

RETHINKING ASSUMPTION OF RISK AND SPORTS SPECTATORS

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In 2002, the puck-related death of thirteen-year-old Brittanie Cecil at a National Hockey League game spurred calls for improved safety measures in professional sports arenas. However, common law tort principles—under which injured fans' claims have traditionally failed—are unlikely to provide the impetus for any such change. Under the "baseball rule," stadium owners owe the "limited duty" of providing screened seats for as many fans as can reasonably be expected to desire them. However, some courts also applied assumption of risk as an affirmative defense without explicitly differentiating between it and the baseball rule. Uncertainty over the extent to which the two doctrines overlap posed a particular problem in jurisdictions in which the abolition of contributory negligence partially overruled the assumption of risk defense.

Recently, in *Knight v. Jewett*, a plurality of the California Supreme Court held that assumption of risk now operates as an entirely duty-based doctrine. Subsequent California appellate courts opine that *Knight* replaces the limited duty of the baseball rule with a doctrine in which stadium owners owe fans a mere duty not to increase a sport's inherent risks. In this Comment, David Horton contends that a close examination of *Knight* and its underlying principles casts doubt on this conclusion. Even though *Knight* substitutes a duty-based regime for cases previously resolved under the rubric of assumption of risk, its approach is entirely consistent with the application of the duty-based baseball rule to cases of fan injury. To conclude otherwise treats fans and athletes identically, neglecting both the vast difference between their participatory roles, and modern tort law's penchant for allocating the burden of injury prevention entirely to business entities instead of to consumers. Yet, the baseball rule itself allows stadium owners to discharge their legal obligations by taking a single, anachronistic safety measure, thus creating little incentive to examine new methods of keeping fans safe.

Horton concludes that stadium owners should instead owe fans a duty of reasonable care. This standard would force stadium owners to link safety measures to the specific manner in which fans are hurt and to update their precautionary measures as sports and technology evolve. In addition, the doctrine of comparative fault would assign liability in accordance with each party's blameworthiness, thus ameliorating

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concern that a duty of reasonable care would greatly increase stadium owners' liability for fan injuries.

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INTRODUCTION

On March 18, 2002, thirteen-year-old Brittanie Cecil died, shortly after being hit by an errant puck at a National Hockey League (NHL) game in Columbus, Ohio.¹ Brittanie's death, the first spectator fatality in NHL

1. Brittanie and her father were watching the Columbus Blue Jackets play the Calgary Flames at the Nationwide Arena. With 12:18 remaining in the second period, Flames' defenseman Derek Morris deflected Blue Jackets' center Espen Knutsen's shot into the stands. The puck struck Brittanie then grazed another fan. The force of the impact fractured her skull, bruised her brain, and damaged a

history,² focused national media attention on the adequacy of safety standards in professional hockey arenas³ and baseball stadiums.⁴ While some commentators dismissed the incident as a tragic fluke,⁵ others claimed the NHL should

vertebral artery, causing fatal swelling. Her seat, in Row S of Section 121, was more than one hundred feet from the ice. See Phil Taylor, *Death of a Fan*, SPORTS ILLUSTRATED, Apr. 1, 2002, at 59.

2. There have been at least four reported fan fatalities due to errant pucks at minor league and amateur hockey games. In 1948, a fan's death at a game between the minor-league New York Rovers and Ottawa Senators "prompt[ed] questions about safety regulations in the NHL." Edward Wong, *In 1948, A Fan Was Killed in the Garden*, N.Y. TIMES, Mar. 30, 2002, at D4. Most recently, in 2000, a twenty-one-year-old man died after being struck during a game in South East Manitoba, Canada. Chris Foster, *Girl Hit by Puck Dies*, L.A. TIMES, Mar. 20, 2002, at D1.

3. See, e.g., *All Things Considered* (NPR radio broadcast, Apr. 5, 2002), available at 2002 WL 3495746. Two weeks after the incident, *Sports Illustrated* devoted five articles, including its cover story, to fan safety. See, e.g., Taylor, *supra* note 1. Newspapers catalogued other instances of serious fan injuries. See, e.g., Mary Schmitt Boyer, *As Hockey Season Opens, Fan Safety Is at Forefront*, CLEVELAND PLAIN DEALER, Oct. 9, 2002, at D1; Bob Foltman, *Entering Hockey's Danger Zone*, CHI. TRIB., Apr. 7, 2002, § 3 at 1; Art Golab, *Hawks Spectator Survived Injury*, CHI. SUN-TIMES, Mar. 21, 2002, at 13; Tommy Hine, *Focus Is on Fan Safety*, HARTFORD COURANT, Apr. 9, 2002, at C4, available at 2002 WL 4801340; Joe Lapointe, *Hockey Safety Debate Lands at the Garden*, N.Y. TIMES, Mar. 26, 2002, at D1; Steve Politi, *Spotlight on Safety After Fan Death*, NEWARK STAR-LEDGER, Mar. 21, 2002, at 33; Dave Scheiber, *Danger in the Grandstands*, ST. PETERSBURG TIMES, Mar. 26, 2002, at 1D; Neil Schmidt, *Hockey Death Spurs Reevaluation*, CINCINNATI ENQUIRER, Mar. 22, 2002, at C7.

4. Like hockey, baseball is a sport in which hard, fast-moving projectiles regularly enter the stands. See Frank Fitzpatrick, *Crying Foul: After Hockey Death, Baseball Gets Safety Reminder*, CHARLESTON GAZETTE, Apr. 10, 2002, at 5B, available at 2002 WL 5191782 (noting that "about 35 to 40 batted balls usually reach the stands during a major-league game"). Five fans have been killed by foul balls at Major League games. Most recently, fourteen-year-old Alan Fish died during a Los Angeles Dodgers game in 1970. See Ray Delgado, *Flying Hockey Puck at NHL Game Kills Girl*, S.F. CHRON., Mar. 19, 2002, at A1.

After Brittanie's death, concern centered on the wave of intimate, retro-style ballparks that opened in recent years. See Fitzpatrick, *supra*; Art Spander, *States of Play*, THE SUNDAY HERALD, Mar. 31, 2002, available at 2002 WL 101044564; Tom Verducci, *Safety Squeeze*, SPORTS ILLUSTRATED, Apr. 1, 2002, at 64. New stadiums have opened in Atlanta, Arlington, Baltimore, Chicago, Cincinnati, Cleveland, Detroit, Houston, Milwaukee, Pittsburgh, San Diego, San Francisco, and Seattle. New York is currently debating building new stadiums for both the Yankees and the Mets. See Murray Chass, *New Parks Lose Magic Quickly*, N.Y. TIMES, May 7, 2002, at D1. In these parks, the average distance from home plate to the backstop has decreased from sixty feet—the distance recommended in THE OFFICIAL RULES OF BASEBALL § 1.3 (2000)—to 50.3 feet. For example, in San Diego's new Petco Field, fans will move about twelve feet closer to the playing field than they sat in Qualcomm Park. See Kevin Acee, *Beware out There: Fans Place Themselves in Harm's Way—and Love It*, S.D. UNION-TRIB., Apr. 28, 2002, at C1; see also <http://www.ballparks.com> (last visited Jan. 3, 2003). But see *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 220 n.2 (Mich. Ct. App. 2001) (noting that there is no evidence that the sixty-foot standard is for safety purposes).

