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Article 9

Torts - Contributory Negligence by Patron at Wrestling Match

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Why this particular combination of words should justify relief the Court failed to explain. In that respect the Michigan Supreme Court was doing only what other courts have done, denying relief under the general rule or granting relief under some exception, without any satisfactory analysis of the situation or discussion of the reasons for granting or refusing relief. With the aid of the now accepted "exceptions" there is now no question of the power of a court of equity to rescind a gift. The only problem lies in the propriety of exercising that power in a given case.

Of course, the *Lowry* and the *Stone* decisions are Michigan cases. The extent to which they will be followed in other states depends upon the extent to which the principles of equity in those states are consistent with the principles of equity as applied by the Michigan courts. Much depends, also, upon the extent to which the courts in those states are willing to invoke equitable jurisdiction under the circumstances in question. In the last respect, it is doubtful whether relief would be forthcoming in cases where, after the United States Supreme Court decision, the tapayer formed the partnership. It is probable that such a situation would be treated as one in which no relief is warranted.

DANIEL A. KRAEMER

Torts — Contributory Negligence[1] by Patron at Wrestling Match — The plaintiff while attending a wrestling match staged under the auspices of defendant promoter and by defendant contestants was injured when the referee was catapulted out of the ring onto his lap. The referee left the ring in this manner by reason of an inopportune impact with one of the contestants who had just missed placing a flying tackle on his opponent. The plaintiff through choice occupied a front seat. It was not shown how familiar the plaintiff was with wrestling matches. *Held:* it was error for the trial court to take the question of contributory negligence from the jury. *Klause v. Nebraska State Board of Agriculture, 35 N.W. (2d) 104 (Nebraska, 1948).*

The point worthy of notice in this decision is that the plaintiff was not contributorily negligent as a *matter of law* in placing himself in a front seat. The question posed, therefore, is: when is a spectator at a sporting event regarded as contributorily negligent in the choice of his vantage point as a matter of law? The general rule appears to be that

[1] "The term (assumption of risk) is rightly applicable only to master and servant cases and is a result of a contract of hiring. City of Linton v. Maddox, 75 Ind.App. 449, 130 N.E. 810. Contributory negligence implies misconduct, the doing of an imprudent act by the injured party, or his dereliction in failing to take proper precaution for his personal safety. Wheeler v. Tyler, 129 Minn. 206, 152 N.W. 137." Black's Law Dictionary, "Assumption of Risk," p. 160.

such spectator must exercise due care in protecting himself against known dangers or such dangers as should be known and appreciated by a reasonable person in the exercise of due care.[2] In the instant case the Court held this rule not applicable, and stated:

> "While it is shown that participants and referee often get out of the ring yet it is not shown that a known characteristic of such a departure from the regular wrestling precincts is the knocking of the referee into the laps of spectators."

The general rule as stated requires two elements in order that contributory negligence may be found as a matter of law; the first is the source of the injury which must be from a "known danger", and the second is selection by the spectator of a vantage point which must indicate a failure to exercise due care. The Nebraska Court here held this fact situation did not reveal a known danger.

When in any particular locality the hazard of attending a sporting event becomes generally appreciated, the courts will declare such to be a known danger.[3] In baseball, being hit by a pitched or batted ball;[4] and in ice hockey, being hit by a flying puck[5] is considered a known danger in areas where such game is a familiar sport. Baseball appears to be a sport of such wide renown that most courts hold being hit by the ball is a known danger. Hockey evidently hasn't become sufficiently widely known in California,[6] Nebraska,[7] and Rhode Island[8] for the courts to hold being hit by a puck is such.

On the known dangers of wrestling one can only speculate. It would seem plausible to say that a reasonable man would not think it unusual if a contestant were thrown out of the ring onto the lap of a spectator, or even if the referee were to leave the ring in a less accidental manner than that illustrated in the present case.

