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# UNSPORTSMANLIKE CONDUCT: THE DUTY PLACED ON STADIUM OWNERS TO PROTECT AGAINST FAN VIOLENCE\*

STEVEN J. SWENSON\*\*

## I. INTRODUCTION

Violence in sports is not a new phenomenon; it has seemingly existed in one form or another since sports began. Sometimes this violence occurs among the players on the field, such as when Los Angeles Lakers player Kermit Washington floored the Houston Rockets' Rudy Tomjanovich with a brutal punch in 1977.<sup>1</sup> At other times, it occurs between a player and a coach, like when Latrell Sprewell famously choked P.J. Carlesimo, his coach at the time.<sup>2</sup> In some cases, violence erupts between players and fans, often due to heckling, derogatory language, or physical aggression on the fan's part.<sup>3</sup> Oftentimes, however, the violence that plagues stadiums, arenas, and ballparks around the world is the violence that occurs between the fans themselves. This type of fan violence has been prevalent for many years in Europe, where soccer-crazed fans known as "hooligans" have commonly instigated violence at international matches, sometimes resulting in severe bodily injuries and even death.<sup>4</sup>

Unfortunately, fan violence has started to become more prominent in the United States, as well, most notably occurring in the savage beating of San Francisco Giants fan Bryan Stow. Stow was attacked by rival Los Angeles Dodgers fans in the parking lot of Dodger Stadium following the 2011 Major

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1. David Leon Moore, *New Start from Old Wounds*, USA TODAY, Nov. 26, 2002, at 1C.
2. Phil Taylor, *Centre of the Storm*, SPORTS ILLUSTRATED, Dec. 15, 1997, at 60, 62.
3. See generally *Previous Examples of Fan Violence*, SI.COM, [http://sportsillustrated.cnn.com/baseball/news/2002/09/19/fan\\_violence/](http://sportsillustrated.cnn.com/baseball/news/2002/09/19/fan_violence/) (last visited Nov. 18, 2012).
4. WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW 327-28 (2d ed. 2004).

League Baseball (MLB) Opening Day.<sup>5</sup> Due to the attack, Stow received severe injuries and has remained in care ever since, with estimates of his medical costs now projected at upwards of fifty million dollars.<sup>6</sup> As a result, Stow's family recently sued former Dodgers owner Frank McCourt and a number of other Dodgers entities in an effort to recoup some of those costs, alleging that "lack of security, lighting, and other" adequate protections helped bring about the attack on Stow.<sup>7</sup>

Although Stow's case has yet to reach a courtroom, California case precedent and common law negligence principles operating therein indicate that his case against McCourt and the Dodgers will be difficult to win.<sup>8</sup> Had the attack on Stow occurred in a jurisdiction with a more protective statute, such as Wisconsin,<sup>9</sup> it is far more likely that Stow's case would end favorably for him. Stow's increased chance of success is due to stadium owners in Wisconsin, unlike those in California, being subject to a safe place statute, which increases the standard of care owed by stadium owners to fans attending their games.<sup>10</sup> The variance between the two standards is subtle yet important, as "[u]nder the common law, [stadiums are] merely required to be reasonably safe; but under the safe place statute, liability is imposed if the premises are not kept as free from danger as the nature of the place will reasonably permit."<sup>11</sup>

Therefore, this Article analyzes the duty imposed on stadium owners to protect against fan violence and how that duty is elevated in a jurisdiction like Wisconsin with a more protective statute. Part II contains a brief history of fan violence occurring in Europe and the United States, as well as what measures have been taken by various professional sports leagues and state agencies to address such violence. Part III examines the Bryan Stow case in detail, including what occurred and what claims he has brought in his suit against the Dodgers. Part IV analyzes these events under the California standard of common law negligence, including the required legal elements and various affirmative defenses. Finally, Part V analyzes the likely outcome these events would receive in a jurisdiction with a more protective statute,

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5. Lee Jenkins, *The Day that Damned the Dodgers*, SPORTS ILLUSTRATED, Aug. 29, 2011, at 50, 53.

6. Associated Press, *Lawyers: Giants Fan's Medical Costs to Top \$50M*, YAHOO! NEWS (Sept. 13, 2011), <http://news.yahoo.com/lawyers-giants-fans-medical-costs-top-50m-013450968.html>.

7. *Id.*

8. *See infra* Part IV.

9. WIS. STAT. § 101.11(1) (2009–10).

10. *See infra* Part V.

11. *Gould v. Allstar Ins. Co.*, 208 N.W.2d 388, 391 (Wis. 1973) (citing *Krause v. Menzner Lumber & Supply Co.*, 95 N.W.2d 374, 378 (1959)).

such as the safe place statute in Wisconsin, and why these protective statutes should be more widely adopted.

