September 14, 2009

Duty Of Care To Spectators At Sporting Events

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DUTY OF CARE TO SPECTATORS AT SPORTING EVENTS: A UNIFIED THEORY

BY

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Abstract

This article examines the duty of care owed by field owners and event organizers to spectators at sporting events. The article examines the traditional reverence courts have afforded baseball in American law. The article next examines the three theories to determine whether the owner/operator in liable to an injured spectator: Negligence; Limited Duty Rule; Assumption of the Risk. The article argues that a unified theory combining elements of each theory works best in determining the duty owed to a spectator, and potential liability for breach of the duty.

TABLE OF CONTENTS

DUTY OF CARE TO SPECTATORS AT SPORTING EVENTS: A UNIFIED THEORY

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Introduction

Millions of people attend sporting events as spectators every year, whether professional, college, high school, little league or even pick-up games at a local park. While most of the spectators are aware that there is some risk of injury in attending these events, for example being hit by a foul ball at a baseball game, few, if any, consciously analyze all the potential risks associated with viewing a particular sporting event. However, the courts have long recognized that certain risks are inherent in sporting events, including injuries to spectators, and have often imposed limited duties on the owners of the facilities and organizers of the sporting events.

Baseball was the only significant professional sport played for many years. This has led to many cases involving injuries to baseball spectators working their way through the courts. While baseball thus has a unique place in American culture, and in American law,[1] in recent times, litigation has arisen from spectators' injuries while viewing sports, including hockey, soccer, golf, skateboarding, volleyball, and other spectator sports.

As long as there has been a sporting contests, lawyers have looked to insure the safety of those sporting events by bringing personal injury actions for injuries to spectators.[2] When dealing with injuries to spectators, courts have developed three principal theories to determine whether an owner or organizer is liable to plaintiff. The

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[1] *Yates v. Chicago National League Ball Club, Inc.,* 230 Ill.App.3d 472, 595 N.U. 2d 570, 172 Ill. Dec. 209 at 481-482 (1st Dist. 1st Div. 1992).

[2] For a view of the history of sports torts, see *Two Sports Torts: The Historical Development of the Legal Rights of Baseball Spectators,* by Roger I. Abrams, 38 Tulsa L. Rev. 433 (2003).

first is a general negligence theory. That is, the owner and/or organizer owe a duty to the spectators to take reasonable care to protect spectators from foreseeable injuries. This is generally a question of fact for a jury.[3] The second is a limited duty rule. That is, the owner and/or organizer owe a limited duty to the spectator to protect those spectators that are subject to a high risk of injury. This is generally as a combination of questions of fact and law.[4] The third theory of liability is assumption of the risk. That is, the spectator assumes the risks inherent in viewing a sporting event. This is generally a question of law, [5] but may involve questions of fact regarding what specific risks were assumed by the spectator.[6]

An issue that often arises in analyzing these issues is what particular activity the spectator was doing at the time of the injury. For example, the owner/operator may have a greater duty to spectators at concession stands or on ticket lines, when the spectator's full attention is not on the game.[7]

Negligence

The first theory of liability is the simple general negligence theory. Under the negligence theory, a landowner has a duty to exercise reasonable care for the maintenance of the premises for the protection of visitors.[8] Of course, this theory is applied differently in various jurisdictions. This has led to modifications of the negligence theory, including the application of a limited duty rule and assumption of the risk. The limited duty rule essentially states that the landowner or operator has

[3] *Reley v. Chicago Cougars Hockey Club, Inc.,* 100 Ill. App. 3d 664 (1st Dist. 1981).
[4] *Arnold v. City of Cedar Rapids,* 443 N.W. 2d 332 (IA 1989); *Turner v. Mandalay Sports Entertainment, LLC,* 180 P. 3d 1172 (NA 2008).
[5] *Hurst v. East Coast Hockey League,Inc.,* 371 S.C. 33 (2006).
[6] *McGarry v. Sax 158 Cal.* App. 4th 983 (2d Dept. 2008).
[7] *Maisonave v. Newark Bears Pro. Baseball Club, Inc*., 185 N.J. 70 (2005).
[8] *Allred v. Capital Area Soccer League, Inc.,* 669 S.E. 2d 777, 781-782 (N.C. 2008).

