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A THREE DIMENSIONAL MODEL OF STADIUM OWNER LIABILITY IN SPECTATOR INJURY CASES

JOSHUA E. KASTENBERG*

I. INTRODUCTION

Stadium and event-site owners are under a duty to provide reasonably safe premises for spectators at sporting events. In turn, spectators may find that in certain jurisdictions, they are limited to, or outright barred from, recovering damages resulting from injuries which occur at the event. This article analyzes the duties placed on the stadium and event-site owners to prevent such injuries, as well as the defenses available to stadium and event-site owners.

Spectator injuries constitute a large area of negligence law and there is a commonality among the various spectator sports. This article analyzes stadium/event-site owner liability in a three dimensional model. The purpose of a three dimensional model is to unweave the complex fabric which constitutes liability for spectator injuries.

Various sports are independently analyzed in the first section, which represents one dimension. Analyzing specific spectator sports is somewhat traditional. That is, law review articles typically analyze the risks inherent to spectators in the more popular sports by breaking these sports into separate categories. Baseball has for a long time received the most attention. However, golf, hockey, auto racing, wrestling, and a variety of other spectator sports have seen a significant number of spectator injuries.

Part II assesses three common types of jurisdictions which affect the stadium/event-site owner’s ability to defend against negligence actions. Jurisdictions which continue to recognize contributory negligence as a defense will allow primary assumption of risk to be raised as a complete bar to recovery. Comparative negligence jurisdictions allow for a secondary assumption of risk to be raised by defendant stadium/event-site owners against negligence actions. The laws of California, New York, and Texas are analyzed to provide a basis for how comparative negli-

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gence jurisdictions weigh a plaintiff's contribution under a secondary assumption of risk defense. Finally, states which place a higher duty than reasonableness through the use of statutory exceptions are analyzed. Wisconsin, through its use of a safe place statute, provides the best example of such a jurisdiction. Thus, the second section constitutes a second dimension of spectator liability.

Part III addresses the various types of injuries to which spectators are more commonly prone. Inclusive in this list are both injuries caused by other spectators and injuries which occur to third-party employees, such as the media on the sidelines. Because injuries arising from the nature of the sport itself are addressed throughout the previous two sections, they are not discussed in section three. By analyzing common injuries independently, a third dimension is created. Thus, each section represents a different tort dimension in the stadium/event-site owner context.

II. Duties on Various Events

It will be helpful to the reader to introduce the concept of spectator liability by first examining typical standards which apply to the various sports. Different classes of sports are often analyzed under different standards. Thus, baseball, hockey, golf, auto-racing, and "fighting matches" will be analyzed because these represent distinct classes of spectator sports. Baseball has been a model for studying stadium/event-site owner liability because, as the nation's pastime, it represents the basic threshold standards of liability. In spectator injury cases arising from baseball, courts generally assume that most people comprehend the intricacies of the game. Hockey, though gaining in popularity, is a sport where a spectator's knowledge of the event cannot necessarily be assumed. Golf is a unique event in that there is no stadium, enclosed structure, or set field of play. Thus, golf requires a special analysis because of its uniqueness. Auto racing can be representative of most types of racing in that high speed vehicles, such as motorcycles, dragster, stock cars, "funny cars," horses, or harness racing, present problems in ensuring spectator safety. Finally, "fighting matches," typified both by their high level of fan involvement and small spectator base, represent a unique type of event. Although most of the case law involves wrestling matches, the same analysis applies to boxing, "tough man," and even martial arts contests.
A. Baseball

For over a century, baseball has been the most popular spectator sport in America. In the early days of baseball, the sport was dangerous to both its participants and spectators. Until World War I, the game was devoid of gloves, catchers' mitts and masks, protection for umpires, and backstops, even at the professional level. It was generally assumed that spectators who entered a ballpark assumed the risks of foul balls and thrown bats. Thus, in a historical context, baseball has helped to define negligence in a sports context.

The duty to reasonably provide a safe viewing area for baseball spectators evolved after 1914 when liability for injuries caused by foul balls and thrown bats were being challenged in the courts. By the late 1950s several jurisdictions adopted the Restatement (Second) of Torts on the duty of a possessor of land/landowner to apply to stadium owners. However, the spectator's knowledge of both the sport and its accompanying dangers remains a factor up to the present. Even today, most jurisdictions have placed only a limited duty on stadium owners to screen certain seats.

2. Seymour, supra note 1, at 6.
3. Id.
4. Sports and the Law, supra note 1, at 24. See also Wells v. Minneapolis Baseball & Athletic Ass'n, 122 Minn. 201 (1913).
7. See, e.g., Crane v. Kansas City Baseball & Exhibition Co., 143 S.W. 1076 (Mo. Ct. App. 1913). Establishing the principle that "baseball" is our national game and the rules governing it and the manner in which it is played and the dangers inherent incident thereto are matters of common knowledge. Id. See also, Cincinnati Baseball Club v. Eno, 147 N.E. 85, 87 (Ohio 1925). Ohio courts have held "in baseball games hard balls are thrown and batted with great swiftness, that they are liable to be thrown or batted outside the lines of the diamond, and that spectators in positions which may be reached by such balls assume the risk thereof. This theory is fortified by the fact that such spectators can watch the ball and can thus usually avoid being struck when a ball is directed toward them." Id.
The standard of reasonableness as a duty on stadium owners is best illustrated in the recent Illinois case *Yates v. Chicago National League Ball Club*. In *Yates*, the plaintiff, a minor, attended a Chicago Cubs baseball game with her father and two other friends. The plaintiff was seated in an area near, but not covered by, the protective screen behind home plate. During the game, the plaintiff was struck by a foul ball and suffered severe injuries which required a five day hospital stay. The plaintiff's father testified that he had been to Wrigley Field a number of times prior to the incident, that he was aware of the danger, and that he had requested protective seating. This latter point was contested by the stadium owner. The trial court fashioned a special inadequate screening instruction to the jury. The jury found the team liable for $67,500.15

The appellate court then framed the issues that the owner raised on appeal in a manner favorable to the plaintiff. First, the court stated that in the context of negligence law, a ballpark owner does not absolutely insure the safety of his invitees on his premises. At the same time, the owner owes a duty to those spectators. This duty is satisfied if the ballpark owner "provides screen[ed protection] for the most dangerous part of the grandstand and for those who may be reasonably anticipated to desire protected seats." Because *Yates* alleged inadequate screening, there was a factual question in this case. The jury had found that the stadium owner had breached the duty to provide adequate screening, and the appellate court upheld this finding.

