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WHAT DUTY OF CARE is owed to participants in sports by the owners and/or operators of sports facilities, with regard to the design of these facilities? What risks does the participant assume? Does a jockey assume the risk of being injured by striking an improperly designed railing when thrown from his horse? Does a basketball player assume the risk of injury caused by running into a wall in close proximity to the end of the court?

The above situations are illustrative of perplexing questions in this area of the law of Torts. The scope of this note is limited to the *design* of sports facilities and the duties of owners and participants relative thereto. Faulty construction and faulty maintenance of the facilities are not within its purview.

Generally, a participant in a sports event, game or contest assumes only those risks and dangers inherent in that particular game. The participant does not assume the risk of injury resulting from the negligence of the owner or operator of the facility used, although he may be precluded from recovery if he was contributorily negligent,[1] or if the defect was patent and he assumed the patent risks of such dangers.[2] There is an apparent trend toward broadening the definition of dangers inherent in a particular sport; these now seem to include not only the dangers of the sport, but also the dangers inherent in the particular facility necessarily used.[3]

For What Is the Participant Accountable?

A participant in a sport accepts all normal risks inherent in that sport. For instance, in the game of golf, it is reasonable to expect that someone may be hit by a driven golf ball. In *Campion v. Chicago Landscape Co.*,[4] an expert testified that he was not aware of a golf course where it would not be possible for someone to slice or hook a ball into another fairway. This is one of the hazards of all golf courses, with which golf players are familiar. But the mere proximity of fairways

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1 Annot., 7 A. L. R. 2d at 706 (1949); Farfour v. Mimosa Golf Club, 240 N. C. 159, 81 S. E. 2d 375 (1954).

2 Paine v. Young Men's Christian Assn., 91 N. H. 78, 13 A. 2d 820 (1940).

3 Maltz v. Board of Education of New York City, 32 Misc. 2d 492, 114 N. Y. S. 2d 856 (Sup. Ct. 1952).

4 295 Ill. App. 225, 14 N. E. 2d 879 (1938).

without barriers does not subject a golfer to risks over and above those recognized as inherent in the game.[5]

Each sport has its own set of risks or dangers. Users of downhill winter sports facilities, such as skiers, sledders or tobogganers, assume the risks inherent in the nature of the snow and the fact that it may conceal dangerous terrain.[6] In horse racing, jockeys are subject to the risk of being thrown from their mounts onto the railing.[7]

The general rule, with regard to participants assuming risks inherent in a particular sport, has been expanded to include also the patent risks of playing the sport on a specific facility. For instance, a basketball player who was carried into a wall beyond the end of the court by his momentum, was barred from recovery because the proximity of the wall to the basket was an obvious risk necessary to the sport as played on this particular court.[8] In a baseball game an outfielder who ran into a steel cable which had been constructed to restrain spectators could not recover for his resulting injury.[9] A participant in a softball game, who was injured when he tripped on a cement curbing, around an area originally designed for skating but subsequently used also for softball, could not recover damages because the risks of injury as a result of the curbing and adjacent benches were obvious and necessary to the sport as played on that particular field.[10]

It is interesting to note that while each sport has its set of inherent dangers, the list is a basic one to which one should add any dangers which are obvious because of the interaction of the design of the facility used with the normal action of the sport, with which one must assume the participant to be familiar. Thus, although the cable on a baseball field, as in the case above,[11] is not a risk normally inherent in a game of baseball, it becomes so where the plaintiff is aware of its existence and of the possibility of his running into it during the course of the game.

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[5] Hornstein v. State, 46 Misc. 2d 486, 259 N. Y. S. 2d 902 (Ct. Cl. 1965); Trauman v. City of New York, 208 Misc. 252, 143 N. Y. S. 2d 467 (Sup. Ct. 1965). See also, Walsh v. Machlin, 128 Conn. 412, 23 A. 2d 156 (1941); Houston v. Escott, 85 F. Supp. 59 (C. C. Del. 1949); Benjamin v. Nernberg, 102 Pa. Super. 471, 157 A. 10 (1931); 21 Temp. L. Q. 288 (1948); Petrich v. New Orleans City Park Improvement Assn., 188 So. 199 (La. App. 1939); Johnston v. Blanchard, 301 N. Y. 599, 93 N. E. 2d 494 (1950); Rocchio v. Frers, 248 App. Div. 786, 290 N. Y. S. 432 (1936).