discharged its duty by taking certain appropriate actions, for example protective netting.[9] The assumption of risk defense provides that the spectator assumed any risk of danger inherent in the game regardless of the actions taken by owner/operator.[10]

Under the negligence theory, it is generally a question of fact as to whether the harm was foreseeable, and whether the owner/operator took appropriate action.[11] Sometimes, the negligence theory is applied because of statutes passed by the respective state legislatures. For example, Louisiana statute La.R.S. 9:2800 provides that a plaintiff must show that the field was in the care custody and control of the defendant; the field had a defect; which caused unreasonable harm; that plaintiff's injury was caused by the defect; and defendant had actual or constructive notice of the condition.[12] Under Colorado law, section 13-21-115 (3) (c) (I) C.R.S. 1999, an invitee may make a claim for damages caused by a landlord's unreasonable failure to exercise reasonable care of protecting against dangers of which he knew or should have known.[13] In *Teneyck v. Royal Hockey of Colorado,* the Colorado Supreme Court specifically rejected the no duty rule as applied to hockey because of the premises liability statute.[14]

The negligence theory is the minority rule in the United States regarding injury to spectators, with only a few states adhering to this rule.[15] Indeed, as noted above, baseball contains such a revered position in the United States that several states that have adopted the negligence rule by court decision have passed legislation protecting the owners and

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[9] See discussion of limited duty below.
[10] See discussion of assumption of risk theory below.
[11] See, *Riley v. Chicago Cougars Hockey Club, Inc.,* 100 Ill. App. 3d 664, 667 ("whether the requisite care was exercised is a question of fact for the jury."
[12] *Reider v. Louisiana Board of Trustees,* 897 S.O. 2d 893, 896 (La. 2005).
[13] *Teneyck v. Royal Hockey Of Colorado, Ltd.,* 10 P. 3d 707, 709 (Co. 2000).
[14] *Id.*
[15] *Colorado, Hook v. Lackside Park Co.,* 142 Colo. 277 (1960); *Florida, City of Coral Springs v. Rippe,* 743 S. 2d 61 (Fl 1999); *Illinois, Riley, Supra.; Louisiana, Reider v. State Bd. Of Trustees*, 897 S. 2d 893 (LA 2005); *North Carolina, Allred v. Capital Area Soccer League, Inc.*, 669 S.E. 2d 777 (NC 2008).

operators of baseball facilities.[16] Interestingly, the Colorado Court of Appeals held that because the legislature carved out certain exceptions to landowner's liability in certain cases, including baseball, the presumption is that there was no exception, including the "no duty rule" exception, in other cases, specifically hockey.[17]

Of course, just because a state applies the general negligence theory does not mean that it cannot apply other rules to come to the result that the owner/operator did not owe a duty to the spectator. In *Shain v. Racine Raiders Football Club, Inc.*[18] a youth football coach was injured when he was coaching a team and was hit by players from an adjoining field. The court analyzed the statute applying a general reasonableness standard for owners of property, and analyzed the "baseball rule" articulated in *Powless v. Milwaukee Count,*[19] which bars recovery for injuries to sport spectators. The court analyzed all the issues in the case, including the fact that Wisconsin had abolished the assumption of risk defense. The court concluded, as a matter of law, that the coach cannot recover because of the coach's contributory negligence. "The nature of the sport of football and the intrinsic hazards of playing it and coaching it are widely comprehended."[20] Thus, contributory negligence was raised to assumption of risk, completely barring recovery.

The court determined that the plaintiff, a football coach, was a hybrid of spectator and participant. The coach was a spectator because he observed the game, "with a critical eye of a coach."[21] However, as a coach, he was also something of a participant

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[16] Colorado, 13-120, C.R.S. 1999; Illinois, 745 ILS 38-1 at seq. (West 1996).
[17] *Teneyck* at 709.
[18] 297 Wis. 2d 869 (2006).
[19] 6 Wis. 2d 78 (1959).
[20] *Shain* at 880.
[21] Id at 878.

because he was an intrical part of the workings of the team. Because a spectator is held to know the risks inherent in the mere presence at a sporting event, the coach is surely held to a similar standard. Therefore, a coach standing on the sidelines voluntarily places himself within the zone danger. While the court termed this contributory negligence, the analysis is closer to assumption of risk than traditional contributory negligence.

