

## AUGUST 1998 NRPA LAW REVIEW

### HOCKEY PUCK “FACIAL” A FORESEEABLE RISK FOR SPECTATORS?

Negligence liability presupposes a defendant knew of an unreasonable risk of injury which was not apparent to the injured plaintiff through the reasonable use of his or her own senses. Conversely, negligence liability is less likely where the risk of injury is known and/or open and obvious to the recreational user. Under such circumstances, the recreational user generally has a legal duty to look out reasonably for his or her own safety and either avoid or protect oneself against an open and obvious risk.

Generally, the owner or operator of the hockey facility owes a limited duty of care to spectators. Specifically, customary practices in the sport of hockey would require adequate protection for spectators in the area where the risk of being struck by an errant puck is the greatest, i.e., behind the goals. In so doing, these hockey cases have adopted the majority rule of law developed for baseball stadiums. Under this rule the owner or operator of a baseball stadium has a duty to screen the most dangerous part of the ball park, i.e., the area behind home plate. As illustrated by the *Moulas* and *Pestalozzi* cases described herein, hockey spectators generally assume the open and obvious risk of being struck by an errant puck. On the other hand, the *Fisher* and *Sawyer* cases described below provide examples of negligence liability attributable to inadequate protection for hockey spectators.

#### SPECTATOR AWARE OF RISK?

In the case of *Moulas v. PBC Productions, INC.*, Wis.App. 1997, plaintiff hit by a hockey puck while attending a Milwaukee Admirals hockey game. In her complaint, Moulas alleged that the Admirals were negligent in failing to provide adequate protection to spectators against hockey pucks “which are known to forcibly leave the ice rink from time to time.” Specifically, plaintiff argued that the existing Plexiglas screening should have been higher than eight feet. Defendant, however, provided testimony that “the Bradley Center’s sideboards and Plexiglass walls are designed for and comply with the National and International Hockey League rules.” Moreover, defendant claimed the walls and boards would not be modified because league rules prohibited the playing of professional hockey games in a facility which did not comply with league rules.

While acknowledging that Moulas had “sustained a serious injury from an errant puck,” the court noted “the mere happening of an accident does not automatically establish” that “someone was negligent.” Although it was possible to provide protective screening that “reached from the rink floor to the Bradley Center’s ceiling,” the court found defendant had no legal duty to do so. On the contrary, the court found “the risks associated with hockey should be known to the reasonable person attending a game.”

When the puck is passed from player to player across the playing area, it often rises

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from the ice. Since the puck is round with a flat bottom and top, it is not always possible for a particular player to determine the direction the puck will take when in flight, nor how high it will rise. Any person of ordinary intelligence cannot watch a game of hockey for any length of time without realizing the risks involved to players and spectators alike.

Applying these principles to the facts of the case, the court found “Moulas was aware of the risks” and “chose to attend despite her knowledge and the warnings espoused.

Moulas does not deny that she was aware of the risk of an errant puck causing injury. She admits that she had attended at least ten Admirals games in the past, she was aware that the puck may leave the ice and fly into the spectator area, she heard the announcer's warnings about watching the puck to avoid injury and she chose to sit in the second row because she wanted to avoid getting hit by an errant puck. From these factors, Moulas was conscious of the risk, even though she may not have known the degree of risk. Despite these risk factors, Moulas voluntarily chose to attend the hockey game..

The appeals court, therefore, affirmed judgment of the trial court in favor of defendant.

### COMMON, FREQUENT, EXPECTED RISKS?

Similarly, in the case of *Pestalozzi v. Philadelphia Flyers LTD.*, 576 A.2d 72 (Pa. 1990), plaintiff was injured while attending a professional game as a spectator. In this particular instance, plaintiff argued the he had not assumed the risk of injury because “he intentionally sought to avoid this danger by securing a seat two rows behind the protective plexiglass near center ice.” In the opinion of the court, “the so-called ‘no duty’ rule’ for spectator sports,” in particular baseball, was also “applicable to similar incidents involving hockey pucks.” In so doing, the court cited the general rule concerning “flying baseballs,” viz., “baseball parks are not generally the insurer of its spectators with regard to batted balls.”

