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Bowling Alley Tort Liability

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TORT LIABILITY of the bowling alley proprietor or operator has become a common problem with the increased popularity of bowling. The two principal grounds upon which tort liability of the proprietor or owner may be predicated are negligence and nuisance.

Negligence

A bowling alley proprietor generally owes the same duty of care to his business invitees as would the proprietor of the corner supermarket. In general, he has an affirmative legal duty to take reasonable care to keep his premises in reasonably safe and usable condition so as not to injure his patrons, and to warn his patrons of any dangerous condition of which he is or should be aware.[1]

One entering a bowling alley is a business invitee whether his purpose is to seek refreshment or to become a participant in the sport. Thus the proprietor is under a duty to warn him, as an invitee, of any dangerout condition that he knows or should know, exists.[2] Presumably, when the proprietor will potentially derive no business benefit from a party entering the premises he is under no duty to warn of danger.

This is not to say that a proprietor is held as an insurer of the safety of invitees or licensees.[3] He is held only to the duty of exercising ordinary care to prevent accident and injury.[4] In the operation of a restaurant and bar, the bowling alley proprietor owes the same duty to his invitees.[5]

The duty of care owed to a person participating in the sport of bowling is of necessity, however, slightly different from that owed to an ordinary person who enters a business establishment as an invitee or

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[1] Englehardt v. Philipps, 136 Ohio St. 73, 23 N. E. 2d 829 (1939); Schock v. Ringling Bros. and Barnum and Bailey Combined Shows, 5 Wash. 2d 599, 105 P. 2d 838 (1940); White v. Standard Oil Co., 116 Ohio App. 212, 187 N. E. 2d 504 (1962).

[2] Jacques v. Dayton Power & Light Co., 80 Ohio App. 258, 74 N. E. 2d 211 (1947); 38 Am. Jur., Negligence § 136 (1941); Mississippi Winn-Dixie Supermarkets v. Hughes, 247 Miss. 575, 156 So. 2d 734 (1963); Sears, Roebuck & Co. v. Tisdale, 185 So. 2d 916 (Miss. 1966).

[3] S. S. Kresge Co. v. Fader, 116 Ohio St. 718, 158 N. E. 174 (1927); Cronin v. Northland Bowling Lanes Co., 389 S. W. 2d 863 (Mo. App. 1965) where bowling alley owner was held not liable for injuries when plaintiff fell as result of sticky substance on the alley.

[4] S. S. Kresge Co. v. Fader, *supra* n. 3.

[5] 29 Am. Jur., Innkeepers § 81 at 67 (1960); Greenlock v. New Frontier Hotel Corp., 78 Nev. 182, 370 P. 2d 682 (1962); Johnson v. Rulon, 363 Pa. 585, 70 A. 2d 325 (1950); Ryan v. Harry's New York Cabaret, Inc., 293 Ill. App. 534, 12 N. E. 2d 905 (1938).

licensee. *American Law Reports, Second Series,* comments on this difference in the following way:

> It is apparent that the game of bowling involves certain inherent risks, since the player carrying a ball weighing 12 to 16 pounds must make a running and sliding approach to a foul line where he delivers the ball near the floor and must then stop abruptly. These necessities of the game have influenced both the duty of the proprietor to maintain the premises and the care to be exercised by the patron for his own safety.[6]

The cases on this subject indicate that the participant in the sport will be treated as an invitee and thus should be accorded the degree of care commensurate with that status.[7] However, cases also indicate that the bowling alley proprietor owes a greater degree of care to a participant than to an ordinary invitee; but they fail to establish specific rules as to the exact duty of the operator.[8] In general, it may be said that a greater duty of care is owed to the participants in the sport only in those areas in which the sport is conducted. Illustrations of such areas are the floor of the alley on which the player must make his approach[9] and the areas for accommodation of the bowler while he has his bowling shoes on.[10]

The general rule in Ohio, for example, seems to be that the proprietor of a business for the entertainment of others must exercise that ordinary care in dealing with an invitee which is commensurate with the hazard involved in the amusement or sport.[11] One who takes a seat outside of a screened area at a baseball game assumes the risk of being struck by a baseball because he could have chosen a seat in the protected area. The due care owed by the management is not to protect *all* the seats in the grandstand, but only those where danger could regularly result from the nature of the game.[12]

Some states have safe-place statutes which impose a higher duty of care upon the proprietor than he ordinarily would be held to,[13] but these statutes are more the exception than the rule. The general rule appears to be close to that followed by the Ohio courts, and this may help to explain the general trend of cases holding that the proprietor is

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[6] Annot., 92 A. L. R. 2d 1075 (1963).