The appellate court also disregarded the stadium owner's disclaimer on the back of the ticket, reasoning that such a disclaimer could not form the basis of a defense because the print on the ticket was too small to be legible. Finally, the ballpark owner argued that Wrigley Field con-

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10. Id.
11. Id.
12. Id.
13. Id.
14. Id.
15. Id.
16. Id.
17. Id. at 578 (citing Maythnier, 225 N.E.2d at 87).
18. Id. (citing Maythnier, 225 N.E.2d at 87).
19. *Yates*, 595 N.E.2d at 581 (quoting *Restatement (Second) of Torts* § 496B cmt. c). Although this article does not encompass exculpatory clauses and thus does not analyze express assumption of risk, this remains a valid point. A plaintiff's acceptance of a ticket containing a disclaimer in fine print on the back is not binding for the purposes of asserting express assumption of risk. *Id.*
formed to industry standards. However, the Illinois Court recognized that in certain jurisdictions, a ballpark owner is not always absolved of liability once he or she provides adequate screening.\textsuperscript{20}

\textit{Yates} is helpful in examining the duty to provide spectator safety for a number of reasons. First, baseball represents a threshold level in determining duties to spectators. Second, the court held that if the stadium owner failed to meet one of the duties, liability could attach. These duties were defined as providing adequate screening to spectators who desired protection. Thus, the screening must not only be adequate in its design, but there must be enough of it to satisfy those customers who are concerned about their safety.

\textbf{B. Hockey}

The game of hockey is inherently dangerous to unprotected spectators. The Pennsylvania Superior Court stated that "the omnipresent specter of a deflected Mario Lemieux\textsuperscript{21} missile whizzing toward spectators seated at center ice is as inherent to the sport of hockey as the unnerving probability of a Von Hayes\textsuperscript{22} rocket flying towards patrons sitting in first base box seats is to a baseball game."\textsuperscript{23} Unlike baseball, hockey spectators have not made a mini-sport out of catching errant pucks in mid-flight. Moreover, hockey does not enjoy the universal spectator base that baseball has been accustomed to. As a result, the question of a plaintiff's knowledge of the dangers of the game has come under review.

Typically, a hockey rink owner's duty to spectators is to provide protective seating throughout the rink.\textsuperscript{24} However, the level of acceptable protection seems to vary between sites. In \textit{Gilchrist v. City of Troy},\textsuperscript{25} the New York Court of Appeals held that a hockey rink owner's duty is satisfied only when two conditions are met. First, the owner must "provide screening around the area behind the hockey goals, where the dan-

\textsuperscript{20} \textit{Yates}, 595 N.E.2d at 582 (citing Coronel v. Chicago White Sox, Ltd., 595 N.E.2d 45 (Ill. App. 1992)). Interestingly, while the owner argued that the plaintiff should have been aware of the danger of foul balls and thrown bats, the owner also asserted that he was unaware of the danger to a spectator in the section in which the plaintiff was seated. The court responded to this by stating "[t]he Cubs zealously maintained throughout this litigation that the hazard in question was open and obvious. The suggestion that the Cubs may have been unaware of this hazard is somewhat ironic. It need not be addressed." \textit{Id}.

\textsuperscript{21} He is a current player for the Pittsburgh Penguin's Hockey Club.

\textsuperscript{22} He is a former Philadelphia Phillies baseball player noted for his batting power.


\textsuperscript{24} \textit{See, e.g., Gilchrist v. City of Troy}, 495 N.Y.S. 781 (N.Y. App. 1985).

\textsuperscript{25} \textit{Id}.
ger of being struck by a puck is the greatest." 26 Second, the screening must be "of sufficient extent to provide adequate protection for as many spectators as may be reasonably be expected to desire to view the game from behind such screening." 27 Thus, the Gilchrist holding was substantially similar to the duty of reasonableness discussed previously in the Yates baseball case.

The adequate screening standard for hockey was addressed four years after Gilchrist by the New York Court in Rosa v. County of Nassau. 28 In Rosa, a young spectator was injured by a puck while attending a New York Islanders hockey game. 29 The protective plexiglass screening in the plaintiff's section was three feet above the ice boards, which were approximately three feet above the ice. 30 Thus, the spectator was afforded six feet of protection from the ice to the first row seating. The court held that the protective screening satisfied the duty of care owed by the stadium owner, despite the fact that the screening did not totally eliminate the risk of spectator injury. 31 The court further held that if stadium owners were required to completely eliminate risks to spectators, such a requirement would create an undue burden on the stadium owners of being insurers of their patrons' safety.

