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P. A. L
University of Michigan Law School

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TORTS — LIABILITY OF OWNERS OF BASEBALL PARK — SPECTATOR STRUCK BY BATTED BALL — The plaintiff, a spectator at a baseball game, brought an action to recover for injuries sustained when he was struck by a foul ball. He was sitting in a reserved seat, but in a section of the grandstand not protected by a wire netting. Despite novel allegations designed, apparently, to suggest plaintiff's right to rely on the implication that a "reserved seat" is one which is located back of a protecting screen, and, further, to deny any appreciation of the risk, on plaintiff's part, by suggesting that, at sixty-four, he was subject to the failing eyesight which customarily accompanies that advanced age, it was *held* that the operators of the ball park were not liable. *Hudson v. Kansas City Baseball Club* (Mo. 1942) 164 S. W. (2d) 318.

A leading English scholar has suggested that he supposed that "it has never occurred to any one that legal wrong is done by such an accident" (he was speaking of injuries resulting from being hit by a cricket ball) "even to a spectator who is taking no part in the game." [1] Perhaps, in England, it still "isn't cricket" to attempt to shift the loss for injuries received while participating in sport, or watching such spectacles; in this country the proprietors of hockey rinks, ball parks, and amusement places generally are fair game, at least for spectators.[2] In the baseball cases, particularly, a sort of mysticism has developed;

[1] POLLOCK, TORTS, 14th ed., 124 (1939) (retained from the original edition of 1887).

[2] The court lists many of the cases: 164 S. W. (2d) 318 at 320.

it is thought that there are special rules of law applicable to that game. The court, in the principal case, recognized that tendency, and deplored it. Early in its opinion it said: "The rules" applicable in the baseball cases "are neither more nor less than the usual rules of liability applicable to the possessor of land and his business invitee." [3] The section of the *Torts Restatement* covering the liability of possessors of land to "invitees" was quoted verbatim.[4] And then, by "taking time out" to "classify" and "rationalize" the game cases, the court gave new life to the mystical approach which the reader might have supposed was to be rejected. "Knowledge, assumed risk, and choice," it was said, were all present in certain named game cases; "assumed risk alone" decided others; "the combined elements of knowledge and choice" were decisive in one case; "knowledge and assumed risk" seemed to control in another.[5] This approach not only keeps alive the tendency to pigeonhole the game cases; it also stimulates some of the mysticism which has been injected into the phrase "assumption of risk." "Knowledge of the risk is the watchword of assumption of risk," it has been said.[6] And, again, "The risk is not assumed where the conduct of the defendant has left the plaintiff no reasonable alternative." [7] A possible interpretation of this confusing phrase suggests that knowledge and choice are but necessary concomitants of assumed risk. But do we need to overemphasize the "doctrine of assumption of risk" in these cases? If the applicable rules, in the baseball cases, are those governing the "invitor-invitee" cases, and if the *Torts Restatement* is followed, a possessor of land is liable to a business visitor *only if* he (a) knows of, or should have known of, a dangerous condition, and (b) realizes that it involves unreasonable risk, and (c) has no reason to believe that the plaintiff will discover the condition and realize the risk, and (d) fails to warn the visitor so that the latter may avoid the harm.[8] What dangerous conditions, involving unreasonable risk, not likely to be appreciated by the patron, surround the playing of a game of baseball in a big league park today? A defective wire netting directly back of the catcher? A seat in the center-field bleacher into which a home run ball is hit once a week? A seat in a section, along the third base line, into which hard-hit foul balls go, on the average, two or three times a game? Unless we overlook the requirements that the risk must be an *unreasonable* one and (not or) one which the spectator will not appreciate, there would seem to be little room for liability in the baseball cases.[9]

P. A. L.

[3] 164 S. W. (2d) 318 at 320.

[4] 2 TORTS RESTATEMENT, § 343 (1934).

[5] 164 S. W. (2d) 318 at 322.

[6] PROSSER, TORTS 385 (1941), quoting Cincinnati, N. O. & T. P. Ry. v. Thompson, (C. C. A. 6th, 1916) 236 F. 1 at 9.

[7] PROSSER, TORTS 389 (1941).

[8] 2 TORTS RESTATEMENT, § 343 (1934), states alternative requirements: "reasonable care (i) to make the condition reasonably safe, or (ii) to give a warning adequate to enable them to avoid the harm," etc.

[9] The defective netting case seems clear; but, aside from such a case, and even assuming that the plaintiff was not a "fan," could the defendant be said to have reason to believe that a patron would not appreciate the risk of being hit by a foul ball batted into the third base section, at least after one such foul had come into that portion of the stands?