Thus, while a few states adhere to the general negligence theory as to the responsibility of owners regarding injuries to spectators, those states often find other ways to exempt owners/operators of sporting events, whether by statute or by other legal theories, including contributory negligence. Thus even under a negligence theory, the burden is high for plaintiffs to establish a cause of action against the owners/operators of sports facilities.

Limited Duty Rule

The second legal theory regarding injuries to spectators at sporting events is the limited duty rule. The limited duty rule, as stated by the Supreme Court of New Jersey, is unique in that it only applies to sport venues in respect to a specific peril, that of objects leaving the field of play that may injure spectators in the stands. [22] Such a venue must provide sufficient screening for those spectators who desire protected seats, and provide screening in the most dangerous sections of the stands.[23] A venue that has satisfied those obligations has satisfied its duty of care to spectators. Generally, the limited duty rule applies to all aspects of activities of the field of play, including pre-game warm-ups, and generally includes no duty to warn spectators of potential dangers.[24]

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[22] *Sciarrotta v. Global Spectrum,* 194 N.J. 345, 347-348 (2008) (citations omitted).
[23] *Id.*
[24] *Id* at 348.

The limited duty rule is a modification of a no duty rule. Under the no duty rule, an owner/operator owes no duty at all to spectators regarding the dangers inherent in watching a game.[25] The limited duty rule requires that the owner/operator provide protection to those want such protection, and must offer protection for spectators in the most dangerous sections of the stands. This generally applies to all sports.[26]

Several states have adopted the limited duty rule. [27] Under this rule, an owner/operator has met its duty when it provides protection for those patrons seeking protection, and provides protection for the most dangerous portions of the field.[28] One issue regarding the limited duty rule is what the spectator was doing when they were injured. Certainly when spectators are in the stands watching the game, the limited duty rule is applicable, and as long as the owner/operator has complied with the requirements of the limited duty rule, no liability will be imposed.[29]

However, questions have arisen as to the scope of the limited duty rule when the spectator is not in the stands. In *Turner v. Mandalay Sports Entertainment, LLC.*,[30] a patron was injured while she was sitting in a concession area of the stadium, not in the stands. There was no protective netting in the area. The court held that the limited duty rule was applicable even to the concession area.[31]

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[25] *Schneider v. Americana Hockey and Ice Skating Center, Inc.*, 342 N.J. Super. 527 (App. Div. 2001).
[26] *Id*.
[27] *Bellezzo v. State of Arizona*, 174 Arz. 548 (1993); *Teixiera v. New Britain Baseball Club, Inc*., 41 Conn. L.Rptr.777 (Sup. Ct. 2006) (unpublished opinion); *Arnold v. City of City Rapids*, 443 N.W. 2d 332 (Iowa 1989); *Benejam v. Detroit Tigers, Inc.,* 246 Mich. App. 645 (2001); *Grisim v. Tetmark Charity Pro-Golf Tournament,* 415 N.W. 2d 874 (Minn. 1987); *Turner v. Mandalay Sports Entertainment, LLC,* 180 P. 3d 1172 (Nev. 2008).
[28] *Schneider.* Supra.
[29] See, e.g. *Arnold,* supra. 333-334 ("The defendants have screened the most dangerous parts of the spectator's stands, behind home plate. There was sufficient seating there for this plaintiff. Defendants owed her nothing further)." See also, *Belazio, supra.* (spectator struck by foul ball who was not seated in a screened off area, no recovery).
[30] 180 P. 3d 1172 (Nev. 2008).
[31] *Id.*

The court held that because the plaintiff decided not to sit in a protected seating area, the only question was whether the concession area was one of the most dangerous areas of the ballpark, and posed an unduly high risk of injury.[32] The court noted that the mere risk of an occasional foul ball does not amount to an unduly high risk of injury. Plaintiff failed to demonstrate that any other spectator suffered injuries as a result of a foul ball in a concession area. Therefore, the court held, the plaintiff could not recover against the owner/operator of the facility.[33]

