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"Public Building" and "Place of Employment" as Defined Under Wisconsin Safe Place Statute

Robert Choinski

"PUBLIC BUILDING" AND "PLACE OF EMPLOYMENT" AS DEFINED UNDER WISCONSIN SAFE PLACE STATUTE

The Wisconsin Safe Place Statute[1] has been the subject of much litigation. The liability of an owner and/or employer depends upon the situs of the injury. No recovery can be had unless the injury occurred as a result of a structural defect in a "public building"[2] or as a result of an unsafe "place of employment."[3] A discussion of the factors employed by the Wisconsin Court in defining these terms will be undertaken here. The majority of cases construing these provisions deal with educational, charitable and municipal activities. The remaining ones are obviously commercial and easily handled.

Prior to 1957, Section 101.01(12) of the Wisconsin Statutes read:

> "The term 'public building' as used in sections 101.01 to 101.29 shall mean and include any structure used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public, or by three or more tenants."

Beginning with *Bent v. Jonet*,[4] a highly elastic construction was placed on the term "building," so as to make it the practical equivalent of "anything constructed" for use within one of the purposes specified.

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[1] West's Wis. Stats. Ann. §101.06 (1957), recites: "Every employer shall furnish employment which shall be safe for the employes therein and shall furnish a place of employment which shall be safe for employes 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 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 consrtucted shall so construct, repair or maintain such place of employment or public building as to render the same safe."

[2] West's Wis. Stats. Ann. §101.01 (12) (1957: "The term 'public building' as used in ss. 101.01 to 101.29 means and includes any structure, including exterior parts of such building, such as a porch, exterior platform or steps providing means of ingress or egress, used in whole or in part as a place of resort, assemblage, lodging, trade, traffic, occupancy, or use by the public or by 3 or more tenants."

[3] Wis. Stat. 101.01(1) (1955), states: "The phrase 'place of employment' means and includes every place, whether indoors or out or underground and the premises appurtenant thereto where either temporarily or permanently any industry, trade or business is carried on, or where any process or operation, directly or indirectly related to any industry, trade, or business, is carried on, and where any person is, directly or indirectly, employed by another for direct or indirect gain or profit, but shall not include any place where persons are employed in (a) private domestic service which does not involve the use of mechanical power or (b) farming. The term 'farming' includes those activities specified in s. 102.04(4), and also includes the transportation of farm products, supplies or equipment directly to the farm by the operator of said farm or his employes for use thereon, if such activities are directly or indirectly for the purpose of producing commodities for market, or as an accessory to such production."

[4] 213 Wis. 635, 252 N.W. 290 (1934), 126 A.L.R. 1245 ( ).

The court stated in the *Bent* decision that the statute had no requirement that the structure resemble an inclosure with walls and roof.

Simultaneously, and beginning with *Cegelski v. Green Bay*,[5] a mere landscaping was held not to constitute a "building" or "structure" regardless of intended use.

Furthermore, until the change in the statute,[6] platforms, concourses, steps, and approaches, though appurtenant to buildings, were also outside the statute.

Following the broad construction of the *Bent* case, wherein temporary bleachers were held to constitute a "public building," the court decided a pier[7] and a pool[8] were likewise "public buildings."

In *Feirn v. Shorewood Hills*,[9] the minor plaintiff alleged that her injuries were occasioned by a fall upon the platform of a public pier. The pier consisted of a boardwalk and platform which extended out into the lake. Located on the platform was a wooden bench, a diving board, and an observation tower. The complaint further alleged that the pier was used in whole or in part as a place of resort and assemblage for occupancy and use by the public. In affirming the lower court, which overruled the defendant City's demurrer, the supreme court held that in view of the allegations as to the nature and manner of the construction and the defendant's intended and actual use of the platform and pier, it was a structure and "public building" under the safe place statute.

Some five years after the *Feirn* decision, the court in *Flesch v. Lancaster*,[10] held that a swimming pool was a "public building." The plaintiff, surviving her son who drowned in a municipal pool, alleged as one of her causes of action that the pool was a "public building" and structure used in whole or in part as a place of resort and assemblage for occupancy and use by the public. These allegations were again held sufficient against demurrer.

