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### Comment

**\*601 HEADS UP!: THE BASEBALL FACILITY LIABILITY ACT** [FN1]

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### Introduction

There are many baseball players, celebrated for one reason or another, that have sparked the diamond and its environment. [FN2] They have provided fuel for recaptured thrills, for reminiscence and comparisons, and for conversation and anticipation in-season and off-season. [FN3] If a baseball fan is lucky enough to observe any of these players, or anyone, playing baseball in Illinois, she would be wise to keep her eyes peeled to the playing field and prepare to dodge a foul ball or stray bat. [FN4]

Since the beginning of this century, cases involving foul ball injuries have been common in American courts. [FN5] After years of losing these cases, in 1992 a baseball spectator finally sustained a victory in *Yates v. Chicago National League Ball Club*. [FN6] Immediately following the spectator's victory, the Illinois legislature passed the "Baseball Facility Liability Act" which now serves as a near-complete restriction of recovery on fans struck by stray balls or bats. [FN7] Spectators attending amateur or professional baseball games are barred recovery under the statute, unless they are seated behind a screen or their injury was caused by willful and wanton misconduct. [FN8]

This comment discusses how the "Baseball Facility Liability Act" came into existence and asserts that it should be stricken from Illinois law. [FN9] Part I of this comment provides the significant history and case law regarding the liability of ballparks to spectators who are struck by stray balls or bats. Part \*602 II analyzes the appropriateness of the "Baseball Facility Liability Act" and proposes a change in the law. [FN10]

### I. The History of Ballpark Liability

Baseball has traditionally been America's favorite sport, and cases of foul balls hitting spectators have clogged the courts for years. [FN11] Theoretically, when a baseball spectator is injured by a foul ball, the traditional negligence analysis should apply. [FN12] The following subsections show the development of common law regarding spectator injury cases, and exhibit the duty of care owed by stadium owners to spectators at common law and the duty of care owed by stadium owners to spectators under the "Baseball Facility Liability Act." [FN13]

#### A. Development of Common Law

There is a seemingly endless array of tort cases concerning injuries suffered by fans watching baseball. [FN14] Although there are several inherent dangers associated with watching a baseball game, the most common danger is that foul balls can inflict serious injury upon spectators. [FN15] Unfortunately for spectators, before 1992, nearly all spectator injury cases concerning baseball were decided in favor of the defendants. [FN16] Nationwide, common law has established the general rule that either: (1) a baseball park has no duty to spectators, or a limited duty to spectators that is generally met as a matter of \*603 law, [FN17] or (2) the spectator assumes the risk of injury by coming to the ballpark to watch the game. [FN18]

#### 1. The Beginning: Plaintiffs Strike Out

Cases determining that spectators are owed a limited duty or assume the risk of watching baseball games began to develop in the early part of this century. [FN19] In 1913, *Crane v. Kansas City Baseball and Exhibition Co.* established that baseball parks are not insurers of the safety of spectators. [FN20] Instead, the duty of the ballpark towards spectators was to provide

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some seating protected by screening for the use of spectators who desire such protection. [FN21] The Crane court justified this limitation of the ballpark's duty \*604 by declaring that although the danger of being hit by a foul ball is inherent, it is not imminent. [FN22] Also the limited duty has been justified by the fact that many baseball spectators prefer to sit in a seat that is not obstructed by a screen, and ballparks have a right to cater to these spectators. [FN23] Additionally, some fans consider the chance to catch a foul ball to be one of their most exciting experiences while attending a baseball game. [FN24]

The Crane court also held that spectators correspondingly assume the risk of injury from foul balls if they know the danger of taking a seat that is not protected by screening. [FN25] Moreover, the holding suggested that the requisite knowledge for assumption of the risk of injury would be present in virtually every plaintiff. [FN26] The court stated that since baseball is the national game, the rules governing it, the manner in which it is played, and the risks and dangers incident to it are matters of common knowledge. [FN27]

Thus, the case suggested that a baseball park only needed to screen a portion of the seats to satisfy any duty it had to spectators. [FN28] Additionally, spectators would assume the risk of injury in virtually every case even if the ballpark did not satisfy its duty because of their presupposed knowledge of baseball. [FN29] The spectators could not recover the cost of their injury, even if they were completely ignorant of what the game of baseball is or how the game of baseball is played. [FN30] Therefore, the Crane holding also suggested that the ballpark had no duty to warn spectators that they should pay attention to the possibility of being hit by a foul ball. [FN31]

\*605 Later in 1913, the Minnesota Supreme Court decided *Wells v. Minneapolis Baseball & Athletic Ass'n.* [FN32] While primarily agreeing with the Crane holding, the Wells court held that not every spectator attending a baseball game would possess immediate knowledge of baseball's inherent dangers. [FN33] The court reasoned that only those that have been struck with a baseball realize the hardness of the ball, the speed at which it travels, and the dangerous force with which it can strike. [FN34] For instance, women and children are invited to purchase tickets to baseball games and may not have enough experience with baseball to fully understand the risk they are taking by sitting in an unscreened seat. [FN35] Therefore, it would be unreasonable for no duty to rest upon the ballpark to protect spectators from the inherent dangers related to baseball, other than by properly screening some of the seats. [FN36] The Wells court held that spectators ignorant of the attendant dangers of baseball should be reasonably warned or that plaintiffs must know and understand the risk they are taking, and their choice to incur that risk must be free and voluntary. [FN37] Otherwise the ballpark could not successfully argue that the spectator assumed the risk of injury. [FN38]

By the late 1950s several jurisdictions adopted the Restatement (Second) of Torts on the duty of a possessor of land to apply to stadium owners. [FN39] Under the Restatement, the duty of a baseball park proprietor to the spectator was considered the same as that of any landowner to an invitee on the owner's land. [FN40] The Restatement established that:

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: \*606 (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. [FN41]

Thus, the ballpark needed to use reasonable care to keep the premises reasonably safe and give warning of latent or concealed danger; but the proprietor was not liable for injury to an invitee resulting from a danger which was or should have been observed, when exercising reasonable care. [FN42] Since the spectator had a duty of self-protection, the duty of the ballpark was reduced proportionately. [FN43] Thus, in jurisdictions that adopted the Restatement rule, determination that the ballpark owner was liable for injuries would be virtually impossible for a spectator that was struck by a batted ball because a spectator should either subjectively understand or immediately observe the inherent risks associated with watching a baseball game. [FN44] For the same reasons, under Restatement rule, the ballpark had no substantial duty to warn spectators of being hit by a baseball. [FN45]

## 2. The Coronel Case: A Plaintiff Reaches Base

In 1992, an Illinois Appellate Court adopted new standards that expanded the duty of stadium owners and improved the chances of a spectator \*607 being compensated for an injury suffered by a foul ball or stray bat. [FN46] In *Coronel v. Chicago White Sox*, the plaintiff contended that the ballpark was negligent for: (1) failure to provide adequate protection from batted balls; (2) failure to provide an adequate number of seats behind a screen; and (3) failure to warn her of foul balls, which it knew would be hit into the unscreened area in which she was sitting. [FN47] The trial court granted the ballpark's motion for summary judgement and the plaintiff appealed stating her contentions were issues of fact that should have been

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decided by a jury, and which could not be decided by summary judgement as a matter of law. [FN48] The appellate court recognized the long-standing common law principle that the duty ballpark owners owe to spectators does not require them to completely fence the seating area to protect spectators from foul balls. [FN49] The common law rule only required a screen for the most dangerous portion of the seating area, which "is universally recognized as the area behind home plate." [FN50] The court held that the decision of whether or not the ballpark adequately screened the most dangerous seating area was a question of fact to be decided by a jury, and thus could not be decided by summary judgement. [FN51] The court reasoned that if summary judgement was granted to the White Sox, it would be the White Sox, and not an unbiased trier of fact which would determine the adequacy of the screening protection at Comiskey Park. [FN52] The White Sox were not allowed to make this determination, especially since the protective screen was one of the smallest screens in Major League Baseball. [FN53] Also, the court did not require any reference by the trial court regarding requests for screened seating before submitting the issue to a trier of fact. [FN54] Additionally, the court determined that the White Sox could owe a duty to warn spectators, even though the danger \*608 was "open and obvious." [FN55] Therefore, whether or not the duty to warn spectators has been breached was also held to be a question of fact, to be determined by a jury. [FN56] Thus, even if the ballpark had provided adequate fencing for the most dangerous seats, it is not necessarily exculpated from further liability if the plaintiff was not properly warned. [FN57] The court justified this position by stating that a landowner or occupier may owe a greater duty to warn business invitees when there is reason to believe that the invitee's attention will be distracted. [FN58] The case was reversed and remanded for further proceedings. [FN59]

### 3. The Yates Case: A Spectator's Home Run

Later in 1992, in *Yates v. Chicago National League Ball Club*, an Illinois Appellate Court finally upheld a trial court's decision finding a baseball team liable to a spectator that was injured by a foul ball. [FN60] The facts of *Yates* indicate that the plaintiff, his four sisters, mother, and father attended a ballgame at Wrigley Field on August 20, 1983. [FN61] The plaintiff's father testified that he thought a screen behind home plate protected his own seat. [FN62] The plaintiff was sitting six seats down the row from his father, away from the \*609 screening. [FN63] During the game, a foul ball struck the plaintiff in the face. [FN64] A knot immediately appeared under the plaintiff's eye and blood began to pour down his face. [FN65] He was taken to the first aid station and then to a local hospital. [FN66] The injury required surgery and a hospital stay of at least five days. [FN67] For the three months following the injury, the plaintiff continued to have "excruciatingly" painful headaches, occasional double vision, and became withdrawn from his friends and family. [FN68] The plaintiff alleged that the defendant was negligent because: (1) it failed to provide adequate screening in the area behind home plate; and (2) it failed to warn him so as to allow him to avoid harm. [FN69] At the conclusion of the trial, the jury returned a verdict for the plaintiff in the amount of \$67,500. [FN70]

On appeal, the defendant claimed that the trial court erred in allowing the jury to determine the inadequate screening issue as a question of fact. [FN71] The court reaffirmed the principle that a ballpark owner does not absolutely insure the safety of his invitees on his premises. [FN72] However, the owner does owe a duty of reasonable care to spectators. [FN73] The *Yates* court followed the *Coronel* court's holding which determined that the ballpark must provide screening for the "most dangerous part of the grandstand" to satisfy its duty to the spectators. [FN74] Thus, the trial court was correct in allowing the jury to decide \*610 the case based on whether the screening behind home plate was adequate to protect patrons in "the most dangerous area of the ballpark," without reference to requests for screened seats. [FN75]

At trial, the plaintiff had obtained expert testimony that the Cubs had not exercised reasonable care in providing safe seating in the area behind home plate. [FN76] The expert witness testified that the Cubs had provided only the minimal amount of screening necessary to cover the area directly behind home plate. [FN77] The screen behind home plate was 73 feet wide and 30 feet tall. [FN78] Further evidence suggested that there were no warning signs in the home plate area and at least 10 foul ball injuries occurred in the home plate area of Wrigley Field during the 1982 baseball season. [FN79]

### B. The Baseball Facility Liability Act [FN80]

The response by the Chicago Cubs and Chicago White Sox to the plaintiff's victory in *Yates* was to seek immediate legislative protection. [FN81] In September of 1992, the governor of Illinois signed the "Baseball Facility Liability Act," which completely restricts an injured spectator's ability to recover for damages in nearly all situations where the spectator is struck by a stray ball or bat. [FN82] The Act provides that:

\*611 The owner or operator of a baseball [FN83] facility [FN84] shall not be liable for any injury to the person or property of any person as a result of that person being hit by a ball or bat unless: (1) the person is situated behind a screen, backstop, or similar device at a baseball facility and the screen, backstop, or similar device is defective (in a manner other than width or

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height) because of the negligence of the owner or operator of the baseball facility; or (2) the injury is caused by willful and wanton conduct, [FN85] in connection with the game of baseball, of the owner or operator or any baseball player, coach, or manager employed by the owner or operator. [FN86]

Thus, the provisions of the statute eliminate the issue of proof of whether a protective screen is adequate in height and width, which was a question of fact for a jury under the Coronel and Yates holdings. [FN87] The statute also eliminates \*612 the Illinois common law principle that the ballpark is not necessarily absolved of liability once adequate screening is provided. [FN88] Moreover, the statute eliminates the Illinois common law rule that the ballpark has a duty to warn spectators of the risk of being injured by foul balls, even though the danger is open and obvious. [FN89] Therefore, the current law in Illinois is that a spectator may not recover compensation from ballpark owners or operators if injured by a foul ball or stray bat at the ballpark unless the spectator is seated behind a defective fence or willful and wanton misconduct is present. [FN90]

## II. Analysis: Did the Legislature Make the Right Choice?

The passage of the "Baseball Facility Liability Act" raises the question of whether the Illinois legislature made the right choice in determining that ballparks should not be held liable for spectator injuries caused by foul balls and stray bats. [FN91] The following sub-sections set forth: (1) that the statute is problematic because it is excessively broad; (2) that baseball has historically received an anomalous position compared to other sporting events; and, (3) a proposition for new law for all spectator events, including baseball.

### A. The Baseball Facility Liability Act's Breadth is Problematic

The problem with the statute completely barring recovery is illustrated by comparing the outcome of *Lowe v. California League of Professional Baseball*, a California case, to the likely outcome of the same case under the "Baseball Facility Liability Act." [FN92] In *Lowe*, the plaintiff was seriously injured when struck by a foul ball while attending a professional baseball game. [FN93] To enhance the "ballpark experience," the ballpark featured a team mascot. [FN94] The team mascot was performing his antics in the seats behind the \*613 plaintiff and the mascot had been touching the plaintiff with his tail. [FN95] While the plaintiff was distracted by the mascot, he was struck by a foul ball. [FN96] The plaintiff was very seriously injured, as several bones in the left side of his face were broken. [FN97]

The trial court granted the ballpark's motion for summary judgement under the common law rule that the ballpark does not owe spectators a duty to protect them from foul balls. [FN98] However, the appellate court reversed the summary judgement ruling. [FN99] The court reasoned that the ballpark had a duty not to increase the inherent risk baseball spectators are regularly exposed to and assume. [FN100] The court held that the mascot's antics during the game prevented the plaintiff from being able to protect himself from any batted ball and foreseeably increased his risk over those inherent in the sport of baseball. [FN101] Thus, the *Lowe* court concluded that a trier of fact should determine whether the antics of the mascot increased the inherent risk to the plaintiff or whether the plaintiff assumed the risk of being struck by a foul ball during the time he was distracted by the mascot. [FN102]

Had these facts occurred in Illinois after the passage of the "Baseball Facility Liability Act" the summary judgment in favor of the ballpark would have been upheld. By the terms of the statute, no spectator can recover for injuries incurred due to a stray ball or bat unless that person is situated behind a screen or willful and wanton misconduct by the ballpark occurred. [FN103] Thus, in Illinois, baseball fans are put in a compromising position because if they turn away from the playing field, they will assume all risk of being hit by a ball or bat. [FN104] This risk of injury would be assumed even if the spectator was \*614 distracted for the benefit of the ballpark. [FN105] Additionally, the risk of injury would be assumed if the distraction had nothing to do with the inherent and incidental dangers associated with baseball or if the ballpark increased the inherent risk of injury to the plaintiff for the ballpark's own benefit. [FN106] For instance, buying food or drink would distract a spectator, be a benefit to the ballpark, but could hardly be considered an inherent risk of baseball. Yet, under the statute, when a spectator turns to pay for food, he assumes all risk of injury. [FN107]

Additionally, the "Baseball Facility Liability Act" does not specify whether a ballpark has a duty to provide any screening. [FN108] On its face, the statute solely provides that the ballpark can be held liable when the injured party is seated "behind a screen, backstop, or similar device" which is defective or if willful and wanton misconduct exists. [FN109] Thus, it seems that if the ballpark operator or owner did not provide any screening, an injured spectator could not recover for an injury related to stray balls or bats unless he could show willful and wanton misconduct. [FN110]

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## B. Baseball's Anomalous Position

Baseball has historically occupied an anomalous position in American law and it can be inferred that the Illinois legislature was giving baseball park owners preferential treatment when it passed the "Baseball Facility Liability Act." [FN111] For instance, if a spectator attends a golf tournament in Illinois, the spectator is owed a duty of reasonable care by the course owner. [FN112] Hence, if \*615 a spectator is hit by a golf ball, a jury will decide if the event operator breached the duty of reasonable care owed to spectators. [FN113] In golf, the defendant can either use assumption of risk, which would bar recovery, or comparative negligence, which would either bar recovery or reduce the awarded damages, as a defense to the spectator's claim. [FN114] However, in baseball cases, the defendant does not need a defense to negligence because the spectator does not get a chance to present the facts of the case to a jury, especially since the passage of the "Baseball Facility Liability Act." [FN115]

## C. A Proposition for the Future

One commentator has called for the courts to impose strict liability upon ballparks for injuries to spectators caused by stray balls or bats. [FN116] Another has called for the adoption of Section 343A of the Restatement of Torts. [FN117] Of course, until the "Baseball Facility Liability Act" is stricken from Illinois law, spectators have no chance to recover damages caused by foul balls in Illinois unless they were sitting behind a defective screen when injured or they can \*616 show they were injured because of willful and wanton misconduct. [FN118] However, an elaborate change would not be necessary, if the statute were to be stricken, to make the law concerning spectator injury more equitable.

