

The Faulty Law and Economics of the “Baseball Rule”

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THE FAULTY LAW AND ECONOMICS OF THE
“BASEBALL RULE”

NATHANIEL GROW* & ZACHARY FLAGEL**

ABSTRACT

This Article examines the so-called “Baseball Rule,” the legal doctrine generally immunizing professional baseball teams from liability when spectators are hit by errant balls or bats leaving the field of play. Following a recent series of high-profile fan injuries at Major League Baseball (MLB) games, this century-old legal doctrine has come under increased scrutiny, with both academic and media commentators calling for its abolition. Nevertheless, despite these criticisms, courts have almost uniformly continued to apply the Baseball Rule to spectator-injury lawsuits.

This Article offers two contributions to the ongoing debate surrounding the Baseball Rule. First, it provides new empirical evidence establishing that the risk of being hit by an errant ball or bat at a professional baseball game has increased considerably in recent years. Specifically, fans attending MLB games today are sitting more than 20 percent closer to the field than they were when the legal doctrine was first established. This fact, along with other changes in the way in which the game is played and presented to fans, have converged to substantially reduce the reaction time that spectators have to protect themselves from flying objects entering the stands,

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calling into question courts' continued reliance on the century-old rule.

Second, the Article makes the novel observation that courts and academic commentators have, to date, largely failed to reconsider the Baseball Rule in light of the emergence of the law-and-economics movement, and in particular the contributions the movement has offered regarding the optimal apportionment of tort liability. By subjecting the doctrine to such an economic analysis, this Article finds that the host team will usually constitute the lowest-cost or best risk avoider, thus suggesting that the legal immunity currently provided to teams by the Baseball Rule inefficiently allocates tort liability in spectator-injury lawsuits.

As a result, the Article concludes by contending that future courts (or legislatures) should reject the Baseball Rule and instead hold professional baseball teams liable for spectator injuries. Specifically, it asserts that the Baseball Rule should be replaced by a strict-liability regime, thereby better incentivizing teams to implement the most economically efficient level of fan protection in their stadiums.

TABLE OF CONTENTS

INTRODUCTION 62

I. THE HISTORICAL EVOLUTION OF THE BASEBALL RULE 68

A. The Origins of the Baseball Rule 69

B. The Continued Development of the Baseball Rule 74

C. The Subsequent Mischaracterization of the Baseball Rule 80

D. The Codification of the Baseball Rule 84

II. THE RISK OF BEING INJURED AT PROFESSIONAL BASEBALL GAMES HAS INCREASED IN RECENT YEARS. 85

A. Changes in Stadium Construction. 86

B. Changes in the Way the Game Is Played 91

C. Changes to Ticket Policies. 94

D. Increased Spectator Distractions 97

III. COURTS HAVE FAILED TO ADAPT THE BASEBALL RULE TO CHANGING LEGAL DOCTRINE 98

A. The Rise of the Law-and-Economics Movement 98

B. Misplaced Reliance on the Doctrine of Assumption of Risk 106

IV. COURTS SHOULD ABANDON (OR MODIFY) THE BASEBALL RULE. 111

A. Strict Liability for Spectator Injuries. 111

B. Expanding the Definition of a Ballpark’s “Most Dangerous Area”. 115

C. Imposing a Duty to Warn 119

CONCLUSION 122

INTRODUCTION

On September 20, 2017, a one-year-old girl was enjoying an afternoon at the ballpark with her grandparents at Yankee Stadium in New York City. Seated only five rows from the field, just past the visitors' dugout, the girl had a terrific view of that day's game between the Yankees and the Minnesota Twins.¹ Unfortunately, the young child's proximity to the field also placed her at a heightened risk of being hit by an errant ball or bat leaving the field of play. In the bottom of the fifth inning, Yankees third baseman Todd Frazier hit such a foul ball, a missile of a line drive that entered the stands at a blistering 106 miles per hour.² Before anyone could react, the ball hit the girl squarely in the head, causing multiple facial fractures—including to her orbital bone and nose—and leaving a visible imprint of the ball's seams on her forehead.³

While the young girl was fortunate to escape the incident without being more seriously injured, the episode nevertheless quickly sparked renewed concern over the issue of spectator safety at professional baseball games.⁴ Although only a single fan to date has lost his life after being hit by an errant ball or bat at a Major

1. See Andrew Marchand, *Young Fan Taken from Yankees Game to Hospital After Being Hit by Foul Ball*, ESPN.COM (Sept. 21, 2017, 1:28 PM), http://www.espn.com/mlb/story/_id/20768433/young-fan-new-york-yankees-game-hit-face-foul-ball [<https://perma.cc/N9RR-GKT3>] (reporting that the child was sitting “with her grandparents about five rows up on the third-base side of Yankee Stadium”).

2. See Wallace Matthews, *Line Drive Strikes Young Girl in the Face at Yankee Stadium*, N.Y. TIMES (Sept. 20, 2017), <https://www.nytimes.com/2017/09/20/sports/baseball/young-fan-is-injured-by-line-drive-during-yankees-game.html> [<https://perma.cc/3QWS-6HXD>] (reciting the details of the incident).

3. See Billy Witz, *Father of Girl Hit by Ball Recounts Ordeal, and the Yankees Promise Fixes*, N.Y. TIMES (Oct. 1, 2017), <https://www.nytimes.com/2017/10/01/sports/baseball/yankee-stadium-netting-foul-ball.html> [<https://perma.cc/255Z-VCW6>] (recounting the nature of the girl's injuries).

4. See, e.g., Michael McCann, *Yankees Incident Revives an Old Question: How Responsible are Teams for Foul Ball Injuries?*, SPORTS ILLUSTRATED (Sept. 21, 2017), <https://www.si.com/mlb/2017/09/21/new-york-yankees-netting-ballpark-injury> [<https://perma.cc/FMW3-YZ9F>] (observing that the girl's injuries have “sparked reconsideration of a longstanding legal controversy: to what extent should teams be legally responsible for foul ball injuries?”); Larry Neumeister, *Girl Hit by Foul Ball at Yankees' Game Gets Game's Attention*, SFGATE (Sept. 21, 2017, 7:50 PM), <http://www.sfgate.com/sports/article/Girl-hit-by-foul-ball-at-Yankees-game-gets-12219276.php> [<https://perma.cc/2DAZ-JLB4>] (characterizing the incident at Yankee Stadium as a potential “game changer” for professional baseball).

League Baseball (MLB) game,⁵ serious incidents like the one at Yankee Stadium have become increasingly common in recent years, occurring more frequently than many fans realize.⁶ Indeed, according to a recent analysis by *Bloomberg*, approximately 1750 fans are hurt each year by foul balls while attending MLB games.⁷ This equates to a rate of roughly two injuries per every three games, making a fan injury from a foul ball a more common occurrence than a batter being hit by a pitch.⁸ Moreover, that estimate does not include any injuries sustained by the more than forty million fans who annually attend games hosted by one of the nearly 250 minor-league teams competing at lower levels of professional baseball.⁹

Despite the frequency with which these incidents are increasingly occurring, professional baseball teams have historically had little motivation to take greater steps to protect their spectators from injury.¹⁰ Under what has commonly become known as the “Baseball

5. See ROBERT M. GORMAN & DAVID WEEKS, DEATH AT THE BALLPARK: A COMPREHENSIVE STUDY OF GAME-RELATED FATALITIES OF PLAYERS, OTHER PERSONNEL AND SPECTATORS IN AMATEUR AND PROFESSIONAL BASEBALL, 1862-2007, 133 (2009) (reporting that 14-year-old Alan Fish died in 1970 after being hit in the head by a line drive foul ball at a Los Angeles Dodgers game). In addition, at least one fan has been killed by a foul ball while attending a minor-league game. See *id.* at 134 (recounting that a 68-year-old fan at a then-minor-league Miami Marlins game in 1960 was struck in the side of the head by a foul ball, and eventually died two days later).

6. See *id.* at 131 (declaring that baseball “is among the most dangerous spectator sports”).

7. Jennifer Beebe, Comment, *Injuries from Foul Balls, Broken Bats, and Railing Fall-Overs: Who is Liable?*, 8 N. ILL. U. L. REV. ONLINE 65, 72-73 (2017) (citing David Glovin, *Baseball Caught Looking as Fouls Injure 1,750 Fans a Year*, BLOOMBERG (Sept. 9, 2014, 4:05 PM), <https://www.bloomberg.com/news/articles/2014-09-09/baseball-caught-looking-as-fouls-injure-1-750-fans-a-year/> [<https://perma.cc/DT2M-UHUH>]).

8. *Id.*

9. See John Sickels, *Minor League Baseball Attendance for 2016 Tops 41.3 Million*, MINORLEAGUEBALL.COM (Sept. 14, 2016, 12:32 PM), <https://www.minorleagueball.com/2016/9/14/12914896/minor-league-baseball-attendance-for-2016-tops-41-3-million> [<https://perma.cc/5V55-EDGY>] (reporting that “[a] total of 41,377,202 fans” attended minor-league games in 2016).

10. To its credit, in response to the aforementioned public scrutiny, MLB has recently taken steps to incentivize its teams to adopt greater measures to protect their fans from injury, primarily through the installation of additional protective netting. See *infra* note 309 and accompanying text (discussing efforts). While certainly laudable, as discussed *infra*, these precautions do not obviate the need for a critical reassessment of the Baseball Rule, as there is no guarantee that these teams’ voluntary measures are fully providing the most socially desirable level of protection, see *infra* notes 303-05 and accompanying text, nor that they will be adopted by the numerous teams competing at the minor-league level, see *infra* notes 311-14

Rule,” courts for over a century have consistently held that professional baseball teams are not liable for injuries sustained by fans hit by bats or balls leaving the field of play, so long as the teams have taken minimal precautions to protect their spectators from harm.¹¹ Specifically, as traditionally applied, the Baseball Rule imposes a legal duty upon professional teams to merely implement two safety measures.¹² First, teams are generally expected to install protective netting to shield the “most dangerous area” of their stadiums from errant flying objects, a region rigidly interpreted by courts to consist only of those sections of seats located immediately behind home plate.¹³ Second, teams must also maintain a sufficient number of screened seats to meet the anticipated consumer demand for protected seating during an average game.¹⁴ Assuming a team has satisfied these two requirements, then under the Baseball Rule it is considered to have met the duty of care it owed to its patrons, and therefore cannot be held legally liable for their injuries.¹⁵

and accompanying text (noting the potential shortcomings of MLB’s voluntary efforts).

11. See, e.g., Matthew J. Ludden, *Take Me Out to the Ballgame ... but Bring a Helmet: Reforming the “Baseball Rule” in Light of Recent Fan Injuries at Baseball Stadiums*, 24 MARQ. SPORTS L. REV. 123, 124 (2013) (stating that “the baseball rule holds stadium owners to a lower duty of care for the safety of fans compared to the reasonable duty of care owed by most property owners”); Aaron Wakamatsu, Note, *Spectator Injuries: Examining Owner Negligence and the Assumption of Risk Defense*, 6 WILLAMETTE SPORTS L.J. 1, 1 (2009) (finding that “[c]ourts have concluded that stadium owners and teams do not owe a duty to protect their patrons from ‘common, frequent, and expected’ risks” such as those presented by foul balls (quoting *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 551 (Pa. 1978))).

12. Cases arising from foul-ball or errant-bat-related injuries are typically brought as negligence actions, alleging that the team breached its duty of care by failing to take sufficient precautions to protect fans from injuries. See Joshua D. Winneker et al., *Who Let the Dogs Out: Should a Stadium Owner Be Held Liable for Injuries Sustained From a Mascot’s Errant Hot Dog Toss?*, 21 JEFFREY S. MOORAD SPORTS L.J. 369, 370 (2014) (Lawsuits filed by “[f]ans [who] have been hurt by foul balls or pieces of a bat ... have all been grounded in tort law under a negligence theory.”).

13. See *infra* notes 90-92 and accompanying text (discussing the “most dangerous area” requirement).

14. See *infra* notes 81-85 and accompanying text (discussing the sufficient number of seats requirement).

15. See *infra* Part I.B (discussing the development of the Baseball Rule). The Baseball Rule is thus a particularly narrow, sport-specific application of the general legal principle holding that sports facilities are not liable for spectator injuries resulting from sporting equipment leaving the playing field, so long as the facilities have taken reasonable measures to protect their fans from injury. See Walter T. Champion, Jr., *“At the Ol’ Ball Game” and Beyond: Spectators and the Potential for Liability*, 14 AM. J. TRIAL ADVOC. 495, 504 (1991) (noting that fans are owed a standard of ordinary or reasonable care by facilities hosting

Although often erroneously attributed¹⁶ to the generally unenforceable liability waivers that teams routinely place on the back of their tickets,¹⁷ courts have instead traditionally justified the Baseball Rule by observing that foul balls and flying bats are inherent and unavoidable parts of the sport and thus present a risk that anyone of ordinary intelligence attending a game should easily be able to discern.¹⁸ Moreover, courts have noted that many spectators actually prefer to watch the game from a seat unobstructed by protective netting, to both enjoy a clearer view of the field and also preserve the possibility of catching a foul ball, a cherished memento for many fans.¹⁹ Thus, courts have crafted the Baseball Rule in hopes of balancing the competing interests of enhancing fan safety and spectator demand for unobstructed seating.²⁰

Nevertheless, following a recent series of highly publicized ballpark injuries like the one recently sustained by the young girl at

hockey games, professional wrestling matches, or automobile races).