5. *The Today Show* (NBC television broadcast, Mar. 21, 2002), available at 2002 WL 3319172 (statement of Matt Lauer). Other journalists also downplayed the risk to fans. See, e.g., Acee, *supra* note 4 (calling another fan death or serious injury "something of an inevitability," but dismissing concern because "[t]here is only so much teams can do"); Babita Persaud, *The Pucks Fly in Tampa, With Few Major Injuries*, ST. PETERSBURG TIMES, Mar. 21, 2002, at 6A.

have known its fans were at risk.⁶ In particular, the league's critics cited a report presented to the American College of Emergency Physicians (ACEP) in 2000, which found that serious puck injuries were surprisingly common.⁷ The ACEP study revealed that, in the course of 127 games at the MCI Center in Washington, D.C., 122 fans required first aid for puck-related injuries—nearly half of whom needed to be transported by ambulance to an emergency room.⁸ In addition, women and children were hurt 2.6 times more frequently than men.⁹ Although the NHL previously imposed no mandatory safety measures,¹⁰ the league's Board of Governors voted to mount protective netting behind the goals in all its arenas two months after Brittanie's death.¹¹ Such netting had been common in European and American college and junior hockey arenas for

6. See, e.g., Michael Farber, *Put up the Net*, SPORTS ILLUSTRATED, Apr. 1, 2002, at 62; Rick Morrissey, *MLB Must Play Fair With Hard Foul Balls*, CHI. TRIB., May 12, 2002, § 3 at 1, available at 2002 WL 2654146.

7. See David Milzman et al., *The Puck Stops Here: Spectator Injurers, A Real Risk Watching Hockey Games*, 36 ANNALS EMERGENCY MED. 524 (Oct. 2000) (abstract of an unpublished research study presented at the ACEP Research Forum). Seventy-four percent of the injured required some form of laceration repair. See *id.* In addition, "three to four" fans per game were hit by pucks but did not require medical attention. *Good Morning America* (ABC television broadcast, Mar. 21, 2002) (interview with Dr. David Milzman), available at 2002 WL 2969611. The American College of Emergency Physicians (ACEP) report seemed to belie the National Hockey League's (NHL's) claim that only two hundred fans had been injured by pucks in the last five years. See Jerry Crowe, *Playing It Safe*, L.A. TIMES, Sept. 19, 2002, at D1 (noting that the NHL's estimate "seems low").

8. See Milzman et al., *supra* note 7.

9. See *id.* This figure led the ACEP report to conclude that those less interested in the game pay less attention, which "appears to directly lead to risk of puck injury." *Id.* The majority of spectator tort claims have indeed been brought by women and children. See generally James L. Rigelhaupt, Jr., Annotation, *Liability to Spectator at Baseball Game Who Is Hit by Ball or Injured as Result of Other Hazards of Game*, 91 A.L.R.3d 24 (1979) (detailing fifty-three cases in which a female or child spectator was injured by a foul ball or puck, compared to twenty-five that either involved men or did not specify). Of course, this may also indicate a greater willingness to sue when a woman or child has been injured—either for psychological reasons, or because the plaintiffs believe they have a greater chance of success.

10. Before Brittanie's death, the NHL left "implementation of fan-safety measures to its respective teams and/or arenas." Michael Arace, *NHL Could Get More Involved in Safety Issues*, COLUMBUS DISPATCH, Mar. 21, 2002, at 1C, available at 2002 WL 13976677. This was largely due to the practical difficulty that variance in arena designs posed to league-wide safety measures. See Golab, *supra* note 3. However, most teams reminded fans to stay alert in messages over the public address system, on the scoreboard, and on tickets. See Acee, *supra* note 4.

11. The netting, which protects what is considered the most dangerous area of the stadium for fans, costs teams between \$90,000 to \$120,000. See Crowe, *supra* note 7. An informal poll revealed that 56 percent of fans approved of the league's decision, but 37 percent claimed they were "very upset" and "would do what they could" to avoid sitting behind the nets. David Pollack, *Black Netting to Protect Fans From Puck at Sharks' Games*, SAN JOSE MERCURY NEWS, Sept. 4, 2002 at D1. Formerly, in the NHL, the American West Arena in Phoenix, which has a balcony that hangs over the ice, was the only rink to feature netting. The Calgary Flames franchise experimented with netting in 1993, but removed it after a negative response from fans, who felt the nets obstructed their view. See Crowe, *supra* note 7.

years;¹² ironically, the NHL considered requiring it the season before Brittanie died.¹³

Brittanie's death and the NHL's belated decision to install netting also raised questions about whether tort law encourages stadium owners to take fans' safety seriously.¹⁴ Injured fans' lawsuits have generally been unsuccessful. In 1935, the California Supreme Court crafted the "baseball rule," which requires stadium owners to provide a certain number of screened seats.¹⁵ If stadium owners did so, they fulfilled their legal obligation, and could not be found negligent.¹⁶ Traditionally, even if stadium owners breached this duty, they could rely on the affirmative defense of assumption of risk, which barred recovery on the ground that attending a game manifested a fan's knowing and voluntary acceptance of its dangers.¹⁷

Since then, however, both sports and tort law have undergone massive transformations. In baseball and hockey, new training techniques and technologies have made play faster and players stronger.¹⁸ Professional sports have

12. See Crowe, *supra* note 7. Minor league hockey followed suit. See *AHL Will Install Protective Nets*, PITTSBURGH POST-GAZETTE, July 9, 2002, at D3, available at 2002 WL 21884228; Kollen Long, *Thunder Hanging Nets for Fan Safety*, WICHITA EAGLE, Aug. 30, 2002, at 1D, available at 2002 WL 26007423; Ed Reed, *ECHL Orders Safety Net Installation*, NEWS-PRESS, Jul. 25, 2002, at 7C, available at 2002 WL 22107452.

13. NHL General Managers discussed netting after a fan struck by a puck shot out of frustration by San Jose Sharks' defenseman Joe Murphy received a \$3 million settlement. The matter was raised at a meeting, but never came to a vote. See Crowe, *supra* note 7. In the early 1990s, a group of Canadian doctors also recommended the use of safety netting. See Hal Habib, *Message for Spectators: Watch out, You're at Risk*, PALM BEACH POST, Mar. 24, 2002, at 1B, available at 2002 WL 15255009.

14. See, e.g., Cam Cole, *A Net Result Puck Watchers Can Get Behind: The Courts of Appeal and Common Sense Will Have to Mesh*, NAT'L POST, Mar. 28, 2002, at B1; Sheryl Y. Fred, *Fan's Death Spurs Legal Debate in Front Office*, CORP. LEGAL TIMES, June 2002, at 18; L. Jon Wertheim, *No Penalty*, SPORTS ILLUSTRATED, Apr. 1, 2002, at 63; Edward Wong, *Fan Safety and Liability Debated in Puck Death*, N.Y. TIMES, Mar. 22, 2002, at D4.

15. See *Quinn v. Recreation Park Ass'n*, 46 P.2d 144, 146 (Cal. 1935) (per curiam) (holding that a ballpark owner must provide enough screened seats to accommodate the number of fans who can reasonably be expected to call for them on an ordinary occasion).

16. To maintain a cause of action for negligence, a plaintiff must prove that the defendant owed her a duty, breached the duty, and that the breach caused the plaintiff's injuries. The existence and scope of duty are questions of law "involv[ing] a rather complex analysis that considers the relationship of the parties, the nature of the risk—that is, its foreseeability and severity—and the impact the imposition of a duty would have on public policy." *Schneider v. Am. Hockey & Ice Skating Ctr., Inc.*, 777 A.2d 380, 383 (N.J. Super. Ct. App. Div. 2001) (citations omitted).