In the late 1990s there does not seem to be any justification for treating baseball differently than any other sport or event. [FN119] Thus, a good solution for ballpark liability would be to adopt the law that is used for golf. [FN120] Under such a solution, the ballpark would owe a duty of reasonable care to spectators for any injury they may incur at the ballpark. [FN121] If the spectator knowingly and voluntarily assumed risks that were inherent and incidental to baseball, he would be barred recovery because the assumed risks were not created by the ballpark, but by the nature of the activity. Therefore, the ballpark should not be held liable. [FN122] However, if the spectator did not knowingly and voluntarily assume the risk of injury or if the ballpark somehow increased the spectator's risk of injury, whether or not the ballpark's duty of care was breached would be a question of fact for a jury. [FN123]

Utilization of the proposed law would result in more equitable outcomes than past decisions and decisions under the current statute. Application of the proposed law would be an incentive for ballpark owners or operators to sufficiently screen the most dangerous areas of the ballpark. Also, the ballpark would have additional incentive to warn inexperienced spectators, probably through signs or a public address system, that balls may be directed at them at a fast rate of speed. Furthermore, the ballpark would have an incentive to limit dangerous sideshows to the periods between innings. However, under the proposed law, the ballpark would not be liable to the fanatic that is injured while attempting to catch every foul ball that is hit into the seating area.

## Conclusion

There has been a long history of spectators being hit by foul balls and most of them were unable to recover any compensation for their injury, regardless of the severity, even if the ballpark owner or operator was \*617 negligent. [FN124] The present law in Illinois reflects the notion that baseball has historically been a legal anomaly and makes recovery virtually impossible for a spectator injured by a foul ball. [FN125] Thus, application of the present statute could result in some very harsh outcomes, especially when the ballpark increases the spectator's risk of injury or has benefited from the risk of injury assumed by the spectator. [FN126] However, ballpark owners and operators are protected even if they commit what would otherwise be a negligent act that results in a spectator being seriously injured. [FN127] Yet, owners and operators of other sports and entertainment events rarely enjoy a statute holding them harmless. [FN128] Thus, the "Baseball Facility Liability Act" should be stricken and the proposed law should be adopted. [FN129]

[FN1]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998). The Baseball Facility Liability Act is an Illinois statute that vastly restricts any possible recovery by baseball spectators struck by stray balls or bats. Id.

[FN2]. *Flood v. Kuhn*, 407 U.S. 258, 262 (1972).

[FN3]. Id.

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[FN4]. See 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN5]. William T. Champion, Jr., "At the Ol' Ball Game" and Beyond: Spectators and the Potential for Liability, 14 Am. J. Trial Advoc. 495, 497 (1991).

[FN6]. 595 N.E.2d 570 (Ill. App. Ct. 1992).

[FN7]. See 745 Ill. Comp. Stat. 38/10 (West Supp. 1998); Robert Neymeyer, Fans Strike Out with Foul Ball Litigation, in Sports and the Law: Major Legal Cases 24, 26 (Charles E. Quirk ed., 1996).

[FN8]. Id.

[FN9]. Id.

[FN10]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN11]. See Champion, *supra* note 5, at 497.

[FN12]. Under the traditional negligence analysis, the trial court will determine if the defendant owes a duty of care to the plaintiff. *Schentzal v. Philadelphia Nat'l League Club*, 96 A.2d 181, 183 (Pa. Super. Ct. 1953). See *Coronel v. Chicago White Sox*, 595 N.E.2d 45 (Ill. App. Ct. 1992); Mary C. St. John, Strike One, and You're Out: Should Ballparks Be Strictly Liable to Baseball Fans Injured by Foul Balls?, 19 Loy. L.A. L. Rev. 589, 590 (1985). If a duty of care is owed to the plaintiff, a trier of fact will determine if the duty was breached. *Schentzal*, 96 A.2d at 183. See *Coronel*, 595 N.E.2d at 46. If a duty was breached, the defendant acted negligently and will be subject to liability if the negligent act was the cause of the plaintiff's injury, unless the defendant has an affirmative defense. *Schentzal*, 96 A.2d at 183. See *Coronel*, 595 N.E.2d at 46.

[FN13]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN14]. Spencer Waller et al., *Baseball and the American Legal Mind* 391 (1995).

[FN15]. Charles E. Quirk, *Sports and the Law: Major Legal Cases* 24 (1996). Other dangers include getting hit by a stray bat, being injured by other fans, or being injured intentionally by players or coaches. Id.

[FN16]. Id.; see generally *Yates v. Chicago National League Ball Club, Inc.*, 595 N.E.2d 570 (Ill. App. Ct. 1992).

[FN17]. St. John, *supra* note 12, at 591. See generally *Maytnier v. Rush*, 225 N.E.2d 83, 89 (Ill. App. Ct. 1967). One court distinguished the limited duty owed by the ballpark from the assumption of risk doctrine by stating that in baseball the spectator participates in the sport by watching. While watching, the spectator subjects himself to certain risks that are necessarily incidental and inherent in the game. *Brown v. San Francisco Baseball Club*, 222 P.2d 19, 20 (Cal. Ct. App. 1950). The *Brown* court maintained that these risks are obvious and should be observed in the exercise of reasonable care. Id. However, that does not mean that the spectator has assumed the risk of being injured by the ballpark operator's negligence. Id. Instead, by voluntarily entering into the sport as a spectator, the patron knowingly accepts the reasonable risks that are inherent and incidental to the game of baseball. Id. See also *Jones v. Three Rivers Management Corp.*, 394 A.2d 546, 549 (Pa. 1978).