16. *See, e.g.*, Joe Nocera, *The Score: No Lawyers, No Nets, Dozens of Injuries*, BLOOMBERG (May 11, 2017, 12:30 PM), <https://www.bloomberg.com/view/articles/2017-05-11/the-score-no-lawyers-no-nets-dozens-of-injuries> [<https://perma.cc/LBS5-5NT6>] (“However sympathetic they might be, these injured fans have almost no ability to have their day in court. That’s because every ticket to a baseball game comes with a disclaimer that reads something like this: ‘The bearer of the ticket assumes all risk and danger incidental to the game of baseball.’”).

17. *See, e.g.*, *Yates v. Chi. Nat’l League Ball Club, Inc.*, 595 N.E.2d 570, 581 (Ill. App. Ct. 1992) (“[T]he disclaimer on the back of plaintiff’s ticket could not form the basis of defense because the print was so small that it was not legibly reproduced on the photocopy submitted to the trial court. Plaintiff’s acceptance of a ticket containing a disclaimer in fine print on the back is not binding for the purposes of asserting express assumption of the risk.”).

18. *See, e.g.*, *Costa v. Bos. Red Sox Baseball Club*, 809 N.E.2d 1090, 1093 (Mass. App. Ct. 2004) (“[W]e are persuaded that the potential for a foul ball to enter the stands and injure a spectator who is seated in an unscreened area is, as matter of law, sufficiently obvious that the defendant reasonably could conclude that a person of ordinary intelligence would perceive the risk.”).

19. *See Wells v. Minneapolis Baseball & Athletic Ass’n*, 142 N.W. 706, 708 (Minn. 1913) (“In fact, a large part of those who attend prefer to sit where no screen obscures the view. The defendant has a right to cater to their desires.”); *see also* Brett Celedonia, *Flying Objects: Arena Liability for Fan Injuries in Hockey and Other Sports*, 15 SPORTS LAW. J. 115, 130 (2008) (“[B]aseball has developed into a sport in which spectators not only hope, but expect to come into contact with the ball.”). MLB teams have granted fans the right to keep foul balls since 1921. *See* Glovin, *supra* note 7 (reporting that the custom of allowing fans to keep foul balls dates back to May 16, 1921, when “a spectator at a New York Giants game ... refused to surrender a ball knocked into Polo Grounds seating”).

20. *See, e.g.*, *Grimes v. Am. League Baseball Co.*, 78 S.W.2d 520, 523 (Mo. Ct. App. 1935) (concluding that the Baseball Rule enables teams to balance fan demand for unscreened seating with the need to protect the stadium’s most dangerous seating locations).

Yankee Stadium,²¹ the continued justifiability of the Baseball Rule has come under increased scrutiny, with both academic and media commentators calling for the doctrine to be abolished.²² Indeed, despite the slim chances of success in court, injured spectators routinely continue to file lawsuits against professional baseball teams in hopes of persuading a judge to disavow the doctrine and impose liability for the plaintiff's injuries.²³ At the same time, however, other fans have opposed the suggestion that teams should be legally required to take greater precautions to protect spectators from injury, fearing that any resulting efforts by teams to install additional protective netting would deprive these individuals of their preferred unobstructed views of the field.²⁴

This Article seeks to offer two primary contributions to the renewed discussion surrounding, and heightened criticism of, the Baseball Rule. First, the Article presents new empirical evidence establishing the extent to which fans' risk of being hit by a flying object at a professional baseball game has increased in recent years.²⁵ Specifically, over the last quarter century, MLB teams have built nearly two dozen new stadiums, almost all of which place spectator seating significantly closer to the playing field than ever before.²⁶ As a result, fans today frequently sit more than 20 percent

21. In addition to the Yankee Stadium incident, for instance, on June 5, 2015, a fan attending a game between the Oakland Athletics and Boston Red Sox at Fenway Park suffered life-threatening injuries after being struck in the head by the shattered barrel of a bat swung by Oakland second baseman, Brett Lawrie. See Vincent C. Lucchese, *Fair or Foul: The Baseball Rule's Place in Modern Major League Baseball*, 24 *SPORTS L.J.* 95, 99 (2017) (discussing incident).

22. See, e.g., Bob Collins, *After Fan is Hit by Bat, Calls to End 'Baseball Rule'*, MPR NEWS (June 8, 2015, 8:15 AM), <https://blogs.mprnews.org/newscut/2015/06/after-fan-is-hit-by-bat-a-call-to-end-the-baseball-rule/> [<https://perma.cc/377Z-DEPA>] (summarizing criticisms of the Baseball Rule); Nocera, *supra* note 16 (condemning the Baseball Rule); see also Mohit Khare, Note, *Foul Ball! The Need to Alter Current Liability Standards for Spectator Injuries at Sporting Events*, 12 *TEX. REV. ENT. & SPORTS L.* 91, 91 (2010) (contending that courts should reject "limited duty" rules that protect sports teams from liability for fan injuries).

23. See J. Gordon Hylton, *A Foul Ball in the Courtroom: The Baseball Spectator Injury as a Case of First Impression*, 38 *TULSA L. REV.* 485, 485 (2003) ("While the general legal rule that spectators are considered to have assumed the risk of injury from foul balls has been reiterated over and over, injured plaintiffs have continued to sue in hope of establishing liability on the part of the park owner.").

24. See Lucchese, *supra* note 21, at 96 ("[W]hen baseball fans first heard rumblings in the media ... that netting should be extended, they vehemently denied the need for it.").

25. See *infra* Part II.

26. See *infra* Part II.A.

closer to home plate than was the case throughout most of the twentieth century.²⁷ This fact, along with a presumptive increase in the speed with which baseballs are being hit into the stands, has substantially reduced the reaction time that fans have to avoid errant flying objects heading in their direction.²⁸ Indeed, in some cases it may now be virtually impossible for spectators to react in time to protect themselves from a particularly hard-hit foul ball.²⁹ Consequently, wayward balls and bats present a much greater risk to fans today than at the time the Baseball Rule was first established in 1913, undercutting the justifiability of courts’ continued adherence to the century-old doctrine.³⁰

Second, the Article makes the novel observation that courts have uniformly failed to reconsider the Baseball Rule in light of the lessons instilled by the law-and-economics revolution of the 1970s and 1980s, and in particular the insights it provided regarding the most efficient allocation of liability in torts cases.³¹ Indeed, no prior court or academic commentator has subjected the Baseball Rule to a full-blown economic analysis, a surprising omission given how dramatically the law-and-economics movement has altered the collective understanding of the ideal apportionment of negligence liability.³² This Article attempts to correct this oversight by analyzing the doctrine under economic principles of optimal risk allocation, concluding that, because the host team itself will almost always be the lowest cost or best risk avoider, the traditional Baseball Rule improperly shields teams from legal liability.³³

Given these insights, the Article ultimately concludes that courts should no longer adhere to the Baseball Rule and should instead

27. See *infra* text accompanying note 158.

28. See *infra* Part II.B.

29. See *infra* notes 177-81 and accompanying text.

30. Cf. Ludden, *supra* note 11, at 125 (contending that evidence of the increased risk of injury was previously “too speculative” to increase teams’ liability under the Baseball Rule).

31. See *infra* Part III.A.

32. See *infra* Part III.A.

33. Along these same lines, although this Article predominately focuses on injuries sustained by spectators at professional baseball games, this analysis likely applies with equal force to other sports—such as professional hockey—where some courts have also imposed a lesser standard of care on teams to protect their fans. Cf. Celedonia, *supra* note 19, at 122-26 (discussing cases in which courts have held that professional hockey teams are not liable for injuries sustained by fans hit by errant pucks).

expand the extent to which professional baseball teams may be held legally responsible for injuries sustained by their spectators.³⁴ The Article proceeds in four parts. Part I begins by examining the historical evolution of the Baseball Rule, surveying its origin in 1913 as well as its subsequent judicial development over the last century. Part II then examines the extent to which the risk of being injured by an errant ball or bat at a professional baseball game has increased in recent years. In particular, Part II presents new empirical data establishing that fans' ability to defend themselves from flying projectiles has decreased considerably due to recent trends in both stadium construction and the way in which baseball is played and presented to fans. Next, Part III considers the failure of courts to adapt their application of the Baseball Rule to two important changes in the underlying law of torts, namely the rise of the law-and-economics movement and the recent judicial repudiation of the traditional tort defense of assumption of risk. Finally, Part IV offers several suggestions for how courts should modify their Baseball Rule jurisprudence to more equitably resolve lawsuits brought by fans injured by errant balls or bats while attending professional baseball games. Most notably, it asserts that courts (and legislatures) should replace the Baseball Rule with a strict-liability regime, forcing 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.

I. THE HISTORICAL EVOLUTION OF THE BASEBALL RULE

The typical spectator injury lawsuit presents an injured fan suing the host team and/or stadium operator³⁵ on a theory of negligence.³⁶

34. This Article predominately focuses on the applicability of the Baseball Rule to cases involving injuries sustained at professional, as opposed to amateur, baseball games. As noted below, the application of the Baseball Rule to amateur facilities triggers different potential policy considerations, arguably warranting a different allocation of legal liability. *See infra* notes 295-98 and accompanying text.

35. In addition to the host team itself, legal liability for spectators' injuries may also potentially extend to other affiliated entities that own or manage the team's stadium, typically taking the form of some sort of governmental agency or authority. *See* A. David Austill, *When it Hits the Fan: Will There Be Liability for the Broken Bat?*, 24 MARQ. SPORTS L. REV. 83, 93 (2013) (observing that there may be an additional stadium-operator defendant in foul-ball cases in addition to the team itself). For simplicity's sake, this Article will refer

Because spectators are considered to be invitees on the defendant’s premises, teams would normally owe their fans a duty of care to protect the patrons from reasonably foreseeable dangers.³⁷ Plaintiffs will thus contend that given the generally predictable nature of errant balls or bats leaving the field of play, the defendant team breached its duty of care by failing to implement more robust safety precautions—such as a larger protective screen or net—to better protect fans from the risk posed by these flying objects.³⁸ Historically, courts have all but uniformly resolved these cases in the team’s favor under the Baseball Rule.³⁹

A. *The Origins of the Baseball Rule*

Considering that baseball has been played professionally for nearly 150 years—dating back to the founding of the first all-professional team, the Cincinnati Red Stockings, in 1869⁴⁰—it is somewhat surprising that the first reported decision in a foul-ball liability case was not issued by a court until 1913.⁴¹ Much of this

to these potential defendant entities collectively as the “team” itself.

36. See Winneker et al., *supra* note 12, at 370 (stating that lawsuits filed by “[f]ans [who] have been hurt by foul balls or pieces of a bat ... have all been grounded in tort law under a negligence theory”).

37. See C. Peter Goplerud III & Nicolas P. Terry, *Allocation of Risk Between Hockey Fans and Facilities: Tort Liability After the Puck Drops*, 38 TULSA L. REV. 445, 448 (2003) (characterizing spectators as invitees and noting that such categorization places a duty of reasonable care upon the host team).

38. See *id.* at 449 (finding that in cases involving an injury from an errant flying object, “the plaintiff will argue negligence in failing to provide sufficient ‘safe’ or protected areas, that the barrier was inadequate in its dimensions or location, or that the barrier was improperly constructed or maintained”).

39. See *infra* Part I.A. It is worth noting that the Baseball Rule has traditionally applied only to injuries arising from unintentional conduct occurring on the playing field; an injury sustained by a spectator from an intentional tortious act by a player—such as a player purposely throwing a bat into the stands in an attempt to injure a fan—would likely be treated differently by the courts. See *Champion*, *supra* note 15, at 496 (stating that fans “do not ... assume the risk of intentional harm” such as that arising from an “outfielder who charges into the stands and assaults a heckler”). But see *Loughran v. Phillies*, 888 A.2d 872, 874, 876-77 (Pa. Super. Ct. 2005) (applying the Baseball Rule in a case where a fan was injured after Philadelphia Phillies outfielder, Marlon Byrd, intentionally tossed a baseball into the stands at the end of an inning as a souvenir).

