OCCUPIERS' LIABILITY AND SPORTS FANS:

LEGAL IMPLICATIONS AND RISK MANAGEMENT STRATEGIES FOR SPORTS AND ENTERTAINMENT FACILITY OPERATORS

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I. INTRODUCTION

Fans attend sporting events every day across Canada and throughout the world. Many fans are there to cheer on their favourite teams, witness a historical game between long-standing rivals, and simply enjoy the traditions associated with attending such an event. These games may attract large crowds and stir emotions, particularly as there is a culture of alcohol often associated with professional sports. While one may reasonably expect to witness a player hurt themselves on the field or on the ice, spectators do not often expect that they themselves will be injured.

There has been no shortage of incidents, however, where spectators find themselves injured while attending a sporting event. A myriad of cases involving spectator injuries have been publicized over the years – from objects flying into the stands (hockey pucks, baseballs and NBA players alike), to violent riots breaking out amongst intoxicated, crazed fans. Certainly hockey fans will recall the tragic story of Brittanie Cecil whose death in 2002, after being struck in the head with a deflected puck at a Columbus Blue Jackets game, led the NHL to impose league-wide standards for protective mesh netting to protect spectators.

Further, there has been no shortage of litigation resulting from such incidents. When a spectator plaintiff is harmed while watching a sporting event, they will generally commence an action against the occupier of the facility where the sporting event was held. Occasionally, the action will include individual athletes, teams, or others that may be appropriate in the circumstances.[1] The owner/operator of the facility, as "occupier", has a legislated duty to ensure that the venue where the sporting event is being held is reasonably safe. It is important to note that the standard of care is based on foreseeable risk, which is to be distinguished from an absolute guarantee of maintaining a completely risk-free environment.

[1] Note that often a plaintiff will be motivated to seek out the "deepest pocket" for recovery, that is, those defendants who will be best able to pay out a large award of damages.

This paper examines a range of situations in which liability may attach to sports and entertainment facility owners and operators when spectators are injured during sporting events, as well as how such liability may be avoided. Attention is given to the courts' interpretation of the legislative provisions in Ontario's *Occupiers' Liability Act.* This area of law serves as an abundant source of Canadian sports law jurisprudence. The discussion proceeds with an outline of categories of available defences to spectator claims, followed by an examination of select issues of significance to Canadian sports facility owners and operators. Finally, new frontiers in spectator liability are explored, as well as risk management strategies for avoiding spectator claims.

II. OVERVIEW OF LEGISLATIVE SCHEME

The current version of the provincial *Occupiers' Liability Act* ("Act") has been in force in Ontario since December 31, 1990.[2] In drafting the Act, the legislature sought to achieve an appropriate balance between ensuring the safety of people entering a given premises, and the need to encourage occupiers to allow for recreational use on their property.[3]

a. Definition of "Occupier"

According to section 1 of the *Act*, the occupier is defined to include persons in physical possession of the premises or who are responsible for, or have control over, the condition of the premises, the activities there conducted, or the persons allowed to enter.[4] Obviously sports facility management, owners and operators are occupiers within the Act. There can also be more than one occupier of a premises.

b. Section 3 – Duty and Standard of Care

Section 3(1) of the Act imposes a duty on the occupier to take reasonable care to ensure that persons and their property are reasonably safe while on the premises.[5] Importantly, section 3(2) clarifies this duty as applying to risks caused not only by the condition of the premises, but also to the activities that take place there.[6]

Waldick v. Malcolm is the leading decision on the occupiers' duty of care. In that decision, the Supreme Court of Canada stated that the duty owed by an occupier is fact-specific:

> [The] statutory duty on occupiers is framed quite generally, as indeed it must be. That duty is to take reasonable care in the circumstances to make the premises safe.

[2] *Occupiers' Liability Act,* R.S.O. 1990, c.O-2 [Act]
[3] See *Schneider v. St. Clair Region Conservation Authority* [1997] OR (3d) 81 [*Schneider*]
[4] *Supra* note 1 at s.1
[5] *Supra* note 1 at s.2
[6] *Supra* note 1 at s.3(2)

> That duty does not change but the factors which are relevant to an assessment of what constitutes reasonable care will necessarily be very specific to each fact situation -- thus the proviso, "such care as in all circumstances of the case is reasonable." [7]

In holding that a determination of the duty owed by an occupier must be fact-driven, the Supreme Court also implicitly stated that such a duty of care is a proactive one that involves taking reasonable steps to prevent injury.[8]

However, while recreational facility owners and operators, as occupiers, must be proactive in their approach to premises safety, it has been generally established that the applicable standard of care is one of reasonableness which "requires neither perfection nor unrealistic or impractical precautions against known risk."[9] The occupier is not automatically liable by virtue of the fact that someone was on its premises and sustained injuries.

In *Sores v. Premier Fitness Clubs*, the court enunciated a number of general principles within the case law that govern occupiers' liability:[10]

i. Occupiers of premises have a positive duty to make their premises reasonably safe for persons entering the premises;[11]

ii. Occupiers are not automatically liable for any damages suffered by persons on their premises. In other words, occupiers are not insurers;[12]

iii. Occupier's liability as stated in the Act does not change, but the factors leading to a finding of liability are fact-driven.[13]

As above, an occupier may be legally obligated to satisfy its duty under the Act, but such a duty can be modified and even excluded.

c. Modifying the Duty

Section 3(3) of the Act allows the occupier to make use of contractual measures such as waivers or releases to restrict, modify or exclude the occupier's duty of care.[14]

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[7] [1991] 2 SCR 456 [1991] SCJ No 55 [*Waldick*]
[8] *Ibid.*
[9] See *Kerr v. Loblaws Inc.* [2007] OJ No 1921 (Ont. C.A.) [*Kerr*]
[10] [2011] OJ No 1662 2011 ONSC 2220 [*Sores*].
[11] *Supra* note 7 at 723
[12] *Ibid.*
[13] *Ibid.* at 124
[14] Subsection 3(3) of the Act states: "The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty".

However, the courts have held if the occupier limits the duty (for example, through the use of a waiver or signage), then they must take reasonable steps to bring that limitation to the attention of the visitor/patron. A more in depth discussion of the effectiveness of these measures in negating occupier liability will follow.

d. Section 4 – "Risks Willingly Assumed"

Where a person willingly assumes the risk of entering a premise, the duty described in section 3(1) is replaced by the duty in section 4(1).[15] In these instances, the occupier owes a duty to the person to not create a danger with the deliberate intent of doing harm or damage to that person and their property, and to not act with reckless disregard of the presence of the person or their property.