Finally, as to whether a spectator's knowledge of the risks involved in attending a hockey game are relevant, a Pennsylvania Court in Pestalozzi v. Philadelphia Flyers 32 stated that "the risk of being struck by an errant puck . . . is common and reasonably foreseeable." 33 The court further held that it found no reason to differentiate between baseball and hockey in regard to the spectator's knowledge of the sport. 34 However, it is important to note that all of these hockey cases occurred in cold-weather states where hockey predominates. As the sport gains

26. Id. at 783.
27. Id. The court acknowledged that "there can be little doubt that it is economically and practically more feasible to screen the entire perimeter of the playing surface of a hockey game than for a baseball game. Indeed . . . many hockey rinks at which professional and college games are played have screening around the entire perimeter of the skating surface. Based upon the wording in Akins, however, it is apparent that the economics and practicality in the field did not play a direct role in the court's holding. Rather, the practical realities of this sporting event were given great weight." Id. (citing Akins v. Glens Falls City School Dist., 424 N.E.2d 531 (N.Y. Ct. App. 1951)).
29. Id.
30. Id. at 653.
31. Id.
33. Id.
34. Id.
popularity in the southwestern part of the United States, it will be interesting to see how courts deal with the plaintiff's knowledge of the event in question.

C. Golf

Golf presents a set of difficulties not present in most other spectator sports. The most successful golf-related law suits are those brought against the owner of the course on which a tournament was held. This is because golf courses still have a duty to provide reasonably safe premises to their spectators, but the hazards are harder to define.

Analyzing course owner liability is problematic because there is little predictability as to where a shot will land after a player strikes the ball. There are a number of cases helpful in analyzing course owner liability. In Duffy v. Midlothian Country Club, an Illinois Court decided that there were two important aspects to deciding liability, and both aspects were questions for the jury. First, a question arose as to whether the golf course owner failed to design and maintain a reasonably safe golf course. Second, the court determined that in order to weigh the plaintiff's contributory negligence, it is essential to gauge the plaintiff's knowledge of the risks inherent in the sport of golf. Thus, under this standard, if an injured spectator had a knowledge of the game of golf, a jury may find that the spectator assumed the risk of injury. However, if the spectator's knowledge of golf is minimal, the jury might find for the injured plaintiff. While the court raised the issue of whether a duty ex-

35. See Walter B. Champion, Jr., Sports Law in a Nutshell 108 (1983). Unlike baseball where there is some predictability to the flight of a home run or foul ball, there is far less predictability to a golf ball in flight. Although assumption of risk remains a salient defense, golf courses and sponsors are still held to provide reasonably safe premises for the spectators.

Typically, the key to a course owner's liability is whether the defendant had reason to expect harm in the plaintiff from an obvious risk in circumstances where the plaintiff's attention might be distracted from the risk, causing him to forget to protect himself against harm.


38. 481 N.E.2d 1037 (Ill. Ct. App. 1985). In this case, the spectator was injured at the concession stand while attending her first golf tournament.

39. Id.

40. Id.

41. Id.
ists to warn spectators against the dangers inherent in the viewing of golf, the court never provided an answer.\textsuperscript{42}

The duty to warn spectators of dangers inherent in the viewing of golf tournaments can be extrapolated from \textit{Hathaway v. Tascosa Country Club, Inc.}\textsuperscript{43} In this case, a Texas Court held that since a golf player is under a duty to warn other golf players of possible dangers by yelling "fore," there is a duty of a course owner to enforce this custom by reminding participants to adhere to it.\textsuperscript{44} The \textit{Hathaway} decision suggests that, unlike a baseball stadium, a golf course owner may have a duty to warn spectators about the risks inherent in golf.

In \textit{Grisim v. Tapemark Charity Pro-Am Golf Tournament},\textsuperscript{45} a spectator was injured at a tournament while seated approximately fifty feet from the edge of the green.\textsuperscript{46} However, in this case, the spectator chose not to sit in the designated seating area, but instead sat under a tree at an angle more amenable to being hit by a golf ball. The court then held that the spectator "assumed the risk to protect herself from injury and the dangers incidental to the game 'as would be apparent to a reasonable person in the exercise of due care.'"\textsuperscript{47} As a result, the course owner was held immune from liability.

If a general standard for golf course owners exists from these cases, it is that providing adequate screening, seating, and other natural protection and warnings will probably immunize course owners against liability from negligence.

\textbf{D. Auto-Racing}

Track owners are under a duty to exercise reasonable care for the safety of spectators in attendance. As in the case of all other sports, track owners are not insurers of the patrons safety and are generally not liable, unless they fail to act in a reasonable manner. This duty consists of providing reasonable protections. The problem is twofold: (1) the

\textsuperscript{42} \textit{Id.} at 1040. The court acknowledged the plaintiff's contention that the course owners failed to warn of the dangerous area, but did not address the issue as a duty to the course owner.

\textsuperscript{43} 846 S.W.2d 614 (Tex. App. 1993).

\textsuperscript{44} \textit{Id.} at 616-617. \textit{See also} Bill McNabb, \textit{Are Sports Torts Now Par For the Course? The Reckless Disregard Standard For Sport Participant Liability,} 19 T. MARSHALL L. REV. 723, 726 (1994).

\textsuperscript{45} 394 N.W.2d 261 (Minn. Ct. App. 1986).

\textsuperscript{46} \textit{Id.}

\textsuperscript{47} \textit{Id.} at 265.
injuries caused from flying auto parts, or the auto itself, are sometimes lethal;\(^4\) and (2) almost all injuries are foreseeable.\(^4\)

Nonetheless, courts have effectively dealt with this problem. In Capitol Raceway Promotions, Inc. v. Smith,\(^5\) a Maryland Appeals Court held that insufficient netting constitutes negligence.\(^1\) Thus, where a track owner knows of auto parts flying over netting into the stands, there is a presumption of negligence on the owner. In Richoux v. Herbert,\(^6\) a Louisiana Court held that the liability on a track owner is predicated on an owner’s failure to observe defects in the premises. Thus, Louisiana places a duty on the track owner to regularly inspect defects which can lead to spectator injury.