## II. HISTORY OF FAN VIOLENCE

Fan violence is an unfortunate reality that cuts across all national, racial, religious, and cultural connections. It occurs in nearly every sport and nation, and it represents a tremendous concern in some areas of the world.<sup>12</sup> Explanations for fan violence have included group thinking and a pack mentality, excessive alcohol use, and the inherent aggression and violence found in sports themselves.<sup>13</sup> According to former New York Giants Stadium Manager Michael Rowe,

At a football game, most spectators are passionately attached to their team . . . . The depth of their attachment is often underrated. And if they like one team, they definitely don't like the other team. They especially don't like the other team's fans. That's an explosive mix. It doesn't take much to set them off.<sup>14</sup>

Unequivocally, the sport that has endured fan violence in its greatest severity has been international soccer.<sup>15</sup>

### A. *International Soccer*

Rabidly loyal fans known as “hooligans” have historically been part of some extremely violent altercations involving international soccer, often leaving behind a trail of carnage that includes property damage, spectator injuries, and sometimes death.<sup>16</sup> Perhaps the most famous and severe example occurred in Belgium's Heysel Stadium in the 1985 European Cup final where English hooligans attacked fans from Italy, leaving 39 people dead and 470 injured.<sup>17</sup> Following this tragedy, the Fédération Internationale de Football Association (FIFA), the international governing body for soccer, banned

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12. Gordon W. Russell, *Sport Riots: A Social-Psychological Review*, 9 *AGGRESSION & VIOLENT BEHAV.* 353, 353–54 (2004).

13. *Id.* at 362–64, 367–68, 372–73.

14. Bob Oates, *Fighting Fan Violence: Some NFL Teams are Limiting Beer Sales, Training Employees to Identify Rowdies and Giving Designated Drivers Free Soft Drinks to Try to Control Crowds*, *L.A. TIMES*, Oct. 2, 1990, at SP1.

15. *CHAMPION*, *supra* note 4, at 327–28.

16. Russell, *supra* note 12, at 354.

17. *Id.*

England from participating in the European Cup for a period of five years.<sup>18</sup> In addition, a number of public reforms were abruptly passed to combat the ongoing problem, among them the Sporting Events Act of 1985 and the Public Disorder Act of 1986.<sup>19</sup> These reforms operated to forbid hooligans from attending matches and banned all remaining attending fans from alcohol consumption, both in route to matches and at the matches themselves.<sup>20</sup>

Additional measures were further instituted to combat the ongoing fan violence at European soccer matches. For example, security was increased at soccer stadiums, the price of admission to matches was raised to deter undesirable fans, separate seating areas were created for rival spectators, matches between historically hated rivals were sometimes moved to neutral sites, and European police updated use of crowd control tactics.<sup>21</sup> Several of these tactics have since been adopted by professional sports leagues and stadiums in the United States.

### B. U.S. Fan Violence

Fan violence is not just limited to Europe and other nations around the world; many violent episodes have also occurred historically in the United States. One of the most famous examples occurred in 1974 at Cleveland Stadium during “10-cent Beer Night.”<sup>22</sup> At the Cleveland Indians–Texas Rangers MLB game, the Indians organization ran a promotion for ten-cent beers, of which reportedly more than 60,000 cups were sold.<sup>23</sup> During the ninth inning, a mass riot broke out in the middle of a 5–5 tie, causing extensive property damage to the stadium and countless injuries among the fans.<sup>24</sup> As a result of the melee, the game was called and the visiting Rangers were given a 9–0 forfeit win.<sup>25</sup>

Another famous example of fan violence in the United States occurred in 1979 at Chicago’s Comiskey Park during “Disco Demolition Night.”<sup>26</sup> Fans

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18. John Sinnott, *The Horror of Heysel: Football’s Forgotten Tragedy?*, CNN (Oct. 31, 2012), <http://edition.cnn.com/2012/10/31/sport/football/football-heysel-hillsborough-juventus-liverpool/index.html>.

19. CHAMPION, *supra* note 4, at 328.

20. *Id.*

21. Lindsay M. Korey Lefteroff, Note, *Excessive Heckling and Violent Behavior at Sporting Events: A Legal Solution?*, 14 U. MIAMI BUS. L. REV. 119, 134–35 (2005).

22. *Previous Examples of Fan Violence*, *supra* note 3.

23. *Id.*

24. *See id.*

25. *Id.*

26. *Id.*

were admitted into the stadium for a doubleheader between the Chicago White Sox and Detroit Tigers and were charged only ninety-eight cents for admission so long as they brought a disco record to be used for a promotional event.<sup>27</sup> In between the two games, the records were placed in “a large wooden box” in the middle of the field and “blown to pieces,” setting off a riot in the stands.<sup>28</sup> Over 7,000 fans were reportedly involved in the brawl, numerous fires were started inside the stadium, and the second game was postponed.<sup>29</sup>

Additionally, some recent examples of fan violence have also been quite notable. For instance, two shootings occurred in parking lots outside Candlestick Park in San Francisco following the completion of a 2011 National Football League (NFL) preseason game.<sup>30</sup> Similarly, violence also erupted outside a 2011 NFL game in San Diego resulting in a stabbing and two assaults outside the main gate at Qualcomm Stadium.<sup>31</sup> Based on these and other violent episodes, NFL teams and league officials have instituted a number of measures to combat the problem of unruly and intoxicated fans. For example, teams have introduced “tattle-text” programs, where fans can anonymously inform stadium security of problematic fans in their section.<sup>32</sup> Also, unruly fans have routinely been ejected from games and sometimes have been required to pass an online course about proper stadium etiquette before being readmitted for future events.<sup>33</sup> Other measures have included limiting parking lot tailgating, instituting limits on beer consumption, and holding season ticket holders personally liable for problems caused by individuals in their seats regardless of whether the actual season ticket holder was present at the game.<sup>34</sup> Unfortunately, none of these measures were in place to prevent the most publicized recent example of fan violence—that of Bryan Stow.