40. See, e.g., Lara Grow & Nathaniel Grow, *Protecting Big Data in the Big Leagues: Trade Secrets in Professional Sports*, 74 WASH. & LEE L. REV. 1567, 1571 (2017) (noting that the Cincinnati Red Stockings of 1869 were the nation’s first professional sports team).

41. See *Hylton*, *supra* note 23, at 486 (observing that *Crane v. Kan. City Baseball &*

delay is likely attributable to differences in the way baseball was played in its early professional days.⁴² Quite unlike the game that fans are accustomed to today, in its early form, professional baseball featured pitchers throwing the ball in an underhanded fashion to batters, who in turn instructed the hurler on where to locate the pitch.⁴³ These two factors significantly reduced the odds that a batter would errantly strike a ball in such a manner that it would enter the stands, thus decreasing the likelihood of spectator injuries.⁴⁴

However, with the onset of overhand pitching in 1884, along with rule changes that no longer allowed batters to call the location of their pitches, the potential danger to fans increased.⁴⁵ Indeed, the threat of injury to spectators sitting immediately behind home plate quickly grew to the point that this area colloquially became known as the “slaughter pen.”⁴⁶ Not surprisingly, as a result, most professional baseball teams quickly began to follow the lead of the National League’s Providence Grays, which in 1879 became the first team to erect a screen protecting a portion of its stadium seating area from errantly tossed or hit baseballs.⁴⁷ Despite initial fan complaints about the obstruction these nets presented, by the late 1880s some form of protective screening had nevertheless become commonplace throughout professional baseball.⁴⁸

Exhibition Co. was the first reported decision in a foul-ball-related case). As Professor Hylton notes, however, media reports suggest that fans may have filed earlier cases, although no reported decision ultimately resulted from these disputes. *See id.* at 486 n.4.

42. *See id.* at 486-88.

43. *See* GORMAN & WEEKS, *supra* note 5, at 131 (arguing that “[i]n the formative years of the game, there was not much reason to be concerned for fan safety” due to “the underhand style of delivering the ball” along with the fact that “the batter called for the pitch”); Hylton, *supra* note 23, at 486-87 (contending that underhanded pitching rules meant that “skilled batters had little trouble hitting the ball squarely, and thus sharply hit foul balls infrequently entered the areas in which spectators where [sic] likely to be situated”).

44. *See supra* note 43 and accompanying text.

45. *See* GORMAN & WEEKS, *supra* note 5, at 131 (“[A] rule change in 1884 [allowing] for overhand pitching ... result[ed] in more foul balls.”).

46. *See* Hylton, *supra* note 23, at 488 (observing that the “frequency of injuries suffered by those” sitting behind home plate resulted in that area earning “the nickname the ‘slaughter pen’”).

47. *See id.*

48. *See id.* (stating that “[i]n spite of the safety they provided, the new screens were not always well received” by fans, but nevertheless were commonplace “by the late 1880s”).

The existence of such protective netting would prove central to the first reported judicial decision considering a baseball team’s liability for a foul-ball-related fan injury. In the 1913 case of *Crane v. Kansas City Baseball & Exhibition Co.*, the Missouri Court of Appeals considered whether to hold the Kansas City Blues of the minor-league American Association liable for an injury sustained by a fan hit by a foul ball while sitting in an unprotected seat down the third-base line of the team’s stadium.⁴⁹ Because the Blues did not sell any reserved seats, all seating at the stadium was available on a first-come, first-served general admission basis.⁵⁰ On the day in question, the plaintiff, S.J. Crane, had purchased a \$0.50 grandstand ticket,⁵¹ providing him with several advantages over a cheaper, \$0.25 bleacher ticket.⁵² Specifically, in addition to being seated closer to the action in the stadium’s main seating area, fans with grandstand tickets could also choose whether to sit in a seat behind the protective screen—which extended from home plate down to third base at the Blues’ stadium—or instead sit in an unprotected seat providing an unobstructed view.⁵³

Crane ultimately elected to sit in a seat not protected by netting⁵⁴ and at some point during the game was hit by a foul ball.⁵⁵ He then sued the team for negligence, alleging that it should have taken greater precautions to protect him from injury.⁵⁶ In response, the Blues pled two affirmative defenses, denying liability because Crane had both (i) assumed the risk of injury and (ii) been contributorily negligent by electing to sit in an unprotected seat.⁵⁷

49. 153 S.W. 1076, 1077 (Mo. Ct. App. 1913); *see also* Hylton, *supra* note 23, at 493-94 (recounting the facts of the case).

50. *Crane*, 153 S.W. at 1077 (“Reserved seats are not sold.”).

51. *Id.* (“[T]he fee to the grand stand being 50 cents.... Plaintiff attended a game as a spectator, and paid for admission to the grand stand.”).

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* (reporting that “during the progress of the game” Crane “was struck by a foul ball and injured”).

56. *See* Hylton, *supra* note 23, at 494 (“In his complaint, Crane asserted that the ballpark owner had been negligent in failing to screen in the entire grandstand and that this negligence was the proximate cause of his injury.”).

57. *Crane*, 153 S.W. at 1076 (stating that the defendant’s “answer ... pleads contributory negligence and assumed risk”).

In deciding the case, the Missouri appellate court began by discussing the duty of care that the defendant team owed to spectators like Crane.⁵⁸ In particular, the court noted that as a business engaged in “providing a public entertainment for profit,” the team was not legally obligated to completely ensure the safety of its fans (such as by installing netting to protect each and every seat in the stadium from an errant ball or bat).⁵⁹ Instead, the court held that the defendants were simply expected to “exercise reasonable care, i.e., care commensurate to the circumstances of the situation, to protect their patrons against injury.”⁶⁰

Applying this standard to the professional baseball industry, the *Crane* court placed particular emphasis on an agreed upon statement of facts the parties had jointly filed in the case.⁶¹ That statement acknowledged that “[b]aseball is our national game, and ... the risks and dangers incident thereto are matters of common knowledge.”⁶² Along those lines, the court observed that the game of baseball involved “hard balls ... thrown and batted with great force and swiftness,” with the result that “such balls often go in the direction of the spectators.”⁶³ Given the nature of the dangers inherent to the game, the court then stated that the “duty of defendants towards their patrons included that of providing seats protected by screening from wildly thrown or foul balls, for the use of patrons who desired such protection.”⁶⁴ Because the team had provided Crane with the option of sitting in a grandstand seat protected by a screen, the court thus determined that the defendant team had fully met its legal duty.⁶⁵ As a result, because the plaintiff “voluntarily chose [to sit in] an unprotected seat,” the court determined that he “assumed the ordinary risks of such position,” and thus was not entitled to any recovery for his resulting injuries.⁶⁶

58. *Id.* at 1077.

59. *Id.*

60. *Id.*

61. *Id.* at 1076 (“The cause was submitted to the trial court on an agreed statement of facts.”).

62. *Id.* at 1077.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 1078.

Other early courts followed the lead of the *Crane* decision, holding that so long as teams provided a screened seating option for their fans, a spectator choosing to sit in an unprotected seat assumed the risk of his injury.⁶⁷ A few months later in 1913, for instance, the Supreme Court of Minnesota cited the *Crane* opinion approvingly in *Wells v. Minneapolis Baseball & Athletic Ass’n*.⁶⁸ As in *Crane*, the plaintiff in *Wells* had been injured by a foul ball while sitting in an unscreened section of the ballpark.⁶⁹ And as in *Crane*, the *Wells* court ultimately held that when a fan decides to attend a baseball game “with full knowledge of the danger from thrown or batted balls ... the management cannot be held negligent when it provides a choice between a screened in and an open seat: the screen being reasonably sufficient as to extent and substance.”⁷⁰ Furthermore, the *Wells* court noted that while “[b]aseball is not free from danger to those witnessing the game,” its “perils are not so imminent that due care on the part of the management requires all the spectators to be screened in.”⁷¹ To the contrary, the court observed that “[i]n fact, a large part of those who attend prefer to sit where no screen obscures the view. The defendant has a right to cater to their desires.”⁷² Likewise, the Supreme Court of Washington cited both *Crane* and *Wells* when ruling against an injured fan in 1919 in *Kavafian v. Seattle Baseball Club Ass’n*.⁷³

Indeed, subsequent courts adopted the same rationale even in cases where the injured fan had erroneously been sold a ticket to an unscreened seat after requesting one in a protected seating area.⁷⁴ Moreover, courts also refused to impose liability on teams when an injured fan alleged that she was unaware of the risks posed by the

67. See Gil Fried & Robin Ammon Jr., *Baseball Spectators’ Assumption of Risk: Is it “Fair” or “Foul”?*, 13 MARQ. SPORTS L. REV. 39, 41-43 (2002) (noting subsequent courts’ reliance on *Crane*).

68. 142 N.W. 706, 708 (Minn. 1913).

69. *Id.* at 707 (“Plaintiff testified that she took a seat ... about 10 feet west of the easterly end of the screen.”).

70. *Id.* at 708. The *Wells* court went on to note that “[t]his is virtually the rule applied in *Crane* [sic].” *Id.*

71. *Id.*

72. *Id.*

73. 181 P. 679, 679 (Wash. 1919); see also *Quinn v. Recreation Park Ass’n*, 46 P.2d 144, 146 (Cal. 1935) (per curiam); *Curtis v. Portland Baseball Club*, 279 P. 277, 278 (Or. 1929).

74. See, e.g., *Hudson v. Kan. City Baseball Club*, 164 S.W.2d 318, 319, 323-25 (Mo. 1942); *Schentzel v. Phila. Nat’l League Club*, 96 A.2d 181, 183, 185-87 (Pa. 1953).

sport, with the courts concluding that the danger of foul balls was sufficiently obvious that even those unfamiliar with the game should have been able to discern it.⁷⁵ This marked an extension of the original logic in *Crane*, where the court had only assumed the plaintiff understood the risk of injury because he had admitted as much in an agreed upon statement of facts.⁷⁶

That having been said, courts did not always rule in the team's favor as a historical matter. Courts did, for instance, require teams to provide satisfactory netting for fans, such as in the case of *Edling v. Kansas City Baseball & Exhibition Co.*—decided by the same Missouri appellate court a year following *Crane*—in which the defendant team was held liable for an injury caused by a foul ball that struck a fan after flying through a square-foot-sized hole in the stadium's protective netting.⁷⁷ However, in cases where a fan was struck by a ball that merely curved around otherwise sufficient netting, courts refused to impose liability on the team.⁷⁸

B. The Continued Development of the Baseball Rule

While in its initial form the Baseball Rule simply obligated teams to offer their spectators a choice between protected and unprotected seating,⁷⁹ by the 1930s courts applying this principle began to add several additional, seemingly modest, requirements. In *Brisson v. Minneapolis Baseball & Athletic Ass'n*, for instance, the Supreme

75. See, e.g., *Brown v. S.F. Ball Club, Inc.*, 222 P.2d 19, 21 (Cal. Dist. Ct. App. 1950) (“We find nothing here to take appellant outside the usual rule, whether it be said that this ‘common knowledge’ of these obvious and inherent risks are imputed to her or that they are obvious risks which should have been observed by her in the exercise of ordinary care.”); *Schentzel*, 96 A.2d at 186 (“It strains our collective imagination to visualize the situation of the wife of a man obviously interested in the game, whose children view the games on the home television set, and who lives in a metropolitan community, so far removed from that knowledge as not to be chargeable with it.”).

76. See *supra* notes 60-62 and accompanying text (discussing same).

77. 168 S.W. 908, 909 (Mo. Ct. App. 1914) (“[T]he evidence of plaintiff tends to show that the ball which struck him passed through a hole almost a square foot in area, that there were many holes of various sizes, and through which a ball could pass, scattered over the screening, and the inference from all of the evidence of plaintiff is very strong that the screening was old, worn, and rotten, and had not been repaired in either that or the preceding season.”).

78. See, e.g., *Curtis v. Portland Baseball Club*, 279 P. 277, 277-78 (Or. 1929); see also *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 220, 227 (Mich. Ct. App. 2001).

79. See *supra* notes 61-67 and accompanying text.

Court of Minnesota was presented with a case in which the plaintiff was forced to sit in an unscreened location after all of the protected seats had been taken by other fans.⁸⁰ Thus, in the words of the *Brisson* court, the case raised the novel question of whether a team “must provide screened seats for all those who desire them, regardless of the number of spectators who come to see the game.”⁸¹ The court ultimately answered this question in the negative, holding that a team satisfied its duty of care when it “provide[d] screen[ing] for the most dangerous part of the grandstand and for those who may be reasonably anticipated to desire protected seats.”⁸² Thus, in cases where demand for screened seating was unusually high, there was no legal obligation for the team to provide a protected seat for every fan who desired one.⁸³

The *Brisson* decision modified the Baseball Rule—as originally formulated in *Crane* and *Wells*—in two important ways. First, *Brisson* clarified that rather than providing a *de minimis* amount of screened seating, to avoid liability teams must instead protect a sufficient number of seats to satisfy the typical demand for protected seating.⁸⁴ Subsequent courts have continued to adopt this formulation of a team’s duty of care.⁸⁵

Second, and perhaps more significantly, the *Brisson* court added an additional new requirement to the Baseball Rule: affirmatively obligating teams to screen “the most dangerous part of the grand stand.”⁸⁶ Although at first glance this addition would appear to

80. 240 N.W. 903, 903 (Minn. 1932) (“For the game at which he was hurt plaintiff bought a ticket for a grand-stand seat, but asserts that such seats were all filled when he arrived.”).

