Sup. Ct. 1941); Adonnino v. Village of Mount Morris, 171 Misc. 383, 12 N.Y.S.2d 658 (Sup. Ct. 1939); Blackhall v. Albany Baseball & Amusement Co., Inc., 157 Misc. 801, 285 N.Y.S. 695 (Albany County Ct. 1936); Blackhall v. Capitol District Ass'n., 154 Misc. 640, 278 N.Y.S. 649 (Albany City Ct. 1935); Hummel v. Columbus Baseball Club, Inc., 71 Ohio App. 321, 49 N.E.2d 773 (1943); Hoke *et ux.* v. Lykens School District *et al.*, 69 D & C 422, 60 Dauph. 226 (1948); Williams *et al.* v. Houston Baseball Ass'n., 154 S.W.2d 874 (Tex. Civ. App. 1941).

know of the risks involved and find that this action amounts to contributory negligence.[61] In this situation actual knowledge of the danger is not required, as in assumption of risk; the fact that the plaintiff should have been aware of the risk is sufficient if his conduct is unreasonable in the light of that risk.

At least one court, however, was apparently concerned, not with the plaintiff's occupying a particular seat, but with his lack of attention to the ball game. In *Cincinnati Baseball Club Co. v. Eno*[62]—one of the few cases allowing recovery—the plaintiff was viewing a double header from an unscreened seat in the grandstand. During the intermission between games a group of players engaged in a practice session, in the course of which several balls were in play at the same time. The players did not confine their activities to the baseball diamond, but were throwing and hitting the balls in various areas of the ball park. The plaintiff was hit when a player not in the batter's box, but only 15 to 25 feet in front of the grandstand in which the plaintiff was sitting, fouled a thrown ball into the stands. In affirming a reversal of the trial court's directed verdict for the defendant, the Supreme Court of Ohio found that the defendant was not negligent in failing to satisfy its duty of screening, but held that it was for the jury to determine whether the defendant was negligent in allowing the players to engage in practice so close to the stands. After recognizing the "general rule" that the plaintiff assumes the risk of being injured by balls batted or thrown into the stands, the court held that here the questions of assumption of risk and contributory negligence were for the jury, distinguishing this case from others on the ground that this was a practice session between games where, (1) there were many balls in play; (2) there were several groups of players on the field using the balls; (3) there was no attempt to confine the hitting and throwing of the ball to the confines of the diamond, and (4) the activities of the ball players were closer to the stand, whereas in those cases where recovery was denied, the injuries were incurred during a regulation ball game where there is only one ball in play, only one group of players

61. Crane v. Kansas City Baseball and Exhibition Co., 168 Mo. App. 301, 153 S.W. 1076 (1913); Zeitz v. Cooperstown Baseball Centennial, 29 N.Y.S.2d 56 (Sup. Ct. 1941); Kavafian v. Seattle Baseball Club, 105 Wash. 219, 181 Pac. 679 (1919).

62. 112 Ohio St. 175, 147 N.E. 86 (1925).

using the ball, an attempt to keep the ball within the confines of the diamond, and the activity takes place at a greater distance from the stands. Undoubtedly the distinguishing facts in this case make the question of assumption of risk a closer one and so for the jury, because, while the plaintiff may realize the risks involved in the ordinary course of the game and may be held to have assumed those risks when he enters into the area of the danger with such realization, it may not be true that the plaintiff realizes the greater risk to his safety where the above additional facts appear. But with respect to contributory negligence, under the view that it is the plaintiff's action in taking a seat in the unscreened portion of the stands which is looked to in order to determine negligence, if the court finds that there is negligence in sitting there in an ordinary game, certainly it should find that he was even more negligent in sitting there with additional factors present. The only plausible explanation is that the court considered that the contributory negligence spoken of in the former cases consists of not watching the ball game while it is in progress, while in this case the plaintiff could have been paying the utmost attention to the game and still have been hit because of the unusual circumstances. As a matter of fact, however, in the cases referred to by the court, where the play was confined to the diamond, the evidence concerning the plaintiff's attentiveness to the game is not discussed in finding contributory negligence, the courts referring only to the conduct of plaintiff in seating himself in an unscreened portion of the stands.[63]