### III. BRYAN STOW CASE

On opening day for the 2011 MLB season, San Francisco Giants fan Bryan Stow traveled to Dodger Stadium with a couple of his friends.<sup>35</sup> Stow was seated in the right field pavilion, a section in Dodger Stadium famous for

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27. *Id.*

28. *Id.*

29. *Id.*

30. Don Muret, *Venue Parking Lots Get More Scrutiny*, SPORTS BUS. J., Nov. 21, 2011, at 28, 28.

31. *Id.*

32. Don Muret, *Schooling Fans on Good Behavior*, SPORTS BUS. J., Nov. 21, 2011, at 25, 25.

33. *Id.*

34. Oates, *supra* note 14.

35. Jenkins, *supra* note 5, at 52.

its unruly fans.<sup>36</sup> Stow and his friends were not involved in any altercations inside the stadium, though they did engage in some minor trash talk with the home fans.<sup>37</sup> At that same game, however, seventy-two other people were arrested for fighting, excessive alcohol consumption, disorderly conduct, and other offenses.<sup>38</sup> Officials at the game were surprisingly pleased with this number, as 132 arrests were made at Dodger Stadium on opening day the previous season.<sup>39</sup>

Following the game, Stow and his friends walked through the vast parking lot outside Dodger Stadium, where they endured taunts from aggressive and intoxicated Dodgers fans delighted by their team's 2–1 victory.<sup>40</sup> Dodgers fan Louie Sanchez, who was also accused of tossing peanuts and soda at Giants fans during the game, reportedly came across Stow in the parking lot, pushed him, and punched one of his friends.<sup>41</sup> Witnesses say that Stow's group brushed off the incident and walked more than 200 feet through the parking lot with Sanchez and another man relentlessly harassing them.<sup>42</sup> Witnesses report that Sanchez then struck Stow in the side of the head, causing him to collapse immediately and bounce his head off the concrete.<sup>43</sup> He was later kicked several times in the head and torso by his attackers as he was motionless on the ground.<sup>44</sup>

Witnesses said it took longer than ten minutes for security personnel to arrive by which time the two attackers had fled the scene.<sup>45</sup> Stow was rushed to the hospital with a fractured skull and severe brain injuries, and he was subsequently placed in a medically-induced coma.<sup>46</sup> Stow later awoke, but he remains in a rehab center to this day.<sup>47</sup>

As a result of the severe injuries sustained by Stow and his escalating medical bills, Stow's family filed a civil lawsuit on his behalf against former Dodgers owner Frank McCourt, as well as against other entities within the

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36. *Id.*

37. *Id.*

38. *See id.* at 53.

39. *Id.*

40. *See id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 53–54.

47. *News and Updates, FOR STOW*, <http://support4bryanstow.com/News-Updates/articleType/CategoryView/categoryId/123/Update-on-Bryans-Condition> (last accessed Nov. 18, 2012).

Dodgers organization.<sup>48</sup> Stow's suit alleges that he was "inappropriately exposed to the aggressive acts of third parties" because the Dodgers "failed to take reasonable steps to prevent the attack on [him]."<sup>49</sup> According to the complaint, unacceptable failures included a lack of uniformed security—both inside the stadium and in the parking lot—a lack of adequate lighting, promotion of excessive alcohol consumption, allowing known criminals and gang members to attend the game, and allowing drunk or disorderly fans to remain inside the game and parking lot.<sup>50</sup>

Attorneys representing McCourt and the Dodgers have denied that there was inadequate security or lighting in the parking lots and have denied liability for the attack.<sup>51</sup> McCourt and the Dodgers organization have deflected liability to Stow's attackers and even to Stow himself for the incident.<sup>52</sup> However, the MLB league office has even said that the "Stow incident was an example of how a lack of security was an example of bad ownership by McCourt."<sup>53</sup> In his complaint, Stow alleged a number of legal claims, including premises liability; negligent hiring, retention, and supervision; and negligent infliction of emotional distress, among others.<sup>54</sup> However, Stow's primary legal claim is that of common law negligence, the standard used in California and the main focus of this analysis.

#### IV. COMMON LAW NEGLIGENCE

Negligence occurs when the acts or omissions of one party fall below a reasonable standard of care and cause damage to another party.<sup>55</sup> To establish a claim of common law negligence, the injured party must show: a duty of care was owed to him by the other party, a breach of that duty occurred, a proximate cause exists between the breach and the plaintiff's injury, and

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48. *See generally* Plaintiffs' Complaint for Damages, *Stow v. L.A. Dodgers, LLC*, No. BC462127 (Cal. Super. Ct. May 24, 2011).