Other jurisdictions support the Richoux standard. In Lane v. Eastern Carolina Drivers Assoc.,\(^7\) a North Carolina Court held that the failure to furnish adequate barriers would constitute negligence where the track owner had observed, or should have observed, the dragsters nearing the top of the barriers.\(^8\)

**E. “Fighting Matches”**

Professional wrestling, martial arts, “tough man,” and lower ranked boxing matches are unique in that the level of spectator participation typically exceeds other sports.\(^9\) Because there is a lack of case law regarding all but wrestling events, this section concentrates on that activity. Yet, the reader may extrapolate liability thresholds to other “fighting matches.”

One court characterized wrestling matches as undignified affairs, where the spectators possess unusual behaviors and both the participants’ and the spectators’ manner is neither gentle nor refined.\(^10\) There are two typical causes of spectator injuries in fighting matches: injuries caused by participants to the spectators when the fight extends beyond the ring (e.g., when a wrestler is thrown from the ring onto a spectator), and injuries caused by the participants assaulting spectators.\(^11\) In regard

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50. 332 A.2d 238 (Mo. App. 1974).
51. Id.
53. 117 S.E.2d 737 (N.C. 1961).
54. Id.
57. Id.
to the former, the liability level is simple. As in the case of baseball, it is up to the jury to examine the extent to which safety precautions were created by the event-site owner.\textsuperscript{58} However, the idea of a wrestler assaulting a spectator raises an interesting question as to whether such an action is foreseeable or even part of the event itself.\textsuperscript{59} A majority of jurisdictions presently hold that a site owner/promoter is liable for the actions of his/her participants.\textsuperscript{60} For example, in both \textit{Pierce v. Murnick}\textsuperscript{61} and \textit{Massey v. Jim Crockett Promotions},\textsuperscript{62} both courts held that a promoter or owner may be held liable for the actions of the contestants outside the ring. In both cases, wrestlers had exited the ring and attacked spectators.

\section*{III. Common Defenses}

This section analyzes assumption of risk defenses in the spectator liability context. The section also discusses greater duties on stadium/event-site owners as a result of legislative action.

Jurisdictions in the United States utilize a variety of negligence standards. Generally, there are two types of recognized negligence standards: contributory negligence and comparative negligence.\textsuperscript{63} However, there are extensive variations on each, particularly the latter. Of the two, contributory negligence is older and places a higher standard of proof on the plaintiff.\textsuperscript{64} In the purest form of contributory negligence, which is no longer recognized, the plaintiff in a negligence case must prove that he or she did not contribute in any way, shape, or form to the

\begin{itemize}
\item \textsuperscript{58} Id.
\item \textsuperscript{59} Id.
\item \textsuperscript{60} \textit{See} \textit{Pierce v. Murnick}, 145 S.E.2d 11 (N.C. 1965). Holding that while the promoter is not the insurer of the spectator's safety on the premises, he is under the duty to use reasonable care to prevent injury through a defect in the condition of the premises or by the action of any of the contestants in the ring. \textit{Id.} at 12.
\item \textit{See also} \textit{Massey v. Jim Crockett Promotions}, 400 S.E.2d 876 (W. Va. 1990). Stating that a promoter may be held liable for the actions of the wrestlers if their actions were foreseeable. \textit{Id.} Given the nature of the sport, the individual wrestler's temperament, and spectator involvement, it seems likely that the wrestler's actions were foreseeable.
\item \textit{But see} \textit{Frik v. Ensor}, 557 So.2d 1022 (La. Ct. App. 1990) and \textit{Ramsey v. Kallio}, 62 So.2d 146 (La. Ct. App. 1962). Louisiana has been reluctant to extend liability onto a premises owner or promoter for the actions of wrestlers which fall outside the scope of the sport and yet injure spectators.
\item \textsuperscript{61} \textit{See generally} \textit{Pierce}, supra note 60.
\item \textsuperscript{62} \textit{See generally} \textit{Massey}, supra note 60.
\item \textsuperscript{63} For a comprehensive table outlining both the comparative and contributory negligence laws by state jurisdiction, see \textit{Richard A. Leiter, National Survey of State Laws} 304-307 (1994).
\item \textsuperscript{64} \textit{Id.} at 303.
\end{itemize}
Injury. Thus, if a defendant can prove that the plaintiff contributed to the injury, then the plaintiff is barred from recovery.

Comparative fault is more lenient to the plaintiff who contributes to the injury. There are two sub-categories of comparative fault. In a pure comparative fault scheme, the defendant is liable for the percentage of negligence which the court attributes to the defendant. Thus, if a plaintiff is ninety percent negligent, the defendant(s) are liable for ten percent of the plaintiff’s injury. However, most comparative fault jurisdictions employ a modified comparative fault/contributory negligence scheme. Under such a scheme, where the plaintiff’s contributory negligence is greater than the defendant(s), the plaintiff will be barred from recovery.

As a result of the above mentioned negligence schemes, there are typically two defenses available. The appropriate defense used depends on whether the jurisdiction recognizes contributory negligence or comparative negligence. Primary assumption of risk (originally titled “assumption of risk”), which denotes that a spectator assumes certain risks while attending sporting matches, is applicable in a contributory negligence jurisdiction. Secondary (or “implied”) assumption of risk is a common defense in comparative negligence jurisdictions. There is a commonality between the two types of assumption of risk. Both acknowledge that there are inherent dangers in a given activity and that the spectator is assuming the risk involved in attending the activity. This article does not discuss the language on the back of purchased tickets, which is intended to absolve stadium owners of liability for injury; therefore, the defense of express assumption of risk is not analyzed.

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66. Letter, supra note 63, at 303.