81. *Id.* at 904.

82. *Id.*

83. *See id.*

84. *See id.*

85. *See, e.g.,* *Quinn v. Recreation Park Ass’n*, 46 P.2d 144, 146 (Cal. 1935) (per curiam) (“The duty imposed by law is performed when screened seats are provided for as many as may be reasonably expected to call for them on any ordinary occasion.”); *Cates v. Cincinnati Exhibition Co.*, 1 S.E.2d 131, 133 (N.C. 1939) (“Those operating baseball parks or grounds are held to have discharged their full duty to spectators in safeguarding them from the danger of being struck by thrown or batted balls by providing adequately screened seats for patrons who desire them, and leaving the patrons to their choice between such screened seats and those unscreened.”); *Leek v. Tacoma Baseball Club, Inc.*, 229 P.2d 329, 330 (Wash. 1951) (“There is no obligation to screen all such seats, however, and the proprietor’s duty is fulfilled when screened seats are provided for as many as may reasonably be expected to call for them on any ordinary occasion.”).

86. *Brisson*, 240 N.W. at 904.

represent only a minimal expansion of the traditional doctrine, in reality this new obligation changed the rule in important, but heretofore unrecognized, ways. Indeed, as originally formulated, the Baseball Rule simply required that teams give spectators a choice between screened and unscreened seating, thus generally ensuring that fans could exercise their own free will by selecting a protected seat or else assume the risk of sitting in an unprotected location.⁸⁷ Following *Brisson*, however, teams now had an obligation to take steps to protect spectators seated in locations subject to the highest risk of injury.⁸⁸ Thus, *Brisson* imposed an affirmative duty on teams to safeguard at least a portion of their fans, whether these spectators desired such protection or not.⁸⁹

As with the requirement that teams provide sufficient screened seating to meet normal anticipated demand, subsequent courts have also generally adhered to the *Brisson* requirement that teams must protect the “most dangerous area” of their stadiums.⁹⁰ However, rather than interpreting this requirement flexibly—relying on a case-by-case determination of risk levels present in various seating sections of a particular stadium—subsequent courts have instead almost uniformly held that this standard only requires teams to screen the area immediately behind home plate,⁹¹ something virtually every professional team has done since the 1880s.⁹²

Meanwhile, in addition to modestly expanding the scope of teams’ duty of care under the Baseball Rule, over time courts have also carved out a few limited exceptions to the doctrine. The first of these

87. See *Crane v. Kan. City Baseball & Exhibition Co.*, 153 S.W. 1076, 1077-78 (Mo. Ct. App. 1913).

88. See *Brisson*, 240 N.W. at 904.

89. See *id.*

90. See *Fried & Ammon Jr.*, *supra* note 67, at 44 (noting that “most courts [have] adopted a ‘two-prong’ test” with the first stating “that the facility owner must protect the most dangerous section of the ballpark”).

91. See, e.g., *Yates v. Chi. Nat’l League Ball Club, Inc.*, 595 N.E.2d 570, 580 (Ill. App. Ct. 1992) (“[W]e note that numerous courts have recognized the area behind home plate as the most dangerous area of the ballpark.”); *Coronel v. Chi. White Sox, Ltd.*, 595 N.E.2d 45, 47 (Ill. App. Ct. 1992) (“The most dangerous part of a ball park is universally recognized as the area behind home plate.”); cf. *Lawson ex rel. Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1015 (Utah 1995) (“[W]e hold that the Trappers had a duty to screen the area behind home plate.”).

92. See *supra* notes 45-48 and accompanying text (discussing the history of the use of protective netting at professional baseball games).

exceptions dates back to 1925, imposing liability on a team when a fan is injured when multiple balls are simultaneously in use on the field.⁹³ In *Cincinnati Baseball Club Co. v. Eno*, a fan sitting in an unscreened section of the stadium was struck in the jaw by one of several balls in use during a session of batting practice held during the intermission between two games of a double-header.⁹⁴ Although the Supreme Court of Ohio concurred with the general doctrine originally set forth in *Crane* and *Wells* limiting a team’s liability once it offered its fans a choice of protected or unprotected seats,⁹⁵ the court nevertheless determined that that rule did not govern the case before it.⁹⁶ Instead, emphasizing the fact that the ball that struck the plaintiff was hit just fifteen to twenty-five feet from where she sat,⁹⁷ the *Eno* court held that “it is impossible for the spectator to protect [her]self by watching the ball” in situations where there are “several balls ... simultaneously in play upon the field.”⁹⁸ As a result, the court allowed the plaintiff to proceed to trial against the team.⁹⁹ Another court reached a similar outcome in *Maytnier v. Rush*, when a fan was injured by an errantly tossed ball thrown by a pitcher warming up in the bullpen while the game was in progress on the playing field.¹⁰⁰

93. See *Cincinnati Baseball Club Co. v. Eno*, 147 N.E. 86, 87, 89 (Ohio 1925).

94. *Id.* at 87 (noting that the fan alleges she was hit by a “batted ball[] inflicted in the intermission between two set games, commonly called a ‘double header’”).

95. *Id.* at 87 (summarizing *Crane*, *Wells*, and *Kavafian*, before stating, “[w]e concur in the soundness of the views expressed in the above cases with regard to injuries incurred by balls thrown or batted during the course of a baseball game”).

96. *Id.* at 88 (“This case, however, presents a situation materially different from those above cited both as to the liability of the defendants and as to the contributory negligence of the plaintiff.”).

97. *Id.* (“Evidence was given tending to show that the players while batting the ball were from 15 to 25 feet from the grand stand.”).

98. *Id.*

99. *Id.* at 89 (“Hence the Court of Appeals did not err in reversing the judgment of the court of common pleas.”).

100. See 225 N.E.2d 83, 89 (Ill. App. Ct. 1967) (“The facts here in issue evidence an entirely different situation in which the plaintiff was struck by a ball, not in play in the game, coming from his left at a time when the spectators’ attentions were focused on the ball actually in play in the game, to plaintiff’s right.”). *But see* *Brummerhoff v. St. Louis Nat’l Baseball Club*, 149 S.W.2d 382, 383-84 (Mo. Ct. App. 1941) (holding that a team is not liable for an injury sustained by a fan after being hit by a ball during batting practice); *McNiel v. Fort Worth Baseball Club*, 268 S.W.2d 244, 245, 247 (Tex. Civ. App. 1954) (same). See generally Scott B. Kitei, Note, *Is the T-Shirt Cannon “Incidental to the Game” in Professional Athletics?*, 11 SPORTS LAW. J. 37, 45-47 (2004) (discussing cases).

Second, some courts have held that teams may be liable for injuries sustained by fans while stationed in a non-seating area of the stadium. In *Jones v. Three Rivers Management Corp.*, for instance, a fan was hit by a ball while standing in an interior walkway within the ballpark.¹⁰¹ Finding that the danger of being hit by a foul ball while standing in such an area of the stadium was not one that most fans would find to be “common, frequent [or] expected,”¹⁰² the Supreme Court of Pennsylvania held that the Baseball Rule did not foreclose the plaintiff’s lawsuit against the team.¹⁰³ Similarly, in *Maisonave v. Newark Bears Professional Baseball Club, Inc.*, the Supreme Court of New Jersey ruled that a fan could proceed with his case after being struck by a ball while purchasing a beverage in the stadium concourse.¹⁰⁴

Finally, two courts have allowed cases to proceed when a fan was injured as the result of a distraction created by the defendant team’s mascot. In *Lowe v. California League of Professional Baseball*, a spectator was hit in the eye by a foul ball after having his attention diverted by the Rancho Cucamonga Quakes’s dinosaur mascot, Tremor, who repeatedly bumped the plaintiff’s shoulder with his tail.¹⁰⁵ Although the court agreed that fans sitting in unprotected seating areas normally cannot recover for their injuries, it found that the team nevertheless “had a duty *not to increase* the inherent risks to which spectators at professional baseball games are regularly exposed.”¹⁰⁶ Because mascots are “not integral to the sport of baseball,”¹⁰⁷ the court concluded that the plaintiff should be allowed to

101. 394 A.2d 546, 547-48 (Pa. 1978) (noting that the plaintiff was hit while standing in an interior walkway on the second level of the stadium).

102. *Id.* at 551.

103. *Id.* at 552 (“The Superior Court was in error when it extended to appellant, standing in this walkway, the no-duty rule applicable to patrons in the stands.”).

104. *See* 881 A.2d 700, 702 (N.J. 2005) (“[A] foul ball struck plaintiff in the face as he purchased a beverage from a mobile vending cart on the concourse of a minor league stadium.”); *see also* Rountree v. Boise Baseball, LLC, 296 P.3d 373, 375 (Idaho 2013) (allowing a fan to proceed with a case after being hit in the stadium’s Executive Club restaurant, one of the only areas of the stadium not protected by netting). *Maisonave* was eventually superseded by statute, as discussed below. *See* New Jersey Baseball Spectator Safety Act of 2006, N.J. STAT. ANN. §§ 2A:53A-43-48 (West 2006); *see also infra* Part I.D.

105. 65 Cal. Rptr. 2d 105, 105-06 (Ct. App. 1997).

106. *Id.* at 106.

107. *Id.* at 109 (emphasis omitted).

proceed to trial against the team.¹⁰⁸ Likewise, in *Coomer v. Kansas City Royals Baseball Corp.*, the Missouri Supreme Court allowed a spectator to proceed with his lawsuit after he was hit in the eye by a hot dog thrown between innings by the Kansas City Royals’s mascot, Sluggerrr.¹⁰⁹ Aside from these limited exceptions, however, the vast majority of jurisdictions today continue to adhere to the Baseball Rule in cases where a fan is injured while sitting in an unprotected area of the stadium.¹¹⁰

Recognizing that they faced slim odds of success by pursuing negligence claims against teams on the basis of insufficient screening, beginning in the late 1970s plaintiffs often began to pursue parallel claims alleging that the defendant team was negligent due to its failure to warn spectators of the potential danger presented by foul balls.¹¹¹ As with claims based on a failure to provide sufficient screening, courts generally have also been unsympathetic to these failure-to-warn claims.¹¹² In particular, courts have held that because the dangers posed by foul balls are “open and obvious,” teams did not have a duty to provide warnings to spectators.¹¹³ As a result, fans have generally fared no better on this theory than they did in the more traditional cases discussed above.¹¹⁴

108. *Id.* at 112.

109. *See* 437 S.W.3d 184, 188 (Mo. 2014) (“In the past, this Court has held that spectators cannot sue a baseball team for injuries caused when a ball or bat enters the stands.... The risk of being injured by Sluggerrr’s hotdog toss, on the other hand, is not an unavoidable part of watching the Royals play baseball.”).

110. *See, e.g.,* *Payne v. Office of the Comm’r of Baseball*, No. 15-cv-03229-YGR, 2016 WL 6778673, at *7 n.6 (N.D. Cal. Nov. 16, 2016) (“[A] majority of states follow the ‘Baseball Rule,’ which limits the duty of care that stadium owners and operators owe to spectators.”), *aff’d*, 705 F. App’x 654 (9th Cir. 2017). *But see* *S. Shore Baseball, LLC v. DeJesus*, 11 N.E.3d 903, 909 (Ind. 2014) (declining to adopt the Baseball Rule, and instead concluding that such a decision should be made legislatively, rather than judicially).

111. *See, e.g.,* *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 548 (Pa. 1978); *Friedman v. Hous. Sports Ass’n*, 731 S.W.2d 572, 573 (Tex. App. 1987). Although plaintiffs primarily began to pursue parallel claims beginning in the late 1970s, a case did arise in 1950 that also brought such a claim. *See Anderson v. Kan. City Baseball Club*, 231 S.W.2d 170, 173 (Mo. 1950).

112. *See, e.g.,* *Costa v. Bos. Red Sox Baseball Club*, 809 N.E. 2d 1090, 1092 (Mass. App. Ct. 2004); *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 220 (Mich. Ct. App. 2001).

