WHO IS RESPONSIBLE WHEN SPECTATORS ARE INJURED WHILE ATTENDING PROFESSIONAL SPORTING EVENTS?

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INTRODUCTION

More than 15 million Americans attend professional sporting events each year, and injuries to spectators as a result of objects leaving the field (or rink) are commonplace.[1] One study found that during 127 National Hockey League ("NHL") games, pucks injured 122 people, 90 of which required stitches, and 57 required transport to a hospital emergency room.[2] Another study found that injuries to Major League Baseball ("MLB") fans from foul balls occur at a rate of 35.1 injuries per million spectator visits.[3]

Contrast this with the incidence of injuries on passenger planes, defined as having 10 or more seats. In 2006 there were only four serious injuries of the total 750 million passenger enplanements[4] and going to a professional sporting event is comparatively much more risky than air travel.

Although injuries can happen at virtually any professional sporting event, they are most common at baseball and hockey games,[5] with auto racing and golf rounding out the top four.[6]

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[1] James E. Winslow and Adam O. Goldstein, *Spectator Risks at Sporting Events*, THE INTERNET JOURNAL OF LAW, HEALTHCARE AND ETHICS, 2007, Vol. 4, No. 1.

[2] *Id.*, citing D. Milzman, *The Puck Stops Here: Spectator Injuries, A Real Risk Watching Hockey Games*, ANNALS OF EMERGENCY MEDICINE, Oct. 2000.

[3] *Id.*, citing A.M. Milstein et al., *Variables Influencing Medical Usage Rates, Injury Patterns, and Levels of Care for Mass Gatherings*, PREHOSPITAL DISASTER MED., 2003.

[4] *See* http://www.ntsb.gov/aviation/Table3.htm.

[5] *See* Winslow and Goldstein, *supra* note 1.

[6] *See* Dave Scheiber, *Danger in the Grandstands*, ST. PETERSBURG TIMES ONLINE, Mar. 26, 2002, http://www.sptimes.com/2002/03/26/Floridian/Danger_in_the_grandst.shtml. Although more injuries occur at baseball and hockey games, more fatalities occur to spectators at auto racing events. For example, from 1990-2002,

So where does the law stand on this issue? Consistently in favor of the teams, leagues, and/or event promoters. Courts operate under the premise that spectators assume the risk of attending a game/event, and that it should be obvious to the spectator that a baseball, puck, tire, or golf ball can hit them.[7]

"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,"[8]

Notwithstanding of the court decisions, some leagues and state legislators have taken matters a step further. Most, if not all leagues and teams, now place a disclaimer and an assumption of the risk statement on the back of each spectator ticket. Additionally, the NHL responded to a recent spectator death by increasing safety devices at venues.[9] Specifically, protective screens (the "glass") around the rink must be at least five feet high and protective netting must stretch from the top of the glass to the ceiling of the venue.[10]

But the law has not always been so favorable to venue owners; from the early 1900's through the 1950's, courts ruled consistently in favor of the injured spectators.

This paper discusses several of such early cases favoring spectators, and the shift in the law toward legislative and court protection of venue owners and operators.

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29 spectators have been killed by cars or flying parts, and another 70 have been injured, at the Daytona Beach Racetrack in Florida.

[7] *See*, for example, *Loughran v. The Phillies*, 888 A.2d 872 (2005). See also *Jones v. Three Rivers Management Corp.*,394 A.2d 546 (1978).

[8] *Loughran*, 888 A.2d 872 (2005) (holding that getting hit by a ball after a play has stopped is the same risk that a baseball attendee assumes when they are hit by a ball in play, Senior Judge Peter Paul Olszewski wrote).

[9] Darren Smith, *Obstruction Crackdown, Safety Netting Usher in New NHL Season*, Oct. 7, 2002, http://www.nhl.com/nhl/app?articleid=3551&page=NewsPage&service=page.

[10] *See* www.nhl.com.

I. THE 1900'S THROUGH THE 1950'S: VENUE LIABILITY

A. Shanney v. Boston Madison Square Garden Corp.

Through the first half of the twentieth century, courts consistently found the venue liable for fan injuries which occurred during the course of the game.