17. See RESTATEMENT (SECOND) OF TORTS § 496A (1965).

18. Recent innovations include carbon-fiber hockey sticks, see Crowe, *supra* note 7, and aluminum bats, which are permitted in Little League and college baseball. See *Sanchez v. Hillerich & Bradsby Co.*, 104 Cal. App. 4th 703, 707 (2002) (discussing the "dangerous nature of the newer metal bats" and a recent National College Athletic Association measure designed "to implement new rules to decrease the speed of the batted balls"). In addition, weightlifting and cardiovascular regimens, which have become common among professional athletes in the last two decades, have vastly improved players' strength, speed, and stamina. See Jason La Canfora, *Protective Netting for NHL Arenas: After Fan's Death, League Approves "Positive Step"*, WASH. POST, June 21, 2002, at D1.

become a lucrative business, presented in a different manner and watched by a different demographic than in the era in which the baseball rule had its genesis.¹⁹ In torts, the recognition of strict product liability has greatly expanded the class of defendants who owe others a legal obligation.²⁰ In many jurisdictions, complex duty rules have been changed to a single standard of reasonable care under all the circumstances, signaling a movement toward fact-specific determinations made by juries rather than bright-line, judge-made denials of liability such as the baseball rule.²¹ Moreover, the doctrine of assumption of risk, condemned for years as unnecessary and confusing,²² has been vastly modified. Contributory negligence,²³ a similar all-or-nothing approach to liability, has largely been replaced by comparative fault, which allocates damages in proportion to the parties' respective responsibilities.²⁴ In light of this change, the extent to which assumption of risk remains viable has become one of the most unsettled issues in tort law.²⁵

Recently, in *Knight v. Jewett*,²⁶ a plurality of the California Supreme Court concluded that assumption of risk partially survived the abolition of contributory negligence.²⁷ Subsequent California appellate courts have interpreted *Knight* as holding that stadium owners only owe fans a duty not to increase risks beyond those that are inherent in the game.²⁸ Other jurisdictions have dealt with the elimination of contributory negligence by adopting the baseball rule.²⁹ While many commentators still believe that these rules properly shield stadium owners from undeserved liability,³⁰ others claim that stadium owners are so insulated

19. In both baseball and hockey, marketing is increasingly targeted to families. A recent survey revealed that women comprise 46 percent of fans at baseball games. See Associated Press, *Nearly Half of Major League Spectators Are Women* (July 26, 2000), available at http://sportsillustrated.cnn.com/baseball/mlb/news/2000/07/26/women_spectators_ap/index.html (last visited Jan. 29, 2003).

20. See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1962) (explicating the strict liability standard of care).

21. See, e.g., *Rowland v. Christian*, 443 P.2d 561, 564 (Cal. 1968).

22. See *Knight v. Jewett*, 834 P.2d 696, 699 (Cal. 1992) (plurality opinion) ("As every leading tort treatise has explained, the assumption of risk doctrine long has caused confusion both in definition and application, because the phrase 'assumption of risk' traditionally has been used in a number of very different factual settings involving analytically distinct legal concepts.").

23. Contributory negligence bars recovery when the plaintiff's behavior falls below the standard of a reasonable person. See *id.* at 716 (Kennard, J., dissenting).

24. See Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 852 (1997) [hereinafter Sugarman, *Assumption of Risk*].

25. See, e.g., MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 472-89 (7th ed. 2001).

26. 834 P.2d 696.

27. See *id.* at 707.

28. See *Nemarnik v. L.A. Kings Hockey Club*, 103 Cal. App. 4th 631, 636 (2002); *Lowe v. Cal. League of Prof'l Baseball*, 56 Cal. App. 4th 112, 114 (1997).

29. See, e.g., *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 533 (N.Y. 1981).

30. See, e.g., Sugarman, *Assumption of Risk*, *supra* note 24, at 837 (arguing that injuries should not be blamed on stadium owners because "there [i]s nothing careless about their behavior").

from legal responsibility that they are under “little pressure to add more protection for fans.”³¹

This Comment contends that neither the “duty not to increase inherent risks” approach nor the baseball rule is acceptable. Instead, stadium owners—like the vast majority of tort defendants—should owe their patrons a duty of reasonable care. This proposal places the onus where it should be: on stadium owners who are in the best position to consider new safety devices, procedures, and warnings. In addition, it would bring the principles governing spectator injuries in line with modern tort law trends, thus simplifying an area of law that could benefit from universally applicable standards. However, it would not lead to the kind of crippling liability that some claim justifies the current pair of doctrines.³² In fact, under traditional negligence principles and comparative fault, responsibility would be apportioned more equitably than before.

This Comment proceeds in three Parts. Part I provides a historical overview of California law, and by doing so articulates the two dominant contemporary methods of analyzing spectator claims: the “duty not to increase inherent risks” approach and the baseball rule. In Part II, I hope to show that extending the “duty not to increase inherent risks” approach to spectators is neither supported by the text of *Knight* nor its animating principles. I also argue that the baseball rule is anachronistic and impractical. Part III then explains why a duty of reasonable care and comparative negligence principles are superior approaches to fan injury claims.

I. THE EVOLUTION OF THE LAW GOVERNING SPECTATOR INJURIES

A. The Baseball Rule and Assumption of Risk: Three Faces of One Doctrine

The California Supreme Court announced the baseball rule in *Quinn v. Recreation Park Ass’n*,³³ a case in which a fourteen-year-old girl was hurt by a foul ball. The court began by considering what duty stadium owners owed to fans.³⁴ Reasoning that injuries caused by foul balls were to be expected, the court determined that stadium owners could reasonably undertake fewer safety precautions than might otherwise be necessary.³⁵ In particular, because many fans preferred unobstructed views, the court noted that stadium owners should not

31. Politi, *supra* note 3; see also *Akins*, 424 N.E.2d at 536 (Cooke, C.J., dissenting) (claiming that the baseball rule will discourage stadium owners from implementing new safety measures).

32. See, e.g., Sugarman, *Assumption of Risk*, *supra* note 24, at 837.

33. 46 P.2d 144 (Cal. 1935) (per curiam).

34. The existence and scope of duty are questions of law, largely based on policy and fairness considerations. See *supra* text accompanying note 16.

35. *Quinn*, 46 P.2d at 146.

be required to screen all seats.³⁶ Thus, the court held that a ballpark owner's duty is performed when "screened seats are provided for as many [fans] as may be reasonably expected to call for them on any ordinary occasion."³⁷

However, after prescribing this duty, the court simply ignored the possibility that it had been breached. Instead of discussing whether the defendant had provided enough screened seats to accommodate the number of fans who should have been expected to desire them,³⁸ the court denied liability based on assumption of risk. Reasoning that the dangers of watching baseball were "common knowledge,"³⁹ and that the plaintiff was familiar with the sport,⁴⁰ the court held that by "accepting the unscreened seat, even temporarily, with full knowledge of the danger attached to so doing, she assumed the risk of injury."⁴¹ This fact, the court explained, absolved the defendant of liability.⁴²

After *Quinn*, courts used both the duty-based baseball rule and assumption of risk to reject injured fans' claims, often failing to differentiate between them. For example, *Brown v. San Francisco Ball Club*⁴³ illustrates the uncertainty over the extent to which the two doctrines overlapped. In *Brown*, the defendant's ballpark had approximately 5000 screened seats behind home plate, many of which were vacant during the game at which the plaintiff was injured.⁴⁴ The court barred the plaintiff's claim under the baseball rule, reasoning that the defendant "fully discharged its duty toward [plaintiff], as concerns the risk to her of being hit by thrown or batted baseballs, when it provided screened seats for all who might reasonably be expected to request them."⁴⁵ However, the plaintiff then argued that the baseball rule did not apply because she was unfamiliar with the game, and thus could "[]not be said to have knowingly assumed the risk."⁴⁶ This statement wrongly suggests that the baseball rule requires both the defendant to provide enough screened seats and the plaintiff to understand the game's hazards. In fact, the baseball rule, which speaks to the amount of duty owed, and assumption of risk, an affirmative defense, should

36. *Id.*

37. *Id.*

38. The court comments, in passing, that the grandstand "contained an unusually large number of screened seats." *Id.* Nothing more is made of that fact.

