

TEAM MASCOT ANTICS NOT ASSUMED SPECTATOR RISK

**LOWE v. CALIFORNIA LEAGUE OF PROFESSIONAL BASEBALL
CALIFORNIA COURT OF APPEAL
FOURTH DISTRICT, DIVISION TWO
July 1, 1997**

In this case, plaintiff John Lowe was seriously injured when struck on the left side of his face by a foul ball while attending a professional baseball game. The facts of the case were as follows:

On July 26, 1994, at approximately 7:05 p.m., Lowe was in attendance at a baseball game between the Rancho Cucamonga Quakes and the San Bernardino Spirit. The game was being played at "The Epicenter," home field of the Rancho Cucamonga Quakes, Class "A," minor league baseball team. The Quakes, at their home games, feature a mascot who goes by the name of "Tremor." He is a caricature of a dinosaur, standing seven feet tall with a tail which protrudes out from the costume...

Lowe had been to the Epicenter on at least two previous occasions. Lowe had witnessed foul balls being hit into the stands on many occasions. Lowe had personally witnessed at least one fan being struck by a foul ball. **Lowe did not request a protected seat. The Epicenter did have protected seats... The Epicenter stadium has approximately 2500 seats which are protected by screens.** [A]fter the seventh inning, "Tremor" the Quake's mascot, came up into the stadium in the area where Lowe and his group were seated. Tremor was accompanied by an usher as he performed antics and entertained the crowd...

As John Lowe sat in his assigned seat, he was facing forward and looking toward the playing field when suddenly, and without warning or his consent, his right shoulder was touched by the tail of Tremor's costume. As he turned to his right to see who, or what, was touching him, baseball play had resumed and a batted ball, believed to be a foul ball, hit Lowe on the left side of his face breaking multiple facial bones.

Lowe sued the defendant California League of Professional Baseball and Valley Baseball Club, Inc., (CLPB) which does business as the Quakes. The trial court granted summary judgment in favor of CLPB. In the opinion of the trial court, Lowe's claim was barred by the doctrine of primary assumption of the risk. Specifically, the trial court found the Quakes owed no legal duty to Lowe, as a spectator, to protect him from foul balls. In so doing, the trial court cited the following general legal principle: **"Where a spectator at a ball game has chosen not to sit in a screened area, that person assumes the risk of being hit by a foul ball."** Lowe appealed.

As noted by the appeals court, **"a defendant generally has no duty to eliminate, or protect a plaintiff from risks inherent to the sport itself, but has only a duty not to increase those risks."**

[I]t is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport. **The rule is no different in instances involving spectators.**

Therefore, under the circumstances of this particular case, CLPB **"had a duty not to increase the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume."** Accordingly, the **specific issue was, therefore, whether the mascot's antics and their resulting distraction of Lowe operated to increase the inherent risks assumed by a spectator at a baseball game.** Specifically, to establish the primary assumption of risk defense, CLPB had to "show that any risk to spectators caused by the antics of the mascot did not operate to increase those inherent risks to which spectators at baseball games are unavoidably exposed."

In other words, the **key inquiry here is whether the risk which led to Lowe's injury involved some feature or aspect of the game which is inevitable or unavoidable in the actual playing of the game.** In the first instance, foul balls hit into the spectators' area clearly create a risk of injury. If such foul balls were to be eliminated, it would be impossible to play the game. Thus, foul balls represent an inherent risk to spectators attending baseball games.... [S]uch risk is assumed.

In the opinion of the appeals court, the antics of the mascot was not integral to the sport of baseball, like foul balls.

[T]he declaration of Mark Monninger, the person who dressed up as Tremor, recounted that there were occasional games played when he was not there. In view of this testimony, as a matter of law, **we hold that the antics of the mascot are not an essential or integral part of the playing of a baseball game. In short, the game can be played in the absence of such antics...**

What a mascot is, according to the deposition of Mark Monninger [Tremor] is a marketing tool or simply entertainment. Mark Monninger states in his deposition that he was sick two days during the 1994 season. The baseball game went on without him there... [T]he game can be played without Tremor being present... Tremor could entertain without even going into the stands... If that safety practice had been in place during 1994, Mr. Lowe would not have been interfered with and injured by the foul ball... **Tremor's antics in hitting Lowe with its tail distracted Lowe and prevented Lowe from being able to protect himself from any batted ball and foreseeably increased the risk to John Lowe over and above those inherent in the sport.**

As a result, the **appeals court held that "the Quakes' mascot cavorting in the stands and distracting Lowe's attention, while the game was in progress... constituted negligence in the form of increasing the inherent risk to Lowe of being struck by a foul ball."** The appeals court, therefore, reversed the summary judgment of the trial court in favor of CLPB.