As illustrated by an August 2014 article in Atlanta magazine entitled “Foul Territory,” spectators seated behind the dugouts and along the baselines, children and adults alike, may not have enough time to get out the way of foul balls to avoid serious injury.

http://www.atlantamagazine.com/features/2014/07/14/foul-territory

Particularly at the major league level, the increasing strength of the players and speed of the game has brought the traditional Baseball Rule into question. As noted in the Atlanta magazine article and described below, a Georgia appeals court has denied motions by the Atlanta Braves for a pretrial judgment based on the Baseball Rule.

Traditionally, under the Baseball Rule, the legal duty of landowners owed to spectators has been limited to providing protection in the “zone of danger” behind home plate. To be considered adequate, such protective screening must be sufficient to accommodate the number of spectators who desire such protected seating during an average game. Once such protection is provided the landowner has satisfied any legal duty owed to protect spectators. Accordingly, spectators who choose to watch the contest outside the screened area behind home plate, including behind the dugouts or down the baselines, are deemed to have assumed the risk of serious injury from foul balls entering the spectator area.

ATLANTA BRAVES

In the case of Atlanta National League Baseball Club, Inc. v. F.F., 2014 Ga. App. LEXIS 507 (Ga.App. 7/11/2014), a six-year-old girl, M.F., was sitting with her father behind the visitors' dugout at an Atlanta Braves home game when she was struck by a foul ball, suffering a skull fracture and brain injuries.

At some point before the 2010 season, the Braves had added netting to portions of both dugouts to protect players from balls leaving the field of play, but did not extend netting to the seats directly behind the dugouts on either side of the field. Although a Braves representative testified that M. F. and her family would have been free to move to unsold protected seats behind home plate by notifying an usher, the same representative testified that a surcharge would apply to seats purchased in this way. In the fifth inning, M. F. and her parents, who had received their tickets as a gift, were sitting a few rows behind the visitor's dugout when a player hit the foul ball that struck M. F.

In response to plaintiff’s negligence claim, the Braves denied any liability based upon “their provision of netting only behind home plate amounted to ordinary care” under the traditional Baseball Rule. As a result, the Braves filed a motion to dismiss or for summary judgment. In so doing, the Braves contended there was “no duty as a matter of law to protect a spectator at a baseball game from being hit by a foul ball.” If such a legal duty existed, in the alternative, the Braves contended it had satisfied the applicable legal duty which was “limited to protecting the seats behind home plate and protecting a sufficient number of those seats to accommodate the
reasonably anticipated number of requests for protected seats,” i.e., the Baseball Rule.

After a hearing, the trial court denied the motion. The Braves requested the appeals court to review the trial court’s ruling. In so doing, the Braves argued that “the trial court should have declared the so-called ‘limited duty’ or ‘baseball rule,’ in effect in various states since at least 1932 as Georgia law in this context.” The appeals court, however, denied the Braves’ motion for a declaratory judgment. As a result, assuming the claim is not settled, the case would proceed to trial, presumably to consider liability based upon ordinary principles governing landowner liability for negligence. In the meantime, if and until the Georgia state supreme court rules on the issue, the applicability of the Baseball Rule in Georgia remains uncertain.

OBVIOUS RISKS ASSUMED

In the absence of the limited legal duty under the Baseball Rule, there is a fear among owners and operators of ball fields at all levels, from the major league stadiums down to sandlot baseball in public parks, that every injury causing foul ball entering the unscreened spectator area could provide a legal basis for potential lawsuit, creating a flood of litigation.

The limited legal duty under the traditional Baseball Rule can also be viewed as consistent with general legal principles governing landowner liability. Generally, landowners owe no legal duty to protect participants, including spectators, against open and obvious risks on the premises or risks inherent in a given activity. Participants are deemed to have assumed the risk of injury related to such obvious or inherent risks. Assumption of risk, however, presumes that the participants, looking out reasonably for their own safety, are able to choose whether or not to avoid or protect themselves against apparent risks.

Accordingly, a limited exception exists for situations in which participants are unable to protect themselves from an obvious an inherent risk. Under such circumstances, a landowner may still owe a limited duty to protect participants against such risks of injury. The Baseball Rule can be viewed as a specific variation of this limited exception to the no duty rule for obvious and inherent risks.

