

## SPORTS LAW TEAM

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## ALERT

FLYING FENWAY BAT CALLS NEW ATTENTION TO THE  
BASEBALL RULE

*By Matthew J. Kelly Jr. and Sekou Lewis*

A tragic accident often leads to calls for re-examination of a long-accepted part of culture. This past week, after a broken bat at Fenway Park seriously injured a fan, commentators are calling for a re-examination of the baseball rule: stadium owners and operators have only a limited duty to fans to protect them from baseballs or other items flying from the field of play. Every few years the baseball rule is challenged. For example, a 2009 accident at a Houston Astros game resulted in a fan losing her eye. That case wound its way through the Texas courts, with the plaintiff's claims shut down at both the trial and appellate levels; she did not even garner an audience with the Texas Supreme Court. The baseball rule was too strong.

Is the recent accident at Fenway Park any different? Should the fact that the injury was caused by a flying piece of a broken bat, and not just a foul ball, call for reconsideration of the limited duty to protect fans? Or should recent events merely serve as an excuse or motivation to consider the obligation of the MLB, stadium owners and operators to protect a larger segment of fans with netting?

#### **The Baseball Rule**

In most jurisdictions, including Massachusetts, a stadium owner or operator – including towns, schools, or any entity that operates a ballpark – owes only a limited duty to fans to protect them

from baseballs hit into the stands. The stadium owner must provide “adequately screened seats for all those who wish to sit behind a screen.”<sup>1</sup> A form of this rule is in place in most jurisdictions, with courts looking to the adequacy of the screening or other protection in the most dangerous areas of the stadium, but holding in essence no duty to fans elsewhere. For example, New York and New Jersey have broad no-duty rules as applied to fans. So long as there is a sufficient screen behind home plate, the stadium owner has no duty to fans elsewhere in the stadium, including areas outside the stands.<sup>2</sup> Taking a more measured approach, Pennsylvania is consistent with New York and New Jersey when fans are still in the stands but has allowed a case to

<sup>1</sup> *Friedman v. Houston Sports Ass'n*, 731 S.W.2d 572, 574 (Tex. App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.) (quoting *McNeil v. Fort Worth Baseball Club*, 268 S.W.2d 244, 246 (Tex. Civ. App.-Fort Worth 1954, writ ref'd)). For an earlier discussion of the rule please see our piece from 2013, “[Taking a Swing at the Baseball Rule](#)” published by *Law360*.

<sup>2</sup> *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325 (1981); *Wade-Keszey v. Town of Niskayuna*, 4 A.D.3d 732 (3d Dep't 2004); New Jersey Baseball Spectator Safety Act of 2006, N.J.S.A. 2A:53A-43 to -48.

proceed when a fan was struck in an interior walkway.<sup>3</sup>

The baseball rule has a firm foundation in Massachusetts, with the high court first applying it in 1950. The court, after reviewing Massachusetts case law pertaining to hockey arenas as well as baseball cases from other jurisdictions, found that “it has uniformly been held – and correctly we think – that a spectator familiar with the game assumes the reasonable risks and hazards inherent in the game.”<sup>4</sup> In that case, and most others involving the baseball rule, the danger to the fan, of course, is a foul ball and not a shattered wooden bat. Is there a chance the courts may consider a bat flying into the stands as a common enough event that such are also considered inherent to the game?

#### **To Net or Not to Net – The Balance Between Safety and the Nature of the Game**

In support of their decisions about fan safety, clubs and courts have often cited a balance between safety and the nature of the game. “The risk of being . . . hit, with a chance to catch the foul and keep the ball, is one of the exciting thrills of attendance at the game. The fan cannot recover if the ball hits him instead of his catching it.”<sup>5</sup> This position, quoted from a 1958 Third Circuit decision, has been repeated by courts and even legislatures since. The New Jersey Baseball Spectator Safety Act of 2006 superseded an effort by the New Jersey Supreme Court to give plaintiffs a window of liability if they were struck by a batted ball.<sup>6</sup> The New Jersey State Legislature recognized that while stadium owners should offer fans some protection, spectators “are presumed to have

knowledge of and to assume the inherent risks of observing professional baseball games.”<sup>7</sup>

Options for change through the court system are limited by the precedential value of the baseball rule. Generally, “precedent” means that courts today must defer to the courts that came before, within reason, of course. This creates consistency and expectations for all the actors. In the context of baseball, stadium owners and operators know that so long as they provide netting around the “most dangerous” seats near the plate, and otherwise generally warn against the dangers of objects flying from the field of play, they will not be liable in unfortunate situations such as the one which occurred at Fenway Park.