113. *See Friedman*, 731 S.W.2d at 573, 575 (“[T]here is no duty to warn of the risk of being hit by batted balls when attending a baseball game, because the risk is obvious.”) (quoting *Falkner v. John E. Fetzer, Inc.*, 317 N.W.2d 337, 339 (Mich. Ct. App. 1982)).

114. *But see Coronel v. Chi. White Sox, Ltd.*, 595 N.E.2d 45, 50 (Ill. App. Ct. 1992) (“[T]he Sox were under a duty to warn plaintiff of the possible dangers of being struck by a foul-tipped

C. *The Subsequent Mischaracterization of the Baseball Rule*

While most courts have thus continued to adhere to the Baseball Rule first established in *Crane* and *Wells*—and as enlarged by *Brisson*—their characterization of the underlying legal basis for the rule has changed in important, but largely unrecognized, ways. Traditionally, courts applying the doctrine had held that teams owed their fans a standard duty of reasonable care.¹¹⁵ As the logic went, so long as teams installed protective screening in front of the most dangerous area of the stadium, and provided a sufficient number of protected seats to meet ordinary demand, then the team had satisfied its duty of care by providing protection appropriate to the degree of risk entailed in watching a professional baseball game.¹¹⁶

Beginning in the 1980s, however, courts began to describe the Baseball Rule in very different terms. Rather than characterizing the duty that teams owed to their spectators as that of reasonable care, courts and commentators instead began to refer to the Baseball Rule as a “no duty” or “limited duty” rule.¹¹⁷ This mischaracterization is unfortunate.

ball.”).

115. See, e.g., *Crane v. Kan. City Baseball & Exhibition Co.*, 153 S.W. 1076, 1077 (Mo. Ct. App. 1913) (“[Defendants] were bound to exercise reasonable care, i.e., care commensurate to the circumstances of the situation, to protect their patrons against injury.”); *Curtis v. Portland Baseball Club*, 279 P. 277, 277 (Or. 1929) (“Under the law, defendant was obligated to exercise reasonable care and diligence commensurate with the danger involved, to protect its patrons from injury.”).

116. See *supra* notes 82-87 and accompanying text (discussing the traditional scope of the Baseball Rule as modified by *Brisson*).

117. See, e.g., *Rudnick v. Golden W. Broads.*, 202 Cal. Rptr. 900, 905 (Ct. App. 1984) (“A baseball club complying with *Quinn’s* screening standard has fulfilled its *limited duty to spectators* as a matter of law and is entitled to summary judgment.” (emphasis added)); *Benejam*, 635 N.W.2d at 220 (characterizing the Baseball Rule as a “limited duty” rule under which “a baseball stadium owner is not liable for injuries to spectators that result from projectiles leaving the field during play if safety screening has been provided behind home plate and there are a sufficient number of protected seats to meet ordinary demand”); *Turner v. Mandalay Sports Entm’t, LLC*, 180 P.3d 1172, 1173 (Nev. 2008) (“We conclude that stadium owners and operators have a limited duty to protect against ... injuries” caused by foul balls); *Friedman v. Hous. Sports Ass’n*, 731 S.W.2D 572, 574 (Tex. App. 1987) (“Virtually all jurisdictions have adopted the *limited duty of stadium owners* to screen certain seats, and have held that where there is a screened area for the protection of spectators, and a fan elects to sit in an unscreened area, liability will be precluded even though injury arises.” (emphasis added)).

As originally formulated, the Baseball Rule was best understood as an ex ante, bright-line rule establishing the standard duty of reasonable care that was required given the characteristics of the sport.¹¹⁸ Indeed, the doctrine was originally intended to balance two competing policy objectives: (i) providing a sufficiently safe environment for fans wishing to be protected from the dangers of errant balls and bats; and (ii) allowing teams to meet the demand of the large number of fans who desire unobstructed views of the playing field, often in hopes of potentially catching a foul ball.¹¹⁹ Courts believed that their original formulation of the Baseball Rule reasonably balanced these objectives given the relative degree of risk that errant balls or bats posed at the time.¹²⁰ Thus, far from establishing a “limited” or “lesser” duty of care for professional baseball teams, the doctrine was instead originally intended to delineate how the standard duty of reasonable care ought to be applied to the professional baseball industry given the inherent dangers of the sport.

Unfortunately, the subsequent mischaracterization of the Baseball Rule by modern courts has created the erroneous impression that the doctrine imposes only a narrow burden on professional teams to protect their spectators. For instance, interpreted properly, the requirement that teams install netting to protect their stadiums’ “most dangerous area” imposes a flexible standard, one that is adaptable as future changes in the way the game is played increase the danger present to fans sitting in different sections of the ballpark. Indeed, in a typical negligence case, having defined a team’s duty as providing netting in front of the most dangerous area of the stadium, the question of whether the defendant breached that standard would normally be one of fact.¹²¹ The resulting factual inquiry

118. Cf. Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 837 (1997) (“[W]hile spectator foul ball injuries are a regrettable by-product of baseball, they are generally not injuries that we should blame on the stadium operators because there was nothing careless about their behavior.”).

119. See *supra* notes 69-72 and accompanying text (discussing the manner in which the *Wells* court balanced the competing interests in fan safety and consumer demand for unobstructed seating).

120. See, e.g., *Wells v. Minneapolis Baseball & Athletic Ass’n*, 142 N.W. 706, 708 (Minn. 1913) (“Baseball is not free from danger to those witnessing the game. But the perils are not so imminent that due care on the part of the management requires all the spectators to be screened in.”).

121. See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 37,

would then typically give specific consideration to a variety of factors, such as the extent of the stadium's existing netting, the proximity of unprotected seats to home plate, and the history of previous injuries in the seating area in question.¹²² In fact, in *Wells*, the trial court was ordered to conduct just such an analysis on remand in one of the original Baseball Rule cases decided all the way back in 1913.¹²³

Rather than engage in such a factual inquiry to determine which areas of the ballpark actually pose the greatest risk to fans, however, modern courts have instead summarily concluded that the danger to fans is most acutely present—and thus that protection was only required—simply in the area immediately behind home plate.¹²⁴ Far from basing this interpretation of the “most dangerous area” of the stadium on any actual data, courts have instead reached this inference on an entirely conclusory basis.¹²⁵ As the court in *Coronel v. Chicago White Sox* stated, for example, “[t]he most dangerous part of a ball park is universally recognized as the area behind home plate.”¹²⁶ Rather than cite any empirical evidence showing that this was, in fact, the only portion of the stadium that posed a heightened risk to fans, the *Coronel* court instead relied on citations to several prior decisions from other jurisdictions.¹²⁷

at 237 (5th ed. 1984); cf. Stephen D. Sugarman, *Misusing the “No Duty” Doctrine in Torts Decisions: Following the Restatement (Third) of Torts Would Yield Better Decisions*, 53 ALBERTA L. REV. 913, 929 (contending that in foul-ball cases, courts should “apply[] the normal ‘reasonable care’ standard to ball parks, taking each case up on its own and giving ball-parks strong protection on a case-by-case basis if their protected seating area conforms to industry custom”).

122. See *infra* Part IV.B (discussing how to better define “the most dangerous area”).

123. *Wells*, 142 N.W. at 709 (concluding that “the question of defendant’s negligence” depended on the question of whether “the screen should [have] extend[ed] beyond the place plaintiff chose for her seat,” or alternatively if “the ordinarily prudent person would deem [the screen to have been] of sufficient size to afford reasonable protection”).

124. See, e.g., *Yates v. Chi. Nat’l League Ball Club, Inc.*, 595 N.E.2d 570, 580 (Ill. App. Ct. 1992) (“[W]e note that numerous courts have recognized the area behind home plate as the most dangerous area of the ballpark.”); see also *Lawson ex rel. Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1015 (Utah 1995) (“[W]e hold that the Trappers had a duty to screen the area behind home plate.”); *Coronel v. Chi. White Sox, Ltd.*, 595 N.E.2d 45, 47 (Ill. App. Ct. 1992) (“The most dangerous part of a ball park is universally recognized as the area behind home plate.”).

125. See, e.g., *Yates*, 595 N.E.2d at 580; *Coronel*, 595 N.E.2d at 47.

126. 595 N.E.2d at 47.

127. *Id.* (citing *City of Atlanta v. Merritt*, 323 S.E.2d 680 (Ga. Ct. App. 1984); *Clapman v. City of New York*, 468 N.E.2d 697, 697-98 (N.Y. 1984); *Akins v. Glens Falls City Sch. Dist.*,

Meanwhile, none of these cited decisions themselves offered any factual support for this conclusion; instead, they simply cited other precedents that had also reached this conclusion on an entirely circumstantial and conclusory basis.¹²⁸

Thus, at no point has any modern court engaged in a factual determination of which areas of a baseball stadium actually present the greatest risk to fans.¹²⁹ Nevertheless, modern courts routinely treat the matter of identifying the sections of a ballpark that present the greatest danger—and thus those which must be screened—as having been conclusively and incontestably settled.¹³⁰ Unfortunately, as discussed in greater detail below,¹³¹ this overly narrow and rigid interpretation of the Baseball Rule fails to account for recent factual changes that have heightened the degree of risk posed to fans sitting in sitting areas other than those immediately behind home plate.

The mischaracterization of the Baseball Rule as being a “limited” or “no” duty rule has helped to reinforce this artificially constrained interpretation of a team’s duty to its fans.¹³² Once courts acceded to an understanding of a baseball team’s legal obligation as being substantially reduced compared to that which a business would normally owe its patrons, it naturally followed that these same courts would adhere to an overly narrow view of the level of protection that teams should be expected to provide to their spectators.¹³³ Conversely, if modern courts instead held that professional baseball teams generally owe a standard duty of reasonable care to their fans—in following with both the original Baseball Rule cases and much of the rest of tort law¹³⁴—then this doctrinaire insistence

424 N.E.2d 531, 533 (N.Y. 1981)).

128. *See, e.g., Merritt*, 323 S.E.2d at 682; *Clapman*, 468 N.E.2d at 697-98; *Akins*, 424 N.E.2d at 533.

129. *See supra* text accompanying notes 124-28.

130. *See, e.g., Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 221 (Mich. Ct. App. 2001) (“The rule that emerges in these cases is that a stadium proprietor cannot be liable for spectator injuries if it has satisfied a ‘limited duty’—to erect a screen that will protect the most dangerous area of the spectator stands, behind home plate, and to provide a number of seats in this area sufficient to meet the ordinary demand for protected seats.”).

131. *See infra* Parts II.A-B.

132. *See supra* note 117 and accompanying text.

133. *See supra* notes 121-23 and accompanying text.

134. *See supra* Parts I.A-I.B.

that teams must only protect the area immediately behind home plate would be less tenable. Instead, courts would reasonably expect teams to adjust the level of protection offered in light of the level of risk that fans in each area of the ballpark actually face.

D. The Codification of the Baseball Rule

Finally, although the Baseball Rule is generally understood to be a common law doctrine, in four jurisdictions—Arizona, Colorado, Illinois, and New Jersey—the rule has actually been codified by statute.¹³⁵ In two of these jurisdictions—Illinois and New Jersey—the state legislatures elected to codify the Baseball Rule after it had been rejected (at least partially) by the judiciary;¹³⁶ in the other two instances, the legislatures simply appear to have decided to proactively establish the doctrine as state law.¹³⁷

While slight differences exist, these statutes typically state that teams cannot be held liable for injuries caused by errant balls or bats so long as the team has taken basic precautions—in line with modern judicial formulations of the Baseball Rule—to protect their fans.¹³⁸ Arizona’s statute, for instance, specifies that a team will not be liable for an injury if it offers a sufficient number of protected seats to meet expected demand,¹³⁹ while New Jersey offers the same insulation from liability to teams so long as they have installed netting protecting the most dangerous area of their stadium (specifically identified by statute as being that behind home

135. See ARIZ. REV. STAT. ANN. § 12-554 (2018); Colorado Baseball Spectator Safety Act of 1993, COLO. REV. STAT. ANN. § 13-21-120 (West 2018); Baseball Facility Liability Act, 745 ILL. COMP. STAT. ANN. 38/10 (West 2018); New Jersey Baseball Spectator Safety Act of 2006, N.J. STAT. ANN. §§ 2A:53A-43-48 (West 2018).

136. See Lisa A. Lehrer, *Limited Liability: Exculpatory Clauses, Statutory Protections and Limited Duties*, N.J. LAW. MAG., Feb. 2011, at 54, 59 (“The *Maisonave* holding has been overruled to an extent by the New Jersey Baseball Spectator’s Safety Act of 2006.”); George D. Turner, Note, *Allocating the Risk of Spectator Injuries Between Basketball Fans and Facility Owners*, 6 VA. SPORTS & ENT. L.J. 156, 168 (2006) (“[T]he Illinois Baseball Facility Liability Act ... superseded *Coronel* and *Yates* later that year.”).