Although obvious and inherent in the game of baseball, spectators can not reasonably be expected to protect themselves from speeding foul balls entering the spectator area directly behind home plate. Unlike other areas of the ballpark, it is unrealistic to expect a spectator to react in time and “get out of the way” of a foul ball in the zone of danger behind home plate. As a result, the Baseball Rule imposes a limited legal duty of care on the owner/operator to provide protective screening, but only behind home plate. Accordingly, spectators who choose or prefer an unobstructed view of the contest down the baselines have traditionally assumed the risk of injury from being struck by foul balls.

The Baseball Rule has also been applied to other sports and activities where spectators are realistically unable to protect themselves against serious injury associated with obvious and inherent risks. For example, courts have extended the reasoning of the Baseball Rule to include hockey where the risk of serious injury requiring protective screening is behind each goal. Within the broader context of the Baseball Rule, protective screening in other sports and
activities is, therefore, limited to those areas in which spectators are subject to unavoidable speeding missiles, like foul balls and pucks, entering the viewing area.

BASEBALL RULE QUESTIONED

In those jurisdictions which have considered landowner liability for foul ball injuries to spectators, the Baseball Rule has remained the majority rule for the past century. However, in light of the realities of modern major league baseball, increasingly there are questions whether the “zone of danger” under the existing Baseball Rule should be expanded to include areas behind the dugouts and down the baselines.

Moreover, in addition to Georgia, a number of state courts have begun to question whether the Baseball Rule should be adopted or abandoned altogether. As illustrated by the South Shore Baseball case described herein, these courts have questioned whether the owner/operator of a baseball facility should be treated any differently than other landowners and enjoy a limited legal duty of care owed spectators. If such a public policy is warranted, several state courts have held that it should be done by the state legislature, not the state courts.

See also: Majority “Baseball Rule” Limits Spectator Liability http://www.parksandrecreation.org/2013/May/Majority-“Baseball-Rule”-Limits-Spectator-Liability/

The Kansas City Royals opinion described below further limits the applicability of the Baseball Rule to those unavoidable risks which are inherent in the game of baseball itself, like foul balls. Such inherent risks, however, may not include entertaining activities associated with the overall “stadium experience,” but not integral and essential to the game itself.

INDIANA REJECTS RULE

In the case of South Shore Baseball, LLC v. DeJesus, 2014 Ind. Lexis 515 (Ind. 6/27/2014), the Supreme Court of Indiana found “stadiums and franchises, by virtue of baseball’s status as our national pastime” should not be “entitled to a special limited-duty rule.” On the contrary, the state supreme court held the liability of an owner/operator of a baseball facility to an injured spectator should be determined by “our standard principles of premises liability.”

In this particular case, plaintiff Juanita DeJesus was attending opening day for the South Shore RailCats at U.S. Steelyard stadium in Gary, Indiana. DeJesus was sitting just outside the protective netting behind home plate when she looked up to follow the flight of a pop-up foul ball. The foul ball struck her in the face causing serious injury, including several fractured facial bones and permanent blindness in her left eye.

The admission ticket issued to DeJesus warned spectators about “the danger of being injured by thrown or batted balls.” Moreover, in the section along the first base line where DeJesus was seated, there was a sign at the end of the aisle which read: “Please Be Aware Of Objects Leaving the Playing Field.”
The trial court denied summary judgment to defendant South Shore Baseball. The appeals court reversed. In so doing, the appeals court adopted “the majority rule that the operator of a baseball stadium does not have a duty to place protective screening continuously from first to third base, but rather only in the most dangerous areas, i.e., the area behind home plate.” The state supreme court granted review of this decision.

In this particular instance, the state supreme court was “not convinced that any sport, even our national pastime, merits its own rule of liability.” As a result, the court held found it was “neither necessary or appropriate for sports events to be distinguished and given special treatment.” On the contrary, if some variation of the Baseball Rule was to be adopted, the legislative branch should decide to do so as a matter of public policy and enact a statute as opposed to the state courts adopting a judicial precedent from other jurisdictions.


