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TORTS — ASSUMED RISK IN BLEACHERS OF BASEBALL PARK WHERE THERE IS NO CHOICE OF PROTECTED SEATS — Plaintiff sued for injuries sustained when struck by a foul ball at a baseball game while seated in the unprotected bleachers of the municipal baseball park. *Held*,[1] the fact that there was no choice of protected seats in the ball park would not justify the recovery against the defendant, for the plaintiff, while seated in these unprotected bleachers, assumed this risk which was reasonably incidental to the game of baseball. *Adonnino v. Village of Mount Morris*, 171 Misc. 383, 12 N. Y. S. (2d) 658 (1939).

The baseball proprietor is not an insurer of the invitee,[2] but being engaged in the business of providing entertainment to the public for a profit, he is bound to use reasonable care in the maintenance of the premises commensurate with the circumstances of the situation.[3] Cutting across this principle, however, is the doctrine of assumption of risk,[4] which negatives the existence of a duty on the part of the defendant proprietor when the plaintiff invitee, knowing and appre-

[1] The fact that the plaintiff had not filed a claim for damages within the 30 days required by the village law was another ground on which the court relied in denying relief to plaintiff.

[2] 22 A. L. R. 610 (1923); Everett v. Goodwin, 201 N. C. 734, 161 S. E. 316 (1931); Crane v. Kansas City Baseball & Exhibition Co., 168 Mo. App. 301, 153 S. W. 1076 (1913).

[3] This reasonable care varies with the danger likely to be incurred and the number of persons subject to the danger. 1 THOMPSON, NEGLIGENCE, rev. ed., § 996 (1901); Scott v. University of Michigan Athletic Assn., 152 Mich. 684, 116 N. W. 624 (1908).

[4] This doctrine of voluntary assumption of risk is a crystallization of the idea expressed in the Latin, maxim *volente non fit injuria*, and was thought for a time to be aplicable to only situations arising out of the relationship of master and servant; however, it seems clear that this doctrine is implied by the law, not by the contract or by reason of the relationship between the parties. For an excellent discussion of this doctrine, see HARPER, TORTS, §§ 130, 131 (1933).

ciating the character of the hazard, voluntarily subjects himself to this risk as an incident to the relationship between himself and the defendant.[5] Thus, the courts hold that when a spectator at a baseball game chooses the unprotected rather than the protected stands he assumes the risk of the ordinary incidents of the game,[6] i.e., foul balls hit into the bleachers. In these cases, the spectator had the choice of a protected seat and from the language of the courts it would seem there was a duty on the part of the management to provide such an election before the proprietor would be relieved of his duty of due care.[7] It could be argued in a case where there is no choice of a screened seat, that the plaintiff invitee had not voluntarily assumed any risk because he had no election in the matter. Professor Bohlen says,[8] "The very individualism of the common law, which requires that each man shall bear the consequences of his own voluntary conduct, of necessity requires that it shall not impose an intolerable subjection to fortuitous advantages of superior physical, social and economic position; that such advantages shall not be abused to obtain the mere form of consent while the substance of real volition is absent." [9] It can hardly be said that the spectator has been forced by one in a "superior physical, social and economic position" to sit in these unprotected bleachers; for the spectator does have the option of not attending this pastime and it seems that when a person goes to a game knowing there are no protective screens he voluntarily chooses to assume the risks which arise as incidents of the game. Thus in *Brisson v. Minneapolis Baseball and Athletic Association*,[10] where the plaintiff occupied an emergency

[5] The underlying policy of the law here is that where knowledge and freedom of choice are equal, one person is as competent to protect himself from danger as others are to protect him from it. For some notes as to liability for one maintaining a place of amusement for the public, see 3 L. R. A. (N. S.) 1132 (1906); 19 L. R. A. (N. S.) 772 (1909); 32 L. R. A. (N. S.) 713 (1911); 42 L. R. A. (N. S.) 1070 (1913).

[6] Wells v. Minneapolis Baseball & Athletic Assn., 122 Minn. 327, 142 N. W. 706 (1913); Ingersoll v. Onondaga Hockey Club, Inc., 245 App. Div. 137, 281 N. Y. S. 505 (1935); Cincinnati Base Ball Club v. Eno, 112 Ohio State 175, 147 N. E. 86 (1925); Crane v. Kansas City Baseball & Exhibition Co., 168 Mo. App. 301, 153 S. W. 1076 (1913); Kavafian v. Seattle Baseball Club Assn., 105 Wash. 215, 177 P. 776, 181 P. 679 (1919). There is a dispute, however, as to whether or not the question of the spectator's knowledge of the hazards of the game should be a question for the jury or is presumed as a matter of law. See 14 N. Y. UNIV. L. Q. 540 (1937). A different situation is presented where the person injured is not a spectator or the injury occurs before the game begins. See Dwyer v. Edison Electric Illuminating Co., 273 Mass. 234, 173 N. E. 594 (1931); Blakeley v. White Star Line, 154 Mich. 635, 118 N. W. 482 (1908).

[7] See Wells v. Minneapolis Baseball & Athletic Assn., 122 Minn. 327, 142 N. W. 706 (1913); Crane v. Kansas City Baseball & Exhibition Co., 168 Mo. App. 301, 153 S. W. 1076 (1913).

[8] Bohlen, "Voluntary Assumption of Risk," 20 HARV. L. REV. 14 at 22 (1906).

[9] Bohlen was thinking of cases where the party injured was under such stress that in reality he did not exercise his own free will. Thus it has been held that a policeman stopping a runaway horse did not assume any risk. See Cottrill v. Chicago, Milwaukee & St. Paul Ry., 47 Wis. 634, 3 N. W. 376 (1879), where it was held that an engineer staying on his engine to avert a crash due to defendant's negligence assumed no risk.

[10] 185 Minn. 507, 240 N. W. 903 (1932). Compare with Murphy v. Steeplechase Amusement Co., 250 N. Y. 479 at 482, 166 N. E. 173 (1929).

seat on the playing field because of the presence of an overflow crowd which had occupied the protected places, the court held he assumed the risk of injury from foul balls.[11] Even if it be assumed that the doctrine of assumption of risk does not apply, it could be argued that the proprietor would be relieved from liability because of the spectator's contributory negligence in exposing himself to this hazard set up by the negligence of the defendant.[12] It seems that the rule laid down in the principal case is the best solution to the problem.

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[11] The Minnesota court qualified this decision by saying that the management does have to provide some screened seats; however, the proprietor is free from negligence if there are enough protected places for a reasonably anticipated crowd.

[12] See Clise v. Prunty, 108 W. Va. 635, 152 S. E. 201 (1929); Powell v. Berry, 145 Ga. 696, 89 S. E. 753 (1916).