The legislature's intention when drafting the Act was to limit the duty of care owed by an occupier of premises to a person who is deemed to accept all the risks of attending at the premises.[16] However, Canadian courts have narrowly interpreted the application of section 4(1) of the Act, holding that the "section has been narrowly interpreted to apply to situations only if the plaintiff has assumed both the physical and legal risks caused by a defendant's negligence."[17] When the courts proceed under section 4(1), the plaintiff must meet a higher threshold than would otherwise be required by section 3(1).

III. POTENTIAL DEFENCES

Spectators' claims against occupiers will typically be based on an alleged breach of the duty of care owed under the *Occupiers' Liability Act*, and in terms of a contractual breach.[18] However, there are a number of available defences to these claims that will, in certain instances, act as a complete bar to a plaintiff spectator's claim.

a) No Contravention of the *Occupier's Liability Act*

The injured spectator as plaintiff has the onus of proving on a balance of probabilities that the occupier was negligent. For an action to succeed, the plaintiff must prove the following elements:

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[15] *Supra* note 1 at s. 4(1)
[16] See *Cormack v. Mara (Township)* [1989] OJ No 647 [*Cormack*]
[17] See *Dogan v. Pakulski* [2007] OJ No 1903157 A.C.W.S. (3d) 673 , where it was held that the plaintiff had not assumed the risks of a slip and fall associated with ice and snow that the defendants had allowed to accumulate, and further that the defendants had recklessly disregarded the plaintiff's safety while on their premises.
[18] An injured spectator who has paid for a ticket to enter a sports venue may be considered as a contractual entrant, i.e. someone who has paid for the right to enter and use the premises. An injured spectator who has paid for a ticket can potentially sue the occupier for breach of the implied term that the seat sold to them will be safe.

i. The defendant is an occupier of the property where the incident occurred;
ii. The defendant breached the duty of care owed to the plaintiff;
iii. The breach caused the injury that the plaintiff sustained; and,
iv. The plaintiff suffered an injury.[19]

Thus, a defendant facility owner/operator can avoid liability under the Act if a plaintiff is not able to prove all of the required elements.

b) Voluntary Assumption of Risk – *Volenti* Defence

Under the doctrine of voluntary assumption of risk, a spectator who voluntarily attends at a sporting event will be presumed to have assumed the risks inherent in attending such an event. For example, a spectator attending at a hockey game is presumed to assume the risk of being injured by a flying hockey puck, unless the presumption is rebutted on such basis as incapacity to appreciate the risks.

The Latin phrase, *volenti non fit injuria* (meaning, "to a willing person, injury is not done") is a common law doctrine which suggests that if a person willingly places themselves in a position where harm might result, whilst knowing that some degree of harm might result, they will not be able to bring a claim against an allegedly negligent party in tort. Where a court holds that a plaintiff knowingly and voluntarily accepted the risk associated with an activity, *volenti* will act as a complete bar to recovery and there will be no apportionment of liability available.

Canadian courts have considerably narrowed the application of this common law doctrine. In the seminal ski-hill liability/waiver case of *Crocker v. Sundance,*[20]the Supreme Court of Canada held that a *volenti* defence "only applies in situations where the plaintiff has assumed both the physical and legal risk involved in the activity."[21]

Appellate Courts in the United States have held that under a *volenti* defence, a person is deemed to have assumed "those commonly appreciated risks which are inherent and arise out of the nature of the sport generally and flow from such participation."[22] Similarly, the Supreme Court of Canada has historically described inherent risks as those "incidental to and inseparable from"

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[19] Klar, Remedies in Tort (Toronto: Carswell, 2000) at 18-24.
[20] *Crocker v. Sundance Northwest Resorts Ltd.*, [1988] 1 SCR 1186 [*Crocker*]
[21]Please see discussion on waivers to follow. Briefly, the Court in *Crocker* held that the respondent ski resort was liable for the appellant's injuries incurred when he participated in a downhill tubing race while intoxicated. The appellant had not, either by word or conduct, voluntarily assumed the legal risk involved in competing, despite the fact that he signed a waiver absolving the resort of liability for participant injury. The Court found that the occupier had failed in its duty by allowing the appellant to participate in the event while intoxicated.
[22] David Tavella, "Duty of Care to Spectators At Sporting Events: A Unified Theory" (2009-2010) 5 Fla. A & MU. [Tavella]

a sport, which are assumed by those who engage in the activity or amusement.[23] In both Canada and the United States, occupiers have no duty to remove inherent risks.

Commentators have noted difficulties in determining what constitutes a risk that is inherent to a sport. In other words, the lines can be blurred in determining whether an injury resulted from a risk that is in fact inherent to a sport. Such a determination requires a subjective inquiry into the spectator's knowledge of the sport and capacity to appreciate the risks inherent to the sport.[24]

Further complications arise when unforeseen circumstances surround the spectator injury. One such example from Wisconsin is *Lee v. National League Baseball Club*[25] where the court found that it was not an inherent risk of the sport of baseball to expect to be knocked down by the force of other spectators clamouring to catch a foul ball.[26]

c) Waivers and Signage

As above, an occupier may make use of contractual measures such as waivers or releases to restrict, modify or exclude the occupier's duty of care.[27]

The effectiveness of waivers and other contractual measures designed to absolve defendant occupiers of liability have been upheld in Canadian courts. Proper drafting, notice and presentation are required in order for a waiver to insulate a defendant occupier from liability. Exculpatory clauses presented on purchased tickets along with clear signage have met with some degree of success.[28] The defendant must ensure that it takes reasonable measures to bring any exclusionary clause to the mind of the plaintiff, and must be able to point to factual elements to demonstrate the reasonableness of its actions.[29]

d) Reasonable System or Procedures

A reasonable system of inspection, maintenance and repair is a defence commonly brought forward on behalf of the occupier.[30] It suggests that precautions were in place and that best practices were followed, so as to ensure the safety of the premises and visitors thereto.

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[23] See *Dixon v. City of Edmonton*, [1924] SCR 640

[24] For example, had the plaintiff attended at such an event previously? Were they familiar with the rules of the game or aware of any injuries that may have occurred at similar events? Were they distracted and not alert to the risk?

[25] 4 Wis. 2d 168, 89 N.W.2d 811 (1958) ["Lee"].

[26] Mohit Kare, "Foul Ball!" The Need to Alter Current Liability Standards for Spectator Injuries at Sporting Events" (2010-2011) 12 Tex. Rev. Ent. & Sports L. 91 at 97 ["Kare"]

[27] Subsection 3(3) of the Act states: "The duty of care provided for in subsection (1) applies except in so far as the occupier of premises is free to and does restrict, modify or exclude the occupier's duty."