137. See ARIZ. REV. STAT. ANN. § 12-554; COLO. REV. STAT. ANN. § 13-21-120.

138. See *supra* note 135 and accompanying text.

139. ARIZ. REV. STAT. ANN. § 12-554(A)(1) (“An owner is not liable for injuries to spectators who are struck by baseballs, baseball bats or other equipment used by players during a baseball game unless the owner ... [d]oes not provide protective seating that is reasonably sufficient to satisfy expected requests.”).

plate).¹⁴⁰ Meanwhile, Colorado limits a team’s liability so long as it maintains its stadium “in reasonably safe condition relative to the nature of the game,”¹⁴¹ the most flexible standard of the four. The Colorado statute therefore potentially requires teams to adjust their level of protection as emerging circumstances warrant.¹⁴² Illinois’s statute, on the other hand, provides teams with the broadest protection, establishing that they will not be liable for playing-equipment-related fan injuries unless the fan was sitting behind a defective screen (i.e., defective in some manner other than size), or was injured by willful or wanton conduct on the part of the team or players.¹⁴³ This protection from liability thus goes above and beyond that established judicially by the Baseball Rule, neither requiring teams in Illinois to screen any particular part of their stadium nor ensure that a sufficient number of protected seats are available to meet anticipated demand.¹⁴⁴

Thus, to the extent that the Baseball Rule is to be modified, in these four states¹⁴⁵—with the possible exception of Colorado¹⁴⁶—any change would have to be undertaken legislatively, rather than through the judiciary.

II. THE RISK OF BEING INJURED AT PROFESSIONAL BASEBALL GAMES HAS INCREASED IN RECENT YEARS

The fact that courts have, by and large, continued to adhere to the Baseball Rule in such a rigid manner is somewhat surprising given several important changes that have conspired in recent years to increase the risk that foul balls (and, to a lesser extent, errant bats) pose to fans. Indeed, differences in how the game has both been played and watched over the past twenty-five years raise significant

140. N.J. STAT. ANN. §§ 2A:53A-47(b) (imposing liability in cases where a team has “fail[ed] to provide protection for spectators in the most dangerous sections of the stands. This limited duty may be satisfied by having a net behind home plate”).

141. COLO. REV. STAT. ANN. § 13-21-120(5)(a) (West 2018) (requiring teams to “to make a reasonable and prudent effort to design, alter, and maintain the premises of the stadium in reasonably safe condition relative to the nature of the game of baseball”).

142. *See id.*

143. 745 ILL. COMP. STAT. ANN. 38/10 (West 2018).

144. *Cf. id.*

145. *See supra* note 135 and accompanying text.

146. *See supra* text accompanying notes 141-42.

questions regarding the continued viability of the Baseball Rule, at least as it has traditionally been applied by courts.¹⁴⁷

A. Changes in Stadium Construction

To begin, fans attending professional baseball games today are, by and large, sitting closer to the playing field than was the case at any point during the twentieth century. This is because MLB teams have constructed new ballparks at a dizzying pace over the last quarter century, with twenty-one of the thirty major-league teams currently playing in a stadium that was built since 1992.¹⁴⁸ Similar building trends have occurred throughout minor-league baseball as well.¹⁴⁹ During this period, most teams have sought to emulate the so-called “retro” style of ballpark first popularized by the Baltimore Orioles with the opening of Oriole Park at Camden Yards in 1992.¹⁵⁰ Along with featuring unique, asymmetrically shaped playing fields,¹⁵¹ a common hallmark of these retro-style stadiums is their placement of fan seating in much closer proximity

147. Cf. *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, 881 A.2d 700, 708 (N.J. 2005) (“[T]here is a ‘pragmatic difficulty [in] applying an old rule to a sport that has changed tremendously in the last seventy years.’”) (quoting David Horton, Comment, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. REV. 339, 365-66 (2003)); Fried & Ammon, Jr., *supra* note 67, at 54 (“Sport viewership has significantly changed over the years, but most courts [applying the Baseball Rule] have yet to embrace this change.”).

148. See Jeff Goldberg, *MLB Ballparks, From Oldest to Newest*, BALLPARKDIGEST.COM (Mar. 31, 2017), <https://ballparkdigest.com/2017/03/31/mlb-ballparks-from-oldest-to-newest/> [<https://perma.cc/LD3Q-ADAA>] (listing current MLB stadiums chronologically by date of opening).

149. See Michael Birch, *Take Some Land for the Ball Game: Sports Stadiums, Eminent Domain, and the Public Use Debate*, 19 SPORTS L.J. 173, 187 (2012) (observing that “[t]he construction of minor league sports stadiums has ... dramatically increased over the last decade”); see also Jeff Friedman, *Antitrust Exemption Vital for Minor League Survival: MLB & Parent Clubs Must Put Money Behind 1991 Stadium Standards*, 1 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 118, 119 (2003) (reporting that just between “1991 to 2001 ... seventy-one new [minor-league] stadiums were built”).

150. See David L. Dobkin, *Fair or Foul? Ballparks and Their Impact on Urban Revitalization*, 41 REAL EST. REV. J. 1, 2 (2012) (“Baltimore’s Camden Yards, which opened in 1992, inspired the third era of ballparks—the retro age.”); W.S. Miller, “*What Do You Mean My Facility Is Obsolete?*”: *How 21st Century Technology Could Change Sports Facility Development*, 10 MARQ. SPORTS L.J. 335, 341 (2000) (“Most facilities have incorporated elements of the retro-look popularized by Camden Yards.”).

151. See Dobkin, *supra* note 150, at 2 (“The Orioles designed the ballpark ... with unique dimensions, historic architecture and an outfield open to views of the city.”).

to the field than had previously been the case.¹⁵² Indeed, because teams are not subject to liability for most fan injuries under the Baseball Rule, clubs have had little incentive to balance fan safety with seating proximity, thus leading teams to chase profits by putting fans ever closer to the action.¹⁵³

In order to determine precisely how much closer to the field fans are sitting today, data were marshalled to empirically establish the extent to which MLB stadium design has changed over the years. Specifically, relying on stadium dimension data gathered and maintained online by Andrew Clem,¹⁵⁴ the yearly average of both (1) the distance between home plate and the wall immediately behind it (i.e., the “backstop”), and (2) the overall amount of foul territory within the stadium, were calculated for all MLB ballparks in use from 1920 to the present. While data regarding the precise distance between home plate and the first row of each ballpark’s unprotected seating were, unfortunately, not available, the data presented below nevertheless clearly establish that fans are sitting closer to the field than ever before.¹⁵⁵ For instance, the data regarding the distance between home plate and the backstop reflects the proximity of what will typically be the closest seat to home plate,¹⁵⁶ thus serving as a useful proxy for the distance between home plate and the nearest unprotected seat. Indeed, anecdotal data suggest that the distance from home plate to the backstop has traditionally been only a few feet shorter than the distance between home plate and the first row of unprotected seating further down the foul lines.¹⁵⁷ Meanwhile, the

152. See Goldberg, *supra* note 148 (noting that Camden Yards “ushered in the era of retro ballparks” in part by featuring “seats close to the field”).

153. See Kent Greenfield, *MLB Teams Should Pay for Fan Injuries*, BOS. GLOBE (June 10, 2015), <https://www.bostonglobe.com/opinion/2015/06/10/mlb-teams-should-pay-for-fan-injuries/NGlssjUp5vFY3pVmA8JasI/story.html> [<https://perma.cc/H7GJ-BLNR>] (“[B]ecause baseball teams are freed of any financial risk, they need not make hard judgments that balance the fans’ experience with their safety. They can generate money by making the game seem more intimate. That includes building seats closer to the action and minimizing protective netting that obscures views — without suffering a downside.”).

154. See CLEM’S BASEBALL: STADIUM STATISTICS, http://www.andrewclem.com/Baseball/Stadium_statistics.html [<https://perma.cc/E4TK-H8TM>].

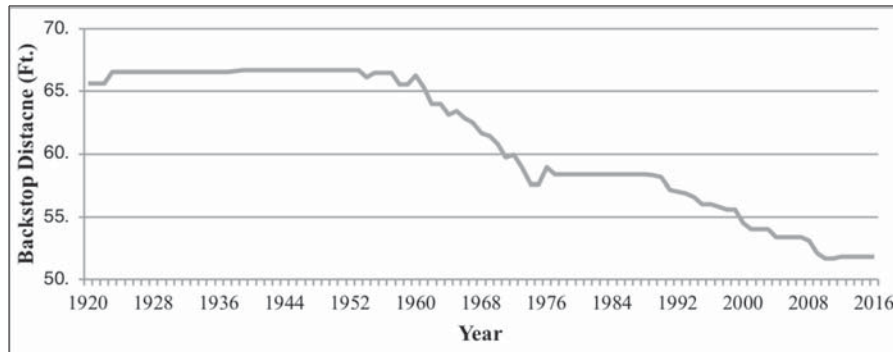
155. See *id.*

156. See *id.*

157. For example, in Globe Life Park, the current ballpark of the Texas Rangers, the backstop is fifty-two feet from home plate, see *id.*, and the first row of seats on the first and third base sides are fifty-six feet, eight inches from home plate, a difference of four feet, eight

decrease in the overall amount of foul territory within each stadium further establishes the extent to which fans are sitting closer to the playing field, as the shorter the distance grows between the first row of seating and the playing field, the less foul territory will exist.

Figure A. Average Distance Between Home Plate and the Backstop



With regards to the average distance between home plate and the backstop, the data reveal that fans today are sitting approximately 21 percent closer to the field on average than they were back in 1920, shortly after courts first established the Baseball Rule.¹⁵⁸ As depicted in Figure A above, whereas the average backstop distance at MLB stadiums was just over sixty-five feet from home plate in 1920, today that distance has decreased to just under fifty-two feet.¹⁵⁹ Much of this decline occurred during two intervals in particular, both periods of substantial stadium construction. Between 1962 and 1977, teams constructed sixteen new MLB ballparks,¹⁶⁰ during which time the average MLB backstop distance declined

inches. See Texas Rangers, *Facts and Figures*, TEXASRANGERS.COM, http://texas.rangers.mlb.com/tex/ballpark/information/index.jsp?content=facts_figures [https://perma.cc/6TDK-X3DF]. This difference is similar to the dimensions for Arlington Stadium, the Texas Rangers's old ballpark, which had a backstop length of sixty feet and a distance of sixty-four feet from the first row of seats along the first and third base sides to home plate. See *id.*

158. See CLEM'S BASEBALL: STADIUM STATISTICS, *supra* note 154.

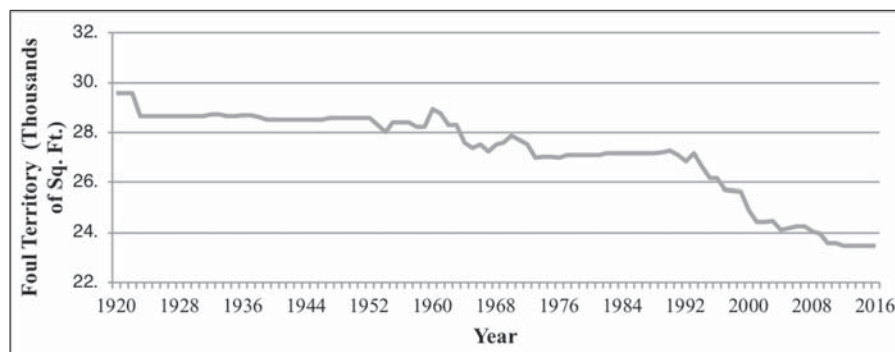
159. See *supra* Figure A.

160. See CLEM'S BASEBALL: STADIUM MILESTONES, http://www.andrewclem.com/Baseball/Stadium_milestones.html [https://perma.cc/T9DV-ECCJ].

from over sixty-five feet—where it had remained relatively static since 1920—to just over fifty-eight feet, a decrease of 11 percent.¹⁶¹ This trend continued from 1992 to present during the construction of the retro ballparks, when the average distance between home plate and the backstop dropped another six feet, again representing an 11 percent decline.¹⁶²

The data regarding the yearly average amount of foul territory establish a comparable trend, as depicted in Figure B below.¹⁶³ For most of the period from 1920 to 1960, MLB stadiums averaged around 29,000 square feet of total foul territory.¹⁶⁴ While the construction boom from 1962 to 1977 decreased this territory slightly—to an average of around 27,000 square feet, a decrease of 7 percent—this trend has accelerated much more rapidly since 1992.¹⁶⁵ Indeed, today the average amount of foul territory at MLB ballparks totals around 23,500 square feet, a decrease of 21 percent since 1920, and representing a fairly precipitous decline of another 13 percent over the last twenty-five years.¹⁶⁶

Figure B. Average Amount of Foul Territory



Thus, by both metrics, fans attending MLB games today are sitting in much closer proximity to the playing field than was the

161. *See id.*

162. *See id.*

163. *See infra* Figure B.