49. *Id.* at 3–4.

50. *See id.*

51. Ramona Shelburne, *Dodgers: Bryan Stow Shares Blame*, ESPN (Oct. 27, 2011), [http://espn.go.com/los-angeles/mlb/story/\\_/id/7155602/los-angeles-dodgers-lawyer-bryan-stow-shares-blame-beating](http://espn.go.com/los-angeles/mlb/story/_/id/7155602/los-angeles-dodgers-lawyer-bryan-stow-shares-blame-beating).

52. *Id.*

53. *MLB, Frank McCourt Trade Legal Jabs*, ESPN (Oct. 25, 2011), [http://espn.go.com/los-angeles/mlb/story/\\_/id/7146959/major-league-baseball-claims-frank-mccourt-took-190m-los-angeles-dodgers](http://espn.go.com/los-angeles/mlb/story/_/id/7146959/major-league-baseball-claims-frank-mccourt-took-190m-los-angeles-dodgers).

54. Plaintiffs' Complaint for Damages, *supra* note 48, at 16, 20, 24–25.

55. *Negligence*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/negligence> (last visited Nov. 18, 2012).



damages occurred as a result of that breach.<sup>56</sup>

### A. Duty

Before a claim of common law negligence could be made out against McCourt and the Dodgers, Stow would need to establish that he was owed a duty of care by the Dodgers organization. Such a duty could perhaps be established through Section 344 of the Restatement (Second) of Torts, which California has adopted and which states:

A possessor of land who holds it open to the public for entry for his business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for [any] physical harm caused by the accidental, negligent, or intentionally harmful acts of third persons . . . and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it.<sup>57</sup>

Therefore, whether a duty exists under the Restatement depends in large part on the foreseeability of harm to members of the public. The emphasis on foreseeability is further elaborated in Comment f to Section 344, which explains how the possessor of land may be on constructive notice of fan violence merely based on past incidences. Comment f states:

Since the possessor [of land] is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he knows or has reason to know that the acts of the third person are occurring, or are about to occur. He may, however, know or have reason to know, from past experience, that there is a likelihood of conduct on the part of third persons in general which is likely to endanger the safety of the visitor, even though he has no reason to expect it on the part of any particular individual.<sup>58</sup>

Due to the frequency of accidents, crimes, and altercations, stadium owners have long provided for a visible security presence at games. Security officials, and thereby stadium owners, have been found to owe a duty of care

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56. WALTER T. CHAMPION, JR., *SPORTS LAW IN A NUTSHELL* 110 (4th ed. 2009).

57. C. Barry Montgomery & Bradley C. Nahrstadt, *A Primer for the Entertainment Community: Legal and Practical Issues About Venue Safety—What You Should Know*, 3 VA. SPORTS & ENT. L.J. 257, 268 (2004) (quoting RESTATEMENT (SECOND) OF TORTS § 344 (1965)).

58. *Id.* at 268–69 (quoting RESTATEMENT (SECOND) OF TORTS § 344 cmt. f).

to the common fan to protect him or her from foreseeable harm that can occur in the stadium, including the acts of third parties.<sup>59</sup>

This duty of care is observed, for example, in the California case *Sample v. Eaton*.<sup>60</sup> In that case, the plaintiff was injured at a professional wrestling match when he was struck in the mouth by a Coca-Cola bottle that was thrown at the ring by another fan.<sup>61</sup> Prior to that specific event, fans had been booing, acting out, and throwing objects at the ring for several minutes, with no intervention by ushers, police, or security.<sup>62</sup> In its analysis, the California court determined that the event organizer was under a duty to protect the fans in attendance ““by taking appropriate measures to restrain conduct by third persons which he should be aware of and which he should realize is dangerous.””<sup>63</sup> The fact that fans were being unruly and throwing objects for a considerable amount of time without intervention by security led the court to determine it could not, as a matter of law, declare the event organizer used reasonable care to protect the injured fan.<sup>64</sup> Therefore, a duty *may* exist on the part of the event organizer (or stadium owner) to the fan to protect against the violent acts of third parties and whether that duty is breached may ultimately be left up to a jury to determine.

### B. Breach

Whether a duty of care has been breached is determined on a case-by-case basis, given the particular facts and circumstances of that case.<sup>65</sup> Typically, in order to determine if a stadium owner has breached a duty of care owed to a fan, “most courts have analyzed the problem in terms of the particular protective measures taken by the owner or operator in view of the prior warning he had that an assault might take place.”<sup>66</sup> Thus, the foreseeability of danger and the steps taken to prevent that danger are the primary considerations in determining a breach.

