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SOFTBALL SPECTATOR STRUCK BY ERRANT WARMUP BALL

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This month's column presents a case which is not unlike that included in the 1985 edition of the Recreation and Parks Law Reporter (RPLR). Report # 85-43, entitled "New York Softball Spectator Struck by Ball During Warmup Sues League," described the case of *Clark v. Goshen Sunday Morning Softball League*. In this case, plaintiff Clark was injured while leaning on a ball-field fence. He was struck in the eve by a softball thrown by a player warming up along the baseline.

The court found Clark was a spectator. As such, Clark assumed the risk of being hit by balls inherent in the game, including pregame warm-up. When adequate screening is provided for spectators (i.e., behind home plate sufficient to reasonably accommodate those desiring such protection), the court found no negligence liability when a spectator fails to utilize available protective screening. In this instance, the court found the defendant soft-ball league fulfilled this duty owed to Clark to provide adequate screening. Further, the court found no duty to warn Clark of hazards inherent in the game. As a result, the court dismissed Clark's case.

In my opinion, the *Clark* case is consistent with the majority of spectator injury, cases which find errant balls to be an obvious and inherent risk in the game. Compare the above synopsis of the *Clark* case with the court's analysis in the *Broxson* case described herein. While acknowledging that errant balls were a risk known to the injured plaintiff, the court in *Broxson* found that the landowner may still have a duty to protect spectators.

ANTICIPATE OBVIOUS HARM?

In the case of *City of Milton v. Broxson* 514 So.2d 1116 (Fla.App. 1 Dist. 1987), plaintiff Charles Broxson was "seriously injured by an errantly-thrown softball in a city-owned park." The facts of the case were as follows:

> One evening in June 1980, the almost-18-year-old plaintiff Broxson was in attendance at Sander's Creek Park watching a softball game in progress. Broxson left his seat in the bleachers and walked over to an area behind the third base dugout. After a few minutes, Broxson turned and appeared to be headed back to the bleachers when he was struck in the head by a soft-ball thrown by Robert Nelson, one of the players who was warming up with several other players for the next scheduled game. The area where Broxson was injured was adjacent to the bleachers. There were lawn chairs in that area where spectators commonly sat to watch the games. The area in which Robert

> Nelson and the other players were warming up was in close proximity to the area where Broxson was struck. In fact, some of the spectators in lawn chairs were within five feet from some of the players warming up.
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> There was evidence that there was no area designated for players to warm up while waiting for the prior game to end, that it was a common practice well known to Broxson for the players to warm up in the same area described above, that spectators had been struck in the past by balls errantly thrown by players warming up in that area, and that Broxson, although having knowledge of such instances and the hazardous nature of such activities, did nothing (until 'after the subject accident) to prevent the players from warming up in such close proximity to spectators. There was testimony that a city employee, who was responsible for operations and maintenance of the park, on occasion "ran off'" players who, while warming up, struck the concession stand as well as people.

The jury in this case returned a verdict in favor of Broxson and the trial court entered judgment accordingly. The City of Milton appealed.

On appeal, the City of Milton argued that it was not legally responsible for Broxson's injuries. Specifically, the city contended that "it had no duty to warn Broxson of dangers or risks which should have been apparent to those attending the softball games" at Sander's Creek Park. In addition, the city maintained that such risks were obvious to Broxson. As noted by the city, Broxson "had played softball in the past, had previously attended games at that park as a spectator, and was familiar with the risks involved in the positioning of oneself in the subject area while players were warming up."As a result, the city contended that the trial court had erred in not granting its motion for a directed verdict (i.e., the trial court directing the jury to return a verdict for the city on the basis that the city had not violated any legal duty of care owed to Broxson).

According to the appeals court, Broxson was an invitee of the city on the evening he was injured. Pursuant to the "invitation test," adopted by the Florida state supreme court, "an invitee may be either a business visitor or a public invitee." ,As described by the appeals court, a Florida landowner owed the following duties to an invitee: (1) to use reasonable care in maintaining the premises in a reasonably safe condition; and (2) to give the invitee warning of concealed perils which are or should be known to the landowner and which are unknown to the invitee and cannot be discovered by him through the exercise of due care.

As noted by the appeals court, the landowner's duty to warn required that "the landowner's knowledge of the danger must be superior to that of the business invitee." In this particular instance, the appeals court found the city's knowledge of the danger to spectators situated in the area where players were allowed to warm up was no greater than Broxson's knowledge. On the other hand, the appeals court

acknowledged that "the landowner also has the duty to invitees to maintain the premises in a reasonably safe condition, including the elimination of dangerous conditions of which the landowner has actual or constructive notice." The Restatement of Torts, Second, Section 343A described this duty as follows:

> A possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness.

As a result, the appeals court found that Broxson's knowledge of the dangerous condition would not necessarily preclude landowner liability in this case.

> Where an invitee's knowledge of a dangerous condition will adequately protect him from harm, an owner's duty with regard to the condition is limited to giving proper warning, where required. The invitee can be expected to protect himself against such risks. However, where the danger is of such a nature that the owner should reasonably anticipate that it creates an unreasonable risk of harm to an invitee notwithstanding a warning or the invitee's knowledge of the danger, then reasonable care may require additional precautions be taken for the safety of the invitee ....
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> Concerning such hazards, the owner can be held liable to the invitee for failing to exercise reasonable care, even though the invitee was himself negligent in encountering the known danger, thus subjecting his claim to the defense of comparative negligence.

Applying these principles to the facts of the case, the appeals court found that the evidence in this case supported the jury's verdict for Broxson.

> We believe that it can fairly be said that the hazardous activity which the city allowed to continue without taking appropriate steps for the safety of the spectators was of such a nature that the city should have reasonably anticipated that such hazardous activity would cause spectator injury notwithstanding the spectator's knowledge of the danger. At least the evidence respecting the above was such that the case was properly permitted to go to the jury.

As a result, the appeals court found that the trial court had not erred in denying the city's motion for a directed verdict.

> It is well settled that the authority of a trial court to direct a verdict must be exercised with caution and that a verdict should not be directed for a defendant unless it is clear that there is no evidence whatever that could in law support a verdict the plaintiff.

The appeals court also considered the city's sovereign immunity argument. As described by the court, the specific issue was "whether the city's acts or omissions were of a planning or operational variety." Many jurisdictions provide discretionary function immunity for ordinary negligence liability to public entities. These immune discretionary functions include policy, planning, judgmental decisions. On the other hand, operational decisions, which merely implement established policy, are not immune. As a result, the deciding is immune, but the doing is not. Once the public entity decides to provide some service, it must do so in a non-negligent fashion to avoid liability.

Applying these general principles to the facts of the case, the appeals court found that Broxson's injury was caused by negligence at the operational level. Consequently, government immunity was not available to the city.

> While it is a discretionary or planning level decision for a governmental entity to operate a recreational facility to accommodate organized softball games and spectators of such games, once the government decides to operate such a facility, it assumes the duty to operate the facility safely-just as a private individual would be so obligated-without benefit of sovereign immunity.

The appeals court, therefore, affirmed the judgment of the trial court in favor of plaintiff Broxson.