63. Every case, except the Eno case, considering the question has rejected the distinction between injuries incurred during the regular course of the game and those incurred during batting practice. Brummerhoff v. St. Louis National Baseball Club, 149 S.W.2d 382 (Mo. App. 1941), (The facts were substantially the same as in the Eno case except that the batting practice was taking place while the batter was in the box and not near the stands. The court distinguished the case on this ground and then decided that since the batting practice was being held in the normal method, the defendant was not negligent). Zeitz v. Cooperstown Centennial, 29 N.Y.S.2d 56 (Sup. Ct. 1941), (The plaintiff argued that although she may have assumed the risks of being injured during a normal game she did not assume those risks incident to batting practice. The court rejected this argument, and expressly disapproving of the Eno case, held that the plaintiff assumes the risks, especially where she is familiar with the game of baseball, as she was here, of all the normal hazards of the game, of which being hit by a ball in batting practice was one). Lorino v. New Orleans Baseball and Amusement Co., 16 La.App. 95, 133 So. 408 (1931), (The court held that plaintiff who had attended many games before and was familiar with the game, assumed the risks of being injured by a

In most of the cases in which the courts consider contributory negligence, they appear to say that if the defendant was negligent in failing to screen the portion of the stands in which the plaintiff sits, the plaintiff is negligent in sitting there.[64] Obviously, such a statement can have no content except in the case where the court has already found that the defendant was negligent. Even though negligence on the part of the defendant and a factual causal relationship between that negligence and the injury are found, it still does not necessarily follow that if the defendant is negligent the plaintiff must also be. As pointed out above, in general terms, the defendant is required to conform to the standard of an ordinary prudent man under the circumstances for the protection of the plaintiff, and the plaintiff is required to conform to the same standard for his own protection. It is readily apparent that the circumstances in which the plaintiff finds himself are quite different from those in which the de-

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wayward ball when he chose an unscreened seat, without considering the distinction between a batting practice and a normal game). Blackhall v. Albany Baseball & Amusement Co., Inc., 157 Misc. 801, 285 N.Y.S. 695 (Albany County Ct. 1936), (The court held that the plaintiff assumes the risk of all normal hazards of the game of which being hit by a batted ball during batting practice is one). Hunt v. Thomasville Baseball Co., 80 Ga.App. 572, 56 S.E.2d 828 (1949), (Same. The court expressily disapproved of the Eno case saying that pre-game warm-ups are a necessary incident to the game of baseball and part of the assumed risk). It should be noted that in none of these cases was there the peculiar allegation of negligence present as in the Eno case, that the defendant was negligent in allowing the practice to go on so close to the stands, but only that the defendant was negligent in improper screening. It would appear that the screening duty laid down for the defendant would apply also when the teams were having batting practice, for it would be strange if the defendant were required to have a different amount of screening for batting practice than for the regular game, especially because batting practice is a normal incident to every game. If this were the ground on which the cases were put, the defendant would not be negligent whether the players were engaged in batting practice or a regular game, unless by the manner of holding the practice there was negligence, as in the Eno case. Even then there would have to be a finding that the player engaged in the practice was suffciently close to the plaintiff so as to increase the risk to him or otherwise there would be no factual causation between the negligence and the injury. After this was found, it might well be true that the plaintiff did not realize the increased risk to him and hence did not assume the risk. But, if the courts find that it is negligent to sit in the unscreened stands during a normal game, it would seem to follow that the plaintiff would be negligent in sitting there when the risk was increased and hence he was contributorily negligent. The only case where this would not be true, would be where there is some exceptional circumstances such as the plaintiff's unfamiliarity with the game, where it could be said that the plaintiff did not, and should not have realized the additional risk, or was not negligent in exposing himself to them.