[7] Guidani v. Cumerlato, 59 Ill. App. 2d 13, 207 N. E. 2d 1 (1965).

[8] Fagan v. Williamsport Lodge No. 145 of Loyal Order of Moose, 361 Pa. 446, 64 A. 2d 805 (1949); Broome v. Parkview, Inc., 49 Tenn. App. 725, 359 S. W. 2d 566 (1962).

[9] Shipman v. Foisy, 49 Wash. 2d 406, 302 P. 2d 480 (1956).

[10] Guidani v. Cumerlato, *supra* n. 7.

[11] Cincinnati Baseball Club Co. v. Eno, 112 Ohio St. 175, 147 N. E. 86 (1925); Painesville Utopia Theater v. Lautermilch, 118 Ohio St. 167, 160 N. E. 683 (1928); Pierce v. Gooding Amusement Co., Inc., 55 Ohio L. Abs. 556, 90 N. E. 2d 585 (1949).

[12] Cincinnati Baseball Club Co. v. Eno, *ibid.*

[13] Spote v. Aliota, 254 Wis. 403, 37 N. W. 2d 31 (1949); Sykes v. Bensinger Recreational Corp., 117 F. 2d 964 (7th Cir. 1941).

held to a higher standard of care on and around the bowling lanes than he would be to an ordinary invitee.

The proprietor of the bowling alley, just as any other proprietor of a recreation area, not only has the duty to maintain his premises with ordinary care and to warn of dangerous conditions, but must also inspect the premises at reasonable intervals to ascertain whether dangerous conditions exist.[14] If he finds such a dangerous condition, he must correct it within a reasonable time or warn of such danger in the manner of a reasonably prudent man.[15] He must keep the premises in good repair and free from structural defects.[16] He must keep the premises clean and the floors dry so as to keep the bowler's shoes from sticking on the alley surface when he delivers the ball.[17] But merely keeping a bowling alley surface bright and shiny is not negligence on the part of the proprietor.[18] In *Elias v. New Laurel Radio Station, Inc.*, the injured party was a 195 point bowler. He knew enough to remove his shoes when leaving the bowling area, but did not do so the last time he left the lanes. After walking to the desk area, he returned to bowling and fell, causing injury to himself. The court indicated that a bowler's experience should be taken into consideration on the issue of assumption of the risk or contributory negligence.[19]

A proprietor is liable only for his failure to give adequate warning concerning conditions which he knows or should know are hazardous and likely to cause injury to his invitees. The proprietor does not have to have actual knowledge of such conditions, but will be deemed to have constructive notice of the hazard if he has not conducted regular and frequent inspections. The adequacy of the inspections in such cases is normally a question for the jury. In *Humphrey Co. v. Ohlson*,[20] the injured party fell in a movie theater, allegedly because of a defect in the carpeting. The court held that the proprietor owed a continuing duty of inspection and refused to reverse the jury's verdict that the defendant had failed to exercise reasonable care in inspecting its premises.

Assuming that a dangerous condition does exist and that a bowler or other invitee is injured, the injured party must prove that his injury resulted as a proximate consequence of this breach of an affirmative

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[14] Stephens v. Akron Palace Theatre Corp., 53 Ohio App. 434, 5 N. E. 2d 499 (1936); Broome v. Parkview, Inc., *supra* n. 8.

[15] Stephens v. Akron Palace Theatre Corp., *ibid;* Guidani v. Cumerlato, *supra* n. 7.

[16] McGillivray v. Eramian, 309 Mass. 430, 35 N. E. 2d 209 (1941); True v. Latimore, 255 Iowa 451, 123 N. W. 2d 5 (1963); Long v. Savin Rock Amusement Co., Inc., 141 Conn. 150, 104 A. 2d 221 (1954).

[17] Guidani v. Cumerlato, *supra,* n. 7; Elias v. New Laurel Radio Station, Inc., 245 Miss. 170, 146 So. 2d 558 (1962).

[18] Lenger v. Modern Recreations, Inc., 203 S. W. 2d 100 (Mo. App. 1947).

[19] *Supra* n. 17.

[20] 32 Ohio C. C. Dec. 571, 18 Ohio C. C. R. (n.s.) 29 (1910); Stephens v. Akron Palace Theatre Corp., *supra,* n. 17.

duty on the part of the operator.[21] The issue of proximate cause in such cases consistently has been held to be a question for the jury.