For example, in the 1930s, Josephine Shanney's sister purchased a second-row ticket for Ms. Shanney to attend her first hockey game at the Boston Garden.[11] During the game, Ms. Shanney "was suddenly struck and injured by a 'puck' which was driven off the playing surface."[12] At trial, Ms. Shanney argued that "[t]he defendant gave no notice of the danger from flying 'pucks'"[13] and that the arena "failed to perform the duty which it owed to her as its invitee to use due care to see that its premises were reasonably safe for the intended use or to warn her of dangers which were not obvious."[14]

In turn, the arena argued that "persons attending such a game must be presumed to know where they are going, and that the risk is in effect an obvious one which the patron must be held to have assumed."[15]

Despite a three-foot protective fence which extended above the boards, the court partially relied on the fact that Ms. Shanney had never attended a hockey game as it held, "[T]here was no presumption that the plaintiff knew and appreciated the risk," upholding the jury's verdict and award for her injury.[16]

B. Lemoine v. Springfield Hockey Ass'n.

A few years after *Shanney*, another lawsuit was filed in Massachusetts. The facts were distinguishable because the injured fan admitted to attending hockey games for several years,

[11] Shanney v. Boston Madison Square Garden Corp., 5 N.E.2d 1 (Mass. 1936).
[12] *Id.* at 1. (Note that the word *puck* is in quotes in the court's decision.).
[13] *Id.*
[14] *Id.*
[15] *Id.* at 2.
[16] *Id.*

and had knowledge that pucks can and do enter the stands.[17] During the game the fan became sick and left his seat to go to the bathroom; it was at that time when he was struck with a puck.[18] The court upheld the jury's verdict for the fan, holding that the fan's knowledge of the game was not an issue, and that a jury could find that pucks entered the stands so frequently that the fan could properly rely on protections provided (or, in this case, not provided) by the arena.[19]

C. Schwilm v. Pennsylvania Sports

The *Schwilm* case involved a woman sitting in a high risk part of a hockey arena, specifically, "behind the goal cage at which the players shoot."[20] Ms. Schwilm was struck in the head with a puck, and the jury awarded her $2,500 for her injuries.[21] The appellate court affirmed the award despite an explicit acknowledgement that baseball fans assume the risk of being hit by balls and bats at baseball games, because it held the hockey fan had "a right to rely on the protection afforded."[22]

The aforementioned cases demonstrate the willingness of courts to find arenas liable through the first half of the twentieth century, however, and as mentioned earlier, the proverbial pendulum began to swing the other direction in the second half of the 1900's.

II. THE SHIFT IN THE LAW

A. Caselaw

The public's (and, correspondingly, the courts') awareness of the inherent injuries that can occur to fans during sports events, coupled with the increased popularity of professional

[17] Lemoine v. Springfield Hockey Ass'n, 29 N.E. 2d 716, 717 (Mass. 1940)
[18] *Id.* at 717.
[19] *Id.* at 718.
[20] Schwilm v. Pennsylvania Sports, 84 Pa. D. & C. 603, 605. The facts of this case involved an injury to a hockey fan, however, in the holding, the court stated it was "not unmindful of the fact that our appellate courts have held that spectators at baseball games assume the risk [of injury].".
[21] *Id.* at 604.
[22] *Id.* at 605.

sports in the second half of the twentieth century forced the courts to protect the business of professional sports, and, rulings against venue owners diminished.[23]

The 1986 case of *Neinstein v. Los Angeles Dodgers* looked at whether the owner of a baseball stadium had a duty to protect spectators from the natural hazards generated by the way in which the game itself is played.[24] The court explained the shift when it held for the venue, reasoning,

> As we see it, to permit plaintiff to recover under the circumstances here would force baseball stadium owners to do one of two things: place all spectator areas behind a protective screen thereby reducing the quality of everyone's view, and since players are often able to reach into the spectator area to catch foul balls, changing the very nature of the game itself; or continue the status quo and increase the price of tickets to cover the cost of compensating injured persons with the attendant result that persons of meager means might be 'priced out' of enjoying the great American pastime. To us, neither alternative is acceptable. In our opinion it is not the role of the courts to effect a wholesale remodeling of a revered American institution through application of the tort law.[25]

The majority of the lawsuits brought against venues by spectators allege breach of duty and negligence on the part of the owner/operator of the venue, as well as against the teams and players themselves. Courts generally started to accept the position asserted by the owner/operator of the venues, that people who attend sporting events assume the risks inherent to the game.