While declining to adopt the “Baseball Rule,” the state supreme court also rejected DeJesus’s argument that South Shore had a legal duty “to provide protective screening continuously from first to third base.”

A stadium protected in all its areas would prove financially disastrous to management and would outrage many devotees of baseball who like to watch the game without obstruction.

Having rejected adopting the traditional Baseball Rule, the Indiana Supreme Court considered DeJesus’s negligence claim under the following general principles governing premises liability:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he
(a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
(b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
(c) fails to exercise reasonable care to protect them against the danger. Restatement (Second) of Torts § 343 (1965).

Applying this “well-known rule” to the facts of the case, under the circumstances of this particular case, the state supreme court found “South Shore would have had no reason to believe DeJesus would not realize the danger or that she would not protect herself against it.”

Both parties agree that South Shore notified DeJesus of the danger of foul balls by printing a warning on her ticket, posting a sign in the aisle near her seat, and making an announcement over the loudspeaker before the beginning of the game.
DeJesus testified she had seen foul balls enter the stands at RailCats games before. She even admitted she knew, when she was sitting in her seat, "there could be a chance that the ball could come that way."

As a result, the state supreme court found “the trial court should have granted South Shore’s motion for summary judgment.”

KC ROYALS HOTDOG

In the case of Coomer v. Kansas City Royals Baseball Corp., 2014 Mo. Lexis 154 (Mo. 6/24/2014), plaintiff John Coomer was injured when he was hit in the eye with a hotdog thrown by “Sluggerrr,” the Kansas City Royals mascot. A jury found in favor of the Kansas City Royals. Coomer appealed. The issue before the state supreme court was “whether the risk of being injured by Sluggerrr’s hotdog toss is one of the inherent risks of watching a Royals home game that Coomer assumed merely by attending.” In considering this issue the state supreme court acknowledged that “spectators cannot sue a baseball team for injuries caused when a ball or bat enters the stands” because such risks are “unavoidable.” The specific issue before the state supreme court was whether the “risk of being injured by Sluggerrr’s hotdog toss” was also “an unavoidable part of watching the Royals play baseball.”

FACTS

Coomer had attended many Royals games before he was injured on September 8, 2009. Coomer admitted he had “frequently watched Sluggerrr toss hotdogs from the roof of the visitor's dugout.”

[O]n September 8, he saw Sluggerrr mount the dugout to begin the Hotdog Launch. Coomer and his father were seated approximately 15 to 20 feet from Sluggerrr, directly in his view. After employing his hotdog-shaped airgun to send hotdogs to distant fans, Sluggerrr began to toss hotdogs by hand to fans seated near Coomer. Coomer testified that he saw Sluggerrr turn away from the crowd as if to prepare for a behind-the-back throw, but, because Coomer chose that moment to turn and look at the scoreboard, he admits he never saw Sluggerrr throw the hotdog that he claims injured him. Coomer testified only that a "split second later ... something hit me in the face," and he described the blow as "pretty forceful."

Coomer did not report this incident to the Royals when it happened because he did not realize he had been injured. Several days later, however, Coomer felt he was "seeing differently" and something "wasn't right" with his left eye. The problem progressed until, approximately eight days after the incident, Coomer saw a doctor and was diagnosed with a detached retina. Coomer underwent surgeries to repair the retina and to remove a "traumatic cataract" in the same eye.

INHERENT TO THE GAME?

Coomer reported his injury to the Royals and subsequently filed his negligence lawsuit alleging
the Royals had failed to exercise reasonable care to adequately train and supervise its employee, Sluggerrrr, to ensure hotdogs thrown into the stands was done safely. In response, the Royals denied any negligence. Moreover, the Royals claimed Coomer had assumed the risk of injury under the circumstances of this case. Coomer contended assumption of risk “only applies to risks that are inherent in the nature of the activity.” As characterized by Coomer, “the harm of getting hit with a hotdog has absolutely no relationship to going to a baseball game.” The state supreme court agreed.

In the opinion of the state supreme court, the rationale for the Baseball Rule “extends only to those risks that the home team is powerless to alleviate without fundamentally altering the game or spectator’s enjoyment of it.” While the “no duty” rationale for the Baseball Rule applies to “risks inherent in watching a baseball game” the state supreme court found “the home team still owes a duty of reasonable care not to alter or increase such inherent risks.”

