LAW REVIEW APRIL 1997

SPECTATORS ASSUME OBVIOUS RISKS IN UNPROTECTED AREAS OF BALLFIELD

James C. Kozlowski, J.D., Ph.D.

In 1995, the Utah supreme court, in the case of *Lawson v. Salt Lake Trappers, Inc*., 901 P.2d 1013 (Utah 1995), noted that "the standard for 'reasonable care' for a baseball park has been extensively explored in case law from other jurisdictions" leading to the adoption of the following "majority rule":

> The majority rule is that an owner of a baseball stadium has a duty to screen the most dangerous part of the stadium and to provide screened seats to as many spectators as may reasonably be expected to request them on an ordinary occasion. The area behind home plate is generally conceded to be the most dangerous area of a ball park... Having provided adequate protection for those spectators seated, or standing, in the area behind home plate, liability may not be imposed for failing to provide additional screening along the baselines of its field where the risk of being struck by a stray ball was considerably less.

In adopting this limited duty of care for ballfield spectators, the Utah supreme court found itself "persuaded" by the following sound "policy and rationale of the majority rule":

> The majority rule insures that those spectators desiring protection from foul balls will be accommodated and that seats in the most dangerous area of the stadium will be safe. At the same time, the majority rule recognizes baseball tradition and spectator preference by not requiring owners to screen the entire stadium.

Applying the majority rule, the Utah supreme court, therefore, affirmed the holding by the trial court that "defendants breached no duty to the Lawsons by not fencing the entire playing field."

OPEN & OBVIOUS RISK?

In the case of *Bellezo v. State of Arizona*, 851 P.2d 847 (Ariz.App. 1993), the court noted that "the risk of being struck by a foul ball at a baseball game" is generally considered "an open and obvious condition" limiting landowner liability for negligence. As described by the court, "a land possessor is not ordinarily found negligent for injuries to invitees from conditions which are open and obvious, nor for those which are known to the invitee."

> The underpinnings of that general principle are self-evident: when a danger is open and obvious, the risk of harm generally is slight because the condition is easily perceived and therefore does not pose an unreasonable risk against which the landowner must protect invitees.

Accordingly, the court found the danger of being struck by a foul ball was open and obvious to plaintiff in this case. In reaching this determination, the court equated "the legal effect of the open and obvious nature of the situation" encountered by baseball spectators to the following situation:

> One may say as a matter of law that the government would not be negligent in failing to post a sign warning visitors to the Grand Canyon that it is a long way to the bottom and those who stand too close to the edge may lose their balance, fall and get hurt.
>
> A similar observation applies to the failure of an owner of a baseball park to post a sign warning fans that no screen protects them from the open and obvious risk of foul balls if they sit in an unscreened area. The lack of a screen is as obvious as the fact that the Grand Canyon is a chasm, and the danger that a spectator hit by a foul ball may be injured is as evident as the likelihood that one who falls into the Grand Canyon may be hurt.

Having found the risk was open and obvious, the court also considered whether the defendant had complied with the above described legal duty to protect spectators from an unreasonable risk of being injured by a foul ball. In this particular instance, the court found the backstop behind home plate was in an area where the vast majority of foul balls were hit during a game. Further, the court noted that the backstop (measuring 85 feet in width and 32 feet in height) protected 1,800 seats in a stadium with a seating capacity of 7,800. Moreover, the court noted that spectators seldom requested seating solely for protection and the number of available protected seats were sufficient to fill expected requests.

In this case, plaintiff contended that her implied request for protected seating was denied. Specifically, plaintiff asserted that defendant's usher had asked her to move from a protected seat behind home plate reserved for season ticket holders directly to her assigned complimentary seat behind the visitor's dugout. In directing her to such free seating, the court found defendant had not denied plaintiff to access to seats in all screened areas. On the contrary, the court noted, 201 screened seats were available to the public for purchase on the day the foul ball struck plaintiff. Accordingly, the court found the defendant was not liable for injuries sustained by those spectators, like plaintiff, "who choose to sit in unscreened areas, despite the open and obvious risk of sitting in such areas and the availability of a protected alternative."