[FN18]. St. John, *supra* note 12, at 59. The assumption of risk doctrine has been used as an affirmative defense to negligence after a breach of duty has been found. Id. Additionally, the assumption of risk doctrine has also been used as a reason for limiting the duty of the ballpark before any breach of duty has been established. Id. Compare *Baker v. Topping*, 15 A.D.2d 193, 222 (N.Y. App. Div. 1961) (baseball spectator barred recovery under assumption of the risk doctrine) with *Akins v. Glens Falls City School Dist.*, 424 N.E.2d 531 (N.Y. 1981) (baseball spectator barred recovery because stadium satisfied legal duty). See generally *Crane v. Kansas City Baseball & Exhibition Co.*, 153 S.W. 1076 (Mo. Ct. App. 1913); *Quinn v. Recreation Park Assn.*, 46 P.2d 144 (Cal. 1934); *Keys v. Alamo Baseball Co.*, 150 S.W.2d 368 (Tex. App. 1941); *Cates v. Cincinnati Exhibition Co.*, 1 S.E.2d 131 (N.C. 1939); *Stradner v. Cincinnati Reds*, 316 N.E.2d 924 (Ohio Ct. App. 1972).

[FN19]. See *Crane*, 153 S.W. at 1076; *Wells v. Minneapolis Baseball & Athletic Assoc.*, 142 N.W. 707, 708 (Minn. 1913).

[FN20]. *Crane*, 153 S.W. at 1076.

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[FN21]. *Id.* The Crane court held that this duty was satisfied as a matter of law because the ballpark had provided screened seats in the grandstand and had given the plaintiff the opportunity to purchase a ticket for a seat protected by the screen. *Id.* Additionally, later cases determined that the ballpark does not have to provide screened seats for every spectator that wishes to have one, regardless of the number of spectators who come to see the game. See [Brisson v. Minneapolis Baseball & Athletic Ass'n](#), 240 N.W. 903, 904 (Minn. 1932). Instead, the Brisson court held the ballpark only needed to provide enough screened seats for those who may be reasonably anticipated to desire such seats to meet the duty it owes to spectators. *Id.* Thus, if a patron wished to purchase a screened seat and none were available, then if the patron subsequently purchased a non-screened seat, the patron was not owed a greater duty and assumed the risk as if the patron had originally wished to purchase a non-screened seat. *Id.*

[FN22]. *Crane*, 153 S.W. at 1077. See also *Wells*, 142 N.W. at 708.

[FN23]. *Wells*, 142 N.W. at 708.

[FN24]. *Boynton v. Ryan*, 257 F.2d 70 (3d Cir. 1958). Spectators should not be able to recover if they attempt to catch a foul ball but fail, and the ball strikes them. *Id.* See also *Jones v. Three Rivers Management Corp.*, 394 A.2d 546, 549 (Pa. 1978).

[FN25]. *Crane*, 153 S.W. at 1077. The Crane court maintained that those who participate as spectators assume the obvious risk of being hurt by foul balls. *Id.* See *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (asserting "the timerous may stay home"). See also *Brisson*, 240 N.W. 903; *Schentzel v. Philadelphia Nat'l League Club*, 96 A.2d 181 (Pa. Super. Ct. 1953).

[FN26]. *Crane*, 153 S.W. at 1077.

[FN27]. *Id.*

[FN28]. *Id.*

[FN29]. *Id.*

[FN30]. *Id.* Courts have often taken notice of the favorable position baseball occupies in American culture. See *Yates v. Chicago Nat'l League Ball Club, Inc.*, 595 N.E.2d 570, 578 (Ill. App. Ct. 1992). Because of this favorable position, "baseball sometimes appears to occupy an anomalous position in American law." *Id.* See *Flood v. Kuhn*, 407 U.S. 258 (1972) (upholding Major League Baseball's exemption from antitrust laws).

[FN31]. *Crane*, 153 S.W. at 1077. See *Wells v. Minneapolis Baseball & Athletic Assoc.*, 142 N.W. 707, 708 (Minn. 1913).

[FN32]. *Wells*, 142 N.W. at 707.

[FN33]. *Id.* at 708.

[FN34]. *Id.*

[FN35]. *Id.*

[FN36]. *Id.*

[FN37]. *Id.*; see also W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 164 (5th ed. 1984).

[FN38]. The court held the warning reasonable ballpark owner should make to caution and protect spectators from the incidental dangers of which they may be ignorant is a question for the jury. *Wells*, 142 N.W. at 707, 708 (Minn. 1913).

[FN39]. Joshua E. Kastenber, *A Three Dimensional Model of Stadium Owner Liability in Spectator Injury Cases*, 7 Marq. Sports L.J. 187, 189 (1996). See also James G. Gaspard II, *Spectator Liability in Baseball: Nobody Told Me I Assumed the Risk*, 15 Rev. Litig. 229, 232 (1996); *Maytnier v. Rush*, 225 N.E.2d 83, 87 (Ill. App. Ct. 1967).

[FN40]. Charles H. Perkins, *The Liability of the Proprietor of a Baseball Park for Injuries to Spectators Struck by Batted or*

Thrown Balls, 1951 Wash. U. L.Q. 434, 436 (1951).

[FN41]. Restatement (Second) of Torts, §343 (1965).

[FN42]. See *Brown v. San Francisco Ball Club*, 222 P.2d 19, 20 (Cal. Ct. App. 1950).

[FN43]. Id.

