
The Prehistoric Baseball Rule: Outdated for Today's Game

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I. INTRODUCTION

One of the biggest changes to Major League Baseball (MLB), in the modern era, is the expansion of its protective screening. As of 2015, all MLB ball clubs had “no more than the standard, behind-the-plate netting in their ballparks.”¹ That all changed when a little girl got hit in the head by a 105 mile-per-hour foul ball while attending a New York Yankees game.² As a result, the little girl suffered a fractured skull and was hospitalized for six days.³ Today, the little girl has to “wear an eye patch for five hours over her non-injured eye to help the weaker side recover from the hit.”⁴ Out of all the foul balls that came before, this incident was the tipping point that made a change to MLB’s protective screening.⁵ This occurrence was so devastating to everyone at the ballpark. You could hear a pin drop in the stadium, and there was a long stoppage in play while the little girl got medical attention.⁶ Todd Frazier, the Yankee player that hit the foul ball was emotional. He instantly dropped in a crouching position with his head folded into his chest.⁷ The majority of baseball players and coaches from both teams were showing the same if not similar body language, and a few were brought to tears.⁸ This was not an ordinary pop-up foul ball. It was a line drive that kept pulling toward the fans sitting behind third base.⁹ At the time, like most ballparks, the protective screening at Yankee Stadium only extended from behind home plate to the beginning of the dugout.¹⁰ This made every fan above or past the dugout vulnerable to foul balls and other objects that may end up flying into the stands.¹¹ “The incident at Yankee Stadium sparked a league-wide response for a change in netting in areas of baseball stadiums that were most at risk for high-speed balls.”¹²

Two months before this incident, the New York Yankees were “‘seriously exploring’ extending protective netting after a series of events including: New York City council member ... proposed a law mandating netting from behind home plate to both foul poles, the Mets extended their netting beyond the dugouts, and a ... line drive foul ball bloodied a man at Yankee Stadium.”¹³

¹ John Harper, *MLB’s Announcement of Extended Netting is a Long Overdue Win for Those Seriously Injured by Foul Balls*, N.Y. DAILY NEWS, Feb. 01, 2018, <https://www.nydailynews.com/sports/baseball/extended-netting-long-overdue-win-injured-foul-balls-article-1.3793772>.

² See Dean Balsamini, *Girl Hit by Yankees Foul Ball is Still Traumatized*, N.Y. POST, Apr. 14, 2018, <https://nypost.com/2018/04/14/girl-hit-by-yankees-foul-ball-is-still-traumatized/>.

³ See Danielle Zoellner, *Revealed: Girl, 2, Who Suffered A Fractured Skull When She Was Hit in The Face by 105mph Foul Ball at Yankees Game is Still Recovering From Her Injuries Months Later*, DAILY MAIL U.K., Apr. 14, 2018, <https://www.dailymail.co.uk/news/article-5617137/Girl-2-hospitalized-getting-hit-face-105mph-foul-ball-recovering.html>.

⁴ *Id.*

⁵ Harper, *supra* note 1.

⁶ Chris Goossens, *Child Gets Hit with Todd Frazier Foul Ball Line Drive at Yankee Stadium - Yankees v Twins*, YOUTUBE (Sept. 20, 2017), <https://www.youtube.com/watch?v=kEUfrSxTQ1s>.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *See id.*

¹² Zoellner, *supra* note 3.

¹³ William Weinbaum, *How One Fan’s Story Contributed to a Conversation About MLB’s Safety Netting*, ESPN, Mar. 31, 2018, http://www.espn.com/mlb/story/_/id/22955279/how-baseball-reached-tipping-point-fan-protection.

The question becomes whether the father of the minor child would prevail if he brought suit against the Yankees. Would the Yankees be held liable for failure to extend its netting when they were “seriously exploring” the idea two months before the incident? Should the little girl’s age be a factor? All of these questions should be considered.

This horrific incident created the expansion of netting on top of the dugouts. Some franchises have even chosen to extend it further – to the edge of the outfield.¹⁴ The question then becomes, how high does the netting have to extend? This is a guideline that has not been set by MLB. This is a scary yet understandable omission. If MLB set a guideline and the owner’s complied with the dimensions of screening, they would not be held liable for regular foul balls that end up in the stands. However, if there are no set guidelines, owners are able to decide these matters on their own. Thus, if a ball is hit an inch over the netting and injures a spectator in the stands, an argument can be made that if the screening was simply an inch higher, the injury would not have occurred. However, this argument can be made at any dimension. In these potential lawsuits, decisions would most probably be left to a reasonable test on whether the owner should be held liable for the foul ball injury. However, if there are guidelines set by the MLB, owners would simply need to follow them or be subject to liability.

For foul ball cases, courts have been relying on the “Baseball Rule” for over one hundred years.¹⁵ The Baseball Rule holds:

that where a proprietor of a ball park furnishes screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest and that screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, the proprietor fulfills the duty of care imposed by law, and therefore, cannot be liable in negligence.¹⁶

The Baseball Rule has been applied by a majority of courts for over a century. This Paper will discuss the history and scope of the Baseball Rule and courts’ detachment from the Rule. In addition, this Paper will make reference to how the Baseball Rule is interpreted today. The purpose of this Paper is to rebut the courts’ use of the Baseball Rule. The target is for courts to dismiss the Baseball Rule and adopt a factor test when a spectator gets struck with an object that leaves the field of play. In addition, the goal is for all baseball leagues to adopt guidelines for its protective netting location and dimensions.

First, in Part I, this Paper will narrate the history behind the creation of the Baseball Rule. It discusses the nature of baseball when it was first played in the 1800s. This section will then

¹⁴ Andrew Joseph, *The Red Sox Are Dramatically Expanding Netting at Fenway After Scary Incidents*, FOR THE WIN, Jan. 22, 2018, <https://ftw.usatoday.com/2018/01/red-sox-netting-mlb-stadium-fenway-park-yankee-stadium-protective-fan-hurt-foul-ball-rules>.

¹⁵ *Crane v. Kan. City Baseball & Exhibition Co.*, 153 S.W. 1076 (Mo. Ct. App. 1913).

¹⁶ *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 534 (N.Y. 1981).

examine how the Baseball Rule evolved from the early 1900s to the late 1900s. Part I will then show how the Baseball Rule would be applied differently today.

Next, Part II of this Paper will detail how the Baseball Rule is outdated. This section will go through more recent case law that has moved away from the Baseball Rule. Part II will also discuss when the Baseball Rule is not applied, such as when the owner increases the risks of the game.

Part III of this Paper will discuss how particular states have included the Baseball Rule in its legislation. This section discusses the scope of the Baseball Rule, so it does not become guesswork for the courts. Finally, Part III will illustrate the most recent cases that involve challenging the Baseball Rule.

Finally, Part IV of this Paper will discuss how the Baseball Rule has been applied inconsistently. Finally, this section will discuss factors that a court should consider when determining whether an owner should be held liable for a foul ball that injures one of his or her spectators.

