Assumptions about spectator injuries at sporting events

By Larry H. Lum

Facts: A spectator attending a professional baseball or hockey game is struck in the face or head by a foul ball or errant puck, resulting in the loss of an eye, skull fracture, brain damage, etc.

Query: The spectator will be unable to maintain a viable cause of action in tort because:

(A) he or she assumed the risk of injury merely by attending the game?

(B) the language on the back of the ticket expressly disclaims any right to sue in the event of such an injury?

(C) an announcement made over the public address system and scoreboard that no one can be held liable in the event a spectator is struck by a ball or puck effectively bars any cause of action?

(D) the risk of getting hit by a foul ball or errant puck is such an open and obvious hazard that no cause of action exists as a matter of law?

(E) none of the above?

Discussion

The answer is (E) of course. It is often surprising how many lawyers and laypersons alike are quick to cite one of the reasons set forth in (A) through (D) as the single reason why suit may be barred, but the actual answer lies in the limited duty imposed upon proprietors and operators of sporting venues and events, and the combination of all of the factors cited in (A) through (D), which support the application of such a limited duty.

For those jurisdictions that adhere to the "limited duty" standard, the duty has been defined as follows: the owner/operator of the sporting venue/event simply has to provide a sufficient number of "adequately screened" or protected seats for those most subject to the risk of being struck and who desire such protective seating. The limited duty standard, or some derivation of it, is followed in virtually every jurisdiction when it comes to spectator injuries at a baseball game, but with hockey, only New York, New Jersey, Pennsylvania, and Minnesota have clear precedents deeming the limited duty rule to apply unequivocally.

As long as the owner/operator meets this standard, it has met its duty of care as a matter of law. Rosa v. County of Nassau, 153 AD2d 618, 619 (N.Y. App. Div., 2d Dept. 1989) ("The mere fact that the screening did not totally eliminate the inherent risk of spectator injury does not alter our conclusion [that the standard of care was met], as the imposition of such a requirement would saddle sporting facility proprietors with the undue burden of being insurers of their patrons."); Gilchrist v. City of Troy, 113 AD2d 271, 273-74 (N.Y. App. Div., 3d Dept. 1985) ("[W]e conclude that the owner's duty owed to spectators is discharged by providing screening around the area behind the hockey goals, where the danger of being struck by a puck is the greatest, as long as the screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire to view the game from behind such screening."); See also Stern v. Madison Square Garden, 226 AD2d 444, 641 NYS2d 41 (2d Dept. 1996), and Shelton v. Madison Square Garden Corp., 249 AD2d 151, 671 NYS2d 727 (1st Dept. 1998).
Limited Duty Standard

In fairness to those operating under the misapprehension of the assumption of risk doctrine alone, one of the underlying principles justifying the application of the limited duty standard is that the court presumes — as a matter of law — that everyone attending such a sporting event knows or should know of the risk of a foul ball or errant puck. Such a presumption has little to do with ticket backs or public announcement warnings, but rather manifests the application of an objective standard by the court, regardless of the subjective knowledge of each spectator. In fact, many cases involving spectators sitting in an unprotected area hinge on the underlying concept of assumption of risk and open and obvious condition. See *Costa v. Boston Red Sox Baseball Club*, 61 Mass. App. Ct. 299, 302 (2004). In *Costa*, the plaintiff was a spectator at a Red Sox baseball game when a foul ball struck her in the face, causing personal injuries. The plaintiff commenced suit against the Red Sox, alleging that it failed to warn her of the dangers of being hit by a foul ball. The court held that "the potential for a foul ball to enter the stands and injure a spectator who is seated in an unscreened area is, as a matter of law, sufficiently obvious that the defendant reasonably could conclude that a person of ordinary intelligence would perceive the risk and need no additional warning." Id. at 303.

The problem with the limited duty standard, of course, is that it is practically useless and a classic illustration of circular reasoning. In fact, the legions of reported cases citing this standard rarely, if ever, contain any real analysis of these factors or otherwise identify how these factors may be objectively ascertained. For example, who is to say what constitutes a "sufficient number" of protected seats? If pressed, how does an owner/operator proceed to really establish the number of people who "desire" such protected seating?