39. The court noted that "it is common knowledge that in baseball games hard balls are thrown and batted with such great swiftness they are liable to be thrown or batted outside the lines of the diamond, and spectators occupying positions which may be reached by such balls assume the risk of injury therefrom." *Id.* (citing *Cincinnati Baseball Club Co. v. Eno*, 147 N.E. 86, 87 (Ohio 1925)).

40. *See id.*

41. *Id.* at 147.

42. *See id.*

43. 222 P.2d 19 (Cal. Dist. Ct. App. 1950).

44. *See id.* at 20.

45. *Id.* at 21.

46. *Id.*

be entirely independent grounds by which to free the defendant from liability.⁴⁷ Instead of dismissing the plaintiff's argument as irrelevant, though, the court rejected it on its merits, reasoning that she had been watching the game for an hour before the accident, which should have made her aware of the likelihood of being struck by a foul ball.⁴⁸

In addition, although assumption of risk hinged on whether the plaintiff chooses to encounter a known danger,⁴⁹ some courts treated baseball spectators differently, reasoning that the hazard of being hit by a foul ball was "common knowledge." Therefore, everyone who went to a baseball game assumed that risk—whether the plaintiff had attended just one other game,⁵⁰ had merely seen the sport on television,⁵¹ or was too young to appreciate the danger.⁵² These courts applied a hybrid doctrine: one that reflected duty analysis in the way it barred the claims of an entire class of plaintiffs, but seemed like assumption of

47. But see RESTATEMENT (SECOND) OF TORTS § 496C (1965). Illustration 4 provides: A, the owner of a baseball park, is under a duty to the entering public to provide a reasonably sufficient number of screened seats to protect those who desire it against the risk of being hit by batted balls. A fails to do so. B, a customer entering the park, is unable to find a screened seat, and although fully aware of the risk, sits in an unscreened seat. B is struck and injured by a batted ball. Although A has violated his duty to B, B may be barred from recovery by his assumption of the risk.

Illustration 5 then states that "[u]nder the facts stated in Illustration 4, B is a Swede who never has seen baseball, knows nothing about it, and does not understand the danger. A is subject to liability to B."

48. See *Brown*, 222 P.2d at 21.

49. See RESTATEMENT (SECOND) OF TORTS § 496C.

50. See *Keys v. Alamo City Baseball Co.*, 150 S.W.2d 368 (Tex. Ct. App. 1941). The plaintiff, a forty-two-year-old woman, was hurt while attending the game with her fourteen-year-old son. The court engaged in a spectacular series of assumptions, inferring that because the plaintiff's son "was a baseball 'fan' as is nearly every normal American boy," he must have "handled baseballs in and around his home, under the watchful eye of his mother." *Id.* at 371. The court then reasoned that "[t]his history, coupled with universal common knowledge, was bound to have acquainted plaintiff with the potential dangers inherent in a baseball in play," including "the fact that a flying baseball is capable of inflicting painful, sometimes serious and even fatal, injury." *Id.* The court noted that this knowledge "must be imputed to every reasonable person having the admitted experience and opportunities of plaintiff to know these things." *Id.*

51. See *Schentzel v. Phila. Nat'l League Club*, 96 A.2d 181 (Pa. Super. Ct. 1953). The court remarked:

Plaintiff was a woman 47 years of age. There is nothing whatever in the record to support an inference that she was of inferior intelligence, that she had subnormal perception, or that she had led a cloistered life. Consequently, she must be presumed to have been cognizant of the 'neighborhood knowledge' with which individuals living in organized society are normally equipped . . . 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.

Id. at 186.

52. See *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1016 (Utah 1995) (involving a six-year-old plaintiff).

risk because its conclusions were stated as judicial determinations of an individual plaintiff's point of view.

Thus, when a baseball spectator was injured by a foul ball, courts employed three separate doctrines—the traditional form of assumption of risk, the baseball rule, and an approach that seemed to hold ballpark owners to no duty of care under the rubric of assumption of risk. However, because a case's outcome rarely depended on which rule a court chose, this confusion was not a problem for many years—until comparative fault partially replaced assumption of risk.

B. Hockey: Duty Analysis Masquerading as Assumption of Risk

Most jurisdictions did not bar claims by plaintiffs who had been injured by errant pucks. Reasoning that hockey's dangers were not "common knowledge" and that "fundamental differences" between the sports made the prospect of being injured by a puck less evident, courts claimed that plaintiffs "did not assume the risk."⁵³ However, this analysis, emphasizing the nature of the sport and the public's inexperience with it, rather than the subjective impressions of an individual plaintiff, seems better described as a duty-based conclusion that arena owners must exercise reasonable care.

For example, in *Thurman v. Ice Palace*,⁵⁴ a California appellate court reversed the trial court's grant of a directed verdict, holding that the jury should decide whether the defendant was negligent for failing to provide sufficient screening or warnings.⁵⁵ The court never mentioned that the plaintiff had only sat through ten minutes of what was her first hockey game,⁵⁶ and thus probably did not realize that errant pucks could be dangerous. Instead, the court reasoned that "the average person does not have the same knowledge respecting ice hockey or the risk of being hit by a flying puck while observing such a game" as they do with baseball.⁵⁷ The court also distinguished *Quinn* because "the puck is ordinarily batted along the surface of the ice, but in a baseball game the ball is ordinarily batted into the air."⁵⁸

53. *Shanney v. Boston Madison Square Garden Corp.*, 5 N.E.2d 1, 2 (Mass. 1938); see also *Uline Ice, Inc. v. Sullivan*, 187 F.2d 82, 85–86 (D.C. Cir. 1950); *Tite v. Omaha Coliseum Corp.*, 12 N.W.2d 90, 97 (Neb. 1943); *James v. Rhode Island Auditorium, Inc.*, 199 A. 293, 298 (R.I. 1938).

54. 97 P.2d 999 (Cal. Dist. Ct. App. 1939).

55. See *id.* at 1000.

56. See *id.*

57. See *id.* at 1001 (noting also that "[t]he game of ice hockey is practically a new one so far as the state of California is concerned").

58. *Id.* Conversely, courts in New York and Minnesota barred injured hockey fans from recovery, reasoning that the sport's popularity in their states made its dangers, like those of baseball, common knowledge. See *Modoc v. City of Eveleth*, 29 N.W.2d 453, 456 (Minn. 1947) ("Hockey is played to such an extent in this region and its risks are so well known to the general public that as to the question before us there is no difference in fact between the two games so far as liability for flying baseballs and pucks is

Ten years after *Thurman*, in *Shurman v. Fresno Ice Rink, Inc.*,⁵⁹ the court rejected the defendant's argument that, since *Thurman*, "over 100,000 persons ha[d] seen ice hockey games and should be familiar with the method of playing it."⁶⁰ The court concluded:

It cannot be held, as a matter of law, that the general public has . . . become so familiar with the hazards of this sport and of the actual appreciation of the seriousness of the risk as to bring them within the "common knowledge" rule and under the doctrine of assumption of risk.⁶¹

Again, although invoking the phrase "assumption of risk," the court's wholesale determination that defendants should be responsible for preventing injury bears the hallmark of pure duty analysis.