II. THE DEVELOPMENT OF THE BASEBALL RULE

A. Where It All Began

“The first recorded baseball game in America was played in 1846 on Elysian Fields in Hoboken, New Jersey.”¹⁷ At the beginning of baseball’s era, the game was pitched underhand, which was less dangerous than the style of baseball played today.¹⁸ “By the 1880s, the rules of the game had [changed, which allowed] pitchers to throw overhand and catchers wore masks and chest protectors.”¹⁹ Because of the new pitching rule change, “the grandstand area behind home plate became known as the ‘slaughter pen,’ because of the frequent injuries suffered by spectators watching the game from that area.”²⁰

B. Baseball’s Protective Netting

After a long list of injuries, in 1879, the Providence Grays were the first professional baseball team to erect netting behind home plate.²¹ The purpose of screening the area behind home plate was to protect spectators from being hit by foul balls.²² Although this was a clever innovation for professional baseball’s spectator safety, “the new screens were not always well received.”²³ A minor league baseball club in Milwaukee installed wire netting “in front of the grandstands, but it was removed a week later due to fan complaints about the obstruction of

¹⁷ *Edward C. v. City of Albuquerque*, 241 P.3d 1086, 1092 (N.M. 2010) (quoting LEONARD KOPPETT, KOPPETT’S CONCISE HISTORY OF MAJOR LEAGUE BASEBALL 5, 7 (2004)).

¹⁸ *See Edward*, 148 N.M. at 652 (quoting ROBERT M. GORMAN & DAVID WEEKS, DEATH AT THE BALLPARK: A COMPREHENSIVE STUDY OF GAME RELATED FACILITIES OF PLAYERS, OTHER PERSONNEL AND SPECTATORS IN AMATEUR AND PROFESSIONAL BASEBALL, 1862-2007 9, 131 (2009)).

¹⁹ *Edward C.*, 241 P.3d at 1092 (quoting J. Gordon Hylton, *A Foul Ball in the Courtroom: The Baseball Spectator Injury as a Case of First Impression*, 38 TULSA L. REV. 485, 488 (2003)).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Edward C. v. City of Albuquerque*, 241 P.3d 1086, 1092 (N.M. 2010).

view.”²⁴ This Milwaukee situation became an outlier as “by the late 1880s, it was commonplace for owners of baseball parks used by professional teams to screen the grandstand directly behind home plate, leaving the rest of the grandstand area and bleacher seats unscreened and unprotected.”²⁵ The purpose for not screening the grandstands adjacent to home plate was to prevent obstruction to the spectators’ view.²⁶ “[M]any field-level fans do not want screens or other protective devices in these areas because they feel their views will be degraded, foul ball catching opportunities will be decreased, [and] the intimate feeling derived from sitting close to the action will be reduced.”²⁷ Since the implementation of netting the grandstands directly behind home plate, there have been thousands of suits brought by fans as the “limited protective screening failed to eliminate spectator injuries.”²⁸

C. The Baseball Rule’s Debut

The “Baseball Rule” made its appearance in 1913 when a spectator at a Kansas City professional baseball game was struck by a foul ball.²⁹ The spectator, S.J. Crane, bought a grandstand ticket to see the baseball exhibition up close, but unlike reserved seating at today’s sporting events, there were no assigned seats in the early era of professional baseball.³⁰ The spectator had the option to sit behind the netting, which would protect him from foul balls and other object flying into the stands, or in an unprotected area.³¹ The spectator chose to sit in an area that was unprotected, and he was hit by a foul ball.³² The spectator brought suit against the owners of the ballpark for their negligence in not screening the entire grandstand.³³ The court described baseball and its risks as follows: “[T]he general public is invited to attend [baseball] games [where] hard balls are thrown and batted with great force and swiftness, and that such balls often go in the direction of the spectators.”³⁴ The court held that the stadium owners “fully performed [their duty to provide] seats protected by screening from wildly thrown or foul balls for the use of patrons who desired such protection.”³⁵ The court reasoned that the spectator “voluntarily chose an unprotected seat and thereby assumed the ordinary risk of such position.”³⁶ In addition, the court articulated that “[one] who is offered a choice of two positions one of which is less safe than the other cannot be said to be in the exercise of reasonable care if, with full knowledge of the risks and dangers, he chooses the more dangerous place.”³⁷ “That is a fundamental rule of the law of negligence.”³⁸ As a result of the *Crane* case, the Baseball Rule was born.

²⁴ *Id.* (quoting Hylton, *supra* note 19, at 488). (The minor league Milwaukee club was a part of the Northwestern League).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Edward*, 241 P.3d at 1092 (quoting GORMAN & WEEKS, *supra* note 18, at 132).

²⁸ *Id.*

²⁹ *See Crane v. Kan. City Baseball & Exhibition Co.*, 153 S.W. 1076, 1077 (Mo. Ct. App. 1913).

³⁰ *Id.*

³¹ *Id.*

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 1095.

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

Crane is the foundational case that lays out how ballpark owners can avoid foul ball liability. The owners simply need to erect protective netting in the high-risk areas where foul balls are usually hit. If the owner offers a reasonable amount of protected seats and spectators have the opportunity to sit in those seats, the owner has performed his duty.³⁹ This appears to be a practical conclusion because owners cannot be expected to screen or protect every seat in their ballpark. If they were expected to do so, the enjoyment of watching a baseball game would be ruined with obstructed views. Thus, the court in *Crane* left the spectators responsible for wisely selecting their seats when attending a baseball game. If there were seats available behind the protected screening area but the spectator chose to sit where his view would not be obstructed, a ballpark owner could not be held liable for any injury because the fan assumed the risk of being struck by a foul ball.

The court in *Crane* looked at multiple factors when deciding its holding. It took into account Crane's age, vision, knowledge of the game, number of games he had attended in the past, and his opportunity to sit in the protected area. This case was also decided at a time where there was no reserved seating. Spectators would sit in the ballpark based on a first-come-first-serve basis. As a result, the 1913 outcome of *Crane* may come out differently today. In the current era, fans can purchase tickets with assigned seating. Spectators can buy tickets online where they can select particular seats that are available. In addition, these websites, where tickets are sold, include an approximate view from those seats.⁴⁰ Thus, ticket purchasers are able to see if their view will be obstructed by any netting or ballpark pillars.⁴¹ Buyers are also able to determine which parts of the ballpark become blind spots from their assigned seats.

However, the biggest problem with the *Crane* decision in today's era is that spectators may not have the option to sit behind protected screening. First, the seating area that has protective netting are usually the most expensive tickets at the ballpark.⁴² This includes seats behind home plate and the dugouts. This leaves buyers with what might seem as the only option to purchase tickets down the first and third base line, where most foul balls are hit. Thus, while spectators may have a choice to sit in a protected area, it may not be economically feasible for all. Second, a lot of seating is occupied by season ticket holders.⁴³ The big purchasers are corporations, which bring its clients to games for business rapport building.⁴⁴ Again, these seats are usually in the popular areas, which are behind home plate and the dugouts. This leaves very limited seats available for other or infrequent spectators. Thus, if there are no protected seats available to purchase, fans are forced to sit further down the base lines or in the outfield where there is no protective screening. Finally, if the spectators sit in a section that has protected screening, they are still at risk of being struck with a foul ball. Many of the foul balls go over the screens. In addition, the screening does not properly protect spectators seated in the upper decks

³⁹ *See id.*

⁴⁰ TICKPICK, *Chicago Cubs vs. St. Louis Cardinals*, <https://www.tickpick.com/buy-chicago-cubs-vs-st-louis-cardinals-tickets-wrigley-field-9-22-19-3AM/3677680/> (last visited Nov. 29, 2018).

⁴¹ Some of the old stadiums, such as Wrigley Field, have pillars that obstruct the spectators view. Tyler Perkowitz, *See Every Pole at Wrigley Field (And Find Out How to Avoid Them)*, RATE YOUR SEATS (Feb. 13, 2020), https://www.rateyourseats.com/blog/cheap_seats/location-of-every-pole-at-wrigley-field-and-how-to-avoid-them.