Three judges dissented. The dissent, citing a New Jersey case, *Maisonave v. Newark Bath Professional Baseball Club*,[34] would have held that the limited duty rule is, as the name implies, limited, and not applicable to patrons no longer "engaged" in the game. The dissent would have permitted a jury to decide whether a protected screen or barrier was necessary for the concession area.[35]

In *Maisonave,* the Supreme Court of New Jersey spent a considerable amount of time analyzing the history of the limited duty rule. The court then compared the limited duty rule to the general rule of negligence imposed upon a business. The limited duty rule has protected stadium owners and operators since the early days of baseball.[36] "The limited duty rule insures that those spectators desiring protection from foul balls will be accommodated and the seats in the most dangerous area of the stadium will be safe. At the same time, it recognizes baseball tradition and spectator preference by not requiring the owner to screen the entire stadium."[37] The New Jersey court ultimately limited the

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[32] *Id.* at 1176.
[33] *Id.*
[34] 185 N.J. 70 (2005).
[35] *Turner* at 1179.
[36] *Id.* at 77.
[37] *Id.* at 79-80, quoting *Lawson v. Salt Lake Trappers, Inc.,* 901 P. 2d 1013, 1015 (Utah 1995).

application of the limited duty rule to spectators while in the stands.[38] When patrons are not in the stands, the general rules of negligence apply to the specific area and activity engaged by an injured party.[39]

The court in *Maisonave* described the criticism regarding the limited duty rule. Some commentators have attacked the limited duty rule as anachronistic and not applicable to the current state of tort rule.[40] However, these general attacks on limited duty rule demonstrate a lack of understanding of one of the primary reasons people go to sporting events.

A simple trip to a stadium reveals thousands of fans, including many children, attending the game with their baseball gloves. They do this in anticipation of catching a ball. While few people actually catch a ball, the mere anticipation is a highlight for many. The memory of actually catching a ball at a stadium often remains with people for a lifetime. If a field were completely enclosed, any thought of catching a ball would be eliminated.

In addition, many fans enjoy the close contact with the players. This connection could not occur if the field was entirely behind a screen. As noted by the *Maisonave* court, baseball tradition and spectator preference favors protection in limited areas of a stadium.[41]

While some argue that the burden should be on the owners to provide more protection for fans,[42] such additional protection for fans may also be a detriment to the

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[38] *Maisonave* at 85.
[39] *Maisonave* at 85.
[40] Id. at 80-81.
[41] *Id.* at 79-80/
[42] *Id*. at 80, citing David Horton, *Rethinking Assumption Of Risk And Sport Spectators*, 51 UCLA L.Rev. 339 at 344-345.

experience of attending a live game. Simply put, the more balls that are prevented from leaving the stands means fewer balls may be caught by spectators.

In addition, any additional protection automatically creates viewing problems. Most fans would not want to go to a sporting event that is completely surrounded by protective netting obstructing the view of the field. Even without consideration of the cost of such protection, it would certainly take away from the enjoyment of the game.

> "It would be unfair to hold owners and operators liable for injuries to spectators in the stands when the potential danger of fly balls in an inherent, expected, and even desired part of the baseball fans experience. Moreover, owners and operators would face undue hardship if forced to guarantee protection for all fans in the stands from every fly ball. Because the limited duty rule fairly balances the practical and economic interests of owners and operators with the safety and entertainment interests of the fans, we adopt the Appellate Division's opinion in *Schneider,* to the extent that it holds that owners and operators must offer sufficient protected seating to those who would seek it on an ordinary basis and to provide screening in the most dangerous sections of the stands."[43]

Adopting a general negligence theory in all cases would put the issue of whether an owner or operator took reasonable precautions to a jury. However, putting the issue to a jury in a case-by-case scenario is impracticable. The possibility of contrary verdicts would create an impossible situation for an owner/operator. One jury might believe that the provided protection is reasonable, while another jury might believe that the same protection was insufficient. This is simply an unworkable solution.

