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A SURVEY OF THE SAFE PLACE DOCTRINE

ARLO A. McKINNON*

The safe place statute is about 50 years old. When it was first enacted in 1911 it applied only to employers, requiring them to furnish places of employment that were safe. "Safe" was defined to mean "as safe as the nature of the place of employment would reasonably permit." In 1913, the statute was amended to include owners of public buildings, requiring them to construct and maintain public buildings as to render them safe. Public buildings were structures used by the public or by three or more tenants.

The statute is unique to Wisconsin. We are the only state that has it.¹ There are now approximately 250 appellate decisions on the statute. The following are bibles for lawyers preparing substantial cases involving the statute: an excellent article by Joel A. Bloomquist in the Wisconsin Bar Bulletin;² a descriptive word and subject indexing of the statute³ which is very helpful; Attorney Howard H. Boyle's timely descriptive word indexing of the statute⁴ (supplemented through 16 Wis. 2d⁵) and his analytic article on so-called plateaus and pitfalls of the statute;⁶ a fine survey of the statute by the President-elect of the State Bar, Francis J. Wilcox.⁷ I will not inject many of the applicable citations in this discussion because if you read these articles I have just cited, you will find there virtually all of the controlling decisions. The citing I will do here is taken from these articles. Good news for Wisconsin lawyers and judges is that, in response to many reactions to the indexing method and to the lack of an authoritative up-to-date text putting all this subject together in one volume, Attorney Howard J. Boyle has now written this needed book and it will be published soon under the title *The Wisconsin Safe Place Law*.⁸ In it the appellate decisions and the research material available in Wisconsin up to now will be digested and presented in a practical way. In writing this book, Attorney Boyle has rendered a valuable service to the bench and bar of this state.

Generally speaking, the purpose of the safe place statute is to place

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¹ Cross v. Leuenberger, 267 Wis. 232 at 236, 65 N.W. 2d 35 (1953).

² Bloomquist, Safe Place Cases, Wis. B. Bull., Vol. 26 No. 4 at 7 (1953).

³ Comment, 1953 Wis. L. Rev. 323.

⁴ Boyle, *A Descriptive Word Index of Safe Place Statute Law*, Wis. B. Bull. Vol. 31 No. 4 at 43 (1958).

⁵ Boyle, *Safe Place Supplement*, Wis. B. Bull. Vol. 35 No. 4 at 16 (1962).

⁶ Boyle, *Plateaus and Pitfalls of Safe Place Law*, Wis. B. Bull., Vol. 34 No. 4 at 36 (1961).

⁷ Wilcox, Wis. B. Bull. Vol. No..

⁸ BOYLE, WISCONSIN SAFE PLACE LAW, 1962.

on employers and owners of public buildings responsibility for the protection of employees and non-trespassing persons on the premises greater than was imposed at common law. At common law the duty was only to make the place reasonably safe.⁹ The statute expressly enlarges this duty to include making the place as safe as the nature thereof will reasonably permit. Some lawyers have commented that the decisions interpreting this standard have established metaphysical differences between the duty imposed at common law and under the statute. This difficulty, however, is somewhat counterbalanced by the wider presentation to the jury under the statute of what constitutes safety. Some judges have complained about this. "The legislature evidently endeavored to remove the question (of safeness) as exclusively as practicable into the field of jury *interference*."¹⁰ It has been stated that a Wisconsin lawyer retained in a case involving the liability of an occupant of premises has come upon confusion as well as a client because here the limits of that liability are determined not only by the common law but also by the safe place statute.¹¹ On the other hand, the statute has been described as "nothing less than a work of genius."¹² More recent authors have said that compared to the huge body of safe place law that has developed in Wisconsin, "the court has maintained a surprising integrity to the law." Practicing lawyers, however, must face the fact that there are many apparent inconsistencies in the decisions.¹³ This has been the experience under all great legislation which, although relatively simple in its language, has an almost infinite number of applications. The purpose of the Marquette Law School and Wisconsin NACCA, however, in this institute, is to point out to both sides of the counsel table some of the important applications of this statute.

For example, under the statute you can put in evidence changes made or precautions taken by a defendant after the accident has occurred.¹⁴ This is an advantage for the plaintiff because such subsequent changes or precautions are cogent evidence that the pre-existing conditions were not as safe as the nature of the place would reasonably permit. In *Hanlon v. St. Francis Seminary*, a guard rail was not put on a retaining wall until after the plaintiff had fallen over the wall and fractured his spine. The jury was allowed to hear and see evidence that after the accident the defendant put up a guard rail.

Again, under the statute, it is important to put in evidence applic-

⁹ *Tomlin v. Chi., M., St. P. Ry.*, 220 Wis. 325, at 329, 265 N.W. 72, 1936.