⁴² *Id.*

⁴³ Nathan Hubbard, *The End of Season Tickets*, THE RINGER (Aug. 16, 2017), <https://www.theringer.com/nfl/2017/8/16/16147716/season-tickets-end-secondary-sellers>.

⁴⁴ Robert Tuchman, *How Corporate Hospitality Has Become a Major Part of the Sports Business*, FORBES (Jun. 10, 2015).

behind home plate or the dugouts. In fact, fans seated behind home plate in a high numbered row are also at risk as the netting is not erected high enough to prevent all foul balls from entering the stands.⁴⁵

Therefore, because professional baseball allows spectators to purchase seats for its exhibitions, the *Crane* decision might come out differently today. However, there are still factors to consider when the spectator chooses not to sit behind protected screening, whether it is due to the availability of seats, preference, or price.

Just a year after the *Crane* case, another foul ball case was decided by the same court. In *Edling v. Kansas City Baseball & Exhibition Corporation*,⁴⁶ a fan bought a ticket to the game and decided to sit behind home plate where there was protected screening.⁴⁷ However, during the game, a foul ball passed through a hole in the netting, which struck and broke the plaintiff's nose.⁴⁸ The spectator sued the owner of the ballpark, and the court held that the owner of the ballpark was liable for negligence.⁴⁹ The court reasoned that “[i]t was the duty of the [owner] to exercise reasonable care to keep the screen free from defects and if it allowed it to become old, rotten and perforated with holes larger than the ball, it did not properly perform its duty.”⁵⁰ Therefore, because the owner failed to provide sufficient screening in the area most exposed to foul balls, it cannot avoid liability with the application of the Baseball Rule.

D. The Duty Test

Since the decisions in *Crane* and *Edling*, there have been thousands of foul ball cases, and the Baseball Rule has been carried out consistently. However, one of the most cited cases regarding the Baseball Rule is *Akins v. Glens Falls City School District*.⁵¹ *Akins* was the first case where the Court of Appeals in New York⁵² defined what the duty of care is for a “proprietor of a baseball field to its spectators.”⁵³

In *Akins*, the spectator arrived at a high school baseball exhibition while it was in progress and decided to watch behind the “three-foot fence along the third base line.”⁵⁴ As the game progressed, she was hit by a foul ball, and she sued the City School District for “failing to provide safe and proper screening devices along the base lines of its field.”⁵⁵ There was seating

⁴⁵ The first photograph in the following link reflects how some ballparks have low protective netting behind home plate. Vinny Messana, *What's The Best Stadium to Visit This Summer?*, ACCESS BASEBALL (Dec. 31, 2017), <https://www.accessbaseball.com/2017/12/31/whats-best-stadium-visit-summer/>.

⁴⁶ 168 S.W. 908 (Mo. Ct. App. 1914).

⁴⁷ *See id.* at 908.

⁴⁸ *See id.*

⁴⁹ *See id.* at 908-09.

⁵⁰ *Id.* at 910.

⁵¹ 424 N.E.2d 531, 534 (N.Y. 1981).

⁵² The Court of Appeals is the highest court in the state of New York.

⁵³ *Akins*, 424 N.E.2d at 533.

⁵⁴ *Id.* (The baseball diamond had a backstop 60 feet behind home plate, and it was 24 feet high and 50 feet wide. *Id.* at 532. The diamond also had small fences running down the first and third base lines, approximately 60 feet behind [the bases]. *Id.* The spectator was situated 10 to 15 feet from the end of the backstop and 60 feet from home plate. *See id.*).

⁵⁵ *Id.* (The issue presented at the trial level was “whether [a proprietor of a baseball field], having provided protective screening for the area behind home plate, is liable in negligence for the injuries sustained by a spectator as a result of being struck by a foul ball while standing in an unscreened section of the field.” *Id.* at 327.).

behind the backstop, but there was no proof that the seats were filled.⁵⁶ According to the Court of Appeals, “the critical question becomes what amount of screening must be provided by an owner of a baseball field before it will be found to have discharged its duty of due care to its spectators.”⁵⁷ At the trial court level, the jury found in favor of the spectator.⁵⁸ Damages resulted in \$100,000, and the jury determined that the school district was 65% at fault while the spectator was 35% at fault.⁵⁹ At the Appellate Division, the case was affirmed. However, the Court of Appeals reversed the order of the Appellate Division.⁶⁰

When the case appeared in front of the Court of Appeals, the court considered how other jurisdictions addressed the question presented.⁶¹ The Court of Appeals decided to follow trend of the other jurisdictions, and it adopted the majority rule – “in the exercise of reasonable care, the proprietor of a ballpark need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest.”⁶² The court added that “such screening must be of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game.”⁶³ The court reasoned that “an owner of a baseball field is not an insurer of the safety of its spectators.”⁶⁴ Rather, like any other owner or occupier of land, it is only under a duty to exercise ‘reasonable care under the circumstances’ to prevent injury to those who come to watch the games played on its field.”⁶⁵ Justice Jasen further explained that “due care on the part of the owner [does not] require that the entire playing field be screened. [M]any spectators prefer to sit where their view of the game is unobstructed by fences or netting and the proprietor of the ballpark has a legitimate interest in catering these desires.”⁶⁶

The *Akins* case changed the narrative of foul ball decisions in the courtroom. The Court of Appeals found it inappropriate to follow the trial and appellate court in conducting a comparative fault scheme. Instead, the court looked at the issue as a duty test. Although it adopted the majority rule on the issue, it clearly defined the scope of an owner’s duty to provide protective screening for its spectators. However, the facts of this case were related to a high school baseball game, which usually has minimal seating. Even in this case, it was not determined whether there were any available seats for Ms. Akins behind the home plate backstop. If there were not any seats available, spectators would be forced to stand on the fence going down the base lines to watch the game. In cases where there is not enough seating in the

⁵⁶ *See id.*

⁵⁷ *Id.* at 533.

⁵⁸ *See id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ (Specifically, it looked at three possible scopes for the owner’s liability: (1) “the owner merely has a duty to screen such seats as are adequate to provide its spectators with an opportunity to sit in a protected area if they so desire;” (2) “a proprietor of a baseball field need only screen as many seats as may reasonably be expected to be applied for an ordinary occasion by those desiring such protection;” and (3) “the owner must screen the most dangerous section of the field – the area behind home plate – and the screening that is provided must be sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion.” *Id.* at 534.)

⁶² *Akins*, 424 N.E.2d 533.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* (quoting *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976)).

⁶⁶ *Akins*, 424 N.E.2d at 533.

protected areas, should spectators be liable for the owner's failure to provide enough seats or screening in additional sections of the ballpark? Courts cannot hold the owner's liable for satisfying every spectator's needs, but this issue raises questions about the Baseball Rule.

Akins is the most recent precedent for New York foul ball cases. However, would it still be considered good law if Todd Frazier's victim filed suit against the Yankees? Because the little girl's father never filed suit, *Akins* remains, to this day, the law in New York for foul ball cases. Thus, the Baseball Rule is alive and well in New York.

The *Akins* case has become one of the most popular case cited for foul ball suits.⁶⁷ Since *Akins*, the courts have remained consistent with its ruling. However, several courts have handled the issue⁶⁸ differently. These courts decide not to adopt the Baseball Rule.⁶⁹ For the owners to perform their duty and be free from liability, is it enough for them to simply erect a sufficient net behind home plate?