Accordingly, the specific issue was whether the “Hot Dog Launch” was an inherent part of baseball and an unavoidable risk assumed by spectators, or an increased risk.

Citing the dictionary definition, the state supreme court found an “inherent risk” must be "structural or involved in the constitution or essential character of something: belonging by nature or settled habit." Webster's Third New International Dictionary (1966). Accordingly, for a risk to be “inherent,” the court found the risk must “remain so until there is a fundamental change in that thing’s constitution or essential character.” Applying this definition, the court acknowledged the risk of being struck by a foul ball at a baseball game was “involved in the constitution or essential character of watching baseball.” On the other hand, the court seriously questioned whether the “risk of being injured by Sluggerrrr’s hot dog toss” was involved in the “essential character of watching a Royals game.” In the opinion of the state supreme court, the risk of injury from Sluggerrrr’s hot dog toss was not inherent to watching a Royals game.

The rationale for barring recovery for injuries from risks that are inherent in watching a particular sport under implied primary assumption of the risk is that the defendant team owner cannot remove such risks without materially altering either the sport that the spectators come to see or the spectator's enjoyment of it.

No such argument applies to Sluggerrrr's hotdog toss. Millions of fans have watched the Royals (and its forebears in professional baseball) play the National Pastime for the better part of a century before Sluggerrrr began tossing hotdogs, and millions more people watch professional baseball every year in stadiums all across this country without the benefit of such antics.

While conceding that “Sluggerrrr's hotdog toss has nothing to do with watching the game of baseball,” the Royals contended that “the Hotdog Launch is a well-established (even customary) part of the overall stadium experience.” The state supreme court disagreed, finding “no link between the game and the risk of being hit by Sluggerrrr’s hotdog toss.”

The Hotdog Launch is not an inherent part of the game; it is what the Royals do to entertain baseball fans [between innings] when there is no game for them to
watch. Sluggerrr may make breaks in the game more fun, but Coomer and his 12,000 rain-soaked fellow spectators were not there to watch Sluggerrr toss hotdogs; they were there to watch the Royals play baseball …

The risk of being injured by Sluggerrr's hotdog toss … is no more inherent in watching a game of baseball than it is inherent in watching a rock concert, a monster truck rally, or any other assemblage where free food or T-shirts are tossed into the crowd to increase excitement and boost attendance.

Unlike foul balls which the team cannot control or limit without changing the essential nature of baseball, the Royals conceded there were negligent and non-negligent ways of tossing a hotdog. Moreover, the Royals conceded responsibility for the employee portraying Sluggerrr including the ability to control the ways in which he tossed hotdogs.

As a result, the state supreme court held “as a matter of law that the risk of injury from Sluggerrr's hotdog toss is not one of the risks inherent in watching the Royals play baseball that Coomer assumed merely by attending a game at Kauffman Stadium.” Accordingly, the Royals would “owe the same duty of reasonable care when distributing hotdogs or other promotional materials that it owes to their 1.7 million fans in all other circumstances.”

This risk can be increased, decreased or eliminated altogether with no impact on the game or the spectators' enjoyment of it. As a result, Sluggerrr (and, therefore, the Royals) owe the fans a duty to use reasonable care in conducting the Hotdog Launch and can be held liable for damages caused by a breach of that duty.

Sluggerrr's tosses may — or may not — be negligent; that is a question of fact for the jury to decide.

The state supreme court, therefore, concluded that the trial court erred in allowing the jury to consider the risk of injury associated with the hotdog toss as an “inherent risk of watching a baseball game at Kauffman Stadium.” The state supreme court vacated the judgment of the trial court in favor of the Royals and remanded the case to the trial court for further proceedings consistent with this opinion. On remand, the jury would consider and compare the alleged negligence of both the Royals and Commer. In so doing, the jury could possibly conclude that Coomer failed to use reasonable care to protect himself from Sluggerrr’s negligence, failing to keep an adequate lookout, instead choosing to let his attention wander elsewhere just when Sluggerrr was releasing the hotdog. If so, the jury could assess some percentage of fault to Coomer.

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