68. Champion, supra note 35, at 104.


70. Id. at 5.

71. For a statement of express assumption of risk, see Drago, supra note 69, at 3-4.
A. Primary Assumption of Risk Defense in Contributory Negligence Cases

Spectators are often at risk of injury while viewing a sporting event. A common defense by stadium and event-site owners against charges of negligence is primary assumption of risk. Primary assumption of risk denotes the denial of a duty by the defendant.72 Primary assumption of risk as a complete defense applies only in contributory negligence jurisdictions.73 Generally, under this doctrine, spectators are unlikely to recover for injuries that result from the common feature of the event itself.74 Thus, damages as a result of injury caused by a baseball or hockey puck in the normal course of a game are non-recoverable.

Georgia is a jurisdiction which continues to view primary assumption of risk as a viable defense. However, Georgia operates a combined comparative-contributory negligence scheme — if the plaintiff's negligence is fifty percent or more, the plaintiff is barred from recovery.75 The Georgia Court defined the elements of assumption of risk in Newman v. Collins76 as: (1) a hazard or danger which is inconsistent with the safety of the invitee; (2) the invitee must know and appreciate the danger; and (3) there must be an acquiescence or willingness on the part of the invitees to proceed in spite of the danger.77 The Georgia Court held that as a matter of law, the plaintiff's assumption of risk for injuries arising out of occurrences common to the event automatically constitutes a fifty percent contribution to the injury.78 In Sewell v. Dixie Region Sports Car Club of America, Inc,79 the court held that a spectator who ignored the dangers of up-close videotaping of an auto race met all of the above requirements for the assumption of risk standard.80

73. Typically, these jurisdictions differentiate between invitees, licensees, and trespassers as well. The designation of a spectator is typically, but not always, an invitee. In these jurisdictions, the use of primary assumption of risk, even in a comparative negligence scheme, is important.
74. SCHWARTZ, supra note 65, at 972.
75. GA. CODE ANN. § 51-11-7 (1988).
78. Sewell, 451 S.E.2d at 490.
79. Id.
80. Id.
Georgia Courts appear to be more lenient toward the stadium/event-site owner for sporting events. For example, recently in *Daves v. Shepherd Spinal Center, Inc.*, a Georgia Court held that a spectator at a wheelchair race was barred from recovery under the defendant’s assumption of risk defense. The spectator-plaintiff had stationed herself at the bottom of a hill where it could be “reasonably” assumed that the racers could reach high speeds. One such racer, travelling at a high rate of speed, careened off the course and collided with the spectator, causing severe injury. Thus, the plaintiff should have realized the potential for a participant racer to lose control of the vehicle on a curve at the bottom of a decline. In situations where the plaintiff should have been aware of a danger, or the injury results from a common feature of the event, under a contributory negligence jurisdiction, the plaintiff will be barred from recovery.

**B. Secondary Assumption of Risk in Comparative Negligence Jurisdictions**

Secondary assumption of risk refers to instances in which the defendant owes a duty of care, but the plaintiff-spectator knowingly encounters the risk. Unlike primary assumption of risk, secondary assumption of risk defenses are subsumed into a comparative fault scheme and the assumption of risk defense does not act as a bar to recovery. Thus, a jury weighs the responsibility of both parties and accordingly designates a percentage of fault. This is a salient defense in that the majority of states now utilize a comparative fault rather than a contributory negligence standard.

To better understand the use of comparative negligence in a stadium/event-site owner context, it is helpful to examine diverse jurisdictions. Baseball stadiums, because of their abundance, provide an obvious ex-

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82. Id. at 693.
83. Id.
84. Id.
85. Id.
86. Id.
87. SCHWARTZ, supra note 65, at 92.
88. Id.
89. Id.
90. See LEITER, supra note 63, at 303.
ample of the different formulations of an owner's duty. California holds that a stadium owner has a limited duty to provide screened seats for as many fans as may reasonably be expected to call for them on any ordinary occasion. Additionally, California imposes a duty on the stadium owner to provide a warning to spectators of the danger of foul balls. If this duty is met, the plaintiff is barred from recovery.

In comparison, the New York Supreme Court held in *Akins v. Glens Falls City School District* held that the "critical question becomes what amount of screening must be provided by an owner of a baseball field before it will be found to have discharged its duty of care to its spectators." In addition, the court held that the owner was required to protect the most dangerous section of the field. Finally, the New York Court held that the number of protected seats provided must be sufficient to accommodate the "spectators who may reasonably be anticipated to desire protected seats on an ordinary occasion."

Texas adopted the New York standard enunciated in *Akins*, above. However, a Texas Court held in *Friedman v. Houston Sports Association* held that a stadium owner has no duty to warn spectators of the danger of foul balls. The stadium owner's duty is merely to provide "adequately screened seats" for all those desiring them.

The author argues that California uses a more easily quantifiable standard than either New York or Texas. Keeping track of ticket sales is easier than estimating the percentages of foul balls and home runs that enter the stands in specific areas, in addition to calculating the various speeds of these balls and predicting injury to a specific spectator. Thus, although all three jurisdictions use a comparative negligence scheme, jury outcomes from similar situations may be different because of the higher duty placed on stadium owners in the New York jurisdiction.

C. "Common Feature of the Event-Nature of the Sport" Standard

By this time, the reader has been exposed to the term "injury arising out of a common feature of the event" a number of times in this article.

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92. *Id*.
93. *Id*.
95. *Id*.
96. *Id*.
97. *Id* at 533.
98. 731 S.W.2d 572 (Tex. App. 1987).
99. *Id* at 575.
In the context of assumption of risk, the common feature of the event becomes important in assigning negligence, especially in non-stadium events. Although secondary assumption of risk is a viable defense in all comparative negligence jurisdictions, courts have held that the stadium/event-site owner's duty depends heavily on the nature of the sport itself, as well as on the defendant's role in, or relationship to, the sport.  