[28] See *McQuay v. Big White Ski Resort Ltd.,* [1993] BCJ No 1956 (BCSC)

[29] *Ibid.*

[30] Grant G. Walsh, "Defending Occupier's Liability Claims in the Context of Unusual or High Risk or Highly Specialized Properties" (2012), as presented at the Canadian Defence Lawyers' seminar of February 7, 2011.

Moreover, it implies that the defendant occupier did all that should have been reasonably done in the circumstances, and as such, liability should not attach.

A trier of fact will typically look to expert testimony on industry standards for safety precautions in a given sport when determining whether or not a system was in fact reasonably safe. For example, compliance with league-wide NHL standards for protective spectator netting can serve to protect fans from injury from errant hockey pucks, as well as serve to protect an occupier from liability. The authors note that a detailed examination of league standards and the implications of "meeting code" follow shortly.

Even where league-wide standards have not been imposed, a trier of fact can assess the reasonableness of a system of inspection, maintenance and repair in order to be satisfied that an occupier has met its duty of care. For example, in *Stein v. Sandwich West (Township)* the Ontario Court of Appeal upheld the decision of the lower court that the occupier of a local hockey arena failed to prove that it had a reasonable system in place.[31] The plaintiff had suffered an injury when they caught their skate in a rut in the ice. The court pointed to evidence suggesting that the defendant occupier had failed to meet standard practices. Specifically, evidence was led to suggest that the defendant had failed to separately flood the goal creases and adjacent areas at the appropriate time intervals.

In *Herman v. London (City)* the Court stated that the defendant occupier had fulfilled their duty of care by implementing well-defined procedures for maintaining the ice surface and ice surfacing equipment at a local rink. Such evidence helped bolster the defendant occupier's suggestion that they were diligent in their pursuit of safety.[32]

In *Brinco v. Milton (Town)*, however, the defendant occupier was found to have failed in meeting their duty to provide a reasonable system for ice maintenance at a local ice rink. In that case, the plaintiff brought an action against the town of Milton for damages he suffered after tripping on a large gouge in the ice while playing recreational hockey.[33] Maintenance of the ice was monitored by two people during organized hockey events but only monitored by one during recreational scrimmages. The court determined that it was unreasonable to have two standards of care for the two groups and ultimately apportioned the defendant occupier's liability at 75% and the plaintiff's at 25%.

One can also contemplate instances where a plaintiff spectator may injure themselves at a sporting event in a manner that is completely unrelated to the sport (i.e. a slip and fall or an injury from a T-shirt "cannon" between innings[34]). In these instances, a defence that a reasonable

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[31] [1995] CarswellOnt 160 (C.A.) [*Stein*]
[32] [1996] CarswellOnt 3318 (Ont. Ct. Gen. Div) [*Herman*]
[33] [2000] OJ No 4474 (Ont SCJ) [*Brinco*]
[34] T-shirt cannons are hand-held machines that launch prizes and t-shirts into the stands, often at high speeds and with great force.

precautionary system was in place may still succeed in limiting an occupier's liability. Unfortunately, this was not the case in *Rees v. B.C. Place Ltd.*[35] where a plaintiff brought an action against the defendant facility as a result of slipping and falling on a spilled beverage following a Grey Cup game. The BC Supreme Court stated that a two-part test must be met in such cases:

> The first requirement to satisfy that obligation is to take the kind of steps that were taken by the defendants here to put into place a system to safeguard against dangerous substances being allowed to remain on the surface of the concourse. And then secondly to be sure that there was compliance by the people who were carrying out that responsibility with the system in place.[36] [emphasis added]

In opining that the defendant occupier had failed to implement a reasonable system of inspection and maintenance to clean up spills, the Court further stated:

> [I]n the circumstances here where there is a concourse where the sale of beer and other food stuffs took place and there is a likelihood of spillage in that area, particularily with the kind of crowd in attendance on that occasion, that the duty on the Defendants was to have a more complete and adequate staff on hand on that occasion and then be sure that they were in place and watching for the kind of dangerous situation that was created by this particular spill.[37]

Indeed, while an occupier is not an insurer and will not be held liable by virtue of the fact that a plaintiff sustained an injury while on their premises, a defendant occupier must still be able to show that a reasonable system of inspection, maintenance or repair was in place to prevent such injury.

e) Foreseeability

The defendant occupier may also succeed against a plaintiff's claim where it can be shown that the risk of the harm incurred was unforeseeable and, where appropriate, that the plaintiff was the author of his or her own misfortune.

The Court of Appeal decision in *Alchimowicz v. Schram*[38] is a leading case on foreseeability in Ontario. The Ontario Court of Appeal dismissed the claim of the plaintiff, who was rendered paraplegic after diving, while intoxicated, from a public dock into shallow water during the early hours of the morning. The Court stated that the defendant occupier had met its duty:

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[35] [1986] B.C.J. No. 2594 [*Rees*]
[36] *Ibid* at 10.
[37] *Supra* note 31.
[38] [1999] CarswellOnt 83(C.A.) [*Alchimowicz*]. In this case, a grossly intoxicated plaintiff dived from the railing of a dock into shallow water and was rendered a quadriplegic. He brought an action in negligence against the City of Windsor. After a month long trial on the issue of liability, the trial judge found that the appellant's negligence was the sole cause of his injuries and dismissed the action.

> In fulfilling its duty as an occupier, it was not incumbent upon [the defendant] to guard against every possible accident that might occur. [The defendant] was only required to exercise care against dangers that were sufficiently probable to be included in the category of contingencies normally to be foreseen.[39]

The Court focused on the plaintiff's subjective knowledge of the dock, and the fact that he was a trained lifeguard, but also held that an occupier has "no duty to warn of a danger which is so obvious and apparent that anyone would be aware of it."[40]

To reiterate, occupiers can only be held to a standard of reasonableness and not one of perfection. As soon as the harm inflicted is deemed to have been reasonably foreseeable it becomes necessary for the occupier to parse out elements in the factual scenario to establish that it has satisfied its duty to the individual and has taken all reasonable precautions to ensure patron/visitor safety. Where the harm incurred is held to be completely unforeseeable and outside the realm of dangers that could reasonably be expected of attendance at a venue, an occupier will be able to avoid liability.

IV. TOPICS OF INTEREST

The remainder of the discussion will focus on topics of particular interest to sports facility owners and operators across North America. Accordingly, case law from the United States is included with specific references to professional sports leagues.

A) SIGNED WAIVERS

Signed waivers are certainly relevant to occupiers who may face liability where patrons or participants are injured on their premises.