UNUSUAL CROWD?

In the case of *Swagger v. City of Crystal*, 379 N.W.2d 183, (Minn.App. 1985), plaintiff alleged that the number of available protected seats were insufficient to accommodate her during the game in which she was injured. In this case, plaintiff was struck in the face by a wild throw at defendant's softball game. When struck, plaintiff was standing six feet behind first base and was thirty feet from the baseline. Because the softball game was part of the "Crystal Frolics," sponsored by the defendant's

parks and recreation department, there was an unusual crowd numbering between 600 and 1,000 persons. As a result, when plaintiff arrived at the game, she found the bleachers behind the backstop, with a capacity for fifty to seventy spectators, were full. Since she was unable to obtain a screened seat, applying the above cited majority rule, plaintiff maintained that the landowner had negligently failed to provide adequate protection for as many spectators as may reasonably be expected to desire such screened seating in the course of an ordinary game.

While acknowledging legal duty to "provide screen for the most dangerous part of the grandstand and for those who may be reasonably anticipated to desire protected seats," the court held that the ballpark owner "need not provide screened seats for all who want them." Specifically, under the circumstances of this case, the court found landowners "need not provide such seats for an unusual crowd." On the contrary, the court found the city owed no legal duty to spectators, including plaintiff, "other than provide some protected seating." Given such protected seating , the court held that plaintiff had assumed the risk of injury when she voluntarily encountered the inherent dangers of being a spectator at a softball game:

> [N]o adult of reasonable intelligence, even with limited experience... could fail to realize that he would be injured if he was struck by a thrown or batted ball such as are used in league games of the character he was observing, nor could he fail to realize that foul balls were likely to be directed toward where he was sitting...
>
> Normally, the management's duty to protect its patrons from thrown or batted balls ceases when it offers the spectators a choice between screened-in or open seats unless some reason exists requiring a fuller explanation of the perils involved.

RISK INCLUDES EQUIPMENT?

In the case of *Sprunger v. East Noble School District*, 495 N.E.2d 250 (Ind.App. 1986), the plaintiff was struck by a by practice weight "donut" which flew from the end of a bat being swung by a player in the on-deck circle during a baseball game. Unless caused by intentional or outrageous misconduct (i.e., willful/wanton injury), the court found spectators assume the risk that "balls, bats, masks, helmets, other equipment may occasionally accidentally or negligently enter spectator area." At the time of the injury, the court noted that the player was entitled to be in the on-deck circle and was doing what was expected, i.e., warming up using an authorized bat and swing weight.

WARM-UP WITHIN SCOPE OF GAME?

In the case of *Clark v. Goshen Sunday Morning Softball*, 493 N.Y.S.2d 262 (1985), plaintiff was struck in the eye by an errantly throw during pre-game warm-up. When struck, plaintiff was actually outside the ballfield and was leaning over perimeter fence engaged in conversation. Accordingly,

plaintiff argued that he was a mere bystander, rather than a spectator, because he had merely come there to introduce his adult son to the other players" on the baseball team. In addition, plaintiff argued that he had "not assumed the risk of being hit by a ball since he was injured during warmup, rather than the actual ballgame."

Based upon "the known and recognized dangers of such sports contests," the court found plaintiff was "a spectator as a matter of law." Further, the court rejected plaintiff's "warmup" argument as "a distinction without a difference." According to the court, "a spectator at a baseball game may be regarded as assuming such risk from balls necessarily inherent to the game." In the opinion of the court, "the practical realities of this sporting event (i.e. baseball) and whether or not the umpire has actually called, 'Play Ball,' does not minimize the dangers to spectators present during the actual team warmups on the field pregame." Since adequate screening existed behind home plate, and the defendant league as well as the players owed no further legal duty to further protect plaintiff from being inattentive to the inherent risks of the game, including errant throws during pre-game warmups.

DISTRACTION THEORY EXCEPTION?