[FN44]. The spectator would not be barred recovery because the inherent risks associated are a matter of "common knowledge" as the Crane court held. *Crane v. Kansas City Baseball & Exhibition Co.*, 153 S.W. 1076, 1077 (Mo. Ct. App. 1913). Instead, the spectator would be barred recovery as a matter of law because he either had a subjective understanding of the risks associated with baseball or, at the very least, should have observed the inherent risks associated with watching a baseball game. See *Brown*, 222 P.2d at 21; *Quinn v. Recreation Park Ass'n*, 46 P.2d 144, 146 (Cal. 1935); *Brisson v. Minneapolis Baseball & Athletic Ass'n*, 240 N.W. 903, 904 (Minn. 1932). The Brisson court held that no adult of reasonable intelligence could fail to realize that injury may occur if they were struck by a batted ball, even if the spectator had limited baseball experience. *Brisson*, 240 N.W. at 903. Further, no one of ordinary intelligence could watch more than part of a baseball game without realizing that batters cannot, and do not, have complete control over the ball they are attempting to strike. Id.

[FN45]. Such a danger should become apparent almost immediately to anyone of reasonable intelligence after viewing only a small portion of a baseball game. See generally *Brown*, 222 P.2d at 21; *Quinn*, 46 P.2d at 146; *Brisson*, 240 N.W. at 904.

[FN46]. See *Coronel v. Chicago White Sox*, 595 N.E.2d 45 (Ill. App. Ct. 1992); *Yates v. Chicago Nat'l League Ball Club*, 595 N.E.2d 570 (Ill. App. Ct. 1992).

[FN47]. Id. at 46. The plaintiff was sitting behind home plate, facing first base, approximately three seats away from the edge of a screen intended to protect spectators from foul balls. Id. at 45. During the sixth inning of the game, the plaintiff looked down to pick up some popcorn from her lap and was struck on the face by a foul ball which broke her jaw. Id.

[FN48]. Id.

[FN49]. Id. See generally *Maytnier v. Rush*, 225 N.E.2d 83 (Ill. App. Ct. 1967). The Coronel court affirmed that the existence of a duty is a matter of law to be determined by the court and whether that duty has been breached is a matter of fact, which should be decided by a trier of fact. *Coronel*, 595 N.E.2d at 46.

[FN50]. Id.

[FN51]. Id. at 47. See also *Maytnier*, 222 N.E.2d at 83.

[FN52]. *Coronel*, 595 N.E.2d at 48.

[FN53]. Id. The screen was 21 feet high and 39.7 feet wide. Id. The court viewed this as a factor which should be used by a trier of fact to determine whether the ballpark had violated the duty of care it owed to spectators. Id.

[FN54]. Id.

[FN55]. Id. The White Sox contended that they did not owe a duty to the plaintiff as a matter of law because a landowner owes no duty to warn of open and obvious dangers. Id. See also *Friedman v. Houston Sports Ass'n*, 731 S.W.2d 572, 573 (Tx. Ct. App. 1987); *Jones v. Three Rivers Management Corp.*, 394 A.2d 546, 550 (Pa. 1978). The Coronel court held that even though such a law may exist in other jurisdictions, the White Sox had misstated the law in Illinois. *Coronel*, 595 N.E.2d at 48. The court determined that any rule which held the duty of reasonable care owed by a landowner to those on his premises never extends to conditions which are known or obvious to such entrants is not the law in Illinois. Id. See also *Ward v. K-Mart Corp.*, 554 N.E.2d 223 (Ill. 1990).

[FN56]. *Coronel*, 595 N.E.2d at 46. The court also noted that the Illinois Supreme Court, in recent decisions, has harshly criticized section 343 of the original Restatement of Torts which was adopted by many jurisdictions as the general rule regarding ballpark owner liability. Id. at 49. See also *Ward*, 554 N.E.2d 223. In Illinois, the ballpark's duty toward invitees



was that of reasonable care. [Coronel](#), 595 N.E.2d at 46.

[FN57]. [Id.](#) at 49-50. See also [Ward](#), 554 N.E.2d 223.

[FN58]. [Coronel](#), 595 N.E.2d at 46. The court noted that, at a baseball game, spectators could have their attention distracted by the lapse of time during the game, food and drink vendors, and other various activities that occur. [Id.](#)

[FN59]. [Id.](#)

[FN60]. [Yates v. Chicago Nat'l League Ball Club](#), 595 N.E.2d 570, 573 (Ill. App. Ct. 1992).

[FN61]. [Id.](#) at 570. The plaintiff's father had purchased the game tickets through a retail store in Merrillville, Indiana. [Id.](#) He requested tickets behind home plate. [Id.](#) Mr. Yates testified that he had been to Wrigley Field two or three times before the accident and was aware that foul balls would leave the playing field and go into the seating area. [Id.](#) However, he also testified that he assumed the tickets he purchased were for seats behind a screen. [Id.](#)

[FN62]. [Id.](#)

[FN63]. [Id.](#) The plaintiff testified that he had been to Wrigley Field approximately five times before the injury and that he knew foul balls would leave the field and travel in many directions. [Id.](#) at 574.

[FN64]. [Id.](#) at 573. The plaintiff was struck by a foul ball immediately after he had bet his sister whether the batter, Leon Durham, would get a hit. [Id.](#) at 574. The plaintiff testified that he saw only a white streak before he was hit by the baseball. [Id.](#)

[FN65]. [Id.](#) at 573.

[FN66]. [Id.](#)

[FN67]. [Id.](#)

[FN68]. [Id.](#) Before the injury, the plaintiff had played basketball and organized baseball; however, testimony suggested that he could no longer catch a baseball. [Id.](#)

[FN69]. [Id.](#)

[FN70]. No punitive damages were requested. [Id.](#) at 581.

[FN71]. [Id.](#) at 578.