With regard to fan liability, one can imagine the implications for sports arena occupiers when fans are invited to participate in intermission entertainment and contests (i.e. Score a slapshot for a chance at $100,000). In these instances, it would be imperative to have willing participants sign a waiver precluding any action against the occupier facility in the event that they are somehow injured while participating.[41]

Case law with respect to the duty of care owed to participants provides further guidance on the role of waivers in limiting liability. The aforementioned *Crocker* case regarding waivers and ski resort liability is immediately brought to mind.[42] Canadian case law has demonstrated that

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[39] *Ibid* at 13.
[40] *Ibid* at 10.
[41] For a detailed discussion of waivers or exclusionary clauses see: "UPDATE: Liability Waivers" by J. Tomlinson and A. Nicolini. http://www.mccagueborlack.com/emails/articles/liability-waivers.html
[42] See also *Ocsko v. Cypress Bowl Recreation,* [1992] 74 BCLR (2d) 73 (BCCA). See also *Schuster v. Blackcomb Skiing Enterprises Ltd. Partnership*, [1994] BCJ No 2602 (BCSC). In *Schuster*, the defendant was entitled to rely on

courts will pay very close attention to detail when determining whether or not a defendant occupier is entitled to rely upon a signed waiver to exclude liability when a participant is injured while attending on their premises. Was the waiver clearly written? Was it in a bold or colored font? Did the plaintiff have a clear opportunity to read it? All of these considerations are weighed carefully in assessing reasonableness.

B) TICKETS AND SIGNAGE

An occupier may also seek to rely on an exclusion of liability where same has been printed on a purchased ticket to a sporting event or has been clearly posted at the sports entertainment facility. Similar to the guidelines surrounding waivers, courts have held that if an occupier intends to rely on an exclusionary clause, they must take steps to bring such a clause to the attention of those patrons it would purport to affect.[43]

A determination of liability requires a comprehensive assessment of all of the defendant's safety measures. While a component of this analysis will inevitably include an individual plaintiff spectator's subjective capacity and knowledge, if the defendant has clear and easy to understand safety measures in place, such as large, clear signage and audiovisual warnings, their ability to avoid liability is greatly strengthened.

Unfortunately, professional sports organizers have been largely reactive in taking safety measures, often implementing more reasonable cautionary systems only after spectators have been injured at their facilities. For example, the Texas Rangers posted large signs, including yellow warnings on all railings almost immediately following the 2011 death of Shannon Stone who fell over a railing at Rangers Ballpark while attempting to catch a ball tossed into the stands by outfielder Josh Hamilton.

The Rangers are not the only Major League Baseball (MLB) team who has responded in this matter. In *Costa v. Boston Red Sox Baseball Club*, the plaintiff was hit by a hard foul ball.[44] Since the litigation, the Red Sox voluntarily posted large signs with bold print in the stadium warning of the risk. After a similar foul ball occurrence resulted in the case of *Pakett v. Phillies*, the Philadelphia Phillies posted warnings on stadium walkways, between concourses, and by means of a video cartoon played during the first inning.[45]

In *Coronel v. Chicago White Sox, Ltd.,* the plaintiff was struck in the face with a foul ball as she looked down into her lap for a piece of popcorn. She sued the Chicago White Sox, Ltd. and Comiskey Park Corporation, alleging negligence for failure to provide adequate protection from

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a waiver signed by the plaintiff, that by her own admission, she had failed to read. In deciding against the plaintiff, the court cited the defendant's adequate steps to bring the waiver to the plaintiff's attention.

[43] See *Brown v. Blue Mountain Resort Ltd.,* [2002] 7591 ONSC 16; and, *McQuay v. Big White Ski Resort Ltd.* [1993] BCJ No 1956 (BCSC) [*McQuay*]

[44] [2004] 809 N.E.2d 1090,

[45] [1994] L.P., 871 A.2d 304

batted balls, failure to provide an adequate number of protected seats, and failure to warn about errant balls. The court granted leave to appeal a summary judgment in favour of the defendant because it felt summary judgment was not appropriate given the circumstances. However, the court held that the fact that the plaintiff had been warned on three occasions of the dangers inherent in watching a major league game by (1) flashing a warning on the screen, (2) announcing a warning over the public address system and (3) the caveat printed on the back of the ticket stub, was of considerable import.[46]

C) PROTECTIVE MEASURES AND LEAGUE STANDARDS

The evolution of protective measures in sport facilities is undeniable. As the incidence of injuries to spectators has risen and become more serious, so have the safety precautions taken to address them. Similar to the measures taken by MLB teams and stadiums, the National Hockey League (NHL) has reacted to spectator injuries by implementing league-wide standards for fan protection. Before delving into these standards and their implications for occupiers, it is important to review the way North American courts have dealt with spectators and 'flying object' injuries in the past.

In the seminal case of *Elliott v. Amphitheatre Ltd.*, a plaintiff spectator was hit by a puck while seated in the front row of the defendant's rink watching a hockey game.[47] The plaintiff had purchased a ticket to the event and sued the operator of the rink in negligence on the basis that it failed to provide adequate protection of spectators by installing protective wiring or netting. The action was dismissed on the basis that the defendant was not an insurer against dangers that were incidental to the game of hockey. A defendant need only take reasonable steps to ensure the safety of spectators, and the court found that in this instance, the occupier had done just that. As will be seen, this case demonstrates just how far the court's interpretation of 'reasonable' has evolved.

In *Payne v. Maple Leaf Gardens Ltd.*, the Ontario Court of Appeal held that there is no absolute warranty on the part of an occupier who invites others to use the premises to see a game or other spectacle that the premises are safe.[48] An occupier is not under a duty to guard against every possible danger. Rather, he or she is under a duty to see that reasonable skill and care have been used to ensure safety and guard against dangers that may reasonably be anticipated in the circumstances. *Payne* involved a fight that broke out between two players at a hockey game, over a hockey stick. During the struggle, a spectator sitting next to the boards was injured by a stick. The action against the defendant occupier failed on the grounds that the evidence did not show any failure on the part of the company or its employees to take reasonable care to make its

[46] [1992] 595 N.E.2d 45, 48(Ill. App. Ct.)
[47] [1934] MJ No 19, 3 WWR 225, ["Elliott"]
[48] [1949] OR 26-36 (Ont. CA) ["Payne"]

premise reasonably safe for spectators. It was not reasonable for the occupier to anticipate that the hockey players would fight in contravention of the game rules. The plaintiff spectator's injuries were held to be the result of one of the hockey player's negligence or improper conduct. As a result, the occupier was not held liable.