Most recently, the Court of Appeals of New Mexico held that the general negligence theory is applicable to injuries to spectators at baseball games, and rejected

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[43] *Maisonave* at 81.

the limited duty rule.[44] In *Crespin*, an infant plaintiff was attending a minor league baseball game and, during pre-game batting practice, was hit by a batted ball. Plaintiff's family was seated at a picnic table in the left field stands eating during a pre-game little league party. The picnic tables were not facing the field.

The *Crespin* court rejected the limited duty rule: "In addition, we do not believe it is necessary to immunize the Isotopes and the City against all risks in order to preserve the game of baseball."[45] The court noted that, even without the limited duty rule, many claims would be barred under traditional negligence principles if the jury determined that the stadium owner used reasonable means to provide a safe stadium to spectators.[46]

Crespin shows the weakness of the general negligence theory, and the strength of the unified theory, discussed below. The *Crespin* court went to far in rejecting the limited duty rule, and indeed a complete rejection was not necessary to its decision. The court rejected the limited duty rule because, it opined, an owner should not be immunized against "all risks" associated with a baseball game.[47] However, the limited duty rule does not immunize an owner against "all risks," only those risks assumed when a spectator is in the stands and engaged in the game.[48] In *Crespin* evidence was produced that the picnic table did not face the field, and the spectators were actually distracted by a pre-game party. This may have been sufficient to defeat summary judgment and send the case to a jury, even applying the limited duty rule.

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[44] *Crespin v. Albuquerque Baseball Club, LLC, et a., No. 27,864, decided July 13. 2009.l*
[45] *Id.* at p. 9.
[46] *Id.*
[47] *Id.*
[48] *Maisonave, supra.*

As in *Maisonave*, the spectator in *Crespin* was in an eating area and his attention was actually distracted. The rational of *Maisonave*, therefore, could apply equally to the facts in *Crespin.*

The *Crespin* court left all issues of duty, traditionally the province of the judge, to the jury. This, as noted, could lead to inconsistent verdicts. For example, the jury in *Crespin* may determine that the owner was not negligent. However, if another spectator was injured at the same time as the plaintiff in *Crespin* a different jury could find that the actions of the owner did not provide reasonable protection for spectators. This places a difficult burden on an owner, to decide what protection is necessary.

Also, a jury could determine a spectator in the stand who is distracted by the scoreboard may have a cause of action against an owner. This is precisely why issues of duty should be determined by a judge.

The *Maisonave* rationale, holding that there is a limited duty for protection of the fans while in the stands, but not necessarily when fans are at concession stands and distracted by ordering and obtaining food, drinks, or souvenirs, etc., often with their backs to the filed, makes sense. A jury could determine whether the protection provided by stadiums in areas where a spectator is not actually involved in watching the game was appropriate.[49] This rule could also be analyzed under the assumption of risk theory to determine whether the spectator actually assumed a risk of being injured while not watching the event in the stands.

The fact that the limited duty rule may have its origins from the earliest days of baseball does not mean it's anachronistic or unfair. The limited duty rule seeks to balance an operators' duty to ensure the safety of the public, with that of the public's

[49] We note that the decision in *Maisonave* was superseded by statute, N.J.S A. 41 *et. seq.*

ability to enjoy a sporting event, including all the elements that go with sporting events, such as the potential for souvenirs, interaction with players, and unobstructed views.

ASSUMPTION OF RISK

The third theory regarding injuries to spectators at sporting events is one of assumption of the risk. In assumption of the risk, a person is deemed to have assumed "those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation."[50] Pursuant to the assumption of the risk doctrine, a plaintiff assumes risks attributable to any open and obvious condition of the place where the activity is carried on.[51]

Thus, the scope of plaintiff's assumption of a risk, and consequent limitation upon an owner's duty, varies depending on a particular plaintiff's capacity to appreciate the risks of the activity. The doctrine is potentially broad, and may encompass risks engendered by less than optimum conditions, provided that those conditions are open and obvious and the consequently arising risks are readily appreciable.[52]