While the court applied the broad construction of the *Bent* case in the *Feirn* and *Flesch* decisions, it refused to extend the doctrine in two cases[11] where landscaping was alleged to constitute a structure. In *Cegelski v. Green Bay*, plaintiff was injured when the toboggan on which he was riding collided with a snowdrift at the bottom of a toboggan hill. The supreme court held that the slide was not a "building" nor a structure because it followed the natural slope of the hill. The municipality merely kept the surface of the ground smoothed and

[5] 231 Wis. 89, 285 N.W. 343 (1939).
[6] Compare Wis. Stat. §101.01(12) quoted in text with note 2 *supra*.
[7] Feirn v. Shorewood Hills, 253 Wis. 418, 34 N.W. 2d 107 (1948).
[8] Flesch v. Lancaster, 264 Wis. 234, 58 N.W. 2d 710 (1953).
[9] See note 7 *supra*.
[10] See note 8 *supra*.
[11] Cegelski v. Green Bay, *supra* note 5. Hoepner v. City of Eau Claire, 264 Wis. 608, 60 N.W. 2d 392 (1953).

covered with ice and snow. Although a guide railing was used, plaintiff did not allege that it was unsafe or a cause of his injury.

In another ground surface case, the plaintiff was injured while playing softball on a municipal baseball field. The plaintiff in *Hoepner v. City of Eau Claire*,[12] broke his leg when his shoe cleat caught on a piece of buried wire. He maintained that the additional earth used in the construction of the field constituted the field a "structure." The court embarked on an historical treatment of the statute and decided that the word "structure" was used by the legislature to define the words "public building." The court decided that the bleachers, pier and pool in the *Bent, Feirn* and*Flesch* cases had some similarity to a building while the baseball field did not so qualify.

In all of the above cases, the places in question were apparently intended and used as places of resort and assemblage for occupancy and use by the public, the distinguishing factor being that not all of them involved a structure independent of the natural terrain. On the basis of these cases, one would assume that an allegation that a structure is a "public building" would withstand demurrer, as long as the structure in question is more than a mere surfacing of the natural terrain, and is used in whole or in part as a place of resort and assemblage for occupancy and use by the public.

An analysis of the latest decision[13] in this area apparently substantiates this assumption to some degree. Although this conclusion is not apparent from a reading of the opinion itself, an examination of the briefs submitted provides further facts which establish partial conformity of this case with the previous decisions. The minor plaintiffs, in *Ball v. City of Madison*,[14] were injured when their toboggan left a municipally constructed slide at a curve and collided with an adjacent tree. The slide consisted of an elevated wooden platform to which was attached a wooden ramp leading to the ground. An iced track continued from the edge of the ramp to the end of the slide. Ice was placed on the wooden ramp and on the ground adjacent thereto to form one continuous course. The plaintiffs maintained that the platform, ramp and iced track constituted one integral unit and resembled the pier in the *Feirn* case. The defendant city, however, contended that the slide (iced track) was divisible; and, inasmuch as the curve was in the iced track portion, the case was ruled by *Cegelski v. Green Bay*. The injuries were not sustained on the wooden platform or wooden ramp. The supreme court, in sustaining the defendant City's demurrer, held that the case was largely ruled by the *Cegelski* decision. At the point of injury, there was no structure, but merely an arrangement of ice which was

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[12] See note 11 *supra*.
[13] Ball v. City of Madison, 1 Wis. 2d 62, 82 N.W. 2d 894 (1957).
[14] *Ibid.*

placed upon and followed the natural slope of the hill. Although the defense maintained that the allegation that the slide was one integrated unit was a conclusion, and therefore not admitted on demurrer, the court proceeded expressly to disqualify the wooden platform as a "public building." The opinion accomplished this on two apparently distinct grounds. Following the rule of the *Hoepner* case, the court held that the platform did not resemble a building as that term is commonly understood. The court further held that it was not a place of resort and assemblage as alleged by the plaintiffs. The public usages outlined in the statute are not confined to resort and assemblage; and it is unfortunate that the court did not determine whether the platform was intended and used in whole or in part as a place of "traffic" by the public. Had the court definitely stated that any one of the public uses required by the statute was present, it would be clear that the case turned entirely upon failure of the platform to meet the building similarity test. On the other hand, had the court recited that the use of the platform could never qualify under any of the statutory purposes, the discussion of building similarity would seem relatively unimportant to the decision.