[6] Annot., 94 A. L. R. 2d 1432 (1964); Kaufman v. State, 11 Misc. 2d 56, 172 N. Y. S. 2d 276 (Ct. Cl. 1958); Wright v. Mt. Mansfield Lift, Inc., 96 F. Supp. 786 (C. C. Vt. 1951); Broderson v. Rainier Nat'l. Park Co., 187 Wash. 399, 60 P. 2d 234 (1936); Van Der Veen v. United States, 349 F. 2d 583 (9th Cir. 1965).

[7] Cole v. N. Y. Racing Assn., 24 App. Div. 2d 933, 266 N. Y. S. 2d 267 (1965).

[8] Maltz v. Board of Education of New York City, *supra* n. 3.

[9] Kubitz v. City of Sandusky, 176 Ohio St. 445, 200 N. E. 2d 322 (1964).

[10] Scala v. City of New York, 200 Misc. 475, 102 N. Y. S. 2d 790 (Sup. Ct. 1951).

[11] Kubitz v. City of Sandusky, *supra* n. 9.

For What Is the Owner or Operator of the Sports Facilities Accountable?

The owners and/or operators of the sports facilities are charged with the responsibility of providing facilities properly designed and safely constructed for the use for which they are intended. The major question posed is that of the standards to be used in the design. A man is not necessarily obliged to conduct his business in the same manner as another man; however, if there is a custom in the trade, or where certain dangers have been removed by a customary manner of doing things, the custom may be shown to prove failure to meet a required standard.[12] It has been held that a general usage may be shown in order to establish a standard of construction, and that where there is a question of negligence, the general usage may be shown to demonstrate failure to meet a required standard of care.[13] It must be remembered, however, that a person does not necessarily have the obligation to use the best methods, nor must he employ the best equipment, nor even supply the safest place for the use intended. It is only necessary that he use or provide those which are reasonably safe for the intended use.[14]

A novice skier was injured when she was struck from behind by a sled coming down a run adjacent to the ski slope. The two slopes were separated for the first 40 feet, after which there was no barrier or obstruction to keep sledders and skiers from crossing each other's paths. Expert testimony demonstrated that there was an accepted standard of care recognized, wherein sledding and skiing should not be permitted together, because to do so would create added dangers which were not inherent in each sport individually. The court, in holding for the plaintiff skier, found that the ski and sled slopes were negligently designed.[15]

In a recent case, a jockey was killed when he was thrown from his horse and struck his head on a concrete footing of a post supporting the railing. The footing protruded three to five inches above ground level. Such elevated footings were non-existent at any other race track in the country. Here the footings had been raised in order to retard the corrosion of the metal posts, although at other race tracks it was customary to have these footings at, or below, ground level. Prior to this fatal accident, a number of other riders had been thrown without any serious injuries as a result of these footings, and these spills should have put the race track owners on notice that the raised footings were

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[12] Garthe v. Ruppert, 264 N. Y. 290, 190 N. E. 643 (1934).

[13] Annot., 94 A. L. R. 2d 1432 (1964); Welo v. Union News Co., 263 App. Div. 328, 32 N. Y. S. 2d 943 (1942).

[14] Bennett v. Long Island R. R. Co., 163 N. Y. 1, 57 N. E. 79 (1900); Miele v. Rosenblatt, 164 App. Div. 604, 150 N. Y. S. 323 (1914).

[15] Morse v. State, 262 App. Div. 324, 29 N. Y. S. 2d 34 (1941).

an added peril to riders. It was held that this design was a negligent deviation from the customary standards and was the proximate cause of the death of the jockey.[16]

Negligent design of a sports facility in and of itself is not always sufficient to result in a judgment for the injured participant. It must be shown that the negligence in design was the proximate cause of the injury. In the sport of golf, it has been held that it is virtually impossible to design a course so that at every point one cannot be hit by a ball from another fairway.[17] An injured golfer alleged that to design a nine-hole course on thirty acres of land was negligence per se, and in fact a recognized golf course architect testified that considerably more acreage should have been used. It was held, however, that the design of the golf course was not the proximate cause of the injury.