Golf provides an extreme example of how the standard works. For example, in *Morgan v. Fuji Country USA*, a spectator who was injured at a golf tournament by an errant ball was not barred from recovery under the secondary assumption of risk doctrine. However, the California Court held that the duty of a golf course towards a golfer or spectator is to provide a reasonably safe golf course. Again, whether or not the golf course met the reasonably safe golf course standard was a question for a jury.

Under the California scheme, a jury is faced with two questions. First, does the stadium/event-site conform to accepted industry standards for safety? Second, even if the stadium/event-site conforms to industry standards, did the owner/operator contribute in any other way to the plaintiff's injuries? Thus, the course owner has an obligation to design the course "as to minimize the risk that [persons on the course] will be hit by golf balls, e.g. by the way the various tees, fairways, and greens are aligned or separated."  

Such a question presents two obvious difficulties for golf course owners. First, unlike a baseball stadium, establishing an industry standard by which to judge a breach of duty is problematic. By their very nature, golf courses do not typically mimic each other. Secondly, where spectators are concerned, unlike most other athletic games, the spectators are rarely stationary, and the likelihood of a golf-ball related injury is relative to the quality of the participants in the event. Therefore, golf course owners may have difficulties under the secondary assumption of risk scheme in comparison to their stadium owner counterparts.

**D. Safe Place Statutes**

Almost all jurisdictions utilize safe place statutes that place a higher threshold of liability on property owners. However, a minority of the

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101. Id.
102. Id. at 253.
103. Id.
existing safe place statutes actually attach liability to the stadium/event-site owner. For example, Wisconsin’s safe place statute attaches to stadium/event-site owners.\textsuperscript{104} In instances where the owner fails to construct or maintain safety features such as fences, there is a violation of the safe-place statute.\textsuperscript{105} Additionally, liability attaches when the stadium or field owner knowingly permits employees and frequenters to venture into a potentially dangerous area.\textsuperscript{106} Of importance to the owners is that the primary assumption of risk doctrine is barred under the safe place statute.\textsuperscript{107}

Although primarily designed for the protection of employees, the Wisconsin safe place statute creates protection for persons who frequent buildings and structures.\textsuperscript{108} This includes ballparks, stadiums, and other places likely to be used for sporting events by spectators. Wisconsin places a duty on owners to maintain a reasonably safe place for their frequenters.

\begin{itemize}
  \item \textsuperscript{105} Powless v. Milwaukee County, 94 N.W.2d 187 (Wis. 1959).
  \item \textsuperscript{106} Xavier v. Kaiser, 227 N.W.2d 50 (Wis. 1975).
  \item \textsuperscript{107} Sachse v. Mayer, 118 N.W. 914 (Wis. 1963).
  \item \textsuperscript{108} § 101.11 reads:

\begin{quote}
(1) Every employer shall furnish employment which shall be safe for the employees therein and shall furnish a place of employment which shall be safe for employees therein and frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such employment and places of employment safe, and shall do every other thing reasonably necessary to protect the life, health, safety, and welfare of such employees and frequenters. Every employer and every owner of a place of employment or a public building now or hereafter constructed shall so construct, repair, and maintain such place of employment or public building as to render the same safe.

(2)(a) No employer shall require, permit, or suffer any employee to go, or be in any employment or place of employment which is not safe, and no such employer shall fail to furnish, provide, and use safety devices and safeguards, or fail to adopt and use methods and processes reasonably adequate to render such employment and place of employment safe, and no such employer shall fail or neglect to do every other thing reasonably necessary to protect the life, health, safety, or welfare of such employees or frequenters; and no employer or owner or other person shall hereafter construct or occupy or maintain any place of employment, or public building, that is not safe, nor prepare plans which shall fail to provide for making the same safe.

(b) No employee shall remove, displace, damage, destroy or carry off any safety device or safeguard furnished or provided for use in any employment or place of employment, not interfere in any way with the use thereof by any other person, nor shall any such employee interfere with the use of any method or process adopted for the protection of any employee in such employment or place of employment or frequenter of such place of employment, nor fail or neglect to do every other thing reasonably necessary to protect the life, health, safety or welfare of such employee or frequenters.
\end{quote}

In the sports event context, the salient Wisconsin case is *Kaiser v. Cook.* Kaiser involved a spectator injury at an auto racetrack. The injury occurred when a flying tire struck a spectator. The court acknowledged that the mere fact an accident had occurred did not demonstrate that the place was unsafe. However, the court did not look to industry standards to determine whether the racetrack was operated reasonably. Rather, the specific question the court fashioned in creating the standard of negligence was whether the defendant maintained and operated his racetrack as safely as the nature of a racetrack would reasonably permit. Thus, a higher threshold of negligence is placed on the stadium/event-site owner under the Wisconsin safe place statute than in a comparative negligence context. Following the Wisconsin standard, a stadium/event-site owner may be held liable under the safe place statute not only where a failure to construct protection to the spectators exists, but also where the owner knowingly permits frequenters into a dangerous area.

Defendants have raised other defenses under the safe-place statute, specifically that the statute applies to buildings, and not other constructions. As early as 1935, the Wisconsin Supreme Court held that wooden bleachers used for general public seating at an exhibition football game constituted a public building under the safe place statute. Nonetheless, defendants continued to argue that seating was not an integral part of a public building if such seating were not attached to the general structure. As a result, non-connected bleachers frequently found at minor league baseball games, college and high school baseball, golf tournaments and other exhibitions remained open to question as falling under the purview of the statute. This question was settled in three cases discussed below.