C. *Rowland* and *Li*: The Effect of Eliminating Complex Duty Rules and Replacing Contributory Negligence With Comparative Fault

In 1968, with *Rowland v. Christian*,⁶² the California Supreme Court streamlined complex duty rules—including the old common law doctrine that held landowners to different standards of duty depending on the plaintiff's status as a trespasser, licensee, or invitee⁶³—into an overarching standard of "reasonable care under all the circumstances."⁶⁴ The court stated that departures from this

involved."); *Ingersoll v. Onondaga Hockey Club, Inc.*, 281 N.Y.S. 505, 508 (App. Div. 1935) (commenting "any reasonable spectator could foresee" that "[t]he risk of being hit by a baseball or by a puck at a hockey game is a risk incidental to the entertainment").

The *Ingersoll* dissent argued its case should have been submitted to the jury because, unlike baseball, hockey is "the most rugged sport there is in various ways; that it is without question the fastest game there is played, and as far as action among players, there is nothing to compare with it." *Ingersoll*, 281 N.Y.S. at 510 (Rhodes, J., dissenting).

The *Modoc* court cited the same features of the sport—that "[s]ports authorities generally consider it to be the fastest game played in this country and Canada" and that players regularly come into violent contact with each other—as reasons to apply assumption of risk to hockey, as "[a]ny person of ordinary intelligence cannot watch a game of hockey for any length of time without realizing the risks involved." *Modoc*, 29 N.W.2d at 456. Despite claiming to apply assumption of risk, by stressing the nature of the sport and the public's familiarity with it, these opinions seem to conclude that arena owners owe fans no duty of care.

59. 205 P.2d 77 (Cal. Dist. Ct. App. 1949).

60. *Id.* at 79.

61. *Id.* at 81.

62. 443 P.2d 561 (Cal. 1968).

63. Before *Rowland*, landowners owed invitees a duty of reasonable care, and licensees and trespassers a duty to refrain from "wanton or willful injury." *Id.* at 565.

64. *Id.* at 564. Following *Rowland*, courts in eleven jurisdictions also adopted an all-encompassing landowner duty of reasonable care. See *Smith v. Arbaugh's Restaurant, Inc.*, 469 F.2d 97, 100 (D.C. Cir. 1972); *Webb v. City & Borough of Sitka*, 561 P.2d 731, 733 (Alaska 1977); *Mile High Fence Co. v. Radovich*, 489 P.2d 308, 314 (Colo. 1971); *Wood v. Camp*, 284 So. 2d 691, 695 (Fla. 1973); *Pickard v. City & County of Honolulu*, 452 P.2d 445, 446 (Haw. 1969); *Cates v. Beauregard Elec. Co-op, Inc.*, 328 So. 2d 367, 371 (La. 1976); *Poulin v. Colby College*, 402 A.2d

rule should follow only when the balance of a series of factors suggested that defendants should be held to a different standard of care.⁶⁵

Then, in 1975, in *Li v. Yellow Cab*,⁶⁶ the California Supreme Court replaced the contributory negligence defense with a system of comparative negligence. The court reasoned that contributory negligence, which completely barred recovery if the plaintiff was in any way culpable, unfairly failed to link liability to each party's share of fault.⁶⁷ Thus, the court stated that assumption of risk should

846, 851 (Me. 1979); *Ouellette v. Blanchard*, 364 A.2d 631, 634 (N.H. 1976); *Basso v. Miller*, 352 N.E.2d 868, 872 (N.Y. 1976); *Marioenzi v. Joseph DiPonte, Inc.*, 333 A.2d 127, 131-32 (R.I. 1975); *Hudson v. Gaitan*, 675 S.W.2d 699, 703 (Tenn. 1984). Four other states abolished the distinction between invitees and licensees, but retained the no duty rule for trespassers. See *Mounsey v. Ellard*, 297 N.E.2d 43, 51 (Mass. 1973); *Peterson v. Balach*, 199 N.W.2d 639, 647 (Minn. 1972); *O'Leary v. Coenen*, 251 N.W.2d 746, 751 (N.D. 1977); *Antoniewicz v. Reszcynski*, 236 N.W.2d 1, 5 (Wis. 1975).

65. The factors included:

the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and the consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved.

Rowland, 443 P.2d at 564.

66. 532 P.2d 1226 (Cal. 1975).

67. See *id.* at 1230. Due to the "growing unhappiness with the harshness of contributory negligence," FRANKLIN & RABIN, *supra* note 25, at 440, forty-six states have now abandoned the doctrine in favor of a system of comparative fault. In so-called pure comparative negligence jurisdictions, courts divide damages in direct accordance with each party's respective fault. See ALASKA STAT. § 09.17.060 (Michie 2002); CONN. GEN. STAT. ANN. § 52-572h (West 1958 & Supp. 2003); FLA. STAT. ANN. § 768.31(3)(a) (West 1997 & Supp. 2003); IDAHO CODE § 6-801 (Michie 1998 & Supp. 2002); ILL. COMP. STAT. ANN. 5/2-111 (West 1992 & Supp. 2003); IOWA CODE ANN. § 668.3 (West 1998); LA. CIV. CODE ANN. art. 2323 (West 1997 & Supp. 2003); MISS. CODE ANN. § 11-7-15 (1972 & Supp. 2002); N.Y. C.P.L.R. 1411 (McKinney 1997 & Supp. 2003); R.I. GEN. LAWS § 9-20-4 (1997 & Supp. 2002); *Hoffman v. Jones*, 280 So. 2d 431, 438 (Fla. 1973); *Hilen v. Hays*, 673 S.W.2d 713, 719 (Ky. 1984); *Placek v. City of Sterling Heights*, 275 N.W.2d 511, 520 (Mich. 1979); *Scott v. Rizzo*, 634 P.2d 1234, 1241 (N.M. 1981).

Many states follow "modified" comparative fault, under which a plaintiff must be found less blameworthy than the defendant in order to recover a proportionate share of the damages. See ARIZ. REV. STAT. ANN. § 12-2505 (West Supp. 2002); ARK. CODE ANN. § 16-64-122 (Michie 1987 & Supp. 2001); COLO. REV. STAT. ANN. § 13-21-111 (West 2002); DEL. CODE ANN. tit. 10, § 8132 (1999); GA. CODE ANN. § 51-11-7 (2000 & Supp. 2002); HAW. REV. STAT. ANN. § 663-31 (Michie 2002); IND. CODE ANN. § 34-51-2-6 (Michie 1998 & Supp. 2001); KAN. STAT. ANN. § 60-258a (1994 & Supp. 2002); ME. REV. STAT. ANN. tit. 14, § 156 (West 2003); MASS. ANN. LAWS ch. 231, § 85 (West 2000 & Supp. 2003); MINN. STAT. ANN. § 604.01 (West 2000); MONT. CODE ANN. § 27-1-702 (2001); NEB. REV. ST. § 25-21, 185.09 (1995); NEV. REV. STAT. ANN. § 141-41 (Michie 2002); N.H. REV. ST. ANN. § 507, 7-d (Supp. 2001); N.J. REV. STAT. § 2A:15-5.1 (West 1994); N.D. CENT. CODE §§ 32-03.2-01-04 (1996 & Supp. 2001); OHIO REV. CODE ANN. § 2315.33 (West. Supp. 2003); OKL. STAT. ANN. tit. 23, §§ 13-14 (West 1987 & Supp. 2003); OR. REV. STAT. § 18.470 (1999); 42 PA. CONS. STAT. ANN. § 7102 (West 1998 & Supp. 2003); S.D. CODIFIED LAWS § 20-9-2 (Michie 1995 & Supp. 2002); TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (Vernon 1997 & Supp. 2002); UTAH CODE ANN. § 78-27-38 (2002); VT. STAT. ANN. tit. 12, § 1036 (2002); WASH. REV. CODE ANN. § 4.22.005 (West 1988 & Supp. 2003); WIS. STAT. ANN. § 895.045 (West 1997 & Supp. 2002);