Where there is a deviation from standard design it must be such that the danger should have been obvious to the owner or operator.[18] Where a bowler was injured when he caught his foot in a two-inch space between the ball return and floor, judgment was rendered for the bowling proprietor. It was found that this type of construction was standard, except that the space was 5/8 of an inch higher. Some alleys had closed off the space. Prior to this accident, hundreds of thousands of games were bowled without incident. While the owner had a duty to provide a safe place, the court felt that he could not be charged with the breach of a duty to avoid a danger which he did not know existed.[19]

In another case an ice skater was injured when she tripped as her skate struck a wooden ledge when she reached for a handrail.[20] An expert testified that the handrail should have been placed at the very edge of the skating area. This deviation from standard design imposed an obvious and unnecessary risk upon the skater, and the court found against the rink operator.

In a case where a roller skater was injured when he slipped and fell through a window, the actions of the operator of the rink made it obvious that he was aware of a defective design, and the court held

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[16] Cole v. New York Racing Assn., *supra* n. 7.

[17] Campion v. Chicago Landscape Co., 295 Ill. App. 225, 14 N. E. 2d 879 (1938).

[18] Restatement (2d), Torts § 343 (1966) speaks of the liability of possessors of land as to injuries sustained by invitees. The statement of principle is applicable to operators and/or owners of sports facilities.

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
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> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
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> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
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> (c) fails to exercise reasonable care to protect them against the danger.

[19] Sykes v. Bensinger Recreation Corp., 117 F. 2d 964 (7th Cir. 1941).

[20] Welo v. Union News Co., *supra* n. 13.

that he did not use reasonable care in protecting the skaters.[21] Here there were two windows adjacent to the rink; one was protected by an iron grating, and the other had a bench placed under it in an attempt to protect skaters. It was clear that the design should have provided for protection of both windows with a grating, and it was thus reasonable to assume skaters would lose their balance, and therefore the danger of an unguarded window was also obvious.

While an owner must have known, or should have known, that his deviation from standard design presented a danger not inherent in the sport, the courts now charge him with a further duty; he must be able to anticipate the normal actions of the participant of the sport. A bowler was assigned the last alley in a bowling establishment. Parallel to and lower than the alley was a walk presenting a danger obvious to the bowler. After delivering his ball, the bowler turned and walked back, looking over his shoulder at the pins. He stepped off the edge of the alley and fell, causing his injury. It was held that what may be perfectly obvious to a person walking normally is likely to be forgotten by a contestant in the excitement of a game. The construction of the alley in this manner was in no way necessary to bowling as a sport.[22] This decision was contrary to that previously rendered in *Scala v. City of New York*,[23] where a softball player fell on a cement curb around an area designed for skating, but used also for softball. Here the player claimed that in the heat of the game he temporarily forgot the obvious hazard of the curbing and was, therefore, not guilty of contributory negligence. On this point, however, it was held that momentary forgetfulness of the danger was one of the risks he had assumed.

While an operator must anticipate the actions of a participant, he cannot be required to foresee every possible accident.[24] A skater left a roller skating area and skated over to a spectator area, where she tripped and fell through a window. The court held that while it is to be expected that skaters will fall, it was unreasonable to expect the operator to foresee a skater leaving the skating area and crossing a lobby.

Where the defect in design is latent, the owner or operator owes the participant the duty of being able to reasonably rely on the safe construction of the facility. We have seen that in a basketball game the participant assumed the risk of running into a wall or door jamb.[25] In another recent basketball case a player ran into a door in the wall under the basket and was injured when the window in the door shattered. While the player assumed the risk of running into the door,

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[21] Fieger v. Imperial Skating Rink, 148 Ore. 137, 35 P. 2d 683 (1934).

[22] Murphy v. El Dorado Bowl, Inc., 2 Ariz. App. 341, 409 P. 2d 57 (1965).