164. *See* CLEM’S BASEBALL: STADIUM STATISTICS, *supra* note 154.

165. *See id.*; CLEM’S BASEBALL: STADIUM MILESTONES, *supra* note 160.

166. CLEM’S BASEBALL: STADIUM STATISTICS, *supra* note 154.

case one hundred, or even just twenty-five, years ago.¹⁶⁷ Moreover, the fact that the overall foul territory has declined more precipitously over the last quarter century than has the distance to the backstop¹⁶⁸ suggests that a disproportionate part of this recent change has resulted from a decline in the distance between unprotected seats and home plate.¹⁶⁹

From an injury prevention standpoint, the fact that fans today are sitting 21 percent closer to the playing field than a century ago¹⁷⁰ means that, all else remaining static, spectators have approximately 21 percent less time to react to a ball hit in their direction than would have been the case around the time that the Baseball Rule was first established. This makes the prospect of attending a professional baseball game substantially more dangerous today than it was one hundred years ago, at least for those fans seated in relatively close proximity to the playing field.

For example, assuming that the first row of unprotected seating in a stadium has historically been approximately five feet further away from home plate than the closest seat behind the backstop—as the anecdotal evidence cited above suggests¹⁷¹—then a fan in the first exposed row in 1920 would have been sitting around seventy feet from home plate, while a similarly situated fan today would be just fifty-seven feet away. For a foul ball hit at 80 miles per hour, this means that a fan in 1920 would have had around six-tenths of a second to shield themselves from the ball, while a fan today would have less than one-half of a second to react.¹⁷²

While the difference of one-tenth of a second may not appear to be particularly significant, in terms of injury avoidance even this short an amount of time can be critical.¹⁷³ The average human reaction time to visual stimuli is around .248 seconds, but varies

167. See *supra* Figures A, B.

168. Cf. *supra* text accompanying notes 162-66.

169. Because overall foul territory represents the total square footage of the space between the playing field and seating areas of a stadium, a slower decrease in backstop distance inherently means that sections of seats other than those screened areas immediately behind home plate must be moving closer to the field at a faster rate.

170. See CLEM'S BASEBALL: STADIUM STATISTICS, *supra* note 154.

171. See *supra* note 157 (discussing data from two ballparks currently and previously used by the Texas Rangers).

172. A ball hit at 80 miles per hour travels approximately 117 feet per second.

173. See *infra* text accompanying notes 177-80.

depending on an individual’s age, gender, handedness, physical conditioning, and level of fatigue.¹⁷⁴ However, that average rate accounts merely for the amount of time that an individual needs to mentally process a visually perceived danger, and does not necessarily encompass all of the subsequent time that it may take to move one’s hands, arms, and/or body to avoid injury.¹⁷⁵ In the context of avoiding a foul ball, for instance, one expert has estimated that a reaction time of less than one full second would give a fan “virtually no time to react” to a particularly hard-hit foul ball.¹⁷⁶

B. Changes in the Way the Game is Played

Unfortunately, the reaction times stated above—based on a foul ball traveling at 80 miles per hour—almost certainly understate the potential danger that fans experience today. While comprehensive data on the velocity of foul balls is unfortunately not available, anecdotal data suggest that baseballs enter the stands traveling at speeds of 100 to 110 miles per hour on a relatively frequent basis.¹⁷⁷

174. See Aditya Jain et al., *A Comparative Study of Visual and Auditory Reaction Times on the Basis of Gender and Physical Activity Levels of Medical First Year Students*, 5 INT’L J. APPLIED BASIC MED. RES. 124, 125 (2015), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4456887/> [<https://perma.cc/VXY2-HPPZ>] (reporting same). While the study cited above measures the reaction time of a sample of medical students responding to the appearance of a visual stimulus on a computer screen, its results are consistent with other studies based on a broader range of test subjects. See, e.g., *Reaction Time Test*, HUMAN BENCHMARK, <https://www.humanbenchmark.com/tests/reactiontime/> [<https://perma.cc/DQH3-NN4Q>] (stating that the “average human reaction time may fall between 200-250 [milliseconds]”).

175. Cf. Jain et al., *supra* note 174.

176. See *Costa v. Bos. Red Sox Baseball Club*, 809 N.E.2d 1090, 1091 (Mass. App. Ct. 2004) (reporting that the plaintiff’s expert witness testified that “the plaintiff had virtually no time to react to [a] ball” that hit her “no more than 1.07 seconds from the time” it left the bat).

177. See, e.g., *Baseball Fans Deserve More Protection from Foul Balls*, CHI. TRIB. (Oct. 17, 2017, 2:43 PM), <http://www.chicagotribune.com/news/opinion/editorials/ct-edit-baseball-foul-balls-netting-20171013-story.html> [<https://perma.cc/LJ5Q-SKWJ>] (“When Anthony Rizzo, Kris Bryant and Kyle Schwarber connect at the plate, their exit velocity—the speed at which the ball leaves the bat—often exceeds 100 mph.”); see also Matthews, *supra* note 2 (reporting that Todd Frazier hit a foul ball at 106 mph); Carrie Muskat (@CarrieMuskat), TWITTER (Sept. 13, 2017, 6:49 PM), <https://twitter.com/CarrieMuskat/status/908145691104628736> [<https://perma.cc/JS23-ESS2>] (noting that the Chicago Cubs’s Anthony Rizzo hit a foul ball that entered the stands travelling 110 miles per hour); Daren Willman (@darenw), TWITTER (Mar. 7, 2017, 2:45 PM), <https://twitter.com/darenw/status/839245696020598784> [<https://perma.cc/JYZ3-NVQN>] (reporting that the Oakland Athletics’s Renato Nunez had just hit a foul ball at 110 miles per hour). See generally Goplerud & Terry, *supra* note 37, at 460 (observing in 2003 that “[f]oul balls enter the spectator areas at speeds upward of eighty to one hundred miles per hour”).

At 110 miles per hour, a spectator seated sixty feet from home plate would have just four-tenths of a second to react to a foul ball, giving even those fans paying extremely close attention to the action on the field virtually no chance of avoiding injury.¹⁷⁸ Indeed, at four-tenths of a second the hypothetical fan described above would actually have less time to react than MLB batters have to avoid being hit by a 95 mile-per-hour fastball.¹⁷⁹ If elite professional athletes of this caliber are often unable to get out of the way of such a fast-moving projectile,¹⁸⁰ it should come as no surprise that fan injuries from foul balls have become even more common occurrences than batters being hit by a pitch in recent years.¹⁸¹

Although precise data are again unfortunately not available, the frequency with which foul balls are hit at 100 or more miles per hour has likely increased over the last few decades, for several reasons. For one thing, baseball players today are widely regarded as being in much better physical condition than was the case fifty or one hundred years ago.¹⁸² Because the average batter today is almost certainly physically stronger than in prior eras,¹⁸³ players

178. See *supra* notes 174-75 (discussing average human reaction time).

179. See Scott Simon, *How a Baseball Batter's Brain Reacts to a Fast Pitch*, NPR (Sept. 3, 2016, 8:50 AM), <https://www.npr.org/2016/09/03/492516937/how-a-baseball-batters-brain-reacts-to-a-fast-pitch> [<https://perma.cc/8LGK-R9GP>] (“[F]rom the release of the pitch until it gets to the plate, a 95-mile-an-hour fastball is around 425-450 milliseconds.”).

180. See Ed Edmonds, *Baseball Needs to Reduce the Risk of Fan Injury*, CHI. TRIB. (Aug. 24, 2015, 4:18 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-baseball-fans-injuries-mlb-bat-line-drive-ball-perspec-0825-jm-20150824-story.html> [<https://perma.cc/9PMK-KSUX>] (“Pitchers can’t react fast enough on the mound. How’s a fan going to react? ... They can’t.”); Catherine Slonksnis, *Players Rip MLB for Not Taking Fan Safety More Seriously*, SBNATION (Aug. 24, 2015, 9:53 AM), <https://www.sbnation.com/2015/8/22/9192269/mlb-fan-safety-netting-detroit-tigers-boston-red-sox> [<https://perma.cc/5C3K-LPSE>] (“We can’t react that fast in the dugout, and we’re paying attention to the game ... A fan who’s never seen anything moving that fast at them in their life? No chance. Zero chance in this world, a fan sitting right there over the dugout could react.”).

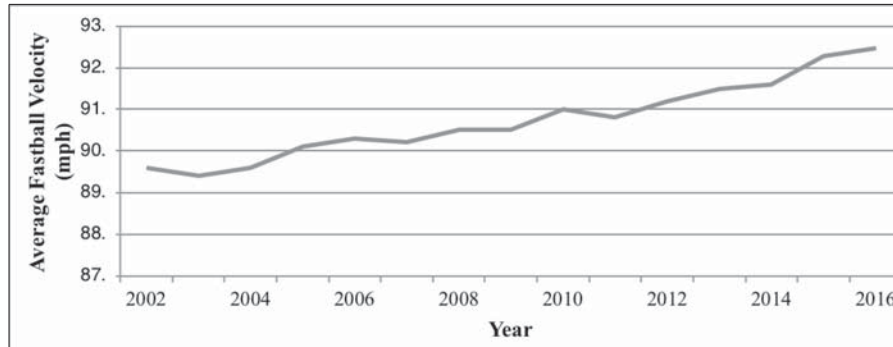
181. See Glovin, *supra* note 7 (comparing the rate of foul-ball injuries to batters being hit by pitches).

182. See, e.g., Horton, *supra* note 147, at 343-44 (“[N]ew training techniques and technologies have made play faster and players stronger.”); Zachary D. Rymer, *Why Today’s Baseball Players Don’t Have the Same Skills as Old-Timers*, BLEACHER REP. (Sept. 16, 2012), <http://bleacherreport.com/articles/1334652-why-todays-baseball-players-dont-have-the-same-skills-as-old-timers> [<https://perma.cc/GE6J-3BMX>] (“Modern ballplayers are bigger, faster and stronger than the old-timers, and they throw the ball faster, hit it harder and field it better.”).

183. See Rick Weiner, *Monumental Differences Between Today’s Baseball Players and Those of Yesteryear*, BLEACHER REP. (Mar. 4, 2013), <http://bleacherreport.com/articles/1549854-monumental-differences-between-todays-baseball-player-and-those-of-yesteryear> [<https://>

today will typically be able to swing their bats both faster and harder than before, with the result that balls now likely often fly further and more quickly into the stands than was the case at the time courts first established the Baseball Rule.¹⁸⁴

Figure C. Average Fastball Velocity for MLB Pitchers



At the same time, pitchers are also throwing harder today than ever before, with the average fastball velocity increasing across MLB by nearly 3 miles per hour between 2002 and 2016, as depicted in Figure C above.¹⁸⁵ While this increased velocity itself incrementally increases the speed at which the ball is hit,¹⁸⁶ perhaps

perma.cc/T2AT-9BMY].

184. See Neil Paine, *Here's What 56,785 Homers Look Like on a Map*, FIVE THIRTYEIGHT (July 17, 2017), <https://fivethirtyeight.com/features/how-far-did-56785-home-runs-travel/> [<https://perma.cc/58DX-85EV>] (finding that through only 55 percent of the 2017 MLB season, hitters had hit the ball an aggregated distance equal to 69 percent of the total distance for an average complete MLB season).

185. This data was presented in Jeff Zimmerman, *Velocity's Relationship with Pitcher Arm Injuries*, *HARDBALL TIMES* (Apr. 22, 2015), <https://www.fangraphs.com/tht/velocitys-relationship-with-pitcher-arm-injuries/> [<https://perma.cc/WA4V-R8JA>]. While league-wide pitch velocity data was not collected prior to 2002, anecdotal evidence suggests that pitch velocities have been increasing for decades. See, e.g., Jayson Stark, *The Age of the Pitcher*, *ESPN.COM* (June 15, 2012), http://www.espn.com/mlb/story/_/id/8048897/the-age-pitcher-how-got-here-mlb [<https://perma.cc/D3XC-XZQH>] (quoting John Mirabelli, former Vice President of Scouting for the Cleveland Indians, as stating, “[w]hen I first started doing this 25 years ago, if you saw a kid touch 90 (mph) at 17 years old, you were like, ‘Oh my God’ ... Now, just about every guy (on a scouting director’s radar) throws 90, and most of them throw 92. And you never saw amateur guys throwing in the upper 90s. Now you see it all the time. It’s unbelievable.”).