While assumption of the risk is generally a complete defense to potential liability, some courts have merged assumption of risk with the limited duty theory. Thus, some courts have stated that, under the doctrine of assumption of risk, a landowners duty is limited to exercising care to make the conditions as safe as they appear to be. If the risks

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[50] *Roberts v. Boys & Girls Republic, Inc.*, 51 A.D. 3d 246 (1st Dept. 2008), quoting, *Morgan v. State of New York*, 90 N.Y. 2d 471, 484 (1997).
[51] *Id.*
[52] *Id.* at 4.

of the activity are comprehended or obvious, plaintiff has assumed such risks and the landowner has performed its duties.[53]

In the area of the assumption of the risk of spectators at sporting events, New York has led the way in its application of the doctrine. In the last five years alone, no less than six cases have reached the Appellate Division, New York's intermediary appellate court, regarding this issue.[54] In those cases, New York courts have consistently upheld the assumption of risk doctrine, and have denied recovery in a variety of circumstances.[55] The particular sporting event, when the specific injury occurred, or how it occurred, is not determinative to liability in New York. As long as the injured party knew or should have known of potential danger, plaintiff is considered to have assumed the risk of such danger and cannot recover.[56]

New York takes a very broad view of the assumption of risk doctrine. However, other states have limited the doctrine. For example, in *Sutton v. Sumner,*[57] plaintiff was in the pit area of a racetrack. At the time, a tow truck was towing one of the cars.

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[53] *Id.* at 4, quoting, *Turcotte v. Fell,* 68 N.Y. 2d 432, 439 (1986).

[54] *Reyes v. City of New York*, 51 A.D. 3d 996 (2d Dept. 2008); *Roberts, supra.*; *Newcomb v. Cuptail Holding Corporation*, 31 A.D. 3d 875 (3d Dept. 2006); *Procopio v. Town of Saugerties,* 20 A.D. 3d 860 (3d Dept. 2005); *Coeing v. Town of Huntington,* 10 A.D. 632 (2d Dept. 2004); *Sutton v. Eastern New York Youth Soccer Association,* 8 A.D. 3d 855 (3d Dept. 2004).

[55] See, *Reyes, supra. (*Coach hit by foul ball that came through an opening between fences); *Roberts, supra.* (Bystander struck by a baseball bat improvised off-field on-deck area); *Newcomb, supra.* (Roller skater taking a break in practice rink area a few feet from main rink precluded from recovery); *Procopio, supra.* (Plaintiff at concession stand ordering food hit by baseball thrown by a player warming up, precluded from recovery); *Coeing, supra.* (Spectator watching son at little league game hit by foul ball from adjacent field, precluded from recovery); *Sutton, supra.*(soccer tournament spectator precluded from recovery after getting hit by a ball which left the field, while standing approximately 30-40 yards from the field at play during practice). See also, *Cohen v. Sterling Mets*, *L.P.,* 17 Misc. 3d 218 (Sup. Ct. Queens Cty. 2007) (Vendor injured when struck by a fan who was diving for a t-shirt tossed into the stands between innings, precluded from recovery); *Powel v. Metropolitan Entertainment, Inc.,* 195 Misc. 2d 847 (Sup. Ct. N.Y. Cty. 2003) (Attendee at a concert could not recover for allegedly hearing loss caused by loud music); *Cannavale v. City of New York,* 257 A.D. 2d 462 (1st Dept. 1999) (spectator trampled by oncoming players while trying to move children standing too close to playing field, precluded from recovery); *Stern v. Madison Square Garden Corp.,* 226 A.D. 2d 444 (2d Dept. 1996) (Infant hit by a stray cut at a hockey arena while sitting on steps, precluded from recovery).

[56] See, *Sutton, supra; Stern, supra.*

[57] 224 Ga. App. 857 (1997).