[23] *Supra* n. 10.

[24] Bryant v. Ludendi Roller Drome, Inc., 150 So. 2d 55 (La. App. 1963).

[25] Maltz v. Board of Education of New York City, *supra* n. 3.

he did not assume the risk that the window panel would be of ordinary glass. He could reasonably have assumed that because of the proximity of the glass panel to the basket, it would be of such construction as to be resistant to impact.[26]

A swimmer dived from a dock into two and one-half feet of water, with resulting injury. The court ruled that while the swimming area operator was not an insurer of the swimmers, he was bound to provide a reasonably safe place for the intended use. A patron of a public swimming pool has a right to rely upon the assumption that the proprietor has provided a place that is reasonably safe for use in the manner for which it was apparently designed and to which in fact it had been adopted.[27]

Where a baseball field was designed so that the outfield contained holes which were concealed from view by grass, the owner was held liable for the injury of a baseball player who tripped.[28] There was a latent defect; the player had a right to believe that the field was safe for the anticipated use.

What Defenses Are Available to Owners of Sports Facilities?

Where it has been alleged that there was negligent design of a sports facility, the defendant owners or operators usually have relied for a defense on the doctrine of *assumption of the risk,* or the participant's *contributory negligence.*

In *Maltz v. Board of Education,*[29] a basketball player was injured when he ran into a door jamb positioned almost directly behind the basket. The player previously had gone through the opened door unharmed, and thus was aware of the hazards and voluntarily assumed the necessary and obvious dangers here. It was held that the risks were obvious and necessary to the sport as played on this particular court.

With regard to the issue of assumption of risk, it must be remembered that, in addition to knowledge of the physical defect, an essential requisite is a reasonable appreciation of all the dangers produced by the physical condition.[30] A successful application of the doctrine does not absolve the operator from liability, but does change the applicable standards and raises the degree of care owed by the injured person for

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[26] Stevens v. Central School Dist. No. 1 Town of Ramapo, 25 App. Div. 2d 871, 270 N. Y. S. 2d 23 (1966).

[27] Hanson v. Christensen, 145 N. W. 2d 868 (Minn. 1966).

[28] Scherz v. Salon, 26 App. Div. 2d 691, 272 N. Y. S. 2d 404 (1966).

[29] Maltz v. Board of Education of New York City, *supra* n. 3.

[30] McEvoy v. City of New York, 266 App. Div. 445, 42 N. Y. S. 2d 746 (1948); Beck v. Monmouth Lumber Co., 137 N. J. L. 268, 59 A. 2d 400 (1948); Larson v Nassau Electric R. R. Co., 223 N. Y. 14, 119 N. E. 92 (1918).

his own safety.[31] Where a basketball player was injured by glass shattering as he impacted with a door in which a window was mounted, it was held that non-shatterproof glass was not an assumed risk, since the injured player was unappreciative of the danger produced by the use of ordinary window glass.[32]

The dangers in a poorly-designed facility must be obvious in order to present a valid defense. In a basketball accident, a participant in a game fell on some bleachers adjacent to the wall of the gymnasium. He had been an observer of the first half of the game and had an opportunity to become cognizant of the risks the bleachers presented to a player. It was held that he encountered a known danger, thereby precluding his recovery.[33]

In the *Scala* case,[34] where a participant in a softball game fell over a concrete curbing, it was held that the risks were obvious and necessary to the sport as played on that particular field. The injured player had played there many times and he voluntarily assumed this danger. The opinion went on to say that "one who takes part in a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his opponent." Where the outfielder ran into the clearly visible steel cable constructed around the baseball field for the purpose of restraining spectators, the danger was held to be quite obvious. The player had assumed this risk.[35] In a softball game a player tripped over a hole and suffered a broken leg. The hole was clearly visible, and it was held that while the field was poorly designed, the condition was patent and the danger obvious to the player. The player had an obligation to use reasonable care for his own safety.[36]

This does not mean that every patent defect gives rise to a valid defense of assumption of risks; it is only one necessary factor. This is exemplified in the bowling case where the bowler stepped off the alley and fell. Here it was held that while the danger was perfectly obvious,

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[31] Schlief v. Grigsby, 88 Cal. App. 174, 263 P. 255 (1927); Graff v. United R. R., 178 Cal. 171, 172 P. 603 (1918).