In the 1989 US case of *Rosa v. County of Nassau*, the plaintiff was injured by a deflected puck at a New York Islanders game.[49] The court held that the protective screening in place satisfied the duty of care owed by the stadium owner despite the fact that the screening did not totally eliminate the risk of spectator injury.

On March 16, 2002, the NHL suffered its first fan fatality when 13 year-old Brittanie Cecil was hit in the temple by a puck as it deflected into the stands. Brittanie's family threatened to sue the NHL, the Columbus Blue Jackets, and Nationwide Arena, but ultimately the matter was settled.[50] The team, the NHL and Nationwide Arena agreed to pay $705,000 to Jody Sergent, the girl's mother, and $470,000 to David Cecil, the girl's father.[51]

Brittanie Cecil's death brought into question the adequacy of safety standards adopted in professional hockey arenas and baseball stadiums across the United States.[52] Many criticized the NHL, citing a report submitted in 2000 to the American College of Emergency Physicians which found that serious puck injuries were commonplace at hockey games. The study revealed, for example, that out of 127 games at the MCI Center (now the Verizon Center) in Washington, D.C., 122 fans required first aid treatment for puck-related injuries, almost half of which needed to be taken to an emergency room by ambulance.[53]

In response to the tragedy, the NHL implemented league-wide standards for mandatory netting at either end of the rink and required that the Plexiglas around the entire arena be at least five feet in height.[54] Rule 1.4 of the NHL's Official Rules addresses spectator netting and states: "Spectator netting shall be hung in the ends of the arena, of a height, type, and in a manner approved by the League."[55] The rules are clear and adherence is assumed.[56]

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[49] [1989] 544 N.Y.S.2d 652 (N.Y. Ct. App.)
[50] Leigh Augustine, "Who is responsible When Spectators are Injured While Attending Professional Sporting Events?" (2008) Univ. of Den. Sports and Entertainment L. J. at 12 ["Augustine"]
[51] Associated Press, April 2004: *http://sports.espn.go.com/nhl/news/story?id=1782097.* Note that the defendants also paid an additional $538,000 towards the family's legal fees.
[52] David Horton, "Rethinking Assumption of Risk and Sports Spectators" (2003) 51 UCLA L. Rev. 339 ["Horton"]
[53] *Ibid*. at 342
[54] Brett Celedonia, "Flying Objects: Arena Liability for Fan injuries in Hockey and Other Sports" (2008) 15 Sports L.J.115 ["Celedonia"]
[55] *National Hockey League Official Rules 2011-2012*
[56] The authors note that attempts were made to ascertain the current NHL standard as to spectator netting, but were advised by NHL officials that such information is not made readily available to the public.

An analysis of the case law reveals that protective netting that meets league-imposed standards will not be sufficient to absolve an occupier of liability. The ultimate question that must be asked by occupiers, however, is whether these safety measures are truly sufficient to ensure fan safety. According to a study conducted by David Milzman, while the vast majority of fan injuries occurred in the area behind the net, approximately one-fifth of fan injuries occurred outside of the area directly behind the goal. Milzman's study concludes that even with increased safety precautions behind the net, fans are still at substantial risk of injury while attending NHL games.[57]

Baseball remains the most litigated sport regarding spectator injuries in the entire United States. Academics and commentators have often vacillated between acceptance and opposition for increased safety precautions. The available case law demonstrates some important principles. Recovery for any potential plaintiff spectator as against the stadium will be unlikely where the harm or injury results from a risk inherent to the sport (usually a foul ball, home run ball, or bat entering the stands).[58] The plaintiff's choice of seat (whether in a protected or unprotected area) is another necessary component in determining whether a plaintiff voluntarily assumed the risk of injury.

In *Noonan v. Exhibition Place,*[59] the child plaintiff attended a Blue Jays baseball game with his father at Exhibition Stadium. The plaintiff was hit by a baseball while seated in a section close to the field where there was no protective screen. The Court held that the defendant was not liable, as the plaintiff knowingly and willingly sat in a section which did not offer the same degree of protection. In finding that the defendant complied with industry safety standards, the Court stated the following:

> Can the Blue Jays organization realistically protect everyone in an area where there is a possibility that foul balls might be struck? In my view, to impose such a duty upon an occupier is not what is contemplated by the *Act*. The occupier in this case has provided protection in accordance with an acceptable standard or norm in the industry and is not required to screen sections of the stadium where the incident of injury is compatible with other seating much further from home plate.[60]

Certainly an element of spectator autonomy must enter the equation as well, as clearly there are fans who will choose to enjoy a sporting event from an unprotected seat and who will willingly place themselves in harm's way. It appears a balance must be struck between fan protection and autonomy in determining what constitutes reasonable protective measures.

[57] *Supra* Celedonia at 117
[58] *Supra* Celedonia at 126
[59] [1991] OJ No 421 (Gen Div), ["Noonan"]
[60] *Ibid*.

In Canada, the reasonable standard of protective measures is largely determined by reference to the industry standards as outlined in *Hagarman v. City of Niagara Falls.*[61] Justice Labrosse stated that the courts have customarily looked to protective measures taken by facilities, designed for the viewing of a particular sport to help determine what constitutes reasonable protection:

> [I]f a spectator chooses to occupy an unscreened seat because he prefers the unimpeded view which it offers, or if he is unable to procure a screened seat but none the less (sic) chooses to remain and view the game, no duty of care extends to him and he bears the risk of injury resulting from a danger inherent to the game.[62]

Recently, in *Benjamin v. Detroit Tigers Inc.,* the plaintiff was injured when a bat broke and a fragment allegedly curved around the protective netting and struck the plaintiff.[63] The plaintiff alleged that the netting was insufficiently long and that warnings about the possibility of projectiles leaving the field were inadequate. In finding for the defendant, the Court relied on the fact that spectators should know that objects may leave the field and potentially cause injury.

Similarly, in *Rees v. Cleveland Indians Baseball Co.,* a woman was struck in the face by a broken bat.[64] She voluntarily sat in the unprotected portion of the stadium and had never contacted any of the stadium personnel regarding a fear of sitting in that area. On that basis, the court found that the spectator had assumed the risk that caused her injury and dismissed the plaintiff's action.

D) SPECTATORS: OUT OF THEIR SEATS

The available jurisprudence has provided some guidance as to the proper course of action when spectators are out of their seats.

In the US case of *Maisonave v. Newark Bears Professional Baseball Club Inc.,* a spectator was standing in line at a vending cart on the mezzanine level of the stadium, not paying attention to the baseball game, when he was hit by a ball.[65] In reaching a decision, the court took notice of the fact that balls were being hit harder nowadays, that modern stadiums were full of multimedia distractions and that the ball club was engaged in a commercial enterprise. The court held that outside of the stands, traditional tort principles applied with respect to situations where spectators are in the concourses and mezzanines where it would be unfair to expect them to be watching for batted balls.