As in *Clark*, the plaintiff in *City of Milton v. Broxson*, 514 So.2d 1116 (Fla.App. 1987) was struck by an errantly thrown warm-up ball. However, unlike *Clark*, this warm-up activity was not within the scope of the softball game plaintiff was watching at the time of injury. Rather, plaintiff was struck by an errant throw from a player waiting to take the field for the next scheduled game. Further, it was common practice for such players to warm-up adjacent to the bleachers while games were still being played on the ballfield. Prior to plaintiff's injury, this practice had resulted in other spectators being struck by errant throws.

As a general rule, when dangers are open and obvious, persons looking out reasonably for their own safety should be able to take measures which avoid or mitigate the risk of injury. Accordingly, the owners and operators of ballfields are generally not liable for physical harm caused to spectators because the danger of being struck by an errantly thrown ball or foul ball is considered known or obvious.

On the other hand, a landowner may be liable if the landowner should anticipate the harm despite such knowledge or obviousness. This exception to the general rule of no landowner liability for open and obvious dangers on the premises is sometimes referred to as the "distraction theory." For landowner liability, however, the distraction must be created by the landowner and not be self-induced by the plaintiff's inattention to obvious risks.

Applying this reasoning to the facts of the case, the court found that the defendant city should have anticipated the hazardous activity and taken precautions, despite plaintiff's knowledge of the obvious danger. Specifically, the city should have taken measures to eliminate the known risks to spectators

associated with warm-up activity unrelated to the game being played. Unlike the inattentive spectator in *Clark,* Broxson could not be expected to watch his game and, at the same time, protect himself against errant throws from warm-up activity occurring behind the bleachers. In other words, individuals, like Broxson, would have to have eyes in the back of their heads to protect themselves from otherwise obvious, yet unreasonable, dangers on the premises created by the landowner.

FORESEEABLE DISTRACTION PART OF GAME?

In contrast to *Broxson,* the federal district court in the case of *Gunther v. Charlotte Baseball Club, Inc.* (S.C. Dist. 1994) found the distraction theory inapplicable where the distraction was both foreseeable and within the scope of the game in which plaintiff was a spectator. In this particular case, plaintiff, age 37, was struck in the face by a foul ball while attending defendant's Triple A baseball game. When struck, plaintiff was seated behind the third base dugout, 81 feet from homeplate. Although this was the first baseball game she attended as a spectator, plaintiff did admit that she knew the game of baseball "in passing."

Defendant had warned spectators of foul ball hazards several times during the game on the public address system. Since she arrived after the game began, plaintiff missed the first warning and was struck before the second warning.

Immediately prior to being struck, plaintiff's attention was momentarily diverted by another foul ball which shattered glass in the press box. Plaintiff was struck in the eye while she was returning her attention back to the game. The press box glass had been shattered on three of four prior occasions. Accordingly, plaintiff claimed that these incidents served notice on defendant that the sports facility was defectively designed. Moreover, plaintiff contended that these incidents made it foreseeable that spectators, like herself, would be momentarily distracted by the sound of shattering glass in the press box and, thus, more vulnerable to injury by foul balls.

As in *Broxson,* under the distraction theory, plaintiff argued that the defendant landowner should have anticipated the harm she suffered despite her knowledge or obviousness of the risk. The court rejected this argument. In the opinion of the court, to apply "distraction" doctrine in a rigid fashion would soon "swallow up" the general rule, i.e., baseball spectators in unprotected seats assume the open and obvious risk of being struck by foul balls. According to the court, baseball games, like other sporting events, routinely involve distractions which are both enjoyed and foreseeable by spectators. Specifically, the court noted that "soft drink and peanut vendors, giant team mascots, raffles for prizes, and high-tech scoreboards all compete for the attention of patrons who attend athletic events." Further, the court found plaintiff's alleged ignorance of the game, as a first time spectator, was no excuse. In the opinion of the court, no adult of reasonable intelligence could watch a game without realizing the potential risk of being struck by a foul ball. The court, therefore, held that plaintiff "must be held to have assumed the risk of the hazards to which she was exposed," i.e., being distracted and subsequently

struck by a foul ball.