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[23] In 1960-61, total hockey tickets sold to fans were 2.3 million (*National Hockey League Official Guide & Record Book 2008*) while the 2007-08 season had 21,236,255 sold (http://puckstopshere.blogspot.com/2008/04/nhl-sets-regular-season-attendance.html).
[24] Neinstein v. Los Angeles Dodgers, Inc., 185 Cal.App.3d 176 (1986).
[25] *Id.* at 180-81.

Therefore, determining what constitutes risks "inherent to the game" is the main issue courts must decide. In a baseball game, if a foul ball is hit into the stands during the regular action of the game, courts will avoid findings of liability. The same is generally true for hockey when the puck goes in to the stands during the normal course of play. However, situations that are not so easily definable as being a part of the regular action of the sport make the question of liability more difficult.

Courts have long held that there is no liability for a spectator struck by a batted ball, whether during the course of the game or in pre-game practice. A good example of this is *Lorino v. New Orleans Baseball & Amusement Co.,*[26] where a batted ball injured a spectator during the pre-game practice, while the spectator voluntarily watched the practice from the "bleachers."[27] The court defined "bleachers" as unprotected seating, the nearest point to home plate of which was 158 feet.[28] "It is knowledge common to all that in these games hard balls are thrown and batted with great swiftness; that they are liable to be muffed or batted or thrown outside the lines of the diamond, and visitors standing in position that may be reached by such balls have voluntarily placed themselves there with knowledge of the situation, and may be held to assume the risk."[29] The court found that the appellant had assumed the risk of common, known, and inherent parts of the game, and affirmed the trial court's dismissal of the suit.

In *Loughran v. The Phillies*, the court sustained the trial court's grant of summary judgment based on the general 'no duty' rule to spectators for injuries happening in the course of the game.[30] On July 5th, 2003, Philadelphia Phillies Center Fielder Marlon Byrd flipped the ball

[26] Lorino v. New Orleans Baseball & Amusement Co., Inc., 16 La.App. 95, 133 So. 408 (1931).
[27] *Id.*
[28] *Id.*
[29] *Id.* at 96-97.
[30] *Loughran*, 2005 PA Super 396, No. 652 EDA, 888 A.2d 872 (2005).

into the stands after catching the last out of the inning.[31] Jeremy Loughran was struck by the ball and treated at the hospital on more than one occasion for various injuries to the head.[32] There were five questions at issue on appeal: "1) Whether a spectator at a baseball game assumes the risk of being struck in the face by a ball; 2) Whether being struck in the face by a ball is an inherent risk of attending a game; 3) Whether the "no duty" defense is available to appellees; 4) Whether the "no duty" rule was properly applied; and 5) Whether summary judgment was appropriate."[33]

The court stated that that the "application of the 'no duty' rule hinges on whether the activity in question is a 'common, frequent, or expected part of the game.'"[34] To that end the court stated that "[e]ven a casual baseball spectator would concede it was not uncommon for a player to toss a memento from the game to nearby fans,"[35] and as such it constituted an inherent and known risk of the game. Therefore, the court affirmed the judgment of the trial court finding that it did not err in applying the "no duty" rule and finding no liability on the part of any of the defendants, who, in this case, were the Phillies organization and Marlon Byrd.[36]

Similarly, in *Rees v. Cleveland Indians Baseball Co.*,[37] the court affirmed a judgment in favor of the defendant in a suit alleging "negligence and willful and reckless failure to protect spectators from objects flying into unprotected and uncovered stands and failure to warn spectators of these risks."[38] In that case, a woman was struck in the face by a broken bat and the trial court issued a summary judgment for the team on the grounds of primary assumption of the

[31] *Id.* at 873-74.
[32] *Id.* at 874.
[33] *Id.* (Citing Appellant's Brief, at 4.)
[34] *Id.*at 875.
[35] *Id.* at 876.
[36] *Id.* at 877.
[37] Rees v. Cleveland Indians Baseball Co., 2004 WL 2610531 1 (Ohio 2004).
[38] *Id.*

risk (another name for the "no duty" rule).[39] In so affirming, the appellate court rejected the appellants argument that "a genuine issue of material fact exists regarding whether they are subject to the defense of primary assumption of the risk."[40] The appellants argued, "they agree that baseballs entering the spectator stands are a common occurrence and the dangers of such are open, obvious, and expected. However, they maintain that broken bats are not a common occurrence and, thus, they claim they were unable to appreciate such a risk."[41]