The proprietor of the bowling alley has two very strong affirmative defenses. The first of these is:

Assumption of Risk

Assumption of risk is a powerful defensive tool of any operator of amusement facilities.[22] When the injured party is a professional bowler with many years of experience as both a bowler and bowling alley manager, it is incumbent upon him to know the risks inherent in the sport and at all times to take the necessary steps to avoid injury. If the mental attitude of the player is such that he comes to play the game assuming all the inherent risks involved therein, he cannot be heard to complain about injuries received while participating in the activity.[23] This is not to say that, by participating, the player assumes *all* the risks to which he may be exposed. He assumes the risks only of obvious dangers or of ones that are common knowledge.[24] The participant cannot assume a risk of which he is not or need not be aware. If the danger is hidden, or undisclosed, and not in the personal knowledge of the party, then the proprietor has a duty to warn the invitee before he begins the game. For example, a bowler may not assume the risk of bowling with wet shoes when he does not know he has stepped in water.[25] Even if he does know of the water, it has been held that it is a question for the jury to decide whether there was assumption of the risk.[26] Even then, a party will not be deemed to have assumed the risk unless he has the capacity to understand the danger which he is assuming, or the nature of the warning which he has received.[27]

From this one may deduce, and it has been so held, that one does not assume the risk of a defect in the surface or sub-surface of the bowling alley lane, of splinters in the approach area which may become stuck in his hand,[28] of wet or sticky substances on the floor of the bowling alley, of unmarked steps under a score board from which a

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[21] Corso v. Knapp, 347 Ill. App. 556, 107 N. E. 2d 59 (1952).

[22] Elias v. New Laurel Radio Station, Inc., *supra* n. 17; Brown v. San Francisco Ball Club, 99 Cal. App. 484, 222 P. 2d 19 (1950).

[23] Troop A Riding Academy v. Miller, 127 Ohio St. 545, 189 N. E. 647 (1934); Kemp v. Coney Island, Inc., 32 Ohio L. Abs. 630, 31 N. E. 2d 93 (App. 1940); Mann v. Nutrilite, Inc., 136 Cal. App. 2d 729, 289 P. 2d 282 (1955).

[24] Ivory v. Cincinnati Baseball Club Co., 62 Ohio App. 514, 24 N. E. 2d 837 (1939).

[25] Elias v. New Laurel Radio Station, Inc., *supra* n. 17.

[26] Cincinnati Baseball Club Co. v. Hines, 264 F. 2d 60 (6th Cir. 1959) (Plaintiff slipped on sticky substance on runway in baseball grandstand).

[27] McGillivray v. Eramian, *supra* n. 16.

[28] *Ibid.*

reader could fall, or even of substances picked up on the player's shoes while in the rest room which might later cause his fall.[29]

Contributory Negligence

The second strong defense in such cases is that of contributory negligence. Contributory negligence differs from assumption of the risk in that it connotes negligent conduct on the part of the plaintiff, while assumption of the risk involves a mental state of willingness or intent.[30] The bowler has a duty to use the same degree of care that a reasonably prudent man would use in his participation in the game and his use of the premises. He has a duty to be aware of his surroundings and not to enter into areas in which he will place himself in danger.[31] Ordinarily, an experienced bowler is held to a higher degree of care than a man who has never bowled before.[32]

An example of the type of case in which the bowling alley proprietor may defend with contributory negligence is one where a person knowingly walks in a puddle of water left there by the negligence of the operating management.[33] A subsequent fall on the alleys, caused by sticky or slippery shoes, would be attributable to the action of the bowler as well as of the proprietor. He might then be precluded from recovery from his resulting injury.[34] This, however, is also a jury question.[35]

In the final analysis the typical negligence case brought by a bowler is similar to that brought by any invitee who is injured in a place of business. The main difference lies in the adjustment of the level of duty owed by and to each party. The bowler with even a limited amount of experience in the sport brings with him greater skill and training than the "ordinary reasonable man," and thus is held to a higher standard of care. The bowler who knows the nature of the game assumes certain inherent risks which the ordinary prudent man would not be deemed to assume by simply walking into a place of business.[36]

On the other hand, the main distinction resulting from operation of an establishment which invites people to participate in a sport, is that

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[29] Miles v. Ozark Bowl, Inc., 250 S. W. 2d 849 (Mo. App. 1952).

[30] Vitaro v. C. W. & P. Const. Co., 64 Ohio App. 73, 28 N. E. 2d 507 (1940); Morris v. Cleveland Hockey Club, 57 Ohio St. 225, 105 N. E. 2d 419 (1952); Haarmeyer v. Roth, 113 Ohio App. 74, 177 N. E. 2d 507 (1960).