Because the court has failed to make these distinctions, it would appear that the *Ball* decision has not altered the structural requirement in the "public building" definition. Also, even if these distinctions had been drawn, it is questionable whether the court would have given less controlling weight to the *Cegelski* rule. Although not stated unequivocally in the opinion, it would appear reasonable to assume that the court determined that the *Cegelski* rule should be applied to the iced track, regardless of whether it be considered separately or as a part of the entire slide structure.

The minority adopts and the majority does not expressly reject the argument that in defining the term "public building," an adjacent area can become integrated with a structure and thereby qualify as a building. Where does one draw the line in the integrated structure theory? Do you integrate a baseball field with the bleachers which surround it? Do you integrate an administrative building in a park with all the park facilities? Do you integrate a bathhouse with a beach? If the concept of "integrated structure" be rejected, then the quarrel whether the platform qualified as a public building is beside the point. Rather than disqualify the wooden platform and ramp as a "public building," the majority should have firmly recited that the actual situs of the injury must qualify in itself.[15]

Although recovery also can be had under the safe place statute when the injury occurs at a "place of employment,"[16] the complaint in

[15] Scanlon v. St. Francis Seminary, 264 Wis. 603, 60 N.W. 2d 381 (1953).
[16] See note 3 *supra.*

the *Ball* case failed to allege that the slide or any part of it constituted such a place. An examination of the previous decisions discloses the reason for the absence of such allegation.

In *Hoepner v. City of Eau Claire,* the court determined that the baseball diamond was not a "place of employment," even though city employees connected with its operation were paid. The decision recited that the city was not engaged in any industry, trade or business and that the employees were not employed for direct or indirect gain or profit. Although the gain or profit mentioned in the statutory definition would appear to concern gain or profit to the employee, this case indicates that such profit must be attributed to the employer. The statutory construction announced in the *Hoepner* case was earlier applied in *Cegelski v. Green Bay* and *Waldman v. Young Men's Christian Assoc.*[17] In the *Cegelski* case, municipal employees were engaged in the preparation and maintenance of the toboggan slide. The court held that at the point of injury the City was not carrying on a trade, occupation or process of manufacture; and that it was not operating the toboggan slide for profit. The *Waldman* case, although dealing with an eleemosynary institution, applied the same doctrine. Here the minor plaintiff was injured when struck by an improvised diving board. The defendant's employee was conducting a swimming class at the time of the injury. The court held that the situs of injury was not a "place of employment," as the portion of the premises in which the accident occurred was not one in which an industry, trade or business was being carried on, nor was any person employed there for direct or indirect gain or profit. It is to be noted that the court here held the charging of nominal registration fees to be immaterial.

There have also been attempts to qualify other locations of municipal activities as "places of employment." The plaintiff in *Kirchoff v. City of Janesville*[18] wanted to qualify a woodworking classroom as such a place. The defendant operated and maintained the Janesville Vocation School. The plaintiff was injured while attending a course of instruction. He alleged that a defective machine constituted the woodworking classroom an unsafe "place of employment." The court held that a place of instruction, operated by a municipality, is not a "place of employment under the safe place statute as the legislature never intended the statute to have such effect." Even though the material produced by the woodworking class was salable, the court stated that the defendant city was not engaged in any industry, trade or business, as the salable articles were merely the result of giving vocational instruction. The presence of paid municipal instructors was held insufficient to constitute the classroom a "place of employment."

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[17] 227 Wis. 43, 277 N.W. 632 (1938).
[18] 255 Wis. 202, 38 N.W. 2d 698 (1949).

The plaintiff in *Padley v. Village of Lodi*,[19] on the other hand, maintained that a street was a "place of employment." She was injured when her foot caught on a protruding water main shut-off box in a paved street. No one was working on the street at the time of injury. Plaintiff apparently felt that maintenance of the water box was a continuing proprietary function of the city and as such constituted the area a "place of employment."

The court, in denying recovery, stated that:

> "A place of employment originally meant and still does mean a place where active work, either temporary or permanent, is being conducted in connection with a business for profit; where some process or operation related to such industry, trade or business is carried on; and where any person is directly or indirectly employed by another."