The Baseball Rule from 1913 and the *Akins* case is outdated. Courts in the early era of the Baseball Rule made its decisions based on whether the spectator had an option to sit behind home plate. This option is not of the same magnitude as it was back in 1913 when you would pay fifty cents to enter the ballpark and sit wherever you desired. Now, there is reserved seating, and each seat is priced differently based on where it is located in the ballpark.⁷⁰ In addition, the protected seats are the most expensive.

Recently, courts have made its rulings based on whether the owner provided the minimum protective screening in the greatest zone of danger – behind home plate. However, most foul balls do not hit the screen behind home plate. In today's game, the pitching is so fast that when a player hits a foul ball, it surpasses the netting, thus going into the crowd at high speeds. Thus, if behind home plate is in fact the most dangerous section, the owners should erect the screen significantly higher or angle it, so it does not allow foul balls to go over the netting. Courts are also basing its decisions on whether the screening is sufficient to provide protection for as many reasonably expected spectators desiring to sit behind netting. While the majority of spectators prefer not to have their view obstructed by a screen, there are other fans that would feel more comfortable sitting in a protected area. Again, this might not always be possible based on the demand and cost for those seats. Thus, this type of reasoning should not be included in the court's analysis because it is virtually impossible to determine what reasonable number of spectators would desire a seat behind protective netting.

Finally, the court in *Akins* also reasoned that “an owner of a baseball field is not an insurer of the safety of its spectators.”⁷¹ However, from an objective standpoint, the owners are in the hospitality business. The goal for owners is to make a profit. Again, all of the owners' profits are derived from the fans. Baseball is a spectator sport, and it would not generate the

⁶⁷ A search on Lexis would reveal that the case has been cited by 438 other authorities. (last visited Nov. 29, 2018).

⁶⁸ (Whether [a proprietor of a baseball field], having provided protective screening for the area behind home plate, is liable in negligence for the injuries sustained by a spectator as a result of being struck by a foul ball while standing in an unscreened section of the field. *Akins v. Glens Falls City School Dist.*, 424 N.E.2d 531, 532 (N.Y. 1981)).

⁶⁹ *Rountree v. Boise Baseball, LLC*, 296 P.3d 373 (Idaho 2013); *Lowe v. Cal. League of Prof. Baseball*, 65 Cal. Rptr. 2d 105 (Cal. Ct. App. 1997); *Coronel v. Chicago White Sox, Ltd.*, 595 N.E.2d 45 (Ill. App. Ct. 1992); *Yates v. Chicago National League Ball Club, Inc.*, 595 N.E.2d 570 (Ill. App. Ct. 1992).

⁷⁰ See *TICKPICK*, *supra* note 40.

⁷¹ *Akins*, 424 N.E.2d at 533.

revenue that it does without the fans. The majority of the owners' profits derive from TV deals, advertising, team apparel, concessions, tickets, etc. All of these features would not be relevant without the fans. The fans are the ones who watch the games on TV, and TV deals are generated by viewers and attendance at ballparks. The advertisements in the ballpark are for the fans. The team apparel, concessions, and tickets are all bought by the fans. Thus, the owners would not be able to make a profit without its spectators. Being in the hospitality business includes providing safety for its patrons. At a baseball game, baseballs and bats can strike a fan in many areas of the ballpark. Not only are foul balls a concern, but players also throw the ball at an extremely fast speed to get the runner out at a particular base. Spectators sitting behind first and third base are in line with the infielders throw to those respective bases. There have been many occasions where a ball is thrown too high into the stands, or a ball might be thrown too short, which can bounce into the bleachers at a high speed. In addition, when a batter loses his grip during his swing, fans are at risk of being struck by a bat flying into the stands. Furthermore, when a bat is broken from contact with the ball, small pieces of the wooden bat can end up in the stands or even fly between the screen netting and strike spectators. There are many ways in which a spectator can get injured at a baseball game. Therefore, the rationale that "owners of baseball fields are not insurers of the safety of its spectators" is inconsistent with reality.

While the owners cannot provide screening for all seats in their ballpark, they are still responsible for the safety of their spectators. In fact, owners should take pride in providing safety measures for their fans as the spectators are the ones who pay the bills. Not to mention that these safety measures can alleviate owners from liability. Providing safety on behalf of the owners is very crucial because the injuries that occur at the ballparks are not minor. Baseballs and bats fly into the stands at very high speeds. Thus, when the spectator is struck by an object, the impact is severe, and the owners can be on the hook for millions of dollars.

III. DIVERGENCE FROM THE BASEBALL RULE

A. Jurisdictional Preference

From baseball's earliest foul ball cases, the legal theory underlying the Baseball Rule has been the spectators' "assumption of risk and contributory negligence."⁷² The courts have rendered its decisions based on the spectator's knowledge of the game, choice to sit in the protected or unprotected area, and the stadium owners providing sufficient netting in the high risk danger zones – behind home plate.

A recent case that did not follow the Baseball Rule is *Rountree v. Boise Baseball*.⁷³ The spectator, Rountree, attended a Boise Hawks baseball game, and the Hawks stadium has a unique layout.⁷⁴ It has multiple areas including the Viper section, the Hawks Nest, and the Executive

⁷² *Id.* at 532. (quoting *Quinn v. Recreation Park Assn.*, 46 P.2d 144, 145 (Cal. 1935)).

⁷³ 296 P.3d 373 (Idaho 2013). (In the *Rountree* case, the spectator took his family to a Boise Hawks baseball game. Rountree, [the spectator], has been a Boise Hawks ticket season holder for over 20 years. *Id.*).

⁷⁴ *See id.* at 375; *see also* CHARLIE'S BALL PARKS, *Boy, oh, Boise!*, <http://www.charliesballparks.com/st/ID-Boise-Memorial.htm> (last visited Nov. 29, 2018); *Boise Hawks Stadium*, WRIGHT BROTHERS THE BUILDING COMPANY, http://www.wbtbc.com/portfolio_page/boise-hawks-stadium/ (last visited Nov. 20, 2018).

Club.⁷⁵ Rountree brought his family to the Executive Club, and while “he was talking to another spectator, he “stopped paying attention to the game.”⁷⁶ During that conversation, “Rountree heard the roar of the crowd and turned his head back to the game.”⁷⁷ He was struck by a foul ball, and as a result, lost his eye.”⁷⁸

Due to the injury, Rountree filed suit against Boise Baseball and the owner of Memorial Stadium.⁷⁹ “The district court was unable to adopt the Baseball Rule [on behalf of the defendants] because it claimed that the legislature knows how to define the scope of duties owed in the case of particular high risk businesses, and that public policy decisions must be made by the legislature, not the courts.”⁸⁰ The district court reasoned that “until the legislature intervenes baseball stadium owners will be held to the standard applicable to all business owners – that being a general duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others.”⁸¹ Thus, although the district court “found there may be a good reason to adopt the [B]aseball [R]ule, it declined to do so.”⁸² However, the “district court granted permission for the [defendant] to appeal its decision, and ultimately, Boise Baseball appealed.”⁸³

There were two issues on appeal: (1) “[whether this court] [s]hould adopt the “Baseball Rule,” which limits the duty owed by stadium operators to spectators injured by foul balls; and (2) [whether] primary implied assumption of risk a valid defense in Idaho”⁸⁴

The Supreme Court of Idaho explained that “despite the district court’s conclusion that only the [l]egislature could adopt the Baseball Rule, it is also within this Court’s power to do so.”⁸⁵ The court held that “even though the court may have the power to adopt ... the Baseball Rule, which limits the duty of a business owner, we decline to do so here. We find no compelling public policy requiring us to do so.”⁸⁶ The court reasoned that the “rarity of [this incident] weighs against crafting a special rule. There is no history of accidents that we can look to, and draw from, to sensibly create a rule.”⁸⁷ “Furthermore, Boise Baseball has not provided any other broader statistical evidence regarding the prevalence of foul ball injuries in general, and –

⁷⁵ *See id.* (The Viper section is an area for the fans to watch the exhibition behind a net that goes 30 feet high. *See id.* The Hawks Nest is a “dining area along the third base line,” which is protected by “vertical and horizontal netting.” *Id.*).