Plaintiff was aware that there was a danger of being hit by a tow truck, and was aware that if the car was being towed without someone steering it, there was a potentially dangerous condition that could lead to an accident. On the day of the race, the tow truck was towing a car that was being steered into the pit area. After the tow truck stopped, the plaintiff turned around. The tow truck started up again, but this time the car was not being steered. The front end of the car moved sideways and hit plaintiff. The Georgia Appellate court held that plaintiff could recover.[58]

In analyzing assumption of risk, the Georgia court held that a plaintiff had to have the requisite knowledge of the danger and appreciation of the risk, and that a subjective standard applies. That is, what the particular plaintiff knew, understood and appreciated is the determining factor.[59] A plaintiff lacking subjective knowledge of the danger will not be taken to assume the risk even though his conduct may be deemed contributorily negligent for his failure under an objective knowledge standard to discover the danger by exercising the ordinary care required of a reasonable man.[60] Thus, if plaintiff should have known of a danger, but his conduct led to a lack of subjective knowledge of the danger, assumption of the risk will not bar recovery, but contributory negligence may impact recovery.[61] This is much narrower than a New York standard, which applies assumption of the risk to any risk plaintiff knew or should have known.

The attacks on the limited assumption of the risk doctrine generally are that the rule is old, so it must be changed. However, despite what people may say during a deposition or at trial, it is hard to believe that anybody who goes to a baseball game, or a

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[58] *Id.* at 859.
[59] *Id.*
[60] *Id.*
[61] *Id.*

hockey or soccer game, cannot anticipate that a ball (or puck) may leave the field of play. Even if they have never been to such a game before, it is pretty simple to realize that a ball can leave the field of play. This should automatically put people on alert.

The public policy associated with the assumption of the risk doctrine is to encourage spectators to view sporting events.[62] Certainly, few people would want to go to sporting events where the fields are completely surrounded by protective netting and/or Plexiglas. Not only would this interfere with the viewing of the game, it would prevent the possibility of obtaining a souvenir, and restrict interaction with the players.

In addition, the cost would be prohibitive. There are an unknown number of parks and playgrounds in this country where there is little protection other than a cage surrounding home plate. If assumption of the risk and the limited duty doctrines were completely abandoned, states and municipalities, as well as grade schools, high schools, colleges, minor league teams, and major league teams, would potentially be liable for any injuries to spectators, or have to spend untold millions of dollars to completely surround the fields to protect the spectators. Thus, there is a strong public policy to protect only those in most danger, and to provide protection to those that want it, while allowing a majority of fans assume the risk inherent of watching these games, most notably being hit by balls, pucks, and/or the playing instruments.

A UNIFIED THEORY

Most people recognize that if a field is not completely surrounded by a net, items, including balls, bats, etc., can leave the field at play. Also, most people understand the concept of a ball, bat, etc. leaving the field at play, particularly in sports such as baseball, which is played virtually in every community in this country, and in many communities

[62] *Shin v. AHN,* 42 Cal. 4th 482, 492 (2007); *David v. LeCoyer*, 849 NE. 2d 750, 754 (IN 2006).

around the world. Indeed, one of the goals of baseball is to hit the ball out of play, for a homerun. The reasonable spectator has an understanding that in virtually every sport, there is a danger, however slight, that items could leave the field of play injuring the spectator.

This knowledge is the foundation of the assumption of risk doctrine. However, no spectator assumes all risks that may be encountered at a sporting event. As the cases demonstrate, there are certainly numerous times when an unexpected event occurs. Sometimes these events are clarified as a risk a spectator should assume, others are not, and still others are given to a jury to decide whether a reasonable spectator would assume such risk.

Complimentary with the assumption of risk doctrine is the limited duty rule. Although set out in opposite terms, the actual theories are similar. While the assumption of risk looks at what risk the reasonable spectator would assume, the limited duty rule looks at what actions the owner/operator must take to protect spectators from reasonable and foreseeable risks. The limited duty rule would impose a limited obligation to protect spectators from certain identified, especially hazardous risks. Under the limited duty rule owners/operators would have a limited duty to provide some seats behind safety netting, and to protect spectators from the most hazardous dangers.

Of course, a general negligence theory can be used to determine the owner's obligation outside of its limited duty, and whether a spectator assumes a certain risk while not in the stands as a spectator. However, the negligence theory should be used only when the spectator is occupied in some other activity, such as buying food at concession stands, or other activities away from the field of play. When a spectator is a

pure spectator, sitting in the seats, this question is more appropriately a question of law for the court. The possibility of inconsistent verdicts regarding the same precautions, and the nature of attending sporting events, places this issue more properly before the court. Once the spectator leaves the seating area. However, it should be up to a jury to determine whether the owner/operator took appropriate steps to protect the fans and/or whether the spectator assumed the risks of attending a sporting event while outside the seating area.