be merged into comparative negligence "in those particular cases in which the form of assumption of risk involved is no more than a variant of contributory negligence."⁶⁸ Although *Rowland* suggested that negligence would normally be a jury question, and *Li* cast doubt on assumption of risk's viability, their precise effect on stadium owner liability was unclear.

Nine years later, in *Rudnick v. Golden West Broadcasters*,⁶⁹ a California court distinguished between the baseball rule and assumption of risk for the first time. The plaintiff was injured by a foul ball while sitting in an unscreened seat at an Anaheim Angels game. The Angels submitted a declaration that claimed the screen behind home plate protected approximately 2300 seats.⁷⁰ The court commented that the declaration did not prove that the Angels had discharged their duty because they "regularly draw crowds ten to twenty times that size."⁷¹ Moreover, the declaration made "no effort to correlate the number of screened seats with the number of requests reasonably to be expected for them and d[id] not allege any screened seats are truly available to fans who are not longtime season ticket holders."⁷² Thus, the court reversed the trial court's grant of summary judgment.

In dicta, the panel split three ways on the state of the law after *Rowland* and *Li*. Justice Crosby argued that the baseball rule was still viable because neither case had affected *Quinn's* limited duty standard.⁷³ Because he doubted that screened seats were ever made available for safety reasons, he concluded that *Quinn* "is thus really a means of imposing a more certain burden on [the defendant]. It has but two choices: (1) provide adequate numbers of unreserved,

WYO. STAT. ANN. § 1-1-109 (Michie 2001); *Nelson v. Concrete Supply Co.*, 399 S.E.2d 783, 784 (S.C. 1991); *McIntyre v. Balentine*, 833 S.W.2d 52, 57 (Tenn. 1992); *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879, 885 (W. Va. 1979).

Only Alabama, North Carolina, Maryland, and Virginia have not adopted comparative fault. See *Williams v. Delta Int. Mach. Corp.*, 619 So. 2d 1330, 1333 (Ala. 1993); *Corns v. Hall*, 435 S.E.2d 88, 90 (N.C. App. 1993); *Harrison v. Montgomery County Bd. of Educ.*, 456 A.2d 894, 905 (Md. 1983); *O'Neil v. Windshire Copeland Assocs.*, 197 F. Supp. 2d 507, 512 (E.D. Va. 2002) (applying Virginia law).

68. *Li*, 532 P.2d at 1241. Due to the widespread elimination of contributory negligence, many states no longer recognize the doctrine of assumption of risk. Instead, the plaintiff's knowledge and appreciation of the danger is simply one factor influencing comparative fault analysis. See *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 454 (10th Cir. 1982) (applying Kansas law); *Simmons v. Frazier*, 642 S.W.2d 314, 316 (Ark. 1982); *Brown v. Kreuser*, 560 P.2d 105, 108 (Colo. Ct. App. 1977); *Hancock v. Dep't of Corr.*, 585 So. 2d 1068, 1071 (Fla. Dist. Ct. App. 1991); *Salinas v. Vierstra*, 695 P.2d 369, 374 (Idaho 1985); *Coney v. J.L.G. Indus., Inc.* 454 N.E.2d 197, 204 (Ill. 1983); *Le v. Johnstown Props.*, 572 So. 2d 1070, 1073-74 (La. Ct. App. 1990).

69. 156 Cal. App. 3d 793 (1984).

70. *Id.* at 795.

71. *Id.* at 796.

72. *Id.*

73. See *id.* at 797.

screened seats, or (2) secure insurance coverage for the statistically predictable numbers who will suffer injury by spreading the cost to all the patrons.”⁷⁴

Justice Trotter was skeptical of the majority’s reliance on *Quinn*. Noting that the case was decided nearly five decades earlier, Justice Trotter argued that “[j]ust as night baseball, relief pitchers, the live ball and designated hitters have totally changed the face of baseball since 1935; *Li* and *Rowland*, and their progeny, have changed, reshaped and modernized tort duty and available defenses.”⁷⁵ Thus, he contended that assumption of risk should no longer apply in this context.⁷⁶

But two years later, in *Neinstein v. Los Angeles Dodgers Inc.*,⁷⁷ another California appellate court did not shy away from using assumption of risk. The plaintiff, “a self-described ‘ardent Dodger rooter’” was “‘generally familiar’ with the game.”⁷⁸ The court commented that, in addition to the screen behind home plate in Dodger stadium, which shields approximately 3000 seats, there are 26,000 other seats where “the chances of being struck by a batted or thrown ball are extremely remote.”⁷⁹

As though it was going to consider the duty issue anew, the court framed its inquiry as “whether the owner of a baseball stadium has a duty to protect spectators from the natural hazards generated by the way in which the game itself is played.”⁸⁰ The court cautioned that allowing recovery would force stadium owners to choose between two unsatisfactory options: screening the entire ballpark, “reducing the quality of everyone’s view, and . . . changing the very nature of the game itself” because players would no longer be able to reach into the stands in order to catch foul balls, or increasing ticket prices to cover the cost of compensating injured fans.⁸¹ If not for *Quinn*, the court claimed it “would not be persuaded that there is a need to impose a duty to provide *any* screened seats.”⁸²

However, after a lengthy discussion of the duty issue, the court applied assumption of risk to defeat the plaintiff’s claim. The court opined that comparative fault did not apply, because the “plaintiff’s conduct did not constitute

74. *Id.* at 802 n.5. Justice Crosby speculated that the insurance approach “is more economical, more practical—and presently in effect.” *Id.*

75. *Id.* at 804 (Trotter, J., concurring).

76. *See id.* (Trotter, J., concurring). Justice Sonenshine concurred in Parts I and II, which dealt only with the plaintiff’s claim.

77. 185 Cal. App. 3d 176 (1986). The plaintiff in *Neinstein* alleged that she had developed breast cancer as a result of being struck by a foul ball. *See id.* at 179 n.1.

78. *Id.* at 180. In addition, the Dodgers warn fans on the back of tickets that the team will not be liable for injuries resulting from “all risk and danger incidental to the Game of Baseball.” *Id.* The text of such warnings is typically five-point font—almost one-half the size of this text.

79. *Id.*

80. *Id.* at 181.

81. *Id.*

82. *Id.* at 182.