The court explained, "While we recognize that a majority of these cases focus on injury sustained when baseballs enter the stands, Ohio courts and other jurisdictions have applied the same principles of primary assumption of the risk in non-baseball cases."[42] Moreover, the court posited that Mrs. Rees had received the tickets from a relative, and had been going to the same seats at different games for years prior to the incident.[43] She voluntarily sat in the unprotected portion of the stadium and had never contacted any of the stadium personnel about a fear of sitting in that area.[44] For those reasons, the court found persuasive the argument for primary assumption of the risk extending to injury caused by the flying broken bat.[45]

Courts have also used the doctrine of primary assumption of the risk in hockey cases. In *Nemarnik v. The Los Angeles Kings Hockey Club, L.P.*,[46] a woman sued the Los Angeles Kings, the NHL, and the owners and operators of the arena (the "Forum") for alleged negligence when, on April 18, 1999, she was struck by a puck during pre-game warm ups while her view of the ice was obstructed by the crowd in front of her.[47] The court affirmed the judgment of the trial court

[39] *Id.*
[40] *Id.* at 2.
[41] *Id.*
[42] *Id.* at 3.
[43] *Id.* at 4.
[44] *Id.*
[45] *Id.*
[46] Nemarnik v. The Los Angeles Kings Hockey Club, L.P., 103 Cal.App.4th 631, 127 Cal.Rptr.2d 10 (2002).
[47] *Id.*

which had "granted defendants' motion for nonsuit at the beginning of trial," and had "concluded, as a matter of law, that defendants were immune from liability under the primary assumption of risk defense.[48] Further, the "[t]rial court also awarded defendants costs of $12,870."[49]

An interesting factual difference in that case is that the Forum has a policy regarding late-comers which states that the ushers prohibit them from obstructing the view of seated patrons, and that they stand along the back wall until there is a stoppage in play and the risk of errant pucks flying into the stands is at a minimum.[50] Further, the appellants expert testified at trial that the ushers did not comply with these standards on the day of the incident.[51] Despite this, the court stated that "[o]bstructions of view caused by the unpredictable movements of other fans are an inherent and unavoidable part of attending a sporting event. Views are blocked whenever fans spontaneously leap to their feet or move to and from their seats."[52] The court further stated that no court has imposed a legal duty upon an athletic team, sports league, or sports arena to prevent large crowds of spectators, during pregame warm-ups, from congregating in the aisles near the front of the arena, or from blocking the views of seated spectators."[53]

Ultimately, the court followed the analysis of *Knight v. Jewett*,[54] and held "'defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself,' and have done nothing to increase the risks inherent in the sport. Just as stadium owners

[48] *Id* at 634..
[49] *Id.*
[50] *Id.* at 634-35.
[51] *Id.* at 635.
[52] *Id.* at 638-39
[53] *Id.* at 639.
[54] Knight v. Jewett, 3 Cal.4th 296, 11 Cal.Rptr.2nd 2 (1992).

owe no duty to eliminate the risk of injury from foul balls, we similarly conclude defendants owe no duty to eliminate the inherent risk of injury from flying pucks."[55]

In another hockey case, *Hurst v. East Coast Hockey League, Inc.*, the court held similarly to the *Nemarnik* court.[56] There, the spectator entered the arena during pre-game warm-ups through a curtained entrance/exit positioned behind the goal and was struck in the face by a puck.[57] The court stated the law on the issue as follows:

> Primary implied assumption of risk is not a true affirmative defense, but instead goes to the initial determination of whether the defendant's legal duty encompasses the risk encountered by the plaintiff.... [T]he Tennessee Supreme Court summarized the doctrine in the following way: In its primary sense, implied assumption of risk focuses not on the plaintiff's conduct in assuming the risk, but on the defendant's general duty of care.... Clearly primary implied assumption of risk is but another way of stating the conclusion that a plaintiff has failed to establish a prima facie case [of negligence] by failing to establish that a duty exists.[58]

In that regard, the court held "under the doctrine of implied primary assumption of risk, respondents' duty of care did not encompass the risk involved. The risk of a hockey spectator being struck by a flying puck is inherent to the game of hockey and is also a common, expected,