The unified theory also combines the full assumption of risk exclusion of liability as applied in New York, with the more limited application exemplified by Georgia Courts. While in the stands, the presumption is that the spectator is aware of the risks involved in viewing the game.[63] While not an active spectator, the question would be whether the spectator was actually aware of the risks.[64]

One problem in these cases is what specific protection should be provided by the owner/operator to the spectators that are in the most danger, e.g., behind the plate in baseball. The question is whether a court should decide how large the protected netting should be, or whether this issue should be sent to a jury. Permitting this issue to be decided on a case-by-case basis by different juries is problematic at best, and completely unworkable at worst. Juries could have conflicting opinions about how large a netting should be, e.g., 50 feet from home plate vs. 100 feet from home plate, etc. One jury could determine that the operator was reasonable in the size of its protective netting, while another jury can determine the same protective netting as unreasonable. It would

[63] See cases cited in footnote 48.
[64] *Sutton v. Summer, supra.*

impossible to present a workable system where a jury can decide the specific areas of protection for the spectators on a case-by-case basis.

This issue is best left to either the state legislature or the municipal government. Certainly different requirements should be imposed depending on the level of performance, age level of a participant, and the number of spectators. It is completely unreasonable to have a little league field in a small village park held to the same requirements as a professional stadium. Legislatures or local building departments could take into account the age and performance level of the participants, and amount of spectators, and issue appropriate requirements regarding levels of protection for little league, high school, college, minor and major leagues fields.

However, most often state legislatures and/or municipal building departments do not address these specific issues, including the size of protective netting. Therefore, courts will continue to decide whether the protection is sufficient to protect spectators from the greatest hazards. In most states, the courts leave the specific issues to the various owners and operators. As long as there is some protection, the owner/operator has met its duty. Some courts, however, use the general negligence theory, which will permit juries to come to different conclusions regarding the amount of protection. As noted, this is unworkable.

The fact that the existing rules have been called anachronistic and are not applicable to the current state of tort law is equivalent to the argument that change is better, no matter what that change is. Simply because rules are old does not mean they are outdated. There are specific rules in place. Here, the rules balance the protection to spectators from injuries that are inevitable in the type of activity, and owner/operators

from unreasonable requirements. As noted throughout this article, people often attend events with an interest of obtaining souvenirs and interjecting with participants. If all parts of the field were protected, then enjoyable aspects of attending a game would be lost.

Spectators have an obligation to know the rules of the game, and should have a general knowledge, via common sense or otherwise, that balls, equipment, etc., could leave a field of play. While the owner/operator is obliged to provide a certain level of protection, spectators likewise have an obligation to protect themselves from injury. The unified theory combining the assumption of the risk, limited duty and general negligence theories and would protect owners and operators from burdensome litigation, while also protecting spectators who are injured while their attention is necessarily diverted from the field of play. Therefore, the unified theory provides the best compromise for the application of three theories of potential liability of owners and operators of sporting events.

CONCLUSION

Rules regarding injuries to spectators must balance protecting spectators from injury with the enjoyment of all spectators at the event. Completely isolating spectators from the playing field is unworkable, and would be opposed by a vast majority of spectators that attend such events. Thus, a theory must be developed to protect those spectators who are most vulnerable, while permitting the vast majority of spectators to freely enjoy the event.

The unified theory combining assumption of the risk, limited duty and general negligence would accomplish these goals. While spectators in the seats would be considered to have assumed the risk of the standard hazards of attending events, i.e., ball, bats, and other equipment leaving the field at play, the owners/operators would have a limited duty to protect those most vulnerable patrons, and to provide those spectators desiring protection with areas that are protected. When there is a risk that spectators do not assume, or when they are not actually engaged as a spectator in their seats, the general negligence theory could be used to determine whether the owner/operator violated a duty owed to the spectators, depending on the specific circumstances of the case.