[FN72]. [Id.](#)

[FN73]. [Id.](#)

[FN74]. [Coronel v. Chicago White Sox](#), 595 N.E.2d 45 (Ill. App. Ct. 1992); [Yates v. Chicago Nat'l League Ball Club](#), 595 N.E.2d 570, 578 (Ill. App. Ct. 1992). The [Coronel](#) court measured the ballpark's duty without reference to requests for screened seats. [Coronel](#), 595 N.E.2d at 45. The defendant asserted that it was entitled to a judgement notwithstanding the verdict because the plaintiff had not introduced evidence regarding the demand for screened seats. [Yates](#), 595 N.E.2d at 578. The generally accepted rule in virtually all other jurisdictions was that the ballpark's duty is satisfied if the owner or occupier provides screening for the most dangerous portion of the grandstand and for those who may be reasonably anticipated to desire protected seats for a typical game. [Id.](#) Although the general rule would appear to impose a more substantial duty on the defendant ballpark, it did not do so because courts would require the plaintiff to establish evidence regarding the average demand for protected seats in addition to showing that there was an issue of material fact regarding the adequacy of the protective screen before a trier of fact was allowed to decide the matter (emphasis added). See [Brisson v. Minneapolis Baseball & Athletic Ass'n](#), 240 N.W. 903, 904 (Minn. 1932); [Akins v. Glens Falls City School Dist.](#), 424 N.E.2d 531, 533 (N.Y. Ct. App. 1981).

[FN75]. Yates, 595 N.E.2d at 578.

[FN76]. Id. The expert was Allan R. Caskey. Id. at 574-575. He had received a doctorate in the field of recreation and parks administration from the University of Illinois in 1974. Id. at 575. On cross-examination, Caskey testified that he was not an architect, nor an engineer. Id.

[FN77]. Id.

[FN78]. This evidence was introduced by the defendant's expert witness, Richard de Flon, who was an architect that had exclusively worked on sports facilities since 1970. Id. at 576. He further testified that the dimensions of the screen fell within the standards of major league ballparks. Id.

[FN79]. Id. at 576. There were also 52 other "foul ball incidents" that did not occur around the home plate area. Id. at 582.

[FN80]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN81]. Neymeyer, supra note 7, at 26.

[FN82]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998). The Act became effective law on September 24, 1992. 745 Ill. Comp. Stat. 38/49 (West Supp. 1998). See Neymeyer, supra note 7, at 26.

[FN83]. "Baseball" includes the game of baseball or softball, including practice, regardless of whether it is played on a professional or amateur basis and regardless of whether it is played under an organized or league structure or outside of any such structure. 745 Ill. Comp. Stat. 38/5 (West Supp. 1998).

[FN84]. "Baseball Facility" means any field, park, stadium, or any other facility used to play baseball, regardless if it is used for other purposes. Id. The facility may be owned or operated by any individual, partnership, corporation, unincorporated association, the State or any of its agencies, officers, instrumentalities, elementary or secondary schools, colleges or universities, unit of local government, school district, park district, or other body politic and corporate. Id.

[FN85]. "Willful and wanton conduct" is conduct which shows an actual or deliberate intention to cause harm or which, if unintentional, shows an utter indifference to or conscious disregard for the safety of others or their property. Id.

[FN86]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998). During, the State of Illinois General Assembly (87th General Assembly, Senate Transcript-June 25, 1992), Senator Marovitz expressed concern regarding the outcome of the Yates case. He stated, "the State of Illinois finds itself in a unique position where one of our courts has found liability on sports franchises for foul balls that are hit in the stands, unlike other jurisdictions around the country. [This] Amendment sponsored by myself and Senator Phillip, clarifies the fact that there is no liability in those kind of situations." Senator Kelly expressed some concern regarding the legislation. He stated, " A lot of families and a lot of people are not aware, and I think the parks ought to do more to advise them of the dangers involved. There's too many children and minors and women that [have not played baseball] and seen these line shots that come off faster than the guns the Senator has been trying to stop. I think that these ball parks ought to take a look at something like they do in hockey, between first base and home base, and between third base and home base; they ought to have some kind of [see-through shield that protects spectators from bodily injury.]"

[FN87]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998). See Coronel, 595 N.E.2d at 45; Yates, 595 N.E.2d 570. Under the statute, it appears that a plaintiff might be able to successfully contend that a ballpark's protective screen is so small, that the size of the screen is willful and wanton misconduct. See 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN88]. See 745 Ill. Comp. Stat. 38/10 (West Supp. 1998). See also Coronel, 595 N.E.2d at 45; Yates, 595 N.E.2d at 570.

[FN89]. See 745 Ill. Comp. Stat. 38/10 (West Supp. 1998). See also Coronel, 595 N.E.2d at 45; Yates, 595 N.E.2d at 570.

[FN90]. See 745 Ill. Comp. Stat. 38/10 (West Supp. 1998). The fence cannot be held defective because of its height or width. Id.

[FN91]. Id.

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[FN92]. *Lowe v. California League of Professional Baseball*, 56 Cal. App. 4th 112 (Cal. Ct. App. 1997); Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN93]. *Id.* at 114. The game was being played at the home field of the Rancho Cucamonga Quakes, a minor league baseball team. *Id.* The plaintiff had been to the stadium on at least two other occasions. *Id.* at 115. The plaintiff had seen balls hit into the seating area on several occasions and had seen another fan hit by a foul ball; however, he did not request a seat behind the ballpark's screen. *Id.*

[FN94]. *Id.* at 114. The mascot was a caricature of a dinosaur, with a tail that protruded from the costume. *Id.* The mascot performed his routine nightly on the playing field and in the seating area. *Id.* at 116. The reason for the mascot was related to public relations, especially for young spectators. *Id.*

[FN95]. *Id.* at 114. The mascot had been moving back and forth behind the plaintiff for approximately two minutes before the injury occurred. *Id.* at 116. At the time of the injury, the plaintiff was not eating or drinking anything. *Id.* at 118.