In 1959, the court held in *Powless v. Milwaukee County Stadium* that the safe place statute applied to an integrated structure. The court noted that the duty under the safe place statute is an absolute duty.

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109. 227 N.W.2d 50 (Wis. 1975).
110. *Id.* at 52.
111. Note that the one exception to this rule pertains to golf courses. *See* Quesenberry v. Milwaukee, 317 N.W.2d 468 (Wis. 1984).
113. *See* Weiss v. City of Milwaukee, 68 N.W.2d 13, 14 (Wis. 1995). The court in *Weiss* noted that the key question is whether the [spectator area] is sufficiently of the character of a public building constituting a place of assemblage for the general public. *Id.*
114. 94 N.W.2d 187 (Wis. 1959).
115. *Id.*
However, the term "safe" is relative, not absolute. While the court refused to consider other jurisdictions' holdings which did not have applicable safe place statutes, it recognized that the Wisconsin safe place statute does not alleviate the duty of spectators to care for themselves. Thus, while assumption of risk was barred as a defense under the safe place statute, contributory negligence was not. In a comparative negligence scheme, the spectator's failure to exercise care would be taken into consideration by the jury and weighed against the duty placed on the stadium/event-site owner.

In Pelock v. Prairie du Chien Joint School District #1, the court determined that a ballpark is an integrated structure of fences and bleachers with controlled access. It is designed and used for public resort, assemblage, and use. As such, a ballpark is considered a public building for the purposes of the safe place statute. Although Pelock is a case involving an amateur softball tournament, it establishes the basic principle that the safe place statute applies to all stadium/event-sites. As a result, Wisconsin places a higher duty of safety on its stadium/event-site owners than do jurisdictions which look strictly to a reasonableness standard, or industry standard. Because of the nature of notice, it can be generally argued that wherever the injury to the spectator arises, the stadium/event-site owner was already on notice of the injury possibility through prior experience, trade journals, or the media.

1. Recreation Statute Exception

In 1983, the Wisconsin Legislature created an exception to the safe place statute by enacting the recreational immunity statute. For owners of private property, there is reduced liability if the owner engages in recreational activities which do not exceed $2000 annual profit. Moreover, there are a number of collection possibilities which do not constitute payment for the purposes of the above aggregate. These include inter-alia: donations of money or services for the management of the

116. Id.
117. Id. The court also noted that "most baseball fans are eager to retrieve foul balls as souvenirs. We may mention that the radio broadcasters of 'braves' keep a fishnet handy to catch balls fouled in the direction of the press box in order to send them to handicapped or shut in children." Id.
118. 394 N.W.2d 316 (Wis. Ct. App., unpub. op. 1986).
119. Id.
120. Id.
121. Id.
123. Id. at § 895.52(6)(a).
property; payments of not more than $5 per person per day for permission to gather any natural product on an owner's property; or a payment by a governmental body. However, a city baseball association that sponsored an amateur baseball team, owned the park in which the team played, and charged admission was not immune from liability. The city itself was, but not the association.

Thus, while the typical sports arena owner will probably not be immune from the safe place statute under the recreational exception, small stadium and event-site owners who host charity tournaments may come under the protection of the limited immunities from liability encompassed in the act. In all likelihood, this is true even if the stadium/event-site owner exceeds the $2000 limit while engaged in other than charitable business. Thus, for example, if a country club hosted an annual charity tournament in which it received no pecuniary benefit, the country club would be immunized from liability by the recreation statute during the course of the event.

IV. Common Injuries to Spectators

A. Injuries Caused by Other Spectators

Courts recognize that injuries can be caused by parties other than the stadium/event-site owner at sporting events for which the owner can be held liable. In recent years, the number of spectators who are injured by other spectators at sporting events has grown considerably. The key question to determine liability is the foreseeability of the injury by the stadium/event-site operator. A general principle of liability is that an individual or organization who invites the public to a public amusement place is liable for injury sustained as a result of the acts of third parties, under certain conditions. More important is the basic question of whether the stadium operator contributed to the dangerous condition. More important is the basic question of whether the stadium operator knew, or should have known, that a dangerous condition existed.

125. Id.
127. Id.
128. Id.
129. Id.
A salient case in the modern era for injuries caused by unruly spectators is *Bowes v. Cincinnati Riverfront Stadium.* Although this case is not *per se* a sports related case, it involves the liability of stadium owners for injuries to spectators caused by other spectators. On December 3, 1979, a popular musical group, The Who, performed at Riverfront Coliseum in Cincinnati, Ohio. As a result of a narrow entrance and the stampeding of the spectators, eleven people were trampled to death. The court held that the owners of the stadium failed to take affirmative steps to adequately and effectively obviate certain known hazards. One of these hazards involved seating arrangements. Important to the court was that the directors of the event were aware of patron safety problems at the Coliseum. While the Ohio court was unwilling to find that a rock concert cannot be defined as an inherently dangerous event, the foreseeability context remained salient in determining liability.

In a sport related context, foreseeability of the behavior of the audience is a key element to determining liability. Recently, in *Johnson v. Mid-South Sports, Inc.*, an Oklahoma court had the opportunity to address this question. The plaintiff in *Johnson* was injured while at a professional wrestling match. Because of his weight and other infirmities, the plaintiff would have normally sat in a handicapped section. However, during the event, the handicapped section was full, so Johnson was escorted to another section, which contained "rowdy" spectators. While exiting the event, Johnson was assaulted by other fans. Mid-South Sports argued that they had removed the rowdy fans during the event. The court determined that there was no indication that Mid-South