⁷⁶ *See id.* (The Executive Club is at the top of the stadium in line with third base. *See id.* “The Executive Club, which is only protected by horizontal netting, is one of the only areas in the whole stadium not covered by vertical netting.” *Id.*).

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *See id.* (Rountree also filed suit against fifteen other defendants. Rountree alleges that the owner’s negligence caused the loss of his eye. *See id.* Boise Baseball moved for summary judgment, alleging that the court “should adopt the Baseball Rule, which limits the duty of stadium operators to spectators hit by foul balls[.]” *Id.* Boise Baseball also argued that Rountree impliedly consented to the risk of being hit by a foul ball.” *Id.* The district court denied these motions. *See id.*).

⁸⁰ *Id.*

⁸¹ *Id.* at 376.

⁸² *Id.*

⁸³ *Id.* at 375.

⁸⁴ *Id.*

⁸⁵ *Id.* at 378.

⁸⁶ *Id.* at 379.

⁸⁷ *Id.*

assuming they are so prevalent – how varying stadium designs might prevent them.”⁸⁸ “Without this information, drawing lines as to where a stadium owner’s duty begins, where netting should be placed, and so on, becomes guesswork.”⁸⁹ The court thinks that these questions are best suited for the legislature because “it has the resources for the research, study and proper formulation of broad public policy.”⁹⁰

The court also concluded that “primary implied assumption of risk is not a valid defense.”⁹¹ “Contributory negligence is not to be a complete bar to recovery; instead, liability is to be apportioned between the parties based on the degree of fault for which each is responsible.”⁹² Thus, the court concluded that the proper standard, in Idaho, when resolving a tort, is comparative negligence.⁹³ In addition, the court held that the “assumption of risk has no legal effect as a defense [in Idaho], except in instances of express written or oral consent.”⁹⁴

Thus, because the court found no compelling public policy, it decided not to follow the Baseball Rule. In addition, it found that when looking at a tort issue in Idaho, the proper standard is comparative negligence.

Rountree is the first case in the modern era that does not follow the Baseball Rule. The court declined to adopt the Baseball Rule simply because it does not want that rule to act as precedent under Idaho law. The court explained that it could adopt the Baseball Rule, but it was going to leave that decision for the legislature. Instead, the court decided to follow the standard of a “general duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others.”⁹⁵ Even under that standard, the court could have ruled the other way. The Executive Club is located in an area where spectators are not expecting to encounter foul balls. The purpose of Executive Clubs is for a handful of fans to attend, have an alcoholic beverage, and enjoy the game from a bird’s eye or VIP view. Thus, under a general duty standard based on what was reasonably foreseeable under the circumstances, *Rountree*’s case would not be one where he would be expected to assume the risk of being hit by a foul ball. This demonstrates that a spectator’s injury at a baseball game is not only subject to its facts, but it is also subject to which state the injury took place. In addition, the court claims that there is no public policy argument supporting the adoption of the Baseball Rule. However, there is a clear public policy argument. Owners of baseball stadiums cannot be held liable for all the foul balls hit during the game. First, owners cannot be liable because they cannot screen the entire stadium. Providing protective netting for all the fans would diminish the purpose of going to watch a game live. Most fans do not want to have their view obstructed when watching professional sports. Second, the majority

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.* (quoting *Anstine v. Hawkins*, 447 P.2d 677, 679 (Idaho 1968)).

⁹¹ *Id.* (For the implied assumption of risk issue, the court laid out the doctrine’s subcategories: primary and secondary. Primary implied assumption of risk ... means that the defendant was not negligent because there was no breach, or no duty. *Id.* at 380 (quoting *Lawson by & Through Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1016 (Utah 1995)). Primary implied assumption of risk arises when “the plaintiff impliedly assumes those risks that are *inherently* in a particular activity.” *Id.* (quoting *Turner v. Mandalay Sports Entm’t, LLC*, 180 P.3d 1172 (Nev. 2008)). Secondary implied assumption of risk “is an affirmative defense to an established breach of duty and as such is a phase of contributory negligence. *Id.* (quoting *Lawson*, 901 P.2d at 1016)).

⁹² *Id.* (quoting *Salinas v. Vierstra*, 695 P.2d 369, 374 (Idaho 1985)).

⁹³ *See id.* at 381.

⁹⁴ *Id.* at 380.

⁹⁵ *Id.* at 377.

of baseballs end up in the stands during the game – there are more foul balls than hits in a game. In addition, the majority of these foul balls do not remain on the field. Thus, for an owner to be held liable for almost every time a ball is made contact with a bat would be extremely burdensome. There were enough reasons for an Idaho court to adopt the Baseball Rule without making any stretch in the law. For whatever reason, the Idaho Supreme Court does not want the owners of baseball stadiums to be free from liability.

B. Increasing the Risks of the Game

There are also many other cases where a spectator at a baseball game gets struck by a foul ball while he or she is distracted by events which are produced by the stadium owner or the ball club. A great illustration of this scenario is in the case of *Lowe v. California League of Professional Baseball*.⁹⁶ This is a second case that does not follow the Baseball Rule. In this case, John Lowe attended a Rancho Cucamonga Quakes minor league baseball game.⁹⁷ The Rancho Cucamonga Quakes, like most sport teams, have a mascot.⁹⁸ The mascot, Tremor, is a seven-foot tall dinosaur with a long tail.⁹⁹ While the game was taking place, Tremor was “performing his antics” to engage the crowd and young fans.¹⁰⁰ Tremor was positioned directly behind Lowe’s seat, which was in an unscreened area down the left field line.¹⁰¹ During Tremor’s antics, his tail hit Lowe in the back of the head multiple times.¹⁰² As a result, Lowe turned around to notice what was hitting him.¹⁰³ When Lowe directed his attention back to the game, he was struck, instantaneously, with a foul ball, which broke “multiple facial bones.”¹⁰⁴ Lowe filed suit against the “California League of Professional Baseball.”¹⁰⁵ The issue before the court was “whether the Quakes’ mascot cavorting in the stands and distracting [Lowe’s] attention, *while the game was in progress*, constituted a breach of that duty, i.e., constituted negligence in the form of increasing the inherent risk to [Lowe] of being struck by a foul ball.”¹⁰⁶ According to the law in California, “a defendant generally has no duty to eliminate, or protect a plaintiff from risks inherent to the sport itself, but *has only a duty not to increase those risks.*”¹⁰⁷ The California Supreme Court concluded that a mascot is not integral to the sport of baseball.¹⁰⁸ The court reasoned that “Tremor’s antics and interference, while the baseball game was in play, prevented the plaintiff from being able to protect himself from any batted ball and foreseeably increased the risk to Lowe and above those inherent in the sport.”¹⁰⁹ Therefore, because the

⁹⁶ 65 Cal. Rptr. 2d 105 (Cal. Ct. App. 1997).

⁹⁷ *See id.* at 106.