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59. See *Sample v. Eaton*, 302 P.2d 431, 434 (Cal. Dist. Ct. App. 1956) (quoting *Winn v. Holmes* 299 P.2d 994, 996 (Cal. Dist. Ct. App. 1956)); *Bearman v. Univ. of Notre Dame*, 453 N.E.2d 1196, 1198 (Ind. Ct. App. 1983); *Bowes v. Cincinnati Riverfront Coliseum, Inc.*, 465 N.E.2d 904, 911 (Ohio Ct. App. 1983) (quoting *Schaefer v. D & J Produce, Inc.*, 403 N.E.2d 1015, 1016 (Ohio Ct. App. 1978)); James O. Pearson, Jr., Annotation, *Liability of Owner or Operator of Theatre or Other Amusement to Patron Assaulted by Another Patron*, 75 A.L.R.3d 441 § 3[b] (1977).

60. See generally 302 P.2d 431.

61. *Id.* at 432.

62. *Id.* at 432, 434.

63. *Id.* at 434 (quoting *Edwards v. Hollywood Canteen*, 167 P.2d 729, 733 (Cal. 1946)).

64. *Id.*

65. CHAMPION, *supra* note 56, at 116.

66. Pearson, *supra* note 59, § 2[a].

In *Townsley v. Cincinnati Gardens, Inc.*, an Ohio case analyzed under the same common law negligence standards of California, the court declared the stadium owner was not liable when a young boy was physically assaulted in a restroom at the stadium by other boys in an attempted robbery.<sup>67</sup> Although the restroom was dimly lit and security at the game was limited to 5 guards for 5,000 fans, the Ohio court determined that there was no prior evidence of assaults in restrooms specifically where the boys were seeking money.<sup>68</sup> As a result, the court determined “there [was] no evidence . . . from which reasonable minds could have concluded that the defendant . . . knew of, or could reasonably have anticipated, the danger to this plaintiff . . .”<sup>69</sup> Thus, no breach of duty on the part of the stadium owner was found in the case.

Likewise, no breach of duty was found in *Noble v. Los Angeles Dodgers, Inc.*,<sup>70</sup> in which a fan was injured in the Dodgers’ parking lot following an altercation with two other intoxicated fans.<sup>71</sup> The intoxicated fans were vomiting and urinating in the parking lot and shouting obscenities at others with no security presence in sight.<sup>72</sup> Nevertheless, the California court held that the stadium owner was not liable for the subsequent assault in the parking lot.<sup>73</sup> When speaking about whether the assault was foreseeable, the court said:

It is a sad commentary but it can be said that in this day and age anyone can foresee or expect that a crime will be committed at any time and at any place in the more populous areas of the country. That fact alone, however, is not enough to impose liability on a property owner when a crime does in fact occur on his or her property.<sup>74</sup>

Despite the fact that five parking lot fights had been reported in the prior sixty-six night games at Dodger Stadium, the California court held that parking lot injury did not amount to a breach of duty because Noble did not provide evidence of reasonable steps the stadium owner could have taken to prevent the assault.<sup>75</sup>

Therefore, based on California precedent, it will likely be difficult for

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67. See generally 314 N.E.2d 409 (Ohio Ct. App. 1974).

68. *Id.* at 410–11.

69. *Id.* at 412.

70. See generally 214 Cal. Rptr. 395 (Cal. Ct. App. 1985).

71. *Id.* at 396.

72. *Id.*

73. See *id.* at 396–97.

74. *Id.* at 397.

75. *Id.*

Stow to establish a breach of duty owed to him by McCourt and the Dodgers. As the court stated in *Noble*, “[a] landowner is not an insurer of the safety of persons on his property. He does, however, have a duty to take reasonable steps to protect invitees from *foreseeable* injury . . . to the extent of controlling the conduct of third parties.”<sup>76</sup> Whether parking lot altercations at Dodger Stadium have become that much more foreseeable in the twenty-six years since *Noble* would be an issue for a jury to decide. Based on the witness reports of the Stow incident and the accusations made against the Dodgers organization, it would now appear such altercations in the parking lots have become foreseeable events, and a closer look at causation is warranted.

### C. Proximate Cause

The third element a plaintiff must prove in a claim for common law negligence is causation—a “connection between the negligence and the resulting injury.”<sup>77</sup> Even where there is a duty and breach found on the part of the stadium owner, if a fan’s injury was not caused by that breach in some significant way, then there can be no recovery for negligence. California follows the principle of proximate cause in which a “natural and continuous sequence, unbroken by an efficient and intervening cause, produces the injury and without which the injury would not have occurred.”<sup>78</sup> The act or omission being considered for causation must “be a substantial factor in bringing about the injury.”<sup>79</sup>

The proximate cause alleged in Stow’s complaint is similar to that alleged in *Noble*—that lack of adequate security outside Dodger Stadium was a substantial factor in bringing about his injury.<sup>80</sup> In *Noble*, the court was not convinced by this linkage, stating:

In the case at bench the direct cause of each plaintiff’s injury was the conduct of the person or persons who struck [him]. Plaintiffs do not contend that the Dodgers had actual advance knowledge of the conduct of the assailants or of their presence in the parking lot. Plaintiffs’ theory is purely and simply that the Dodgers were negligent in failing to effectively *deter* any

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76. *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 344 (1965); *Taylor v. Centennial Bowl, Inc.*, 416 P.2d 793 (Cal. 1966)).