Only when the plaintiff introduces adequate evidence that the amusement facility in which he was injured deviated in some relevant respect from established custom will it be proper for an “inherent-risk” case to go to the jury... [B]all park management has no duty to protect spectators from risks inherent to the game of baseball. Most importantly, this so-called “no-duty” rule applies only to risks which are common, frequent and expected.

Having found no reason to “differentiate flying hockey pucks from batted baseballs with regard to the

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risk assumed by the spectators of the two sports,” the court considered whether the risk in this particular situation was “common, frequent and expected.” Under the circumstances of this case, the court found that “the risk of a spectator being struck by an errant puck, even for an individual sitting behind plexiglass, is common and reasonably foreseeable.” In so doing, the court rejected Pestalozzi’s contention that the defendant was “liable for his injuries since he sought to avoid injury by purchasing seats behind the protective plexiglass.”

[Pestalozzi] was struck by the relevant orb while sitting in close proximity to the playing surface... [He] was struck during the course of the game. Our review of the record reveals that appellant had previously attended a professional hockey game and should have been familiar with the inherent risks involved.

As a result, the court held that Pestalozzi had “assumed the risk of being struck by a flying puck.”

There was no obligation on the part of respondents to protect appellant against a danger incident to the entertainment which any reasonable spectator could foresee and of which [he] took the risk. The risk of being hit by a baseball or by a puck at a hockey game is a risk incidental to the entertainment and is assumed by the spectator. Any other rule of law would place an unreasonable burden upon the operator of a ball park or hockey rink.

### CONSISTENT WITH ARENA STANDARDS?

In the case of *Fisher v. Metropolitan Government of Nashville*, Tenn.App. 1997, plaintiff was injured by a flying puck while providing volunteer services as a “stick boy” for the Nashville Knights, a professional hockey team. Plaintiff’s duties included keeping the hockey sticks properly arranged in a rack. While performing his duties, plaintiff was struck in the eye by a puck knocked through a gap in the plexiglass shield by one of the players on the ice. As noted by the court, the plexiglass shield did not cover the area in front of the players, as well as another twenty foot gap created by an adjacent aisle way. Defendant argued that it did not owe a duty of care to plaintiff. The court, however, rejected this argument:

The proper place to start in that analysis, however, is a recognition that everybody owes to everybody else a duty of care that is reasonable under the circumstances. It may be reasonable to do nothing in which case we do sometimes say that the defendant did not owe a duty to the plaintiff, but that can only be said after an examination of the circumstances reveals that there was no reasonably foreseeable probability of harm that the defendant could, more probably than not, have prevented. Foreseeability is the key.

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Accordingly, the specific issue before the court was “whether the defendant should have foreseen that persons in the area at ice level unprotected by the plexiglass shield were in danger of harm and that some action was required to prevent it.” Under the circumstances of this case, the court found “Metro did owe a duty to protect Mr. Fisher.” Specifically, the court noted “Mr. Fisher was in the unprotected aisle area where the risk of errant pucks was high.” Moreover, the court found “Mr. Fisher was especially vulnerable in that he was assigned a task for which his attention would often be diverted from the playing surface.” In so doing, the court acknowledged that “most arenas hosting professional hockey games have plexiglass protection in this area.”

Plexiglass protectors are now standard in hockey arenas and most all plexiglass protection entirely surround the ice except for the players boxes. The 20 foot gap with no plexiglass between the players boxes in Municipal Auditorium was not consistent with the standard existing in most all professional hockey arenas. The area behind the goals are normally protected by higher plexiglass than along the sides. Municipal Auditorium complied with this standard. Higher plexiglass would not, however, keep pucks out of the mezzanine, but the real area of danger on the ends was directly behind the goal.

The court, therefore, found the defendant owner of a hockey arena had violated a duty of reasonable care owed to plaintiff by allowing the 20 foot gap in the plexiglass protection.

### PROTECTION REDUCED?

Similarly, the defendant failed to provide adequate protection to an injured hockey spectator in the case of *Sawyer v. State of New York*, 485 N.Y.S.2d 695 (Ct.Cl. 1985). In this case, the defendant reduced the amount of protective screening in the area behind the hockey goals. Moreover, defendant failed to warn spectators of the increased risk associated with this change in conditions. As a result, prior to her injury, plaintiff was unaware that her customary seat behind the goal no longer afforded the amount of protection to which she had become accustomed.