64. See cases cited in note 61 *supra*.

fendant stands. The defendant is a baseball proprietor; he is completely familiar with the game and the hazards incident thereto; his employees and agents have often observed baseballs flying into the stands and appreciate the risk of being hit; indeed, in some cases he has instituted a system whereby the patron recovering a ball hit into the stand can obtain a free ticket to another ball game by turning the ball in to an usher.[65] It is because a reasonably prudent man in the circumstances of the defendant would realize the risks and hazards to the spectators that the defendant is required to screen a portion of the stands. On the other hand, the plaintiff is not always as fully apprised as the defendant of the danger of the game to the spectators. This would especially be true if he were attending his first game and the injury occurred while he was looking for his seat. Under these different circumstances a reasonably prudent man might act in an entirely different manner. In such a case it could be held that the defendant was negligent in not screening a portion of the stands while plaintiff was not negligent in sitting there.[66] This distinction is pointed up by the decision of a California court in *Ratcliff v. San Diego Baseball Club*[67]—another case allowing recovery. There the plaintiff had purchased a ticket for a seat behind the screen back of home plate. While she was walking down an unprotected runway between the grandstand and the playing field in order to reach her seat she was struck by a bat which had slipped out of the hands of a batter who was taking his turn in the batter's box during batting practice. There was evidence in the case that bats occasionally flew from the hands of the batters and that there was no way to tell in which direction they would go. The court, in affirming a jury finding for the plaintiff, held that the duty to protect

65. Emhardt v. Perry Stadium, Inc., *et al.* 113 Ind.App. 197, 46 N.E.2d 704 (1943).

66. In the cases involving the liability of the proprietor of a hockey rink to a spectator injured by a puck, the courts will sustain a jury finding of negligence by the defendant and no negligence by the plaintiff, apparently because of this difference in circumstances—*i.e.* a reasonable prudent man may not realize the risk whereas the proprietor should. Lemoine v. Springfield Hockey Ass'n., Inc., 307 Mass. 102, 29 N.E.2d 716 (1940); Shanney v. Boston Madison Square Garden Corp., 296 Mass. 168, 5 N.E.2d 1 (1936); Tite v. Omaha Coliseum Corp., 144 Neb. 22, 12 N.W.2d 90 (1943); James v. Rhode Island Auditorium, Inc., 60 R.I. 405, 199 Atl. 293 (1938).

67. 27 Cal.App.2d 733, 81 P.2d 625 (1938).

spectators from flying bats required the defendant to screen that portion of the stands where the greatest danger existed and where such occurrence might be expected. It held that the jury could properly find that this duty was breached. Although contributory negligence was not considered in the opinion, it is apparent that such a decision could not be sustained under the concept that if the defendant was negligent in failing to screen the area, the plaintiff was also negligent in entering the area. The court would be justified in the flying bat situation in holding that the plaintiff was not negligent while the defendant was, for in the case of a thrown bat the defendant may be fully apprised of the risk of its going into the stands because he has had more opportunity to view such accidents, whereas the plaintiff was not so fully apprised of the danger.

However, in view of the common knowledge of the game, factually, in the great majority of the cases, contributory negligence would be a valid ground for denying recovery if it were needed. This would be true because the primary distinction between the circumstances of the plaintiff and the defendant which are to determine the question of negligence of the respective parties would not in fact be present, for in most cases both parties are equally apprised of the danger.[68] However, in view of the particularized duty of the defendant the better statement of the situation would be that because the defendant was not negligent in failing to screen that portion of the stands, neither was the plaintiff negligent in sitting there.

In only four cases, in addition to the two already mentioned, has recovery been allowed, and in five there have been some unusual circumstances which make the duty of the defendant to those attending the ball games slightly different, while the sixth has been greatly limited by a subsequent decision in the same state. Generally, those cases point up a duty of the de-

68. Undoubtedly situations can be conceived where it would not be negligent for the plaintiff to expose himself to such a risk, and at the same time it would be negligence for the defendant to allow it to remain, as for instance, where the plaintiff, a doctor, was suddenly called to attend a patient and on his way had to enter an unscreened area which by the screening rule followed by the court should have been screened. But because of the limited duty of the defendant, such a situation would be rare. See Olds v. St. Louis National Baseball Club, 232 Mo.App. 897, 104 S.W.2d 746 (1937).

fendant other than that of screening those portions of the stands in which the plaintiff sits.