[31] Elias v. New Laurel Radio Station, Inc., *supra* n. 17; Guidani v. Cumerlato, *supra* n. 7.

[32] Preston v. Newburgh Y. M. C. A., 271 App. Div. 797, 65 N. Y. S. 2d 254 (1946).

[33] Cincinnati Baseball Club Co. v. Hines, *supra* n. 26.

[34] Elias v. New Laurel Radio Station, Inc., *supra* n. 17.

[35] Cincinnati Baseball Club Co. v. Hines, *supra* n. 26.

[36] Belkin v. Playdium, Inc., 194 Misc. 950, 87 N. Y. S. 2d 813 (Albany City Ct. 1949); Elias v. New Laurel Radio Station, Inc., *supra* n. 17.

the duty of care to patrons is increased by the inherent risks attendant to the operation of such an establishment. Thus he is held to a particularly high duty of care to see that his floors are dry and clean, and that the facilities provided are made as safe *for bowlers* as reasonably frequent inspection can make them.[37]

The injured party must plead and prove actual or constructive notice of the defect on the part of the owner or operator, but this requirement has been relaxed to some extent by recent case law.[38] The tendency appears to be toward more relaxation of the invitee's duty of care and proof, and an increasing emphasis of those burdens on the owner or proprietor.

The issue has been raised in a number of cases as to whether the doctrine of *res ipsa loquitur* is applicable to this type of situation. It has usually been held that it does not apply on the grounds that the instrumentality, *i.e.*, a defective bowling alley or attachment to it, is not in the immediate and exclusive care and control of the owner or operator. The proprietor has to share his control with the bowlers, and thus a prerequisite of *res ipsa loquitur* is not met.[39]

Nuisance

The general rule in Ohio, for example, is that a bowling alley does not constitute a nuisance per se.[40] Unless it is found to be operated in such a way that it creates a hazardous or obnoxious situation in the neighborhood in which it is located, there will be no liability for private or public nuisance, and no grounds to enjoin its operation.[41] It is conceivable that the noise of the balls hitting the pins might in certain cases create a nuisance, but since there seems to be no recent cases on this subject, it must be assumed that either the proprietors take care to build in the type of neighborhoods where they do not infringe upon the rights of others or that the problem is insignificant.

There is a paucity of cases on this aspect of the subject. As long as the proprietor keeps within the ordinary limits of operation of a business, it does not appear that he will be held to have created a nuisance.

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[37] Burns v. Goldammer, 38 Ill. App. 2d 83, 186 N. E. 2d 97 (1962); Guidani v. Cumerlato, *supra* n. 7.

[38] Elias v. New Laurel Radio Station, Inc., *supra* n. 17; Guidani v. Cumerlato, *supra* n. 7.

[39] Stelter v. Cordes, 146 App. Div. 300, 130 N. Y. S. 688 (1911).

[40] 39 Am. Jur., Nuisances § 63 at 346 (1938); City of Indianapolis v. Miller, 168 Ind. 285, 80 N. E. 626 (1907); King v. James, 88 Ohio App. 213, 97 N. E. 2d 235 (1950).

[41] King v. James, *ibid;* Commonwealth v. Cincinnati, New Orleans & Tex. Pac. R. R. Co., 139 Ky. 429, 112 S. W. 613 (1908); State ex rel Attorney General v. Canty, 207 Mo. 439, 105 S. W. 1078 (1907).

Conclusion

The duty owed by the bowling alley owner or operator is higher to the bowler than to the non-bowler who is upon his premises. Specific standards of this duty have not been set in the cases on the subject. It remains a jury question whether the proprietor has acted as he reasonably should to protect participants from hazards. Defenses available to the proprietor are those of assumption of risk and contributory negligence on the part of the participant. The bowler has the duty to act as a reasonable man when participating in the sport. His degree of training and its effect upon the reasonableness of his conduct are questions for the jury. It appears from the cases that there is a definite tendency to increase of duty on the part of the proprietor. This is exemplified by the *Guidani v. Cumerlato* case, which put the proper inspection and safety devices in issue[42] and *Stephens v. Akron Palace Theatre Corp.*, where it was held that there is a continuing duty of inspection.[43] But these duties have not yet spelled out rigid standards.

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[42] Guidani v. Cumerlato, *supra* n. 7.

[43] Stephens v. Akron Palace Theatre Corp., *supra* n. 14.