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[61] (1980) 29 OR (2d) 609 Ontario High Court, ["Hagarman"]
[62] *Ibid.*
[63] [*2001*] *635* N.W. 2d 219, 223 (Mich. Ct. App.)
[64] [2004] WL 2610531 1 (Ohio 2004), ["Rees"]
[65] 185 N.J. 70; 881 A.2d 700; 2005, taken from QL Case Summary ["Maisonave"]

In the Ontario Court of Appeal case of *Deyo v. Kingston Speedway Ltd.,* patrons were observing an auto-racing event.[66] The plaintiffs paid admission to attend a car race at the defendant's track. During the race, a car spun out of control and smashed into a guard rail, causing debris to be hurled through the air and strike the plaintiffs. One of the plaintiffs died instantly and another was seriously injured. The Court considered various factors, such as the fact that the plaintiffs were viewing the race from a restricted area which had a snow-fence and rope barrier and which was generally considered unsafe. The Court held that the defendant was not liable to the plaintiffs in the circumstances.

It appears that the same spectators at a sporting event may hold varying statuses, i.e. invitee, licensee or trespasser, for the purposes of the Act. In *Deyo*, the Court concluded that while the plaintiffs were invitees when they were in the non-restricted area, their status changed to that of trespasser when they went past the barrier, and thus, the defendant's duty to them changed as well. The plaintiffs' subsequent appeal to the Supreme Court of Canada was dismissed.[67]

Occupiers must be readily aware of a potentially modified duty of care as per the particular location of the spectator around the facilities. Again, occupiers are not insurers but must guard against reasonably foreseeable harm.

E) MEETING CODE

Reasonableness in cases of sports liability is often measured with reference to established building codes. Professional sports organizations vary in their adoption and implementation of industry-wide practices. Occupiers should be aware of the fact that they may continue to face exposure despite meeting referenced guidelines.

In Major League Baseball, each and every ball park must first adhere to local code requirements thoughout the league.[68] Arguably, this should be true for all arena and stadiums in North America, as facility operators would face sanctions for failure to meet municipal building codes.

In the wake of the July 2011 death of Shannon Stone, Texas Rangers officials were quick to point out that their stadium's railings satisfied the applicable code provisions. Indeed the railing where Stone fell was 34 inches in height.[69] Team president, Nolan Ryan, said the railings exceeded the 26-inch minimum requirement in the adopted 2003 International Building Code

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[66] (1954) CarswellOnt 46 (Ont. C.A.) aff'd by, (1955) CarswellOnt 388 (S.C.C.), ["Deyo"].
[67] *Ibid.*
[68] "Reasonably foreseeable Mayhem: The law of Venue and Safety Security
http://www.adelmanlawgroup.com/articles/reasonable-foreseeability.htm#_ed7
[69] See Steinbach's "Texas Rangers' Railing Renovation May Not Impact Codes, Other Teams" (2011) at
http://www.athleticbusiness.com/articles/article.aspx?articleid=3784&zoneid=27.

and the 1988 Uniform Building Code, which were used during construction of the ballpark.[70] Currently, the International Building Code requires a height of 42 inches in front of aisles, but only 26 inches in front of seating.[71]

Interestingly, just a year earlier, a similar incident occurred at Rangers Ball Park when a fan fell from the second level to the lower bowl while trying to catch a foul ball and suffered a fractured skull and ankle.[72] At that time, Ryan was quoted as saying, "We feel like what we have is adequate. We feel like this was strictly an accident. The ballpark, when it was built, was built above specs as far as what is accepted, so we feel good about it."[73] A few weeks after Shannon Stone's death, the Rangers announced they would be raising the height of all railings in Rangers Ball Park to 42 inches.[74]

To what degree is compliance with code evidence of reasonableness on the part of the occupier? According to US negligence law, compliance with a legislative enactment or administrative regulation does not preclude a finding of negligence where a reasonable man would take additional precautions.[75] Therefore, compliance with available code is evidence of reasonableness but not determinative of the issue.

In order to assess the reasonableness of the railing height an inquiry must be made as to what purposes the current standard was intended to serve. The 26-inch minimum standard for front-row railings dates back to 1929 when it was incorporated into the National Fire Protection Association's new Building Exits Code.[76] The 26-inch standard was largely intended for symphonies and theatres and meant primarily to preserve an unobstructed view.[77] Undoubtedly, when the standard was first enacted, large spectator sports in arenas and stadiums were not what they are today. As such, sports facility occupiers may find that reliance on the fact that they "met code" is demonstrably undermined when consideration is given to the history behind the standard, and further, when select teams opt for 'best practices' and choose to exceed code requirements.

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[70] Wilson and Schrock, *Arlington officials say ballpark railing exceeds code* (posted July 7, 2011; accessed September 2012 from http://www.star-telegram.com/2011/07/07/3207691/fan-at-rangers-game-falls-to-his.html#storylink=cpy)

[71] Steinbach, "Rangers to Raise Ballpark Railings to 42" (2011) at http://www.athleticbusiness.com/editors/blog/default.aspx?id=584&t=Rangers-to-Raise-Ballpark-Railings-to-42

[72] "Rangers fan dies after 20-foot fall" http://sports.espn.go.com/dallas/mlb/news/story?id=6747510

[73] *Supra* note 63.

[74] *Supra* note 64.

[75] Restatement (Second) of Torts § 288C (1965) W. Keeton et al., Prosser and Keeton on the Law of Torts 233 (5th ed. 1984)

[76] "Fans Split on Stadium Safety Changes" http://espn.go.com/espn/otl/story/_/id/6899698/mlb-stadium-deaths-officials-raising-railings-some-fans-disagree-changes

[77] *Ibid.*

The issues raised above are also relevant within the Canadian context. Canada is home to a number of active arenas and ball parks which may or may not be considered old according to building codes. The Rangers and other professional baseball teams have voluntarily undertaken to raise railing heights as per modern day needs. Should the same not be expected of Rexall Place or the Scotiabank Saddledome? Canadian occupiers should expect to be held to the same standard as their American counterparts.

Code compliance will not serve as an absolute defence to claims of liability. The Act demands that occupiers consistently assess the reasonableness of their facility and impliedly requires proactive action. A recent example, whereby proactive action may prove to be effective risk management pertains to the Max Pacioretty and Zdeno Chara incident.[78] As a result of the incident, the league mandated new glass stanchions designed to prevent similar incidents.[79] As the game itself, the stadium or facility or what is considered "reasonable" changes or evolves, so too must the occupier.