In this case, plaintiff, age 13, was struck in the mouth by a hockey puck while attending a hockey game in defendant’s arena. The hockey rink was enclosed with a dasher board that was approximately three and one-half feet in height. Elevated spectator bleachers surrounded the rink. A tempered glass protective barrier was mounted atop the dasher board measuring five feet behind the goals and three feet in height along the sidelines. The extent and availability of protected seating was not defined, nor were there signs posted warning spectators of the danger of being struck by a puck.

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The tempered glass barrier was installed approximately one month prior to plaintiff's injury. Prior to its installation, spectators were protected by a chain link fence that likewise mounted atop the boards. The protection afforded by the fence, however, differed somewhat from that provided by the tempered glass. Although it was the same along the sidelines, the fence furnished an additional one foot of protection behind the goals. In addition, a net had been installed behind each goal. This afforded complete protection to spectators who chose to sit in this area. The net was not removed upon installation of the tempered glass barrier, but rather was drawn to the ceiling leaving much of the area behind the goal unprotected.

Upon her arrival at the arena on the day of the injury, plaintiff proceeded to the spectator seats behind the south goal, the area from which it was her custom to view the games. This was the first game she attended since the tempered glass had been installed and she was not familiar with the changed conditions. She chose a seat in the seventh row. When seated, the top of her head was approximately even with the top of the protective barrier. During the second period of the game, she was struck in the mouth by a puck that had been deflected off the goalie's stick.

In this particular instance, the specific issue was "whether more protection should have been afforded under the circumstances." Plaintiff Sawyer had argued that "the extent of the protection was clearly inadequate and that the protective netting should have been utilized since it was readily available and could have been dropped into place with little effort." The court agreed.

The precautions that were formerly taken are some evidence that the State was aware that more was required. The State's suggestion that the netting was used solely for the purpose of saving pucks and broken windows is unavailing. If this were the case, the netting presumably would have been used subsequent to the installation of the glass. Also of significance is the fact that even before the installation of the netting, a 14 foot to 15 foot chain link fence had been installed at the north end of the rink. The latter was sufficient to protect all of the seats at this end. In sum, the reasonable inference that can be drawn is that the demand for protected seating encompassed the entire area behind each goal. Such is confirmed by the school's hockey coach, who testified that the area behind the goals was the first to fill.

In the opinion of the court, "the State's negligence need not rest solely on the ground that the State failed in its duty to provide more protection." The court found the State was also negligent for its failure to warn spectators.

Due to changed conditions, i.e. lowering the protective barrier one foot, the State was under an affirmative duty to warn spectators that the protection previously afforded had

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been reduced. This is of particular importance where, as here, the spectator chose to sit at the extreme limits of the protected seating, lured there in the belief that the glass barrier was at least the same height as the chain link fence.

The court, therefore, found that the State was negligent and that such negligence was a substantial factor in bringing about plaintiff's injury.

The court also considered whether plaintiff's injuries "were in any way caused by her own carelessness or negligence." Based upon the facts of this case, the court found that plaintiff had neither assumed the risk of injury, nor was she guilty of contributory negligence. On the contrary, the court found plaintiff "had a right to assume that every reasonable care had been taken for her safety when she took her seat behind the glass barrier."

Although she admits to having seen pucks striking the net on her previous visits to the arena and, despite her knowledge that the protective netting had been removed, it cannot be said that a reasonably prudent person of Joanne's years, intelligence, and degree of development, would have fully appreciated the danger, and, hence, could have been said to have assumed the risk. Nor can it be said that such a reasonably prudent person should have been aware of the risk so as to be guilty of contributory negligence. Finally, no culpability may be assigned for Joanne's failure to sit in the second or third row. The view from the seats in those rows was partially obstructed not only by the dasher board, but also by the spectators who were permitted to stand behind the boards that evening.

Having found the State negligent and no negligence on plaintiff's part, the court entered judgment for plaintiff.