77. *CHAMPION*, *supra* note 56, at 116.

78. *Id.* at 117.

79. *Id.*

80. See Ramona Shelburne, *Bryan Stow Family Suing Dodgers*, ESPN (May 26, 2011), <http://sports.espn.go.com/los-angeles/mlb/news/story?id=6584013>.

and everyone from acting in such a manner.<sup>81</sup>

Thus, unless Stow could show that Dodgers security personnel was alerted to the violent and aggressive behavior of his assailants specifically prior to his assault, then it would appear he would have a difficult case to make in California on this causation element. Otherwise, liability to the stadium owner would be attributed to the “failure to provide an adequate deterrence to criminal conduct in general.”<sup>82</sup> On the other hand, should Stow establish the causation element, he must also show he suffered some type of injury in order to succeed on a common law negligence claim.

#### *D. Damages*

Damage to the plaintiff is the final element needed to establish a claim of common law negligence.<sup>83</sup> Whenever there is a significant injury, such as the one sustained by Stow, damages are easy to prove. “The only requirement is that actual loss or damages must result to the interest of another.”<sup>84</sup> In Stow’s case, he suffered damages in the form of physical ailments, monetary loss, and loss of income and companionship.<sup>85</sup> Therefore, this element of negligence would easily be satisfied in Stow’s suit against McCourt and the Dodgers.

#### *E. Contributory Negligence*

In the event that Stow would be able to establish all four elements of common law negligence to a jury, McCourt and the Dodgers could still attempt to assert contributory negligence as an affirmative defense to the claim. In a comparative negligence jurisdiction, of which California and most other states are now participants, “a jury weighs the responsibility of both parties and accordingly designates a percentage of fault.”<sup>86</sup> Thus, in order for Stow to recover in his suit, he would need to establish that the Dodgers’ percentage of fault for Stow’s injuries was greater than his own. This is another obstacle to Stow’s recovery under common law negligence.

#### *F. Stow’s Case Under Common Law Negligence*

Consequently, based on California case precedent and the required

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81. *Noble*, 214 Cal. Rptr. at 398.

82. *Id.*

83. *CHAMPION*, *supra* note 56, at 117.

84. *Id.*

85. *See generally* Plaintiffs’ Complaint for Damages, *supra* note 48.

86. Joshua E. Kastenberg, Comment, *A Three Dimensional Model of Stadium Owner Liability in Spectator Injury Cases*, 7 MARQ. SPORTS L.J. 187, 199 (1996).

elements to make out a case, it does not appear Stow will succeed on a claim of common law negligence against McCourt and the Dodgers. Although it is likely Stow could establish a duty of care was owed to him by the stadium owner and the team, he will have a difficult time showing that a breach of that duty occurred and that the breach was the proximate cause of his injury. If Stow's incident had occurred in a jurisdiction with a more protective statute, such as Wisconsin, it is more likely he could recover in a suit, at least against the stadium owner.

## V. WISCONSIN'S SAFE PLACE STATUTE

Certain jurisdictions differ on the duty of care they place on any particular group. Wisconsin is one such jurisdiction, and its safe place statute attaches an increased duty of care on employers, of which stadium owners are also included.<sup>87</sup> As a result of the prevalence of fan violence, the degree to which a safe place statute increases stadium owner liability and why such statutes should or should not be more widely adopted are matters that deserve significant consideration.

### A. Statute and Its Application

Wisconsin's safe place statute reads as follows:

Every employer . . . shall furnish a place of employment which shall be safe for employees therein and for frequenters thereof and shall furnish and use safety devices and safeguards, and shall adopt and use methods and processes reasonably adequate to render such . . . 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.<sup>88</sup>

Thus, the statute on its face talks primarily of a duty placed on employers for the benefit of employees. However, also included among those protected individuals are "persons who frequent [those] buildings and structures. [Such structures] include[] ballparks, stadiums, and other places likely to be used for sporting events by spectators."<sup>89</sup>

Similar to the analysis under common law negligence, the safe place statute does not mandate that stadium owners be the insurers of their patrons'

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87. WIS. STAT. § 101.11(1) (2009–10).

88. *Id.*

89. Kastenberg, *supra* note 86, at 202.

safety. However, the statute does impose a more stringent standard of care than that found under common law negligence.<sup>90</sup> For example, as stated in *Gould v. Allstar Insurance Co.*, “[u]nder the common law, premises were merely required to be reasonably safe; but under the safe place statute, liability is imposed if the premises are not kept as free from danger as the nature of the place will reasonably permit.”<sup>91</sup> Therefore, reasonably safe may not be safe enough.