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131. 465 N.E.2d 904 (Ohio 1983).
133. *Bowes*, 465 N.E.2d at 911.
134. *Id.* at 908. The type of seating available, known as festival seating, is not typical to paid sporting events. Festival seating is best described as a "first come, first serve basis" arrangement which encourages patrons to enter an area as soon as possible to get the best seating. In *Bowes*, the court noted that there is evidence that festival seating abets pushing and shoving by large numbers of patrons. *Id.*
135. *Id.* at 910. The court held that the record is replete with an awareness by its officers and employees of the safety problems presented by large and uncontrolled crowds at rock concerts at the Coliseum prior to the incident. *Id.*
138. *Id.*
139. *Id.* at 1108. The court described the plaintiff as a 295 pound man with an amputated right arm. *Id.*
140. *Id.*
141. *Id.*
should have foreseen the assault on Johnson because Mid-South’s security had already removed the rowdy fans and as a result, there was no indication of any further danger.\footnote{Id. at 1110. In the dissent, Judge Kauger argued that the general rule is that a boxing or wrestling match promoter or owner is under the same obligation to keep the premises in a reasonably safe condition for his invitees, or to warn them of hidden dangers, as one who controls any other commercial premises open to the public. \textit{Id.} at 1111.}

The majority’s holding in \textit{Johnson} was problematic for two reasons. First, there was ample evidence that the audience was encouraged to act in a rowdy or boisterous fashion, both through the nature of the event and by the high volume sale of alcohol.\footnote{Id. at 1111.} Whether the sale of alcohol to intoxicated fans generally constitutes negligence is a question for a jury.\footnote{Id.} The author argues that stadium/event-site owners have been on notice for many years that intoxicated fans get into fights and otherwise pose dangers to their surrounding spectators.\footnote{Id.} Thus, where the sale of alcohol is encouraged—a common feature of spectator events—the owner should face an additional percentage of liability.

1. Wisconsin Holdings for Spectator Injuries Under the Safe Place Statute

The Wisconsin Supreme Court held in \textit{Lee v. National League Baseball Club}\footnote{89 N.W.2d 811 (Wis. 1958). See Bishop v. Fair Lanes Ga. Bowling, Inc., 803 F.2d 1548, 1552 (11th Cir. 1986). The court held that the sale of beer in conjunction with sporting events has been profitable, but has been severely limited in a number of stadiums and auditoriums across the country. Police have reported that alcohol is involved in nearly every ballpark incident they handle. Where the sale of beer has been limited, arrests and ejections have steadily dropped. \textit{Id.}}\footnote{Id. (citing \textit{Brown v. San Francisco Ball Club}, 222 P.2d 19 (1950)). \textit{See also} Albert J. Goldberg, \textit{Non-Third Party Safe Place Cases}, 46 MARQ. L. REV. 154 (1962).} that a baseball spectator who was injured as a result of being trampled on while other fans pursued a foul ball was entitled to damages from the Milwaukee Braves Baseball Organization. The Milwaukee Braves asserted an assumption of risk defense akin to a spectator being struck by a ball.\footnote{Id.} The court held that unlike a foul ball entering the stands, it is unlikely, as a matter of common knowledge, that spectators
can expect to be trampled.\textsuperscript{148} An affirmative duty to maintain efficient crowd control is placed on the stadium/event-site owner under the Wisconsin safe place statute.

B. Injuries Caused to Spectators-Third Party Employees

Although this is one of the least typical spectator injuries, a natural question which arises is whether liability accrues when media personnel, batboys, assistants, or non-athlete employees are injured. In a 1983 California-Stanford football game, a member of the Stanford band was injured in a collision with a football player.\textsuperscript{149} This question was partially answered in \textit{Gallagher v. Cleveland Browns Football Co.}\textsuperscript{150} Michael Gallagher was employed as a television station videographer to cover the Cleveland Browns football games. During a 1988 game between the Cleveland Browns and the Houston Oilers, players collided with Gallagher in the end zone, known as the "Dawg Pound."\textsuperscript{151} Gallagher sustained injuries and sued for negligence. At trial, he prevailed before the jury, but the Browns were granted judgement not withstanding the verdict (\textit{jnov}).\textsuperscript{152} On motion, the Browns asserted a primary assumption of risk defense.\textsuperscript{153} Despite Ohio's comparative negligence recognition, primary assumption of risk remained a viable defense as a \textit{jnov} issue because the risk is a foreseeable or customary part of the sport.\textsuperscript{154} The Ohio Court held that the "application of primary assumption of risk to sports events requires that the danger involved is ordinary to the game, it is common knowledge that the danger exists, and the resulting injury occurs as a result of the danger during the course of the game."\textsuperscript{155} In general terms, \textit{Gallagher} asserts that concession vendors, media personnel, and even field entertainers will fall under the aegis of spectator for the purposes of determining liability.

\textsuperscript{148} \textit{Brown}, 22 P.2d at 19. The court held that "it boils down to the question of whether it is a matter of common knowledge that spectators at baseball games who scramble for balls batted into the stands, are likely to forcibly knock other patrons out of their seats with such force as to injure them. This could not have been a matter of common knowledge on the part of the patrons." \textit{Id.}


\textsuperscript{150} 638 N.E.2d 1082 (Ohio Ct. App. 1994).

\textsuperscript{151} \textit{Id.} at 1084.

\textsuperscript{152} \textit{Id.} at 1085.

\textsuperscript{153} \textit{Id.}

\textsuperscript{154} \textit{Id.}

\textsuperscript{155} \textit{Id.} at 1089.
V. Conclusion

In examining negligence actions and their correlative defenses in spectator injury cases, the lawyer is left with an unnerving fabric through which to sift. There are standard, common rules which apply to all actions. However, in breaking down the law of the various jurisdictions, the type of injury and whether the injury arose from a common feature of the event creates complexities. Thus, it is incumbent on the attorney to realize each of the three dimensions presented in this article. Although by no means is this a complete survey, it forms a framework from which to begin.