Had municipal employees been engaged in active work at the site of the injury, plaintiff would have had the additional burden of establishing that the city was engaged in a proprietary rather than a governmental function. Under the circumstances actually present, the problem was moot.

The above cases illustrate that the presence of paid employees at a location does not by itself constitute the situs a "place of employment." In addition, to qualify as such place, the employer must be engaged in an industry, trade, or business for profit.[20] Inasmuch as the court has been reluctant to consider municipal recreational facilities commercial operations,[21] and inasmuch as the majority of other municipal functions apparently are governmental, it would appear that a municipality has a very limited liability as "employer" under the "place of employment" provisions of the statute. One would almost be prompted to conclude that a city's liability as such "employer" is as severely limited as is its common law negligence liability. The two are comparable at least to the extent that the proprietary character of the activity must be established in both instances to overcome the immunity.

Under the safe place statute, an "owner"[22] of a "place of employ-

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[19] 233 Wis. 661, 290 N.W. 136 (1940).

[20] Also see, Cross v. Levenberger, 267 Wis. 232, 65 N.W. 2d 35 (1954).

[21] The court has generally held that the conduct of such activities as parks, playgrounds, bathing beaches, and swimming pools are governmental functions rather than commercial enterprises. Nemet v. Kenosha, 169 Wis. 379, 177 N.W. 711 (1919); Gensch v. Milwaukee, 179 Wis. 95, 190 N.W. 843 (1922); Cegelski v. Green Bay, 231 Wis. 89, 285 N.W. 343 (1939).

[22] Wis. Stat. §101.01(13) (1955): "The term 'owner' shall mean and include every person, firm, corporation, state, county, town, city, village, school district, sewer district, drainage district and other public or quasi-public corporations as well as any manager, representative, officer, or other person having ownership, control or custody of any place of employment or public building, or of the construction, repair or maintenance of any place of employment or public building, or who prepares plans for the construction of any place of employment or public building. Said sections 101.01 to 101.29, inclusive, shall apply, so far as consistent, to all architects and builders."

ment" can also incur liability. The "owner's" liability, however, is apparently less extensive than the "employer's."

In the recent case of *Potter v. City of Kenosha,*[23] the city was not liable as "owner" because the court determined that the city retained no control and custody over the area when it awarded a sewer contract to an independent contractor. The City of Kenosha, however, did retain the right to inspect or change the plan with reference to the construction. Such retention was held insufficient to constitute the city the "owner" for statutory purposes. The independent contractor here was considered both "owner" and "employer."

When an "owner," however, employs several distinct contractors, as in the construction of a building, he will be deemed to have such custody and control as the statute requires.[24] The *Potter* case indicated that the city could be liable as "owner" had it engaged several contractors for the various phases of the work. It is to be noted, however, that liability in such instance would attach only if the city had actual or constructive notice of the defect which caused the injury.[25]

The practical advantages of pleading a personal injury case under the safe place statute are, generally, two: first, the plaintiff's burden of proof is considerably reduced because of non-necessity of proving negligence; and, second, municipal and eleemosynary immunity from suit does not extend, per se, to such actions.[26]

Much of the force of the latter advantage disappears, however, when the limited definitions of the terms "public building" and "place of employment" are taken into account. The foregoing analysis has sought to indicate these limitations of definition.

ROBERT CHOINSKI

[23] 268 Wis. 361, 68 N.W. 2d 4 (1955). Also see Burmeister v. Damrow, 273 Wis. 568, 79 N.W. 2d 87 (1956).

[24] Waskow v. Robert L. Reisinger & Co., 180 Wis. 537, 193 N.W. 357 (1923); Umnus v. Wisconsin Public Service Corp., 260 Wis. 433, 51 N.W. 2d 42 (1952).

[25] Kaczmarski v. F. Rosenberg Elevator Co., 216 Wis. 553, 257 N.W. 598 (1934); Williams v. International Oil Co., 267 Wis. 227, 64 N.W. 2d 817 (1954).

[26] Wright v. St. Mary's Hospital of Franciscan Sisters, 265 Wis. 502, 61 N.W. 2d 900 (1953); Grabinski v. St. Francis Hospital, 266 Wis. 339, 63 N.W. 2d 693 (1954).