F) SECURITY AND VIOLENCE

Providing adequate security is an important component of providing reasonably safe premises. Effective policing and security measures will help to ensure the safety of spectators.

In *Shetkla v. Topping*, a fight broke out at a baseball game at Yankee Stadium.[80] The court held that generally a stadium owner will not be liable for the reckless conduct of spectators which is not directed at any one person, but does result in injury to certain patrons.

In 1983, Britain suffered its worst ever sporting disaster, known widely as the Hillsborough disaster. Ninety three football fans were trampled and killed and 766 others were reportedly injured during the FA Cup semi-final between Nottingham Forest and Liverpool. The disaster was said to have been caused when too many Liverpool fans were allowed back into the stadium through a narrow gap leading to the field. A recent official inquiry into the disaster, determined that a leading cause of the incident was in fact the failure of effective police control.[81]

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[78] Pacioretty released from hospital http://www.cbc.ca/sports/story/2011/03/10/pacioretty-hit-police-investigation.html

[79] " New glass stanchions for NHL benches" http://www.winnipegfreepress.com/sports/hockey/new-glass-stanchions-for-nhl-benches-128059943.html

[80] 23 A.D.2d 750, N.Y.S.2d 982 (1965)

[81] http://articles.chicagotribune.com/2012-09-19/sports/sns-rt-uk-britain-hillsboroughbre88i139-20120919_1_hillsborough-stadium-south-yorkshire-police-watchdog [See also *Alcock v. Chief Constable of South Yorkshire Police*, [1992] 1 A.C. 310 at 407 (H.L.)]

In 1985, plaintiffs Philip and Marlene Noble attended an LA Dodgers game. The male plaintiff was assaulted by a number of other spectators, after instigating a fight in the parking lot. In overturning the judgment in favour of the plaintiffs, the California Court of Appeal concluded:

> Plaintiffs cannot claim that the Dodgers had any duty to control their conduct or to protect them against themselves. It could hardly be seriously contended that when someone instigates a fight on the Dodger parking lot…that the Dodgers should guarantee that he win the fight or that the other party not fight back. The evidence here is simply insufficient to support the judgment.[82]

Similarly, in 2011, Bryan Stow, a 42-year old Giants fan, was violently attacked by two Dodger fans in the parking lot of Dodger stadium leaving him near death.[83] Mr. Stow brought an action against the Dodgers. His claim alleges that Dodgers security staff failed to respond, failed to address legitimate safety concerns or intervene to aid Stow and his companions. It is further alleged that the Dodgers failed to take reasonable measures such as: having uniformed security in the parking lot;[84] presence of security at or near the taxi line; presence of mounted uniformed security; better lighting in the parking lots for night games; promoting responsible consumption of alcohol; ejection from both the stadium and parking lot of violent or intoxicated individuals.[85]

Concerns surrounding arena and stadium violence are not isolated to incidents where spectators assault other spectators. Unfortunately, there have been highly publicized incidents involving spectators attacked by players and coaches. One can imagine that in these instances, an injured plaintiff spectator will seek to recover from the deepest pockets, including the arena or stadium owner/operator. By way of example, on November 19, 2004, with the time running down on an NBA basketball game, a fight broke out between several of the on court players and fans courtside.[86] Ron Artest of the Indiana Pacers charged into the stands to physically confront a spectator who had hurled a plastic cup onto the court. Tie Domi, a well-known enforcer and former Toronto Maple Leaf, has had involvement in altercations with spectators in the past.[87] These examples illustrate unique circumstances that digress from normally contemplated reasonably foreseeable risks.

There is a strong argument to be made that incidents such as the above-mentioned assaults are now a reasonably foreseeable risk associated with attendance at a sporting event and that occupiers will have a difficult time absolving themselves of liability.

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[82] [1985] 168 Cal. App. 3d 912, 214 Cal. Rptr. 395
[83] Bryan Stow beating: "two suspects ordered to stand trial http://latimesblogs.latimes.com/lanow/2012/06/bryan-stow.html
[84] Bryan stow v. LA Dodgers, 2011 CSSC
[85] *Ibid.*
[86] "Artest, Jackson charge Palace stands" http://www.webcitation.org/mainframe.php
[87] "Take that! – Famous athlete vs. fan altercations" http://sport.malaysia.msn.com/photoviewer.aspx?cp-documentid=5633066&page=5

G) ALCOHOL

Unsurprisingly, the presence of large numbers of fans and high levels of alcohol consumption at sporting events makes for a volatile environment that requires skillful management.

In July 2009, David Sale was killed as a result of a severe beating endured at a Philadelphia Phillies game.[88] He was part of a group of eight people celebrating a friend's impending wedding. Later in the afternoon, Sale and his group of friends went to McFadden's Restaurant and Saloon, which is part of the ballpark but has a separate entrance. At the restaurant, his group clashed with a large group from South Philadelphia over a spilled drink. As a result of the incident, the bar ejected both groups at the same time and at the same entrance. The dispute continued and escalated as the groups walked to a distant parking lot. Three men pled guilty for Sale's fatal beating.

Alcohol has also been implicated in both the 1985 and 2011 assaults that took place at Dodgers Stadium.[89]

In *Jordan House v. Menow and Honsberger*, the Supreme Court of Canada first established that a commercial host held a special duty of care to its patrons who purchased and consumed alcohol.[90] The fact that the harm was foreseeable was important in finding liability on the part of the defendant. Since that decision, the courts have been asked to extend the same duty of care to employer hosts and social hosts, in line with current social trends regarding the consumption of alcohol.[91]

In Ontario, professional sports organizations are subject to a host of provisions contained within the *Liquor Licence Act.*[92] Section 29 prohibits the sale or supply of liquor to an intoxicated person.[93] Section 31(4)(a) indicates that no person shall be intoxicated in a place which the general public is invited or permitted access.[94] Section 61(3) provides that upon conviction of an offence under this Act a corporation may be liable to a fine of not more than $250,000.00.[95]

The common law and provincial legislation impose responsibility on a commercial enterprise to ensure the safety of its patrons, including the prevention of potential violence, by limiting consumption and, when appropriate, offering measures to accommodate intoxicated individuals.

