

Liability In Spectator Injury Cases: The Risk Has Changed, Will The Law?

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Baseball, our national pastime, evokes nostalgia unlike any other sport. Yet it is simultaneously entrenched in the entertainment business. In an effort to attract spectators (and revenue), ballparks produce a family-oriented experience that is packed with marketing and promotional activities. Just as what comprises a day at the ballpark is evolving, the nature of spectator injury cases is changing. Attending a baseball game subjects a spectator to an array of marketing and advertising activities. Courts are increasingly confronting the issue of whether the ballpark owner or operator or the spectator should bear the risk of injury during these “fan-friendly” activities.

Under common law standards, the owners and operators of ballparks are not the insurers of spectators’ safety. In many jurisdictions , an owner or operator is simply required to provide protected seats where the danger of being struck by an errant baseball or bat is the greatest, *i.e.* the seats behind home plate. When an owner or operator does so, it discharges its limited duty of care. A spectator who sits in an unprotected area voluntarily assumes the risks inherent in doing so and consequently extinguishes the duty of care that is owed to him or her. Assumption of risk, a bedrock defense in spectator injury suits, requires evidence that the spectator had an understanding of the activity and the risks presented so that he or she consented to them. Moreover, the risk must be inherent in the activity and the owner and operator cannot enhance the risk. This raises the question of what risks are inherent in the sport and which arise out of other activities at the ballgame.

Personal injury actions brought by souvenir-seeking spectators are often dismissed based on assumption of risk. For example, in *Pira v. Sterling Doubleday* (2005 N.Y. App. Div. Lexis 2313), an injured spectator’s personal injury action was dismissed because he was struck by a baseball tossed into stands as a souvenir by a pitcher prior to the game. The pitcher admitted that this sort of activity was commonplace and considered “fan-friendly.” Many courts hold that it is immaterial whether the throw occurred in between innings or after the game. *See, e.g., Loughran v. The Phillies* (2005 Pa. Super Lexis 4093); and *Dalton v. Jones* (2003 Ga. App Lexis 485).

Distracted or inattentive spectators (due to cavorting mascots, t-shirt tosses or other promotional activities that are arguably not “integral” to the sport) have attacked traditional defenses such as assumption of risk, sometimes with success. In *Lowe v. Cal. League of Professional Baseball* (1997 Cal. App. Lexis 532), the Court held that the antics of the team’s dinosaur mascot were not essential or integral to the sport and that it was a jury question whether the mascot’s antics increased the risks inherent to the plaintiff. In *Pinaki Ray v. Hudson Valley Renegades* (2003 N.Y. App. Div. LEXIS 6212), the plaintiff’s “distraction theory” was rejected

¹ California, New York, Ohio and Texas have adopted the limited duty rule while states, such as Florida and Arizona apply traditional negligence principles or comparative negligence.

² Another defense is the waiver and release set forth on a spectator’s ticket. The risk of injury by errant bats and balls is reflected in the exculpatory language located on the back of a spectator’s ticket. However, depending on its wording, the disclaimer language may not be broad enough to encompass injuries associated with promotional and marketing activities. Furthermore, some jurisdictions will not enforce this language because it is against public policy.

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