¹⁰ *Sadowski v. Thomas Furnace Co.*, 157 Wis. 443, at 450, 146 N.W. 770 (1914).

¹¹ REUSS, THIRTY YEARS OF THE SAFE PLACE STATUTE, 1940 Wis. L. Rev. 335.

¹² ALMEYER, THE INDUSTRIAL COMMISSION OF WISCONSIN.

¹³ *Supra* note 6, at 39.

¹⁴ *Sweitzer v. Fox*, 226 Wis. 26 at 36, 275 N.W. 546 (1937); *Heiden v. Milwaukee* 226 Wis. 92 at 104, 275 N.W. 922 (1937); *Zehren v. Woolworth Co.*, 11 Wis. 2d 539, 105 N.W. 2d 563 (1960); *Raim v. Ventura*, 76 Wis. 2d 67 at 72, 113 N.W. 2d 827 (1961).

¹⁵ 264 Wis. 603, 60 N.W. 2d 381 (1953).

able code provisions on construction, maintenance and safety. These code provisions have the force of law. Violation of them is negligence per se.¹⁶ Compliance with them is strong evidence of compliance with the safe place statute.¹⁷

The custom in the trade or practice in the community may or may not be admissible on the question of safeness, depending on the circumstances. The Court has recently said that "an avalanche of acceptability of a custom or usage that contravenes no established law of public policy or common sense might be persuasive as a rule of reason in a safe place case."¹⁸ Evidence of custom or usage that is patently unsafe or contrary to law is inadmissible.¹⁹

The persons liable are employers, owners of public buildings and owners of places of employment. A place of employment must be a place where someone is employed for gain or profit.²⁰ Thus, a charitable institution and municipality might be liable under the statute as owners but not as employers.²¹ For example, municipal baseball diamonds,²² municipal toboggan slides,²³ vocational schools,²⁴ highways where work is not then in progress,²⁵ and county jails²⁶ have been held not to be places of employment. But public buildings and the exteriors thereof,²⁷ dance floors,²⁸ filling stations,²⁹ and sidewalks on private property³⁰ are held places of employment when the premises are used for gain or profit. The Court has stated that the safe place statute defines a place of employment very broadly; a place of employment can be "almost any place."³¹ There must be someone employed there and the place must be operated for gain.

In this respect, there is an important distinction between employers and owners of public buildings. The duty of the owner is narrower. He is liable only for structural defects and defects of a temporary nature that are associated with structure.³² His liability as to the latter defects extends only to parts of the building used in common by the tenants or

¹⁶ *Paluch v. Baldwin*, 1 Wis. 2d 427, 85 N.W. 2d 373 (1957); *Gupton v. Wauwatosa*, 9 Wis. 2d 217, 101 N.W. 2d 104 (1959).

¹⁷ *Waterman v. Heineman Bros. Co.*, 229 Wis. 209, 282 N.W. 29 (1938); *Dahl v. Krause Milling Co.*, 234 Wis. 231, 289 N.W. 626 (1940).

¹⁸ *Raim v. Ventura*, 16 Wis. 2d 67, 113 N.W. 2d 827 (1961).

¹⁹ *Johannsen v. Woboril*, 260 Wis. 341, 51 N.W. 2d 53 (1953).

²⁰ *Rogers v. Oconomowoc*, 16 Wis. 2d 621 at 630, 115 N.W. 2d 635 (1961).

²¹ *Jaeger v. Evangelical Luth. Cong.*, 219 Wis. 209, 262 N.W. 585 (1935).

²² *Hoepner v. Eau Claire*, 264 Wis. 608, 60 N.W. 2d 392 (1953).

²³ *Cegelski v. Green Bay*, 231 Wis. 89, 285 N.W. 343 (1939).

²⁴ *Kirchoff v. Janesville*, 255 Wis. 202, 38 N.W. 2d 698 (1949).

²⁵ *Delaney v. Investment Co.*, 251 Wis. 374, 29 N.W. 2d 754 (1947).

²⁶ *Flynn v. Chippewa Co.*, 244 Wis. 455, 12 N.W. 2d 683 (1944).

²⁷ *Gupton v. Wauwatosa*, 9 Wis. 2d 217, 101 N.W. 2d 104 (1960).

²⁸ *Krause v. Veterans of Foreign Wars Post 6498*, 9 Wis. 2d 547, 101 N.W. 2d 645 (1960).

²⁹ *Tryba v. Petcoff*, 10 Wis. 2d 308, 103 N.W. 2d 14 (1960).

³⁰ *Werner v. Gimbels*, 8 Wis. 2d 491, 99 N.W. 2d 708 (1951).