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[88] "Ball park Beating left Victim's Face Unrecognizable" http://www.nbcphiladelphia.com/news/local/Sources-Man-Held-Down- Beaten-During-Ballpark-Fight.html
[89] *Ibid.*
[90] [1974] S.C.R. 239 [*Jordan House*]
[91] "Social Host Liability" http://partyprogram.com/Default.aspx?cid=16&lang=1
[92] *Liquor Licence Act* RSO 1990 c.L.19 [Act]
[93] *Ibid at S.29*
[94] *Ibid* at S.31(4)(a)
[95] *Ibid* at S.61(3)

V. NEW FRONTIERS

Tailgating Parties

The explosion of tailgating parties across North America brings with it a new frontier of liability. Typically associated with football games, the consumption of grilled food and alcoholic beverages, a tailgate party is a social event whereby sports fans gather with their vehicles and celebrate either before or after a game. Spectators will usually pay a reduced rate to enter the stadium's parking lot for the purpose of tailgating. Despite the fun and seemingly harmless atmosphere, severe injuries and even deaths resulting from tailgating activities have attracted international attention.[96]

Given that tailgaters typically pay a fee to enter the parking lot or other tailgating premises, an occupier has a duty to keep these premises safe for patrons. As parking lots have already been the site of violent assaults, occupiers must ensure that proactive measures are employed to preserve the peace and security of the public.

Party Decks

Recently, Fed Ex Field in Washington announced that it will be removing another 4,000 seats from the upper deck in the end zone.[97] Redskins' management has suggested that the renovations will make the stadium more fan-friendly with the creation of a "Party Deck." Tickets to watch the game from the Party Deck will be offered at a reduced rate and fans will be invited to gather around tables, without reserved seating.

It is interesting to note that Washington is not the first to implement a "Party Deck". The Dallas Cowboys have made similar renovations to Cowboys Stadium. In the Canadian Football League (CFL) context, president and CEO of the Winnipeg Blue Bombers, Garth Buchko, announced that certain sections of the new Investors Group Field will "cater to a noisier type atmosphere" when it opens for the 2013 season.[98]

One can imagine that these "party decks" will also create a new form of liability for occupiers, as is typically the case when new relationships are created (i.e. a new relationship among spectators who are free to imbibe and move about without the restriction of reserved seating). What may

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[96] "Yale student who killed fan at Harvard game when he drove his truck into her in car park apologises and blames mechanical fault" http://www.dailymail.co.uk/news/article-2063721/Yale-University-tailgating-accident-Nancy-Barry-30-died-student-crushed-her.html

[97] "Redskins to remove 4,000 seats from FedEx Field" http://www.washingtonpost.com/blogs/football-insider/post/redskins-to-remove-another-4000-seats-from-fedex-field/2012/04/02/gIQAc88brS_blog.html.

[98] Interestingly, the Blue Bombers also intend to create a "Family Zone" across five sections, one of which will be alcohol-free. See: http://bluebombers.com/article/blue-bombers-introduce-family-zone-at-new-investors-group-field

appear to be a fun and creative way to increase game attendance may have profound implications in the courtroom.

VI. RISK MANAGEMENT STRATEGIES

Properly implemented risk management strategies are an occupier's greatest weapon against exposure to liability. As evidenced from the jurisprudence each and every case is assessed on its own particular facts. This inherent unpredictably necessitates the need for measures designed to mitigate risk.

Fundamentally, risk management is the implementation of the following basic principles: (1) identification of risk; (2) Assessing the probability and severity of the risk and (3) determining measures that can be taken to reduce or eliminate risk.

a. Identification of Hazards

Hazard identification is a complex task viewed from the lens of occupier's liability. Seemingly innocuous elements, commonly found within the facility, arena or stadium, may in fact pose a risk of harm. Occupiers must err on the side of caution when assessing their facility by regularly referencing reasonably foreseeable harm. Courts are more inclined to consider a risk foreseeable when it has been documented to have occurred elsewhere in similar circumstances. Professional sports organizations need only look to incidents occurring at other venues to broaden their assessment of risk. The Shannon Stone case was a highly publicized incident, but was not the first of its kind. Given that a nearly identical incident occurred just a year and one day prior to Stone's death, there could be little credence given to a "we did not see this coming" type of argument.

b. Specificity

Occupiers must ensure that their particular facility is adequately assessed as per its own individual operations. The size, shape, design, location, function and other unique characteristic features of the facility will be considered and weighed. The courts will undergo a fact specific exercise in assessing liability.

c. Reasonable System

A reasonable system entails effective standardized procedures that ensure the premises are properly inspected, maintained, repaired, monitored, up to code etc. These practices help demonstrate to a court that the occupier has taken all reasonable precautions in providing a safe premises.

d. Proactive Measures

Occupiers should not restrict themselves to reactive remedial measures but also concern themselves with proactive measures in addressing safety concerns. As discussed in the previous case law, occupiers are wise to learn from the pitfalls and shortcomings of others in similar circumstances.

VII. CONCLUSION

Through jurisprudence, the courts have contextualized and given meaning to the provisions of the *Occupiers' Liability Act*. Critical themes emerge from the relevant case law and as such provide significant guidance.

In assessing liability, the courts undergo a factually sensitive exercise in determining the appropriate standard and level of care. The courts take a holistic approach by appreciating each and every detail of the case and weighing them accordingly. The nature of the activity, the degree of inherent or associated risk, and standard industry practices will all be considered in assessing the reasonableness standard. Notably, with this specificity comes a degree of unpredictability.

The legislature's intent was never to place unreasonable demands upon occupiers and owners by equating them to insurers. It is impractical and impossible for occupiers to guarantee that premises will be completely risk-free. The required standard is reasonableness and not perfection.

A carefully developed, thorough and well-implemented risk management plan can help to reduce risks to participants, reduce insurance costs and help defend against potential lawsuits.

The study of occupiers' liability is a multi-faceted and multi-layered exercise. More importantly, it is an evolving area of law. As an example, in the 1986 case of *Neinstein v. Los Angeles Dodgers, Inc*. the plaintiff alleged that the defendant Dodgers failed to protect her from injury when she was struck with a batted ball.[99] In a short and succinct decision, the court was satisfied that the plaintiff was sufficiently warned of the risk of the sport by common knowledge of the nature of the sport and the warning provided on the back of her ticket. The Dodgers were under no duty to do anything further but print a warning on a ticket that the plaintiff may be injured at the game and that in the event she was, they would not be held liable. Modern Canadian courts will likely undergo a much more sophisticated analysis in determining reasonableness and fault.

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[99] [1986] 185 Cal. App. 3d 176

Occupiers must go further than satisfying “common sense” standards; they must fulfill their duty to provide reasonably safe premises that are free of reasonably foreseeable risks. Given that occupiers must balance the economic burden of liability, the protection of patrons and the preservation of entertainment value, strategic measures are required. Ultimately, perfection can never be achieved but what is considered “reasonable” is demonstrable. As outlined in the discussion above, the more precautionary measures employed by the occupier, the greater the chance of success in defending against potential claims.