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[2] Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N.W.(2d) 90, 149 A.L.R. 1164 (1943). Also cases collected in 68 Corpus Juris 875. 31 Marq. L. Rev. 298.

[3] Modec v. City of Eveleth, 224 Minn. 556, 29 N.W.(2d) 453 (1947); Hammel v. Madison Square Garden Corporation, 156 Misc. 311, 279 N.Y.S. 815, 149 A.L.R. 1181 (1935); Thurman v. Ice Palace, 36 Cal.App.(2d) 364, 97 P.(2d) 999 (1939). If actual appreciation of the danger is not had by the spectator, it becomes a question of whether as a reasonable person he should have had knowledge. Cases in which the plaintiff's ignorance of the hazard absolved him have not the element of known danger in them. Shanney v. Boston Madison Square Garden Corp., 296 Mass. 168, 5 N.E.(2d) 1, 149 A.L.R. 1179 (1936).

[4] Crane v. Kansas City Baseball & Exhibition Co., 168 Mo.App. 301, 153 S.W. 1076 (1913). Also cases cited in Hammel v. Madison Square Garden Corporation, 156 Misc. 311, 279 N.Y.S. 815, 149 A.L.R. 1181 (1935).

[5] Ingersoll v. Onondaga Hockey Club, Inc., 245 App.Div. 137, 281 N.Y.S. 505, 149 A.L.R. 1181 (1935).

[6] Thurman v. Ice Palace, 36 Cal.App.(2d) 364, 97 P.(2d) 999 (1939).

[7] Tite v. Omaha Coliseum Corporation, 144 Neb. 22, 12 N.W.(2d) 90, 149 A.L.R. 1164 (1943).

[8] James v. Rhode Island Auditorium Inc., 60 R.I. 405, 199 Atl. 293, 149 A.L.R. 1180 (1938).

The second element, failure to exercise due care in the avoidance of danger, can be determined from the location of the spectator's seat. A seat so picked by him as reasonably to protect him from pitched or batted balls, flying pucks or wrestlers would deprive the defendant of his defense as a matter of law.[9]

Such is the matter stated generally. "Known danger" is susceptible to the vagaries of judicial interpretation when methods of injury are new to litigation. "Due care" becomes hard to pin down when the spectator is more or less deprived of a choice of seats. The whole process of determining contributory negligence will probably be more flexible where it is not an absolute defense because of a comparative negligence statute.

HOWARD H. BOYLE, JR.

Torts — Liability Insurance and the Rights of an Unemancipated Minor Child — A thirteen year old boy was injured when the automobile in which he was riding, operated by his mother, collided with another car on a highway in Maryland. Acting by his next friend, the infant sued his mother for damages. Defendant's motion to dismiss the complaint as failing to state a claim upon which relief could be granted was denied by the District Court. *Held:* the defendant's motion should have been granted since under Maryland law an unemancipated minor could not sue a parent for injuries sustained in an automobile accident although the parent was protected by liability insurance. *Villaret v. Villaret 169 F. (2d) 677 (1948).*

Two questions are thus presented for review: first, whether an unemancipated child may sue his parent for a tortious act and, second, whether the fact that the parent is protected by public liability insurance would affect the decision of the court.

It is well settled that an emancipated minor child may bring an action for damages against a parent because of injury to person or property, therefore, the two questions mentioned above become important only when an unemancipated child is involved.[1]

The first case to clearly deny relief to an unemancipated minor was *Hewlett v. George.*[2] It was there decided that a child's right of action against a parent for personal injury could not be maintained because it was contrary to good public policy.

The courts which deny relief do not distinguish between an intentional tort and a negligent act. No cause of action has been recognized

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[9] *Supra,* note 4 and cases collected in 68 Corpus Juris 875.

[1] 39 Am. Jur. 736, note 2.

[2] 68 Miss. 703, 9 S. 885, 13 L.R.A. 682 (1891); also see excellent article by Prof. McCurdy in 43 Harv. L. Rev. 1030.