'fault' and thus c[an] not be 'compared' to anything It is neither negligent nor blameworthy to attend a ball game and sit in a 'good seat' in the unscreened area."⁸³ Because the plaintiff "was sufficiently warned of the risk," the court affirmed summary judgment for the defendant.⁸⁴

D. Knight: Primary Implied Assumption of Risk

Finally, in 1992, with *Knight v. Jewett*,⁸⁵ the California Supreme Court examined the degree to which assumption of risk remained a viable defense after *Li*. The plaintiff was injured by another participant in an informal touch football game.⁸⁶ A plurality of the court, led by Justice George, sorted assumption of risk cases into two groups.⁸⁷ According to the plurality, in

most cases involving sports-related injuries[,] past assumption of risk decisions largely have been concerned with defining the contours of the legal duty that . . . owners of baseball stadiums or ice hockey rinks . . . owed to an injured plaintiff. In other settings, the assumption of risk terminology historically was applied to situations in which it was clear that the defendant had breached a legal duty of care to the plaintiff, and the inquiry focused on whether the plaintiff knowingly and voluntarily had chosen to encounter the specific risk of harm posed by the defendant's breach of duty.⁸⁸

The plurality dubbed the first category "primary implied assumption of risk." Primary implied assumption of risk applies where "the assumption of risk doctrine embodies a legal conclusion that there is no duty on the part of the defendant to protect the plaintiff from a particular risk."⁸⁹ Because the defendant cannot be negligent if it has not breached a duty, "the defendant has not committed any conduct which would warrant the imposition of any liability whatsoever," and comparative fault does not apply.⁹⁰ In addition to the sports setting, the plurality

83. *Id.* at 183.

84. *Id.* at 184. The court also mentions that the plaintiff would have had difficulty proving the causation element of her claim. *See id.* at 183. However, it is unclear whether the court was referring to the plaintiff's contention that she developed cancer after being hit by a foul ball, or the fact she would have had to prove that she would have moved to a screened seat if one had been available.

85. 834 P.2d 696 (Cal. 1992) (plurality opinion).

86. *See id.* at 697.

87. Justice Mosk filed a concurring and dissenting opinion, "concur[ring] generally with Justice George's analysis," but urging the complete abolition of assumption of risk, which is "accounted for already in the negligence prima facie case and existing comparative fault defense." *Id.* at 712 (Mosk, J., concurring and dissenting) (quoting Stephanie M. Wildman & John C. Barker, *Time to Abolish Implied Assumption of a Reasonable Risk in California*, 25 U.S.F. L. REV. 647, 679 (1991)).

88. *Id.* at 700 (citations omitted).

89. *Id.* at 703.

90. *Id.* at 704.

explained, primary implied assumption of risk also comes into play with dangerous professions.⁹¹

On the other hand, the plurality claimed, "secondary implied assumption of risk" applies in situations in which the defendant *has* breached a duty, but the plaintiff proceeds to knowingly encounter a danger stemming from the defendant's negligence.⁹² In these cases, the doctrine does not bar the plaintiff's claim. Instead, the trier of fact considers the relative responsibility of the parties under comparative fault principles.⁹³

Although the dissent accused the plurality of "advocat[ing] a radical transformation of tort law" by recasting assumption of risk entirely in duty terms,⁹⁴ the plurality reasoned that its approach—emphasizing the "nature of the sport or activity in question and on the parties' general relationship to the activity"⁹⁵—better lent itself to summary judgment because it eliminated the possibility of the plaintiff raising factual questions about his knowledge and expectations.⁹⁶ In

91. See *id.* at 704 n.5. For example, the "firefighter's rule" states that a person who negligently endangers a police officer or fireman owes them "no duty." Strong policy considerations compel such a rule, including the fact that the public has already compensated the police officer or firefighter for their service through taxes, and that emergency services must be called when needed. See, e.g., *Neighbarger v. Irwin Indus., Inc.*, 882 P.2d 347, 352–53 (Cal. 1994); John L. Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory Into Tort Doctrine*, 52 OHIO ST. L.J. 717, 724–25 (1991) ("Compensation for a dangerous job reasonably undertaken, whether it is fire fighting or making a high risk repair . . . presumably includes fair advance payment for assuming the risks inherent in such employment.").

92. *Knight*, 834 P.2d at 707–08.

93. See *id.* at 708.

94. *Id.* at 714 (Kennard, J., dissenting). Justices Panelli and Baxter joined Justice Kennard's view of assumption of risk after *Li*. *Id.* at 713 (Panelli, J., concurring and dissenting). Justice Kennard detailed how consent—the "voluntary acceptance of a specific, known, and appreciated risk"—has traditionally been the basis of an assumption of risk defense. See *id.* at 715 (Kennard, J., dissenting). Contributory negligence, on the other hand, was premised on "a departure from the reasonable person standard." *Id.* at 716 (Kennard, J., dissenting). Thus, because *Li* stated that assumption of risk should be abolished to the extent it overlaps contributory negligence, see *Li v. Yellow Cab Co.*, 532 P.2d 1226, 1241 (Cal. 1975), Justice Kennard argued that the doctrine should be eliminated in cases in which the plaintiff's actions in confronting a risk fell below the standard of a reasonable person. See *Knight*, 834 P.2d at 720 (Kennard, J., dissenting). Justice Kennard reasoned that "the unreasonableness of the plaintiff's apparent choice provides compelling evidence that the plaintiff was merely careless and could not have truly appreciated and voluntarily consented to the risk." *Id.* (Kennard, J., dissenting). However, if a plaintiff confronted a risk but nevertheless acted reasonably, such behavior indicated that the plaintiff understood and consented to the danger, and thus should be barred under assumption of risk. See *id.* (Kennard, J., dissenting).

Of course, such an approach would create the anomalous result in which a plaintiff who behaves "reasonably" is barred under assumption of risk, while a plaintiff who acts "unreasonably" is allowed to recover partial damages under comparative fault. In response, Justice Kennard claimed that "[t]here is nothing arbitrary . . . in requiring plaintiffs to accept responsibility for the consequences of their considered and deliberate choices, while at the same time apportioning liability between a plaintiff and a defendant who have both exhibited carelessness." *Id.* (Kennard, J., dissenting).

95. *Id.* at 706.

96. *Id.* at 708.

addition, the plurality rejected the dissent's consent-based approach because it would mean that "the basic liability of a defendant who engages in a sport would depend on variable factors that the defendant frequently would have no way of ascertaining . . . rather than on the nature of the sport itself."⁹⁷

The plurality then examined whether the defendant had breached a duty in this case. Noting the general principle that a landowner ordinarily must use reasonable care to eliminate dangerous conditions on his property, the plurality commented that "[i]n the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself."⁹⁸ Thus, the plurality noted, while defendants usually owe no duty to eliminate a sport's inherent risks, they do owe a duty not to increase such risks.⁹⁹ Since imposing liability for carelessness might chill vigorous participation and change the way sports are played, the plurality held that an athlete's duty should be limited to refraining from injuring another player intentionally or recklessly.¹⁰⁰

E. The Current State of the Law

Many states dealt with the abolition of contributory negligence by adopting the baseball rule in the spectator injury context.¹⁰¹ Conversely, despite the fact it

97. *Id.*

98. *See id.* at 708.

99. *See id.*

100. *See id.* at 711. Because the plurality did not find that the defendant had engaged in such behavior, it affirmed summary judgment in his favor. *See id.* at 712.