⁹⁸ *See id.*

⁹⁹ *See id.*

¹⁰⁰ *Id.*

¹⁰¹ *See id.*

¹⁰² *See id.*

¹⁰³ *See id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* Lowe also sued Valley Baseball Club, Inc., which does business as the Quakes. *See id.*

¹⁰⁶ *Id.* (The trial court granted the defendants’ motion for summary judgment. *See id.* The trial court was persuaded that “under the doctrine of primary assumption of risk, [the] defendants owed no duty to [Lowe], as a spectator, to protect him from foul balls.” *Id.* The California Court of Appeal found that the trial level erred in granting the defendants’ motion for summary judgment. *See id.*).

¹⁰⁷ *Id.* at 109.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

mascot was distracting Lowe from the action of the game, the owner was held liable for increasing the spectator's risk of being hit by a foul ball.

However, unlike the *Lowe* case in California, other jurisdictions do not follow the same holding. For example, an Ohio case, *Harting v. Dayton Dragons Professional Baseball Club*,¹¹⁰ decided the mascot interaction did not "absolve Harting from the duty to protect herself from the ordinary risks inherent in the sport."¹¹¹ Again, this goes to show that the scope of the Baseball Rule is dependent on which jurisdiction is hearing the case.

The *Lowe* decision is more practical than *Harting*. Mascots are representing the sport's team brand. The mascot is there to enhance fan engagement with the team and especially the younger fans. Thus, the mascot for sport's teams are acting as an agent of the owners for the purpose of making a great experience for fans at the ballpark. In addition, the owner can control or set limits to the mascot's antics. The owner can choose at what points during the game the mascot can interact with fans. The best way to avoid a potential *Lowe* liability case would be to only allow the mascot to interact with fans between innings. This will ensure that all spectators have the opportunity to be concentrating on the game and all potential hazards that may arise. In this regard, owners would have complied with its duty to keep fans safe at the ballpark. A plaintiff would not have a credible argument claiming that they were distracted if the mascots antics took place when the game was at a stoppage. If an owner does not want to put limitations on their mascots, he or she has the choice of not having a mascot. In fact, some sport franchises have decided not to have a mascot because it distracts fans from the live action, which can lead to an injury. Instead, owners have decided to engage fans through other streams of entertainment. This may include cheerleaders or other activities taking place on the diamond. These alternatives, however, all take place during stoppages in play. Therefore, this prevents distracting spectators while the game is taking place. Thus, the *Lowe* decision demonstrates a proper duty upon the owner not to increase the risks of the game. By having a mascot interact with fans while the game is taking place, it distracts the fans while a ball or bat can be coming in the fan's direction at a high speed. In addition, the owner is the boss. He or she gets to decide the scope of the mascot's antics. When the owner has control over the mascot's actions, he should be held responsible for any injury that may occur due to the mascot's antics. Thus, the only logical conclusion is that courts should follow this rule – if an owner increases the risk of the game, he should be held liable for the fan's injury.

IV. LEGISLATION REVIVING THE BASEBALL RULE

A. Inked in Black Letter Law

In light of all these foul ball injuries, four state have created legislation that makes the Baseball Rule black letter law. The state of Illinois made that decision based on two cases: *Coronel v. Chicago White Sox*¹¹² and *Yates v. Chicago National League Ball Club*.¹¹³ In the *Coronel* case, the spectator was attending her first baseball game, and she sat three seats over

¹¹⁰ 870 N.E.2d 766 (Ohio Ct. App. 2007).

¹¹¹ *Id.* at 770.

¹¹² 595 N.E.2d 45 (Ill. App. Ct. 1992).

¹¹³ 595 N.E.2d 570 (Ill. App. Ct. 1992).

from the edge of the protective netting.¹¹⁴ As the fan put her head down to reach for her popcorn, which was sold by the ballpark, she was struck in the face with a foul ball.¹¹⁵ As a result, she received a broken jaw and sued the owner of the ballpark for negligence.¹¹⁶ The Appellate Court reversed and remanded the trial court's summary judgment decision because a question of fact existed whether the Sox violated its duty to the spectator seated in the most dangerous part of the ballpark.¹¹⁷ The court reasoned that the Sox's netting behind home plate was twenty-one feet high and thirty-nine feet wide, which was one of the smallest in MLB.¹¹⁸ Furthermore, the court determined that although an owner might have "provided adequate netting for the most dangerous part of the grandstands," he has not necessarily "exculpated himself from further liability."¹¹⁹ The owner must "exercise reasonable care to give a warning adequate to enable the visitors to avoid the harm[.]"¹²⁰

In the *Yates* case, Dr. Yates bought tickets to a Chicago Cubs game thinking they were behind home plate and protected screening.¹²¹ During the game, his minor son was hit by a foul ball, which caused blood to pour out of the child's eye.¹²² Yates sued the ball club for its failure to provide adequate screening behind home plate and warn him about the dangers of foul balls.¹²³ The appellate court held that the trial court did not err in admitting expert witness's testimony, other foul ball injuries at the ballpark, or excluding the club's evidence based on contractual assumption of risk.¹²⁴ Like the *Coronel* case, this court reasoned that although an owner might have "provided adequate netting for the most dangerous part of the grandstands," he is not necessarily "exculpated himself from further liability."¹²⁵

After these two cases, the Illinois legislature decided to take the issue of foul ball cases and the Baseball Rule into its own hands. The legislature created the Baseball Facility Liability Act.¹²⁶ Under the limited liability section, it states:

The owner or operator of a baseball facility 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 in width or height)

¹¹⁴ *Coronel*, 595 N.E.2d at 46.

¹¹⁵ *See id.*

¹¹⁶ *See id.* (The trial court granted summary judgment to the owner. *See id.*).

¹¹⁷ *See id.* at 48.

¹¹⁸ *See id.*

¹¹⁹ *Id.*

¹²⁰ *Id.* at 48-9.

¹²¹ *Yates v. Chicago Nat. League Ball Club*, 595 N.E.2d 570, 573 (Ill. App. Ct. 1992).

¹²² *See id.* (The child's injury required surgery and a hospital stay for five days. Following the injury, the child suffered from excruciating headaches and double vision. *See id.* at 573-74.).

¹²³ *See id.* (The jury found in favor of Yates in the amount of \$67,500 as a result of the ball club's negligence. *See id.* at 574.).

¹²⁴ *See id.* at 579-82.

¹²⁵ *See id.* at 582 (quoting *Coronel v. Chicago White Sox, Ltd.*, 595 N.E.2d 45, 48 (Ill. App. Ct. 1992)).

¹²⁶ 745 ILL. COMP. STAT. 38/10 (2018).

because of the negligence of the owner or operator of the baseball facility; or

(2) The injury is caused by willful and wanton conduct, 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.¹²⁷

This statute significantly limits the owner's liability and strengthens the Baseball Rule in Illinois. For the Act's first prong, anyone who is not seated behind protective netting does not have a defense. Thus, courts in Illinois would not be able to provide the same rationale as the court did in *Lowe*. This statute also eliminates the possibility of analyzing other factors such as the spectator's age, complying with league screen standards, spectator's seat location, spectator's knowledge of the game, spectator's first game, stadium design, and entertainment interference. The first prong is identical to the Baseball Rule. All that is required of the owner is to erect sufficient netting behind the most dangerous area of the ballpark. If a spectator is sitting behind the netting, he or she cannot have a claim against the owner, unless the net is in some way defective (not accounting for width and height). This statute eliminates all the progress the courts have made in trying to veer away from an outdated Baseball Rule. This statute is also unclear about what constitutes "situated behind a screen."¹²⁸ If a spectator is sitting directly behind or within the vicinity of home plate, this statute has no flaws because all aspects of the screen will protect him from line drive foul balls. However, if the spectator is situated down the baselines, depending on the seat's angle to the netting and trajectory of the baseball, he may not be considered to be protected by the screen. Therefore, because there are so many aspects to consider, a factor test is more suitable to analyze causes of actions relating to foul balls.