In *Olds v. St. Louis National Baseball Club*[69] the plaintiff, who had attended baseball games for 10 years previous to the accident and was fully aware that balls were often driven into the stands, had occupied a seat immediately behind home plate which was protected by a screen. In the ninth inning before the game was over she started to leave the ball park, and proceeded to use the closest exit to her seat. This exit, as well as the only other one which was provided on the same level near her seat, was not protected by a screen. She was momentarily held up by the other spectators crowding around the exit, and while standing there was hit by a foul ball. The court held that the question of the defendant's negligence in failing to provide a reasonably safe exit for those who sat in screened seats was for the jury in view of the fact that the defendant had actual knowledge that many spectators left the games early; and on the second appeal[70] it was held that the defendant, in providing a method of leaving which was wholly protected by screens which involved walking up through the stands to the second tier, and down a ramp in the back of the stands did not, as a matter of law, satisfy the duty where the exit which the plaintiff took was the closest one to her seat, and the one which the defendant's ushers would have directed her to take had she inquired. The case was a Missouri decision and hence the question of assumption of risk did not arise once the court found there was negligence. The question of contributory negligence is more difficult to decide. The court held that it was for the jury to determine whether it was negligent for the plaintiff to enter that area, fully knowing of the risks in view of the facts that she was a housewife and had to prepare an early supper for her husband and that many other patrons followed the same practice. But if there is a finding that the defendant was negligent in failing to screen that area, it is hard to see that the relatively unimportant circumstance that the plaintiff had to fix her husband's supper would change the conditions under which she acted enough to make her not negligent in leaving at that moment and not waiting until there was no batter in the box. On

69. 232 Mo.App. 897, 104 S.W.2d 746 (1937).
70. 119 S.W.2d 1000 (Mo.App. 1938).

the other hand, and this seems the best explanation for the case, she may have done this, but was held up by the crowd surrounding the exit; so that she acted in a reasonably prudent manner in trying to get safely out of the ball park, but was held up by a circumstance which she was not negligent in failing to anticipate.

In *Edling v. Kansas City Baseball and Exhibition Co.*,[71] the plaintiff occupied a seat behind a screen which had rotted away in places. A foul tip passed through the screen and hit the plaintiff, and the court allowed recovery. The court first found that the defendant knew or should have known of the defect in the screen while the plaintiff did not, and held that the questions of contributory negligence and negligence were for the jury. Undoubtedly there was sufficient evidence of negligence in not providing a screen which would stop the balls, for, if the defendant is required to screen a portion of the stands the screen must be adequate to stop balls driven against it. The question of contributory negligence is not difficult to dispose of, for it is quite possibly true that the plaintiff neither knew nor should have known of the defect.

In *Grimes v. American League Baseball Co.*,[72] the plaintiff who was occupying an unscreened seat was hit when a foul ball glanced off some temporary stands placed on the field for the purpose of accommodating the expected customers at the forthcoming world series. The ball was not hit towards the plaintiff, but was going by her when it glanced off the stands and was deflected so as to hit her. The plaintiff realized that balls were hit into the stands but she did not realize and need not have realized this particular risk. The court allowed a verdict for the plaintiff to stand. Again, the question of assumption of risk did not arise as a defense because the court sustained a jury finding of negligence in constructing the temporary stands on the playing field. The defense of contributory negligence was not pleaded and the court did not consider it, but it would appear that it was not a necessary bar to recovery because the plaintiff due to the difference in the circumstances may not have been fully aware of the risk, nor was she necessarily negligent in not discovering the danger.

71. 181 Mo. 327, 168 S.W. 908 (1914).
72. 78 S.W.2d 520 (Mo.App. 1935).

Wells v. Minneapolis Baseball and Athletic Assn.[73] is the only case found where the plaintiff, sitting outside of the screened area was allowed to recover for injuries sustained when a foul ball driven into the stands hit her. The court found that the duty of the defendant was something more than just screening those seats for those who may wish them on a particular day, and allowed the jury to determine just what that duty was, indicating, however, that a sign apprising the spectators of the danger would be enough if placed in the proper position. The plaintiff in this case did not know of the danger of being hit by the balls, and the court expressly rejected the idea that the dangers were so well known that everyone was held to know them; hence assumption of risk could not be used to defeat recovery. The question of contributory negligence was not discussed, but apparently it would have been no defense because it would be reasonable for a party in plaintiff's circumstances not to know of the danger.

This case has been limited by the subsequent decision of *Brison v. Minneapolis Baseball and Athletic Association*[74] where the court held that the plaintiff assumed the risk of being hit by a ball driven into the stands, in spite of his claimed failure to realize the hazard. The court, without expressly overruling the previous case, said that the risks were of such common knowledge that they would impute knowledge of them to the plaintiff, especially in view of the fact that he had been sitting through six innings of the game before he was injured.