*Gould* is the primary Wisconsin case applying the safe place statute to frequenters of a location. In that case, a pier was located in a swimming area open to the public for a fee, but the water therein was shallow, thus making it dangerous for diving.<sup>92</sup> Owners of the pier had previously posted a warning sign about the shallow water, but the sign had become faded and was subsequently removed.<sup>93</sup> The plaintiff, a twenty-year-old experienced swimmer, dove into the water and struck his head on the bottom, fracturing several vertebrae in his neck.<sup>94</sup> The injury damaged the man’s spinal cord and caused him instant paralysis.<sup>95</sup> The pier the plaintiff dove off was clearly subject to the safe place statute because it was open to the public and operated as a business for profit.<sup>96</sup> Therefore, even though the plaintiff was partially negligent for failing to exercise caution in not checking the depth of the water before diving in, a jury still found the pier owner 85% negligent for not posting a warning sign and for failing to maintain the pier in as safe a condition as its nature would reasonably permit.<sup>97</sup>

On the other hand, the increased standard of care under Wisconsin’s safe place statute does not mandate that a structure or area be *completely* free of danger. This principle is expressed in *Zernia v. Capitol Court Corp.*, in which a woman slipped and fell on an icy parking lot, causing her permanent injury.<sup>98</sup> The defendant store owner had employed a maintenance crew for the parking lot, which had been working throughout the night salting and sanding the lot to make sure it was safe for customers the following morning.<sup>99</sup> As a result, the court and jury both ultimately ruled that the store owner had

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90. *Id.* at 203.

91. 208 N.W.2d 388, 391 (Wis. 1973) (citing *Krause v. Menzner Lumber & Supply Co.*, 95 N.W.2d 374, 378 (Wis. 1959)).

92. *Id.* at 389.

93. *Id.*

94. *Id.* at 389–90.

95. *Id.* at 390.

96. *Id.* at 393.

97. *Id.* at 389, 394.

98. 124 N.W.2d 86, 87–88 (Wis. 1963).

99. *Id.* at 88.

fulfilled his duty to make the lot as safe as its nature thereof would reasonably permit.<sup>100</sup> “The defendant’s duty did not extend to making the parking lot absolutely safe. At the time of the accident, the defendant was using more than ordinary care to fulfill [his] statutory duty.”<sup>101</sup> Thus, the safe place statute will not provide a successful legal claim in every case where a duty is found and an injury occurs; the breach of that duty must also be found as well as causation on the part of the property owner.

When analyzed under the framework of a safe place statute, episodes of fan violence such as the one suffered by Bryan Stow have the potential to attach liability to respective stadium owners. Therefore, because recovery *may* be available—as opposed to its likely failure under common law negligence—Stow’s case under a safe place statute framework warrants further examination, perhaps even offering a compelling justification for further adoption of such statutes.

### *B. Stow’s Case in a Safe Place Jurisdiction*

For Stow’s case to succeed on a safe place statute claim, he would need to establish (1) there was an unsafe condition associated with the area, (2) the condition caused an injury to him, and (3) the Dodgers organization had either actual or constructive notice of the condition before he was attacked.<sup>102</sup>

#### 1. Unsafe Condition Associated with the Area

Stow would first need to show that there was an unsafe condition associated with the area. As previously stated, sports fans are extremely passionate about their teams, and they generally dislike the fans of rival teams. When this volatility is combined with alcohol, aggressive sporting events, and a lack of supervision and security, a formula for violence is often created. Fan violence is not a new phenomenon, and in some locations—for instance, in Southern California—it is notably bad. In that location, just in the past ten years, fans have been “stabbed to death in San Francisco [and] shot in the head and paralyzed in Anaheim.”<sup>103</sup> The Dodgers–Giants rivalry is especially violent, with a fan being stabbed at one game in 2009 and another fan being shot and killed in 2003.<sup>104</sup> Dodgers–Giants Opening Day in 2010 saw 132

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100. *See id.* 88–89.

101. *Id.* at 89.

102. *See Gould v. Allstar Ins. Co.*, 208 N.W.2d 388, 394 (Wis. 1973).

103. Jenkins, *supra* note 5, at 53.

104. *Id.*



fans arrested with 72 arrested in 2011.<sup>105</sup> Given this history, it would not be difficult for a jury to determine that a mixture of alcohol and the lack of security would make the Dodger Stadium parking lot an unsafe condition.

## 2. Unsafe Condition Caused Stow's Injury

Stow would next need to show that the unsafe condition caused his injury. There is no doubt Stow was injured as a result of the attack, but was the lack of security the cause of it? Using Wisconsin's standard of causation, a jury may find that it was. According to *Pfeifer v. Standard Gateway Theater, Inc.*, a leading Wisconsin case on third-party liability:

“‘[P]roximate cause’ of an injury or damage is meant the efficient cause,—that which acts first and produces the injury *as a natural and probable result*, under such circumstances that he who is responsible for such cause, *as a person of ordinary intelligence and prudence*, ought reasonably to foresee [*sic*] that a personal injury to another may probably follow from such person's conduct.”<sup>106</sup>

Therefore, although the injury to Stow was literally caused by his assailants, a jury using the above reading of “proximate cause” could determine that excessive alcohol consumption by fans and the lack of security in the parking lot were the initial causes of the altercation and resulting injury.