B. The Baseball Rule in 2018

While Pennsylvania does not have the Baseball Rule inked in its legislation, the Baseball Rule is floating around the Wendy Camlin case. Camlin was attending a Pittsburgh Pirates baseball game, and her seat was in the first row behind home plate, which is screened with protective netting.¹²⁹ As Camlin was walking in the first row, behind home plate, to get to her assigned seat, a foul ball hit the netting, which caused the screen to extend, and the ball and the net struck Camlin in the head.¹³⁰ Camlin sued Major League Baseball and the Pittsburgh

¹²⁷ *Id.* (Under the Act, the term 'Baseball facility' "means any field, park, stadium, or other facility that is used for the play of baseball (regardless of whether it is also used for other purposes) and that is owned or operated by an 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.* § 5. In addition, the term '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." *Id.* Furthermore, the term 'Willful and wanton conduct' "means a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property." *Id.*).

¹²⁸ *Id.* § 10.

¹²⁹ Jairus Miller, *Fan Hit in Head at Pirates/Cubs Game*, YOUTUBE (Apr. 20, 2015), https://www.youtube.com/watch?time_continue=8&v=syXi7MNNikE.

¹³⁰ *See id.*

Pirates.¹³¹ However, MLB was dismissed shortly after.¹³² In addition, the plaintiff's joined Promats Athletics (Promats), the company that owns and installed the netting at PNC Park.¹³³ Before trial began, the Pirates settled with the Allegheny County Sports and Exhibition Authority for an undisclosed amount.¹³⁴ It is unclear why the Pirates settled with the county instead of Camlin directly. Regardless, the only remaining defendant is Promats.¹³⁵ Camlin's attorney intends to argue that the screen was defective because it "did not do what it was supposed to do," which is to shield spectators from foul balls behind home plate.¹³⁶ This case is similar to the *Eddling* case because although the protective screening did not have any holes, it is still considered defective netting for not properly protecting spectators. Courts must be cautious when determining whether the screening is sufficient based how much resistance it has. If the screen is too tight, it will bounce directly back onto the field, potentially striking players or umpires at a fast speed. However, if the screen is too loose, spectators in the first row behind the protective netting are in danger of getting hit by a foul ball, like Wendy Camlin. As a result of her injury, she "continues to have headaches, tinnitus, vertigo, confusion, neck and shoulder pain and memory loss."¹³⁷ It took Camlin six month to return to work on a part-time basis until she was terminated.¹³⁸ She has not worked since.

The Camlin case is one where the owner increased the risk of the game. The purpose of protective netting is to block or intercept foul balls from striking spectators. Camlin was seated in the high-risk danger zone – behind home plate. She is arguably the most vulnerable spectator at the ballpark because she has the least amount of time to react to a foul ball. However, when spectators sit behind protective netting, even in the first row, he or she does not expect to be hit by a foul ball or for the ball to come through the screen. Thus, Camlin could not have assumed any risk once she was in the first-row walking to her seat. In addition, the ushers allowed Camlin to walk down to her seat while the game was in action. While the employee may have allowed Camlin to enter the stands before the first pitch was thrown, ushers should be aware of when the game is about to start so accidents like these do not happen. It will be interesting to see how the Camlin case plays out, but it would be surprising if a court found in favor of Promats.

V. THE FACTOR TEST

The Baseball Rule is not applied or used consistently within the United States. Baseball is played in all fifty states, and it is not played differently amongst those states. Thus, why should its laws be applied differently for the same or similar set of circumstances in different jurisdictions? The Baseball Rule is useful but only to a certain degree – an owner cannot be held liable for every foul ball that ends up in the stands. However, the owner needs to be held liable based on if it provides the necessary protection to ensure spectator safety at the ballpark. The Baseball Rule or lack thereof should be adopted or applied identically in all cases subject to the

¹³¹ Paula Reed Ward, *Trial Begins Over Errant Foul Ball at Pirates Game*, PITT. POST-GAZETTE, Nov. 16, 2018.

¹³² *See id.*

¹³³ *See id.*

¹³⁴ *See id.*

¹³⁵ *See id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

facts of the incident. This includes providing a factor test to determine whether the owner should be held liable for foul balls injuring his or her spectators. The factors include: (1) whether the owner erected protective netting subject to the league's standards; (2) whether the spectator has knowledge about the game and the risk of foul balls; (3) whether the spectator has ever attended a baseball game in the past; (4) where the spectator was seated; (5) the spectator's age; (6) whether the fan was distracted by the owner's entertainment; and (7) the stadium's design. While these factors should be considered as a whole when the court is deciding whether to apply the Baseball Rule, it is still important to go through each one individually.

First, leagues should provide its ball clubs a standard for erecting their netting. This can be complex as each stadium has a different design. However, if a league were to have a set of standards governing its protective netting, the courts should look to whether the owner was in compliance with those standards. The court should then ask itself whether the injury would not have occurred if the owner was obedient to the standards provided by the league. If the owner could have prevented the spectator's injury by following the league-imposed standards, the court should refrain from applying the Baseball Rule.

Second, the spectator's knowledge about baseball should be analyzed based on his or her experience playing and watching the game, as well as the risks that are involved in being hit with a foul ball. If the spectator is familiar with the game, the court may rely on the Baseball Rule. However, if the spectator has little or no experience with the game and does not understand the risks relating to foul balls, the court should refrain from applying the Baseball Rule. This factor should be strongly considered along with whether the spectator has ever attended a baseball game in the past.

Third, whether the spectator has ever attended a baseball game in the past should be analyzed in two lenses – previous games attended and previous games attended where the spectator was seated in the vicinity of foul balls. If the spectator never attended a baseball game before the injury occurred, the court should be lenient toward the spectator and refrain from applying the Baseball Rule. If the spectator has attended a baseball game in the past, the court should then determine whether the spectator was familiar with the risk of foul balls from previous attendances. For example, if a spectator was previously seated in a box seat or the outfield, he or she may not truly understand the risks of sitting in the danger zones where foul balls are often hit at high speeds. Like most things in life, sometimes people need to experience something before they can truly understand the situation. The same can be true for foul balls. If a spectator has never sat along the baselines, he or she may not truly understand the risks of foul balls in that location. Thus, if a spectator was not familiar with the risks of foul balls although he or she has attended a baseball game in the past, the court may decide not to apply the Baseball Rule. This factor should be strongly considered along with the spectator's knowledge of the game.

Fourth, where the spectator was seated is a factor that has been considered by all courts since 1913. If the spectator is seated in the section directly behind home plate, the owner should not be liable for any spectator injury relating to objects leaving the field of play. However, this analysis becomes complex for spectators who sit toward the end of the screen because, as mentioned above, depending on the seat's angle to the netting and trajectory of the baseball, it might be difficult to determine whether the spectator was protected by the netting.

Fifth, the spectator's age can have serious consequences if he or she is a toddler or a young child. Children are more at risk than adults because they simply do not think of the risks associated with the game of baseball. Adults on the other hand, especially mothers, will usually expect the worst in all situations. These adults would take precautionary measures or at least be aware of the risks to prevent being injured. Therefore, if a spectator is young in age, there should be more leniency toward the spectator, and a court should refrain from applying the Baseball Rule. This factor should be strongly considered along with the spectator's knowledge of the game.