In conclusion, it should be noted that although the courts have said that the duty of the baseball park proprietor to the spectator is the same as that of any landowner to a business invitee, in fact the duty is not the same. In the case of an ordinary landowner, the proprietor is not required to take action if he has reason to believe that the invitee will discover the danger, while the baseball park proprietor is bound to screen a portion of the stands in spite of the fact that the overwhelming number of spectators who attend a ball game realize that balls are hit in the stands and appreciate that injury could result thereby. In view of the slight expense involved in maintaining a screen in relation to the total size of the enterprise—an enterprise engaged

73. 122 Minn. 327, 142 N.W. 706 (1913).
74. 185 Minn. 507, 240 N.W. 903 (1932).

in for profit—it is entirely reasonable to impose such an additional obligation upon the defendant especially when we consider the great popularity of the game of baseball and the fact that many spectators who attend ball games desire screened seats. But it is not unreasonable to limit his duty to screening a portion of the stands because of the great popularity of the game and because many of the spectators who attend the game go with the express idea in mind of recovering a ball if they possibly can, as evidenced by the mad scrambles after a ball once it has been propelled into the stands.[75] Because the duty of the defendant is limited, however, there would rarely be a recovery where a spectator is injured by a wayward ball finding its way into the stands. The simplest and most expedient ground on which to deny recovery would be that the defendant is simply not negligent, but the cases fail to support this suggestion and the courts make an entirely unnecessary effort in trying to base the conclusion on either assumption of risk or contributory negligence. Although either doctrine would be a valid ground

75. In the cases considering the liability of the proprietor of a hockey rink for injuries sustained when struck by a puck driven off the ice, the courts have not formulated a crystallized duty as in the baseball cases. However, due primarily to the fact that the game is not so well known as the game of baseball and because the activity takes place so much closer to patrons, the duty in terms of screening is somewhat greater than the duty of baseball park proprietors. Protecting a portion of the stands by screens is not enough. Shanney v. Boston Madison Square Garden Corp., 296 Mass. 168, 5 N.E.2d 1 (1936), (Jury finding of negligence was allowed to stand where the rink was surrounded by a wooden fence three feet high, and a screen was constructed at each end of the rink six feet higher than the fence and 109 feet in width, where the sides were not protected by screens). James v. Rhode Island Auditorium, Inc., 60 R.I. 405 199 Atl. 293 (1938), (Same. The construction of the rink was the same as in Shanney case, but the dimensions of wooden fence and a screening were slightly different). Thurman v. Clune, 51 Cal.App.2d 505, 125 P.2d 59 (1942) (same); Lemoine v. Springfield Hockey Ass'n., Inc., 307 Mass. 102, 29 N.E.2d 716 (1940), (same); Tite v. Omaha Coliseum Corp., 144 Neb. 22, 12 N.W.2d 90 (1943), (same); Shurman v. Fresno Ice Rink, Inc., 91 Cal.App.2d 469, 205 P.2d 77 (1949), (Defendant, in addition to constructing the rink with a forty-inch wooden wall around it and a higher protective screen at each end, posted signs to the effect that there was a danger to the patrons of being hit by a puck driven into the stands, that the patrons assumed the risk thereof, and that screened seats were available, and made two announcements to the same effect over the public address system during the game! Held: Whether the duty is satisfied is for the jury). *See* Modec v. City of Eveleth, 224 Minn. 556, 29 N.W.2d 453 (1947), (Plaintiff assumed the risk); Hammel v. Madison Square Garden Corp., 156 Misc. 311, 279 N.Y.S. 815 (2d Dep't. 1935), (same); Ingersoll v. Onondaga Hockey Club, 245 App.Div. 137, 281 N.Y.S. 505 (3d Dep't. 1935), (same); Elliott & Elloitt v. Amphitheatre Limited, 3 West.Week.Rep. 225 (K.B. Man. 1934), (same).

on which to decide the cases if the proper facts appeared, in the vast majority of the cases the doctrines are out of place. It is submitted that for sake of clarity of thought a breach of duty on the part of the defendant plus a factual causation between the negligence and the injury be found by the court before either doctrine is considered.

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