## 3. Dodgers Had Actual or Constructive Notice

Finally, Stow would need to show that the Dodgers organization had either actual or constructive notice of the unsafe condition prior to the attack on him. Based on the fan violence previously exhibited in the Dodgers–Giants rivalry, this element would not be difficult for Stow to establish. In fact, “[b]ecause 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.”<sup>107</sup>

Therefore, it is likely Stow would have a strong case against the Dodgers organization and McCourt in a jurisdiction subject to a safe place statute similar to Wisconsin's. Under the safe place framework, fans such as Stow are owed an increased standard of care by stadium owners, and the elements needed to make out a successful claim are more easily proven than under a

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105. *Id.*

106. 55 N.W.2d 29, 31 (Wis. 1952) (quoting the jury instructions read at the trial).

107. Kastenber, *supra* note 86, at 204.

common law negligence framework. Thus, safe place statutes provide more protection for the attending fan, but do not impose an overly undue burden on the stadium owner based on this analysis. In addition, several other policy considerations further justify the adoption of safe place statutes in other jurisdictions.

### *C. Further Adoption of Safe Place Statutes*

Jurisdictions employing safe place statutes are justified in their use for several reasons. First, under this framework, stadium owners—often charging premium prices to the fans who frequent their venues—are merely required to make their premises as safe as nature would reasonably permit. The owners are not required to be the insurers of fan safety but are rather simply obligated to take all reasonable steps to ensure its presence. Because the stadium owner is likely charging the fan a significant fee to be on the premises, it reasonably follows that the owner should make the premises as safe as possible. Under this framework, the apportionment of liability is still determined by a jury and, therefore, unfounded claims will still likely be thrown out. On the other hand, legitimate injury claims, such as the one submitted by Bryan Stow, would have a viable chance to be considerably compensated.

Second, provisions such as recreational immunity statutes help ensure that entities that do not make significant money off its frequenters will not be harmed by the use of safe place statutes, as the recreational immunity statute exempts any facility not exceeding \$2,000 in annual profit from consideration.<sup>108</sup> Thus, concerns for many smaller playing fields are alleviated by this exemption.

Third, under a safe place jurisdiction such as Wisconsin's, stadium owners are not able to circumvent potential liability for fan safety through the use of exculpatory clauses, as those provisions are not an available defense under the statute.<sup>109</sup>

Finally, although common law is created over time through the judiciary, safe place statutes are instead created by the legislature. This feature allows for the protection offered to the public to be carefully crafted, as evidenced by the recreational immunity exemption and prohibition against exculpatory clauses as a defense. In addition, should the legislature wish to retract or further extend the protections offered under a safe place statute, such changes may be more rapidly instituted by amending a statute than by adapting

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108. WIS. STAT. § 895.52(6)(a) (2009–10).

109. See Paul Anderson, *Sports Law in the State of Wisconsin*, 15 MARQ. SPORTS L. REV. 425, 464 (2005).

common law principles.

Therefore, due to the many protections safe place statutes offer to the public, other jurisdictions should more readily consider implementing a safe place statute similar to the one currently employed in Wisconsin. By doing so, those jurisdictions would put considerable pressure on stadium owners to increase their safety measures for sports fans and other workers, and it would also offer a greater chance of recovery for individuals who unfortunately become injured at those facilities.

## VI. CONCLUSION

Fan violence has occurred in the sports context over the course of many years, both in the United States and abroad. Although some leagues and stadiums now appear to be doing more to address the problem, several recent examples of fan violence have received considerable media attention—most notably that of Bryan Stow. Following his savage beating in the parking lot of Dodger Stadium following a game, Stow has acquired tremendous medical expenses, causing his family to file a civil suit on his behalf against the Dodgers organization and its former owner, Frank McCourt. Stow's suit alleges a number of legal claims, though it primarily rests under the framework of common law negligence. Based on prior case precedent and the common law negligence framework utilized in California, Stow may have considerable difficulty making out a successful case.

On the other hand, had the assault on Stow occurred in a more protective jurisdiction, such as Wisconsin with its safe place statute, it is not only more likely that Stow would have an available remedy at his disposal but also that the incident that caused his injuries might not have occurred at all. Safe place statutes operate to compel sports stadiums, concert halls, and other facilities charging for fan admission to make the premises as safe as nature permits, not just what is considered reasonably safe. This increased standard of care is imposed by law, and the elements needed to make out a claim are more easily proven than under common law negligence, thus exposing a facility to greater liability for failing to protect its patrons.

If jurisdictions were to adopt more protective statutes for the public, then stadium owners would be thrust into action to help prevent fan violence. By enacting legislation to effectuate this change, a jurisdiction can carefully craft how it would like the protection to operate, including or leaving out entities as it sees fit. In addition, a legislative act is both quicker to implement and more easily amended than is altering common law principles and case precedent operating in the judiciary. Therefore, due to the added protection a safe place statute provides to the fans, as well as the many policy justifications it offers,

more jurisdictions should adopt and implement safe place statutes so that future episodes of fan violence in the world of sports become the exception rather than the norm.