Sixth, entertainment interference has been the only scenario that has held the owner liable for spectator foul ball injuries other than defective screening. However, for this factor, the owner's liability should not only be with regard to the spectators situated behind a screen, it should include all spectators in the ballpark. The reasoning behind this is that if there is entertainment interference, which is conducted under the owner's business, the act takes away the spectator's attention from the game. Thus, the interference increases the risk of the spectator being hit by a foul ball. This factor should include the analysis of both line drive and pop-up foul balls because, regardless of the spectator's reaction time, his or her attention has veered away from the game as a result of one of the owner's agents. The owners should assume this risk in the event to make a profit while the game is on-going. This factor should also be looked at for spectators who are hit by a homerun. A non-exhaustive list of entertainment interference may include mascots, cheerleaders, employees serving concessions, messages on the jumbotron, T-shirt giveaways, etc. All of these examples are acceptable forms of entertainment, but for the owner not to be held liable for spectator foul ball injuries, all of these must be performed during a stoppage in play. In addition, the ushers should not allow spectators to walk to their seats while the game is in action. Spectators are more focused on the uneven steps in stadiums, looking for their row number, and then squeezing by a set of fans to get to their seats. Thus, if an usher allows spectators to return to their seats while the game is on-going and the fan gets injured by a foul ball, line drive or pop-up, the owner may be subject to liability.

Finally, the stadium's design is extremely relevant to how screening should be erected at the ballpark. Most stadiums and spectator seats are designed in the usual diamond shape.¹³⁹ However, there are some stadiums where spectator seats stick out of the ordinary diamond shape and are close to the field of play.¹⁴⁰ These seats that are close to fair territory are in extreme danger of being hit by a line drive foul ball. Stadiums of this design should consider netting those areas in the outfield that stick out close to the first and third base lines. Thus, if a spectator was hit in this area and it is unprotected, the court should not apply the Baseball Rule.

The court should not consider whether the spectator had time to react because the foul balls being referred to are only with regard to line drives. If there was a pop-up foul ball, it is assumed that the spectator had enough time to react and avoid being hit by the baseball. However, this does not apply when the owner increases the risks of the game. It is not reasonable for the owner to screen all sections of the ballpark. Therefore, if a spectator is sitting in an area that has no protective screening, and he or she is struck by a foul ball, whether it is a line drive or pop-up, the court may apply the Baseball Rule.

¹³⁹ Jason Notte, *10 Most Luxurious Seats in Major League Baseball*, THESTREET, Aug. 2, 2016, <https://www.thestreet.com/slideshow/13661373/1/10-most-luxurious-seats-in-major-league-baseball.html>.

¹⁴⁰ *Fenway Park Seat Map*, RED SOX, <https://www.mlb.com/redsox/ballpark/seat-map> (last visited Nov. 29, 2018).

This factor test incorporates a comparative negligence analysis. The problem with the Baseball Rule is that it is based on a whether the owner complied with his or her duty. However, the factor test allows the court to embrace a comparative negligence scheme to establish a percentage of fault for all the parties involved. Comparative negligence allows the court to determine whether the spectator assumed the risk instead of reverting to contributory negligence – a complete bar from recovery. In the United States, forty-five of the fifty states have a comparative fault scheme.¹⁴¹ Thus, a strong majority of states have moved away from contributory negligence and have veered to a comparative fault distribution. However, courts are not following its jurisdiction's negligence laws when determining assumption of risk for its foul ball cases. This becomes a problem because the spectator's chance of recovery is dependent on where the injury occurred. If the injury occurred in a Baseball Rule jurisdiction, and it is a comparative fault state, the plaintiff may still be barred from recovery.

There has been a lot criticism about the Baseball Rule, but the most recent pushback has come from Nathaniel Grow and Zachary Flagel.¹⁴² Grow and Flagel's position is that the courts should replace the Baseball Rule with a strict liability scheme, which would hold professional baseball teams liable for spectators' injuries.¹⁴³ Grow and Flagel believe a strict liability scheme is the best solution because it “[forces] teams to internalize the cost of spectator injuries, thereby best incentivizing them to implement the most economically efficient level of fan protection in their stadiums.”¹⁴⁴ The problem with a strict liability scheme is that if the stadium owners wanted to completely avoid liability, they would screen the entire ballpark. However, most fans do not want to watch a game live with an obstructed view. Thus, owners are using a balancing test to determine what areas of the stands should be screened to save themselves from liability while considering the spectators' experience and profit. A strict liability may be the proper scheme from an economical standpoint but not a practical one. The best solution is to follow and apply the factor test because it analyses and takes into account comparative fault on behalf of the owner and the spectator.

VI. CONCLUSION

The sports industry is driven by money. The sport market in North America is expected to reach \$73.5 billion in revenue by 2019.¹⁴⁵ The majority of this revenue is a result of media rights.¹⁴⁶ However, the media rights are not driving the sport industry. The fans are. Professional and amateur exhibitions are products for the consumers. The four major professional leagues, the National Football League, Major League Baseball, the National Basketball Association, and the National Hockey League, are spectator sports. The National Collegiate Athletic Association is no different. While the sports industry would not be as rich as it is today without its media rights, it would not be what it was today without its fans. The spectators are the ones willing to pay to

¹⁴¹ *Contributory Negligence/Comparative Fault Laws in All 50 States*, MATTHIESEN, WICKERT & LEHRER, S.C. (last updated Feb. 14, 2018).

¹⁴² Nathaniel Grow & Zachary Flagel, *The Faulty Law and Economics of the “Baseball Rule”*, 60 WM. & MARY L. REV. 59 (2018).

¹⁴³ *See id.* at 111.

¹⁴⁴ *See id.* at 68.

¹⁴⁵ Darren Heitner, *Sports Industry to Reach \$73.5 Billion by 2019*, FORBES, Oct. 19, 2015.

¹⁴⁶ *See id.*

experience the product that each league sets up on display. Without interest from the market, there would be no TV rights for the sports leagues. These leagues have become popular through fan interest. Although the media rights are a big portion of the league and team revenues, the fans are driving their success. Thus, because the fans are arguably the most important piece to the sports industry's success, leagues and teams should be concerned about fan protection at their sporting events. It is also within the owner's interest to protect its fans because it will prevent them from giving up millions of dollars in potential foul ball suits.

If the owner is held liable for the spectator's injuries, for whatever reason decided by the court, the owner should be responsible for the spectator's short and long-term medical expenses. This shall include immediate expenses for the spectator to recover from his and her injury, but it should also include potential disabilities in the future. Some fans lose an eye, break facial bones, and others, who are hit in the head, cannot return to work. Thus, the court should consider potential lost wages and other damages that may be applicable.

Therefore, because the Baseball Rule is outdated, courts should rely on the factor test. Times have changed since the Baseball Rule was first seen in 1913. The foul ball danger zone is bigger than it used to be, spectators are seated closer to the action, and baseballs fly into the stands at higher speeds. This factor test puts the courts in the best situation to analyze the case based on the totality of the circumstances instead of whether the owner complied with his duty by erecting a sufficient net where most foul balls are hit. Whether the owner increases the risks of the game is a crucial issue to these foul ball cases. If this is the case, owners should be held liable for the spectator's injuries. In addition, the factors should be considered as a whole. By going through each factor, the court should have a better idea of whether to hold the owner liable for the spectator's injuries. These factors consider the most crucial issues when analyzing spectator foul ball injuries.