But this does not mean that history always trumps the game. Other sports have revisited “historic” no-liability positions towards fans injured from projectiles. The NHL went through an overhaul of its use of nets after a young fan was tragically struck and killed by a puck. While the NHL, the Columbus Blue Jackets, and the arena settled the action for \$1.2MM, the accident spurred a review of the protection offered to fans at games.<sup>8</sup> Only a few months after the accident, the NHL Board of Governors decided to extend netting above the glass that borders the corners and the end zones in all rinks, allowing height and design of the configuration to be determined by the individual arenas. Minor leagues followed suit.<sup>9</sup>

<sup>3</sup> *Jones v. Three Rivers Mgt. Corp.*, 394 A.2d 546 (Pa. Sup. Ct. 1978) (discussed in *Pakett v. The Phillies, LP*, 871 A.2d 304 (Pa. Comm. Ct. 2005)).

<sup>4</sup> *Shaw v. Boston American League Baseball Co.*, 325 Mass. 419, 422 (1950).

<sup>5</sup> *Boynton v. Ryan*, 257 F.2d 70, 71 (3d Cir.1958).

<sup>6</sup> *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, 881 A.2d 700 (N.J. Sup. Ct. 2005).

<sup>7</sup> N.J.S.A. 2A:53A-44, -46. Interestingly, the Legislature mandated that all professional ballparks post a warning at their stadiums of the “inherent dangers and risks of observing professional baseball...” N.J.S.A. 2A:53A-48.

<sup>8</sup> L. Jon Wertheim, *No Penalty*, SPORTS ILLUSTRATED (April 1, 2002); Mike Wagner, *Brittanie's Legacy*, THE COLUMBUS DISPATCH (August 2, 2011); Associated Press, *Ohio High Court: Release settlement in case of girl killed by puck* (April 14, 2004).

<sup>9</sup> Bob Foltman, *Teams required to install netting*, CHICAGO TRIBUNE (June 21, 2002); *Sciarrotta v. Global Spectrum*, 944 A.2d 630, 634 (NJ 2008).

NASCAR made similar efforts following a harrowing accident at Daytona Speedway in February 2013 in which 28 fans were injured from debris flying from a crash where a car became airborne and broke apart in the safety catch fence. Though the worst injury was a broken leg, that did not stop NASCAR from taking a hard look at its catch fence technology. The track reinforced and reconfigured the crossover gate and grandstand fencing. Similar improvements were also made to Talladega Superspeedway, which had also suffered a recent incident.<sup>10</sup>

Extending the nets in the Major Leagues has come up in the last two rounds of collective bargaining.<sup>11</sup> The players proposed extending the nets even as far as the foul poles to protect fans. Stadium owners, however, worried that it would limit access to the players and upset fans in the higher-priced seats at field level. Back in 2008, Commissioner Bud Selig said of more extensive netting, that while MLB is concerned about safety, “you also don’t want to do anything to obstruct the views of the fans, which creates really a major problem. You sort of have to weigh one against the other.”<sup>12</sup>

This comment was made during discussions about changes to baseball rules aimed at protecting against the increase in shattered bats by mandating higher density bats. A trend towards less-dense maple bats had been cited in the sharp increase in the number of broken bats – pieces of which could fly into the field or into the stands. A fan at a Dodgers’ game, Susan Rhodes, was infamously struck by a jagged piece of a maple bat, helping fuel the MLB’s rule change. Without

discussing the product liability implications of using bats more likely to shatter, the measures to mandate higher density bats indicate that MLB was willing to make concessions in the interests of safety. The question then becomes whether with bats still breaking and foul balls flying into the stands, the MLB and stadium owners and operators will be prepared to take up the players’ proposal for greater net protection anew.