[55] *Nemarnik*, 103 Cal.App.4th at 643 (quoting *Knight*, 3 Cal.4th at 315).
[56] Hurst v. East Coast Hockey League, Inc., 371 S.C. 33, 39, 637 S.E.2d 560, 563 (2006).
[57] *Id.* at 35-36.
[58] *Id.* at 37.

and frequent risk of hockey."[59] Moreover, as the court did in *Nermarnik*, the court here held that the action failed as a matter of law under the theory of primary assumption of the risk.[60]

The conclusion in these cases seems to be where no duty is owed, the courts will enter a judgment as a matter of law for the defendants. The courts are increasingly broad in their definitions of what constitutes common or inherent risks of the game and it does not seem to matter whether the injuries happened in pre-game warm-ups or during the actual game, courts will find no duty exists in either instance. Further, if more states follow suit, and adopt non-liability statutes such as the one in Colorado, the question of negligence and duty owed to the spectator will not make it as far as it has in these cases.

B. Statutes

Although the majority of state courts addressing the issue have adopted a pro-venue stance,[61] several state legislatures, including Illinois and Colorado, took further steps and passed laws explicitly pushing the liability from the inherent dangers and risks of observing professional baseball onto the spectators. This is commonly knows as the "limited duty rule" or the "baseball rule."[62] Colorado Revised Statute 13-21-120 is known as the "Colorado Baseball Spectator Safety Act of 1993," and states in part, "Limiting the civil liability of those who own professional baseball teams and those who own stadiums . . . will help contain costs, keeping

[59] *Id.* at 38.
[60] *Id.* at 39.
[61] *See* Charles Toulant, *Baseball Fan Hit by Foul Allowed to Sue Park Owner for Negligence*, LAW.COM, September 23, 2005, http://www.law.com/jsp/article.jsp?id=1127379914733.
[62] Turner v. Mandalay Sports Entertainment, 180 P.3d 1172, 1175 (Nev. 2008) ("In addressing this issue, at least 12 jurisdictions have adopted the "limited duty rule," which places two important requirements on stadium owners and operators. First, the rule requires stadium owners and operator to provide a sufficient amount of protected seating for those spectators 'who may be reasonably anticipated to desire protected seats on an ordinary occasion.' Second, it requires owners and operators to provide protection for all spectators located in the most dangerous parts of the stadium, that is, those areas that post an unduly high risk of injury from foul balls (such as directly behind home plate).").

ticket prices more affordable."[63] Furthermore, "[s]pectators of professional baseball games are presumed to have knowledge of and to assume the inherent risks of observing professional baseball games, insofar as those risks are obvious and necessary."[64] Therefore, "the assumption of risk set forth . . . shall be a complete bar to suit and shall serve as a complete defense to a suit against an owner by a spectator for injuries resulting from the assumed risks."[65]

C. Exceptions

As always, there are exceptions to the rule. One notable exception occurred in 2002 in Ohio, after a thirteen year old girl was struck and killed by a hockey puck which was deflected into the stands at an NHL game.[66] The family of the girl threatened to sue the NHL, the Columbus Blue Jackets, and Nationwide Arena, but settled with the three entities for $1.2 million.[67] In response, the NHL mandated that protective nets from the top of the glass to the ceiling be installed behind the goals in all NHL venues.[68]

III. CONCLUSION

In sum, when spectators attend professional sporting events, they assume the risks of the inherent dangers of the event, including pucks, balls, bats or tires and other objects inherent to the game which may come off the playing field and cause bodily injury of even death, unless the venue owner/operator severely deviates from their duty of care.

So when you hear the coach yell, "Keep your eye on the ball," they may be talking to you.

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[63] Colo Rev. Stat. § 13-21-120 (2007).
[64] *Id.*
[65] *Id.*
[66] Associated Press, *Coroner's Report-Puck Snapped Girl's Head Back, Damaging Artery*, Mar. 20, 2002, http://sportsillustrated.cnn.com/hockey/news/2002/03/20/puck_death_ap/.
[67] Associated Press, *Ohio High Court: Release Settlement in Case of Girl Killed by Puck*, Apr. 14, 2004, http//www.thefirstamendmentcenter.org/news.aspx?id=13176.
[68] *See* NHL '02-'03: New Rules, new fan protection, new Red Wings, http://www.nhl.com/nhl/app?articleid=3211&page=NewsPage&service=page (October 5, 2002).