[32] Stevens v. Central School Dist. No. 1 Town of Ramapo, *supra* n. 26.

[33] Paine v. Young Men's Christian Assn., *supra* n. 2; In Robinson v. Boston & M. R. R., 85 N. H. 474, 160 A. 473 (1932), although the case involved a train injury, the same principle, of obvious dangers, was involved. It was shown that the injured party was aware of the dangers and should have exercised care. The court said "The duty to give attention to one's safety in a position of obvious danger is imposed because the ordinary man gives that attention. A plaintiff may not say that he was not required to give attention because of other considerations. It is not careful conduct to pay no heed to the demands of safety."

[34] Scala v. City of New York, *supra* n. 10.

[35] Kubitz v. City of Sandusky, *supra* n. 9.

[36] Luftig v. Steinhorn, 21 App. Div. 2d 760, 250 N. Y. S. 2d 354 (1964).

it was reasonable to expect that a bowler may have forgotten the condition in the heat of the game.[37]

Another element apparently required for successful use of assumption of the risk as a defense is that *the deviation* from the standard, or the design used, *was justified, or necessary,* to the sport as played on those particular facilities. In the bowling case mentioned above,[38] there was no factor connected with the sport which required the alley to be constructed as it was. Where the baseball player ran into the restraining steel cable it was held that the cable had been constructed and positioned for a valid purpose: the protection and restraint of spectators who might otherwise venture onto the playing area, subjecting themselves to injury by being struck by a ball.[39]

Another often-used defense is that of *contributory negligence.* This is negligence, or lack of due care, on the part of the injured person which, alone or together with the negligence of the defendant, was a proximate cause of the injury.[40] This defense becomes important where the deviation from standards is not negligent *per se.*

Where a golfer chose not to walk on a path and was injured when he stepped into a vertical pipe which was housing a sprinkler, it was held that the location of the watering system was not part of the terrain provided for playing golf. The golfer's recovery was precluded by his contributory negligence in straying from the path.[41]

Where the negligent design of a sports facility is in issue, it must be shown that, despite the design of the facility, the participant's contributory negligence was the proximate cause of the injury. Generally there is no contributory negligence if an injury would have occurred despite any action of the injured party.[42]

Summary

Successful litigation of an injury caused by negligent design of a sports facility hinges upon the plaintiff's demonstrating that the design of the facility deviated from standards in a negligent manner, and was the proximate cause of the injury. In addition, it must be shown that deviation from the norm is a danger to the participant which should have been anticipated by the owner or operator. The deviation cannot be justifiable or necessary to the sport as played in or on this particular facility. If the defect is latent, it must be shown that the in-

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[37] Murphy v. El Dorado Bowl, Inc., *supra* n. 22.

[38] *Ibid.*

[39] Kubitz v. City of Sandusky, *supra* n. 9.

[40] Garaglio v. Frontier Power Co., 1962 F. 2d 175 (10th Cir. 1951); Saindon v. Lucero, 187 F. 2d 345 (10th Cir. 1951).

[41] Farfour v. Mimosa Golf Club, *supra* n. 1.

[42] James v. Delaware L. & W. R. R. Co., 92 N. J. L. 149, 104 A. 328 (1918).

jured participant reasonably relied on the facility being safe for the purpose for which it was designed.

An owner or operator of a sports facilities, the design of which was alleged to be the proximate cause of injuries, must show that the design was neither negligent nor a deviation from accepted standards or customary usage. It must be demonstrated that the injury was a result of a danger inherent in the sport. It may further be shown that the condition from which the injury arose was a danger which was inherent in the sport as played on that particular facility. Even assuming that there is a deviation from standard design, an effective defense can be interposed if the deviation was warranted and necessary to the sport as played there. However, as a corollary to this defense, the injured participant must have been aware of the danger and must therefore have assumed the risk. Finally, the contributory negligence of the participant will generally preclude his recovery despite any improper design of the facility.