[FN96]. *Id.* The plaintiff had been facing the playing field before the mascot arrived and did not consent to the mascot touching his shoulder. *Id.* at 115. When the mascot's tail touched his shoulder, he turned to see who it was and at that time was struck by a foul ball. *Id.* at 115.

[FN97]. *Id.* at 115.

[FN98]. *Id.* at 114. This is the common law rule in most jurisdictions. See *Lowe*, 56 Cal. App. 4th at 112.

[FN99]. *Lowe*, 56 Cal. App. 4th at 114.

[FN100]. *Id.* The court held that the mascot's antics during the actual playing of the game prevented the plaintiff from being able to protect himself from any batted ball and foreseeably increased the risk over those which were inherent in the sport. *Id.* at 115.

[FN101]. *Id.* at 115.

[FN102]. *Id.* at 112.

[FN103]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998). It is doubtful that the existence of a mascot would rise to the level of willful and wanton misconduct in nearly every case.

[FN104]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN105]. See generally *Lowe*, 56 Cal. App. 4th at 114.

[FN106]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN107]. *Id.* Further, spectators also assume the risk if they are helping the ballpark complete a food or beverage sale to another spectator. For instance, if the vendor is selling a hot dog to a fan in the third row, he could ask a fan in the second row to pass the hot dog to the fan in the third row. The fan in the second row, who is likely put in a compromising position if a foul ball is hit at him, receives absolutely no benefit from his assistance and assumes the risk of injury while helping the ballpark complete the transaction.

[FN108]. *Id.*

[FN109]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN110]. *Id.*

[FN111]. See *Yates*, 595 N.E.2d at 570. In most jurisdictions, a plaintiff cannot recover for injuries caused by a foul ball. *Id.* See also *Flood v. Kuhn*, 407 U.S. 258 (1972) (holding Major League Baseball is exempt from federal anti-trust laws, whereas other sports are not); *Riley v. Chicago Cougars Hockey Club, Inc.*, 427 N.E.2d 290 (Ill. App. Ct. 1981) (noting historical rule

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of non-liability for spectator injuries at baseball games as opposed to liability for spectator injuries at other sporting events). However, in 1995, the Illinois legislature adopted the Hockey Facility Liability Act. See 745 Ill. Comp. Stat. 52/5 (West Supp. 1998). The Hockey Facility Liability Act is virtually identical to the Baseball Facility Liability Act.

[FN112]. *Duffy v. Midlothian Country Club*, 481 N.E.2d 1037, 1040 (Ill. App. Ct. 1985). See *Riley*, 427 N.E.2d at 292. See generally Thomas C. Logan, *Fore! Liability to Spectators at Golf Tournaments*, 13 Am. J. Trial Advoc. 1207 (1990); Karen M. Viera, *Fore! May Be Just Par for the Course*, 4 Seton Hall J. Sport L. 181 (1994). In *Duffy*, a golf spectator was struck in the eye by a golf ball. *Duffy*, 481 N.E.2d at 1040. The injury caused total blindness in the spectator's right eye. *Id.*

[FN113]. See *Duffy*, 481 N.E.2d at 1040.

[FN114]. *Id.* at 1043. The assumption of the risk doctrine completely bars any recovery by the plaintiff. *Id.* at 1041. The doctrine has been divided into two forms: express and implied. *Id.* Under the express form, the plaintiff and defendant have an agreement that the defendant does not owe a duty to the plaintiff. *Id.* Such an agreement would be extremely rare in spectator liability cases. *Id.* The implied form of the assumption of the risk doctrine has been sub-divided into two categories: primary implied assumption of the risk and secondary implied assumption of the risk. *Id.* Primary implied assumption of the risk is applied when a plaintiff knowingly and voluntarily assumes risks that are inherent in a particular activity or situation. *Id.* Since the assumed risks are not created by the defendant, but by the nature of the activity, the defendant owes no duty to the plaintiff. *Id.* Secondary implied assumption of the risk was a true defense to negligence because the plaintiff implicitly assumes the risks created by the defendant's negligence. *Id.* In *Duffy*, the court abolished the doctrine of secondary implied assumption of the risk because the doctrine of comparative negligence had been adopted in Illinois. *Id.* at 1043. The comparative negligence doctrine factors the plaintiff's assumption of risk or misconduct into the apportionment of damages. *Id.* at 1042.

[FN115]. See 745 Ill. Comp. Stat. 38/10 (West Supp. 1998); *Yates v. Chicago Nat'l League Ball Club*, 595 N.E.2d 570 (Ill. Ct. App. 1992).

[FN116]. *St. John*, supra note 12.

[FN117]. *Gaspard*, supra note 39. Section 343A provides: "Known or obvious dangers: (1) 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." *Restatement (Second) of Torts § 343A* (1965).

[FN118]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN119]. The recent labor problems associated with baseball may have made the sport more vulnerable to legal attack. However, as of October 1998, baseball does appear to be making a comeback in popularity due in large part to the home run record setting seasons of Mark McGwire and Sammy Sosa.

[FN120]. See *Duffy*, 481 N.E.2d at 1040. See also Logan, supra note 112; Viera, supra note 112.

[FN121]. See generally *Duffy*, 481 N.E.2d at 1040.

[FN122]. *Id.*

[FN123]. *Id.*

[FN124]. See *Yates v. Chicago Nat'l League Ball Club*, 595 N.E.2d 570 (Ill. Ct. App. 1992).

[FN125]. *Id.* See also 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN126]. See generally *Lowe v. California League of Prof'l Baseball*, 56 Cal. App. 4th 112 (Cal. Ct. App. 1997).

[FN127]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

[FN128]. See *Yates*, 595 N.E.2d at 570.

[FN129]. 745 Ill. Comp. Stat. 38/10 (West Supp. 1998).

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