186. Physicists have determined that pitch velocity accounts for around 15 percent of speed

more importantly, the faster a pitch is thrown, the less likely a batter is to hit it squarely with his bat.¹⁸⁷ Consequently, as pitching speeds have increased, so too have the odds that a batter will mis-hit a ball, sending it into the stands at an elevated speed.¹⁸⁸

Taken together, then, recent trends in MLB stadium construction, along with changes in the way the game is played on the field, have converged to place spectators at a greater risk of injury than was the case just twenty-five years ago.¹⁸⁹ Even if a fan sitting in relatively close proximity to the field today is paying full attention to the game, she may nevertheless have little to no chance to avoid a foul ball traveling in her direction.¹⁹⁰ Indeed, the danger to fans sitting in close proximity to home plate has become so pronounced in recent years that the Major League Baseball Players Association—the union representing all major-league players—has pressed MLB team owners to enlarge the size of their stadiums’ protective screening for over a decade during collective bargaining negotiations.¹⁹¹

C. Changes to Ticket Policies

A third relevant difference worth noting with respect to the continued viability of the Baseball Rule relates to the way in which ticketing policies across professional baseball have changed since the doctrine was first established in 1913. In most of the initial cases applying the doctrine, plaintiffs had purchased general

with which a ball leaves the bat. See Joe Lemire, *Exit Velocity Proves Pitchers Provide Minimal Power to Long Balls*, USA TODAY (Sept. 22, 2015, 1:21 AM), <https://www.usatoday.com/story/sports/mlb/2015/09/22/exit-velocity-harder-a-pitch-comes-in-the-harder-it-goes-out/72624244/> [<https://perma.cc/8J4D-6UQG>] (quoting Alan Nathan, physics professor emeritus at the University of Illinois).

187. See *id.* (quoting Cleveland Indians pitcher Trevor Bauer as stating, “[i]f I throw 95 and the guy’s 100% on time, it’s probably going to leave the bat harder than a pitch that’s 85 (when he’s) 100% on time, but the chances of being 100% on time at 95 are probably not as good as being 100% on time at 85”).

188. See Takatoshi Higuchi et al., *The Effect of Fastball Backspin Rate on Baseball Hitting Accuracy*, 29 J. APPLIED BIOMECHANICS 279, 283 (2013), <https://pdfs.semanticscholar.org/4bbe/c7cdb2d4c061759bf4ad7476a35bf3068203.pdf> [<https://perma.cc/89SV-R9V3>].

189. See *supra* Parts II.A-B.

190. See *supra* notes 175-76 and accompanying text.

191. See Lucchese, *supra* note 21, at 121 (noting that during negotiations for “the previous two CBAs ... the players proposed [fan safety] improvements”).

admission tickets granting them the right to sit in any unoccupied seat in the applicable stadium’s grandstand.¹⁹² Thus, in most early Baseball Rule cases, fans had the ability to choose a seat for themselves upon entering the stadium, and therefore could make a more informed choice as to whether to sit behind the protective netting or instead view the game from an unscreened location.¹⁹³

Today, however, seats at professional baseball games are sold almost exclusively on a reserved basis, meaning that a fan’s ticket specifies the exact seat in which she must sit.¹⁹⁴ As a result, spectators today do not have the same opportunity to select a location from which to view the game upon entering the stadium as was taken for granted in the early Baseball Rule cases. At the same time, because teams frequently fail to clearly identify whether a particular seat is located behind the protective screen at the time a ticket is purchased,¹⁹⁵ fans in many cases may not be able to definitively ascertain whether the ticket they are purchasing will entitle them to sit in a seat shielded from the playing field.

Moreover, the public availability of protected seats is often much more limited today than was the case one hundred years ago.¹⁹⁶ At most MLB stadiums, a large percentage of seats behind home plate are sold exclusively in season-ticket packages, and as a result are

192. See, e.g., *Crane v. Kan. City Baseball & Exhibition Co.*, 153 S.W. 1076, 1077 (Mo. Ct. App. 1913) (noting that plaintiff’s general admission ticket gave him “the option of seating himself at some place behind the netting or in an unprotected seat”).

193. See *id.*

194. See *Buying Tickets to Baseball Games Online*, MLB.COM, http://mlb.mlb.com/mlb/help/faq_buying_tickets.jsp [<https://perma.cc/4S69-WNWF>] (“You can select a seat according to a stadium seating chart.”). But see *Introducing the Pinstripe Pass*, MLB.COM, <https://www.mlb.com/yankees/tickets/specials/pinstripe-pass> [<https://perma.cc/44KE-MB3C>] (“The Pinstripe Pass ... includes a general admission ticket to the [New York Yankees’s] Stadium ... and access to non-designated standing room only locations throughout the Stadium.”).

195. While some teams identify which seating sections are behind a net, others do not. Compare *Comerica Park Map*, TIGERS.COM, <https://www.mlb.com/tigers/ballpark/netting> [<https://perma.cc/AJY7-HU7Y>] (listing sections that are entirely or partially protected by a screen), with *Angel Stadium Seating Map*, ANGELS.COM, <http://losangeles.angels.mlb.com/ana/ticketing/seating.jsp> [<https://perma.cc/SP7Z-PZDF>] (providing no indication of which seats are protected by netting). Meanwhile, few, if any, teams allow fans to search for seats based on their protected status when purchasing tickets online.

196. See Gil Fried et al., *Don’t Sit There...or There...or There: An Analysis of Ball Park Protection and Foul Ball Injury Risks*, 13 INT’L J. SPORT MGMT. 423, 423 (2012) (“At major league baseball games there might be very few seats available in a screened area that are either available for concerned fans or are reasonably priced enough to represent a viable option for concerned fans.”).

rarely available to fans on a single-game or day-to-day basis.¹⁹⁷ Meanwhile, even when protected seats are currently available for purchase, they will often prove to be cost-prohibitive for many fans, as the price of tickets immediately behind home plate has increased exponentially from the time that the Baseball Rule was first established.¹⁹⁸ In the seminal case of *Crane v. Kansas City Baseball & Exhibition Co.*, for example, the plaintiff had purchased his grandstand ticket for \$0.50, the equivalent of \$12.62 in today's dollars.¹⁹⁹ In contrast, the overall average ticket price for an MLB game today is \$31, while the price for a seat immediately behind home plate can often exceed \$100.²⁰⁰ In 2017, for instance, a box seat behind home plate at Boston's Fenway Park averaged around \$150 per game,²⁰¹ while a similar seat at New York's Yankee Stadium ranged from \$128 to \$300 per ticket as of April 2018.²⁰²

Consequently, fans today do not have the same ability to select a protected seat for themselves as was taken for granted by courts at the time the Baseball Rule was first formulated over a century ago. Not only are seats behind the protective net often unavailable to fans buying tickets on a single-game basis,²⁰³ but even when they

197. See Fried & Ammon Jr., *supra* note 67, at 59 ("Spectators can be precluded from these sections based on ... long-term contracts to secure seat location."); Khare, *supra* note 22, at 99 ("Seats behind home plate ... are almost never readily available to consumers unless they are season ticket holders who are given first priority.").

198. See Khare, *supra* note 22, at 99 ("[T]he prices on premium seats have increased dramatically ... [s]eats behind home plate, for instance, have become the most expensive seating area at a baseball game.").

199. 153 S.W. 1076, 1077 (Mo. App. Ct. 1913); see also U.S. DEPT OF LABOR, BUREAU OF LABOR STATISTICS, DATABASES, TABLES, & CALCULATORS BY SUBJECT: CPI INFLATION CALCULATOR, https://www.bls.gov/data/inflation_calculator.htm [<https://perma.cc/ZC2P-7AXD>].

200. See, e.g., *Average MLB Ticket Price by Team in 2017*, STATISTA, <https://www.statista.com/statistics/193673/average-ticket-price-in-the-mlb-by-team/> [<https://perma.cc/2VQD-6KEU>] ("During the 2016 MLB season, the league-wide average ticket price stood at 31 U.S. dollars.").

201. See Boston Report, *Red Sox to Increase 2018 Ticket Prices by 2.5 Percent*, NBC SPORTS (Sept. 27, 2017, 2:09 PM), <http://www.nbcsports.com/boston/boston-red-sox/red-sox-increase-2018-ticket-prices-25-percent> [<https://perma.cc/8L5G-8H62>] (taking the average of the Field Box prices for 2017 to get the average cost for seats behind home plate at Fenway Park).

202. See *2018 Individual Game Pricing*, YANKEES.COM, <https://www.mlb.com/yankees/tickets/pricing> [<https://perma.cc/PWR5-23TG>] (taking the range of New York Yankees's Field Level tickets directly behind home plate on the accompanying interactive map as of April 2018).

203. See *supra* note 197 and accompanying text.

are available, adjusted for inflation such tickets frequently cost eight times as much, or more, than they did in 1913.²⁰⁴

D. Increased Spectator Distractions

Finally, fans attending professional baseball games today face a plethora of potential distractions that did not exist decades ago. At the time courts first established the Baseball Rule, the experience of attending a game was vastly different than it is today, with the game itself serving not just as the primary entertainment, but as the only attraction offered.²⁰⁵ In contrast, baseball games today are increasingly marketed as multifaceted entertainment experiences, offering spectators a variety of additional stimuli potentially distracting their attention from the action on the field.²⁰⁶

For instance, most professional stadiums today feature large, colorful, video-enhanced scoreboards that compete for fans’ attention by presenting a never-ending stream of statistics, advertisements, and replays, often all in spectacular high definition.²⁰⁷ Similarly, over the last four to five decades, most professional teams began employing boisterous team mascots to entertain fans throughout the game.²⁰⁸ While these mascots conduct a number of in-game promotions during breaks in the action—such as t-shirt or hot-dog tosses²⁰⁹—they may also interact with, or perform for, fans even while the game is transpiring on the field.²¹⁰ Perhaps even

204. See *supra* notes 199-202 and accompanying text.

205. See Fried & Ammon Jr., *supra* note 67, at 54-55 (“Fans are enthralled by a comprehensive experience ranging from doing the wave, to between innings games, to watching other distractions.”).

206. See Tom Verducci, *Safety Squeeze: With New Ballparks Putting Spectators Closer than Ever to the Action, More Fans Are Getting in Harm’s Way*, SPORTS ILLUSTRATED, Apr. 1, 2002, at 64, 65 (noting that modern ballparks “present a sensory overload of distractions, from vendors hawking food to scoreboards full of information and video diversions”); see also Fried & Ammon Jr., *supra* note 67, at 56-57.

207. See Kenneth R. Swift, *I Couldn’t Watch the Ball Because I Was Watching the Ferris Wheel in Centerfield*, 22 ENT. & SPORTS LAW., 2005, at 1, 34 (“Fans now have ... huge scoreboards [running] crazy promotions.”).

208. Cf. Robert M. Jarvis & Phyllis Coleman, *Hi-Jinks at the Ballpark: Costumed Mascots in the Major Leagues*, 23 CARDOZO L. REV. 1635, 1656 (2002) (noting that in 1964, “Mr. Met was brought to life as major league baseball’s first costumed mascot”).

209. See Kitei, *supra* note 100, at 53.

210. Cf. Howard W. Brill & Christian H. Brill, *Baseball Mascots and the Law*, 65 U. KAN. L. REV. 105, 107-08 (2016) (observing that a team’s mascot will “entertain fans between

more dangerous, MLB teams now routinely encourage spectators to use their smartphones during the game, offering free Wi-Fi to fans in order to allow them to order food and interact with the team on social media in real time via the “MLB Ballpark” mobile application.²¹¹

Consequently, while spectators could historically be expected to occasionally take their eyes off the field to look around the stadium or converse with friends, expecting a fan today to pay particularly close attention to every pitch of a game is much less realistic than was the case a century ago. As a result, for a variety of reasons, fans attending professional baseball games today are exposed to a higher risk of injury than at any point in time since courts first established the Baseball Rule in 1913.

III. COURTS HAVE FAILED TO ADAPT THE BASEBALL RULE TO CHANGING LEGAL DOCTRINE

Not only have courts continued to adhere to the Baseball Rule over the last one hundred years despite the increased risk that errant balls and bats pose to fans,²¹² but they have also curiously elected to persist in abiding by the century-old doctrine despite intervening changes in the underlying law of torts, transformations that arguably undercut continued reliance on the doctrine.

A. The Rise of the Law-and-Economics Movement

First, modern courts applying the Baseball Rule have uniformly failed to consider whether continued adherence to the doctrine is warranted in light of the important insights that the law-and-economics movement has contributed to tort law. In the years since the 1970 publication of then-Professor Guido Calabresi’s seminal book *The Cost of Accidents*,²¹³ both academic commentators and courts

innings [and] greet children in the stands”).

211. See *The Official Ballpark App*, MLB.COM, <http://www.mlb.com/apps/ballpark/> [<https://perma.cc/XC82-98VZ>] (discussing the app’s functionality); see also Fried & Ammon Jr., *supra* note 67, at 57 (reporting that as early as 2000, teams had begun to allow fans to order food via “Palm Pilots or similar devices”).

212. See *supra* Parts I-II.

213. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).