Not unlike the quote attributed to Justice Potter Stewart when defining obscenity, the courts have traditionally applied this limited duty standard, particularly in the baseball context, by knowing it when they see it — as opposed to pressing for actual proof of the relative risks compared to the location and number of seats. As for people looking to be protected, most do not even think twice about it until they are actually struck or there is a close call nearby! In the instances where the courts actually look at dasher board and glass heights in hockey, for example, the sufficiency of these protective shielding measures seem to have been arbitrarily and randomly chosen with no data or proof regarding their efficacy to support the dimensions deemed to be sufficient as a matter of law.

The 'Baseball Rule'

There is also an interesting dichotomy in some jurisdictions between the court's approach to spectator injuries in baseball versus hockey. As the national pasttime, baseball holds a revered place in the hearts of judges, who routinely apply the limited duty standard to bar recovery. In some jurisdictions, despite the fact that either professional or semiprofessional hockey has been around for years, there are still older cases that stand as precedent where judges refused to apply the same limited duty standard as a matter of law, because they were reluctant to find that each and every spectator knew or should have known of the risks of a puck flying in to the stands. These courts have instead looked at the subjective understanding of the sport and associated risks of attending a game by each claimant on a sui generis basis. See *Shanney v. Boston Madison Square Garden Corp.*, 296 Mass. 168 (1936) (holding that "[i]t cannot fairly be said that ice hockey contests of this kind are now such a familiar experience in life that all persons can be expected to understand incidental risks which are not visually apparent.") *Morris v. Cleveland, Hockey Club*, 157 Ohio St. 225; 105 NE2d 419 (1952) (holding that the "baseball rule" did not apply to hockey games because it was a newer sport and the dangers of flying pucks may not be obvious to patrons such as the spectator who had never seen the game).

Of course, hockey has become more commonly known in both Massachusetts and Ohio since these decisions have been rendered, but they nevertheless stand as the precedent in these jurisdictions, and the prospects of the "baseball rule" being adopted now still remain uncertain.
New Venues

A similar concern arises in the states where professional hockey is still relatively new, like those Southern and Western states where hockey franchises have recently been established or re-located. California, for example, was in accord with the Massachusetts and Ohio cases discussed above. See Quinn v. Recreation Park Assn., 3 Cal.2d 725 (1935) (a baseball case where dismissal upheld), and compare Thurman v. Ice Palace, 36 Cal.App.2d 364 (1939), where California appellate court refused to treat the risk of injury to spectators at ice hockey games in the same manner as baseball games.

Since that time, some progress has been made in California, but the most recent case turned less on the adequacy of the protective glass than on whether there was adequate crowd-control measures to prevent spectators from standing in front of a plaintiff during warm-ups, thereby preventing her from avoiding the puck when it entered the stands and struck her in the head. See Nemarnik v. Los Angeles Kings Hockey Club, L.P., et al, 103 Cal. 4th 631 (2002), where the case was dismissed at trial as a matter of law. Although Nemarnik did not squarely address the application of the limited duty rule in California, it nevertheless signaled the willingness of a California appellate court to deny recovery as a matter of law in a puck strike case.

Athletes, Equipment Stronger

As players become stronger, so does the force of the balls and pucks flying off their technology-enhanced bats and sticks. The law has not evolved with the same speed, however, as the ever-increasing progress of the game. In the last several years, baseballs have been batted into the unprotected seating areas along the foul lines with increasing ferocity, while players seemingly throw or shatter bats into the stands with more frequency than ever before.

The courts nevertheless must use the existing precedent to negotiate their way through these new and unheralded events. It will be interesting to see how the law develops and what steps the major sports leagues and associations take in anticipation of — or in response to — these liability issues. The enhanced spectator shielding measures and protective netting now deployed in every major hockey arena is but one example.

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Endnote:

1 As discussed infra, however, there are some courts who are applying subjective standards, thereby warranting jury trials on the factual issue of what plaintiff should have reasonably known and whether defendants had a duty to warn. This is where the ticket back language and public address announcements are relevant to a legal analysis and defense. PDF

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