### **Perhaps Not Liable, But Change May Be Coming**

Recent cases in Massachusetts and other jurisdictions have upheld the baseball rule and absolved clubs, stadium owners and operators.<sup>13</sup> For example, a 2004 Massachusetts decision denied liability against the defendants. The case included an inexperienced fan who never watched games on TV, followed the Red Sox in the paper, and hadn’t recalled going to a game since she was a little girl (the court stated the obvious, that this was “atypical” in “Red Sox Nation”<sup>14</sup>). The court acknowledged that the club had netting behind the plate, and had disclaimers on its tickets that warned against “thrown bats and thrown or batted balls” flying from the field. This fan was simply outside of the netted area and, even if she didn’t know what she was getting herself into, it was still a baseball game: “Even someone of limited personal experience with the sport of baseball reasonably may be assumed to know that a central feature of the game is that batters will forcefully hit balls that may go astray from their intended direction.”<sup>15</sup>

The court, however, also found “cavalier” Major League Baseball’s position in an amicus brief that, paraphrasing the seminal case on assumption of risk, “the timorous may always choose to stay

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<sup>10</sup> Jerry Bonkowski, *Crossover gate, fencing significantly strengthened at Daytona after February’s near-tragedy*, MOTOR SPORTS TALK (July 4, 2013).

<sup>11</sup> <http://www.foxsports.com/mlb/story/boston-red-sox-fenway-park-mlb-broken-bat-injured-fan-safety-netting-060715>

<sup>12</sup> *Id.*

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<sup>13</sup> Acceptance of the baseball rule is not universal. Idaho recently declined to adopt it in the case of a fan hit by a foul ball. *Rountree v. Boise Baseball, LLC*, 296 P.3d 373 (Idaho 2013).

<sup>14</sup> *Costa v. The Boston Red Sox Baseball Club*, 61 Mass. App. Ct. 299, 301 (App. Ct. Norfolk 2004).

<sup>15</sup> *Id.* at 303.

home.”<sup>16</sup> “Perhaps a more gracious approach,” the court wrote, “would be for major league baseball to elect to internalize the costs of unavoidable injuries sustained by fans through no fault of their own.”<sup>17</sup>

Whether at the Little League or Major League level, the main consideration of the baseball rule is the amount of protection for fans – specifically, if there are adequate seats behind nets for the fans who may want that protection versus those who don’t mind being closer to the action. With press accounts surfacing that the players have advocated at the last two collective bargaining sessions for an extended fence, this recent tragic event at Fenway Park could be the catalyst for adding more safety measures at stadiums. The time may soon be coming for stadium owners and operators, if not the MLB as a whole, to take the “more gracious approach.” Courts can give a push, but under the solid foundation of the baseball rule potential defendants likely will not be liable. For years stadium owners and operators and the leagues have searched for the right balance between access to the game and safety. There is no right answer, because for as many fans who may feel safer ensconced in fencing there will be many fans who are disappointed that they can’t reach over to their favorite player for an autograph. But the most recent accident at Fenway Park, if nothing else, will spur an always welcome dialogue regarding this challenging balancing act. ♦

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*For more information about Schnader’s Sports Law Team or to speak with a member of the firm, please contact:*

*Matthew S. Tamasco*  
*Chair, Sports Law Team*  
*212-973-6105*  
[mtamasco@schnader.com](mailto:mtamasco@schnader.com)

*Matthew J. Kelly Jr.*  
*Co-vice chair, Sports Law Team*  
*212-973-8095*

*Sekou Lewis*  
*Co-vice chair, Sports Law Team*  
*215-751-2236*  
[slewis@schnader.com](mailto:slewis@schnader.com)

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<sup>16</sup> *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 483 (1939) (Cardozo, J.)

<sup>17</sup> *Costa*, 61 Mass. App. Ct. at 304.