³¹ *Ball v. Madison*, 1 Wis. 2d 62, 82 N.W. 2d 894 (1957).

³² *Supra* note 21 at 212, 262 N.W. 585 (1935).

the public.³³ Examples of defects held to be structural are the absence of handrails on a stairway³⁴ and an unanticipated step in a public wash-room.³⁵ Examples of temporary defects associated with structure are oily, greasy and slippery floors,³⁶ and failure to have necessary lights turned on.³⁷ Examples of unsafe temporary conditions not associated with structure are a pail of water momentarily left in a school corridor,³⁸ chairs improperly stacked in a pile,³⁹ an improvised diving board,⁴⁰ and a floor being mopped.⁴¹

An employer is liable for structural defects and temporary conditions whether or not associated with structure.⁴² The owner of a place of employment is mid-way between an employer and an owner of a public building. He is liable as is the owner of a public building and, in addition, he is liable for temporary defects not associated with structure if he has substantial control of the place of employment.⁴³

The liability of the employer therefore is the broadest under the statute. It has been held to include ramps and lumber improperly stacked,⁴⁴ a slipping machine clutch,⁴⁵ rusty nails protruding from a floor,⁴⁶ absence of safety guards,⁴⁷ and other conditions whether or not associated with structure.

Notice of temporary defects, actual or constructive, is required for both owners and employers.⁴⁸ No notice is required of structural defects.⁴⁹ If the owner or employer or his agent or employee created the temporary defect, there is actual notice;⁵⁰ if the temporary defect has been there long enough reasonably to make the owner or employer aware of it, there is constructive notice.

Until the last drop of ambiguity is squeezed out of safe place statute applications, both plaintiffs and defendants will encounter difficulty. Pending that millenium, all Wisconsin lawyers must recognize their responsibilities in prosecuting and defending cases under this statute.

That responsibility is to investigate the facts and applicable de-

³³ Grossenbach v. Devonshire Realty Co., 218 Wis. 633, 261 N.W. 742 (1935).

³⁴ Harnett v. St. Mary's Cong., 271 Wis. 603, 74 N.W. 2d 382 (1956).

³⁵ Bunce v. Grand Est. Bldg. Inc., 206 Wis. 100, 238 N.W. 867 (1931).

³⁶ Watry v. Carmelite Sisters, 274 Wis. 415, 80 N.W. 2d 397 (1957).

³⁷ Zimmers v. St. Sebastian, 258 Wis. 496, 46 N.W. 2d 820 (1951).

³⁸ Juul v. School Dist., 168 Wis. 111, 169 N.W. 309 (1918).

³⁹ *Supra*, Note 21, 262 N.W. 585 (1935).

⁴⁰ Waldman v. Y.M.C.A., 227 Wis. 43, 271 N.W. 632 (1938).

⁴¹ Cronic v. Schuetz, 239 Wis. 425, 1 N.W. 2d 789 (1942).

⁴² N.W.C. & S. Co. v. Ind. Comm., 194 Wis. 337, 216 N.W. 485 (1927).

⁴³ Tryba v. Petcoff, 10 Wis. 2d 308, 103 N.W. 2d 14 (1960); Krause v. Veterans of Foreign Wars, 9 Wis. 2d 547, 101 N.W. 2d 645 (1960).

⁴⁴ Uhrmann v. Cutler Hammer Inc., 2 Wis. 2d 71, 85 N.W. 2d 772 (1957).

⁴⁵ Northern Light Co. v. Ind. Comm., 264 Wis. 313, 58 N.W. 2d 653 (1953).

⁴⁶ Kielor v. Fred Miller Brewing Co., 165 Wis. 237, 161 N.W. 739 (1917).

⁴⁷ Mayhew v. Wis. Zinc Co., 158 Wis. 112, 147 N.W. 1035 (1914).

⁴⁸ Rosenthal v. Farmers Store Co., 10 Wis. 2d 224, 102 N.W. 2d 222 (1960).

⁴⁹ Hommel v. Badger State Ins. Co., 166 Wis. 235, 165 N.W. 20 (1917).

⁵⁰ Kosnar v. J. C. Penny Co., 6 Wis. 2d 238, 94 N.W. 2d 642 (1959).

⁵¹ Rosenthal v. Cutler Hammer, Inc., 10 Wis. 2d 224, 102 N.W. 2d 222 (1960).

cisions thoroughly and present the cases on this basis. The responsibility of the Courts is to decide these cases, not on the basis of the common law requirement of reasonable safety, but on the wider basis required by the statute. Only in this way can the objective of the statute be achieved—to provide greater protection for employees and the public by requiring employers and owners not only to make these places reasonably safe but as safe as the nature thereof will reasonably permit.