101. For example, in *Akins v. Glens Falls City Sch. District*, 424 N.E.2d 531 (N.Y. 1981), the New York Court of Appeals implemented the baseball rule. Intoning the familiar consideration that many spectators prefer to sit where their view is unobstructed, the court concluded that "the practical realities of this sporting event" mandated that stadium owners need only screen the area behind home plate, and also "provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game." *Id.* at 533. Reversing a jury verdict awarding damages and apportioning fault 65 percent to the defendant and 35 percent to the plaintiff, the court held that the plaintiff presented no evidence that the defendants had breached this duty. *See id.* at 532, 534. After *Akins*, the baseball rule became the dominant approach to stadium owner liability. *See Bellezzo v. State*, 851 P.2d 847, 853 (Az. Ct. App. 1992); *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 225 (Mich. Ct. App. 2001); *Swagger v. City of Crystal*, 379 N.W.2d 183, 185 (Minn. Ct. App. 1985); *Schneider v. Am. Hockey & Ice Skating Ctr., Inc.*, 777 A.2d 380, 384 (N.J. Super. Ct. App. Div. 2001) (applying a screening-based test to hockey); *Hobby v. City of Durham*, 569 S.E.2d 1, 2 (N.C. Ct. App. 2002); *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1015 (Utah 1995).

On the other hand, judgments against the Cubs and White Sox led Illinois to legislate a bar against tort claims stemming from errant balls and pucks. *See* 745 ILL. COMP. STAT. ANN. 52/10 (West 2002); *Riley v. Chi. Cougars Hockey Club, Inc.*, 427 N.E.2d 290, 292 (Ill. App. Ct. 1981) (collecting cases). Shortly after Brittanie Cecil's death, a woman who underwent emergency brain surgery after being struck by a puck at a Chicago Blackhawks game sued the NHL, citing the ACEP report as evidence that the league had "wantonly and willfully" disregarded the risk to fans. *See* John Wawrow, *NHL Approves Netting for Safety Purposes*, CHI. SUN-TIMES, June 21, 2002, at D4. The "willful and wanton" language is most likely an attempt to circumscribe the statute, which states arena owners are not liable for injuries unless they are brought about by defective screening or "willful or wanton conduct" in

did not garner a majority, the *Knight* plurality became "the operative statement of current California law."¹⁰² Two subsequent cases have interpreted *Knight* as changing *Quinn's* "limited duty" framework to one in which stadium owners owe "no duty" to protect their patrons from flying balls and pucks.¹⁰³

In *Lowe v. California League of Professional Baseball*,¹⁰⁴ the plaintiff was struck by a foul ball after being distracted by the home team's mascot.¹⁰⁵ The trial court granted summary judgment based on primary implied assumption of risk, stating that the defendant owed "no duty" to protect the

connection with the sport. See 745 ILL. COMP. STAT. ANN. 52/10. Utah has enacted similar legislation. See UTAH CODE ANN. § 78-27-62 (2002). Colorado, which passed laws exempting professional baseball stadium owners from injuries due to foul balls, declined to apply the same protection to hockey arenas. Compare The Colorado Baseball Spectator Safety Act of 1993, COLO. REV. STAT. § 13-21-120(4)(a) (2002) ("Spectators of professional baseball games are presumed to have knowledge of and to assume the inherent risks of observing professional baseball games, insofar as those risks are obvious and necessary.") with *Teneyck v. Roller Hockey Colo., Ltd.*, 10 P.3d 707, 710 (Colo. Ct. App. 2000) (noting the Act "does not provide a blanket exception from liability for all sports that pose the same inherent risks as professional baseball").

Rhode Island and Virginia, on the other hand, continue to apply the traditional doctrine of assumption of risk, as "the key difference is . . . the exercise of one's free will in encountering the risk. Negligence analysis, couched in reasonable man hypotheses, has no place in the assumption of the risk framework." *Kennedy v. Providence Hockey Club, Inc.* 376 A.2d 329, 333 (R.I. 1977); see also *Thurmond v. Prince William Prof'l Baseball Club, Inc.*, 574 S.E.2d 246, 250 (Va. 2003). Cf. *Moulas v. PBC Prod.*, 570 N.W.2d 739 (Wis. Ct. App. 1997). The injured plaintiff chose to sit in the second row of seats behind an eight-foot high Plexiglass screen because of the protection it afforded. See *id.* at 742. The court upheld summary judgment for the defendant because "the risks associated with hockey should be known to the reasonable person attending a game." *Id.* at 745. Although the court determined the plaintiff's negligence was great enough to bar her recovery as a matter of law, it cautioned that it was not "resurrecting the 'assumption of risk doctrine' as an absolute bar to a potential claim" but was merely "rely[ing] on [it] only as it impacts on [the plaintiff's] contributing negligence." *Id.* at 745 n.3.

Finally, Iowa and Florida adhere to the RESTATEMENT (SECOND) OF TORTS § 343A (1965), which states that a landowner is not liable for "known or obvious dangers" unless he should "anticipate the harm." This standard seems easier for plaintiffs to meet than the other approaches. See *City of Milton v. Broxson*, 514 So. 2d 1116, 1119 (Fla. Dist. Ct. App. 1987) (affirming the denial of a summary judgment motion because the defendant "should have reasonably anticipated that such hazardous activity would cause spectator injury notwithstanding the spectators' knowledge of the danger"); *Parsons v. Nat'l Dairy Cattle Cong.*, 277 N.W.2d 620, 625 (Iowa 1979) (reversing the grant of summary judgment for the defendant when the plaintiff was hit by a puck while returning to her seat after intermission).

102. *Staten v. Superior Court*, 45 Cal. App. 4th 1628, 1632 (1996).

103. Oklahoma has also barred a baseball spectator's claim under primary implied assumption of risk. See *Simpson v. City of Muskogee*, 879 P.2d 1269, 1271 (Okla. Ct. App. 1994). Similarly, Pennsylvania imposes no duty on stadium owners to protect spectators from risks that are "common, frequent, and expected," *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 551 (Pa. 1978), and has held that injuries due to foul balls and errant pucks are routine enough to free arena owners from a duty of care. See *Romeo v. Pittsburgh Assocs.*, 787 A.2d 1027, 1031 (Pa. Super. Ct. 2001); *Pestalozzi v. Phila. Flyers Ltd.*, 576 A.2d 72, 74 (Pa. Super. Ct. 1990).

104. 56 Cal. App. 4th 112 (1997).

105. The mascot, a seven-foot tall caricature of a dinosaur, was touching the plaintiff with its tail. See *id.* at 114.

plaintiff from foul balls.¹⁰⁶ The appellate court reversed the judgment, reasoning that “[u]nder *Knight*, defendants had a duty not to increase the inherent risks to which spectators at professional baseball games are regularly exposed.”¹⁰⁷ Because “the antics of [a] mascot are not an essential or integral part of the playing of a baseball game,” the court held that an issue of fact remained as to whether the distraction increased the odds that the plaintiff would be struck by a foul ball.¹⁰⁸

In *Nemarnik v. Los Angeles Kings Hockey Club*,¹⁰⁹ the plaintiff, who was injured during pre-game warm-ups, alleged that she could not see the puck coming because a crowd had gathered near the ice.¹¹⁰ In a confusing opinion, the court barred her claim under primary implied assumption of risk. The court opined that, under *Knight*, arena owners owe hockey fans a duty not to increase the sport’s inherent risks.¹¹¹ Although the court claimed that having one’s view blocked by other fans is “an inherent and unavoidable part of attending a sporting event,” it did not find that fact dispositive.¹¹² Instead, the court reasoned that “it would be purely speculative to conclude that poor crowd control was causally related to plaintiff’s injury.”¹¹³ Thus, the “relevant issue” of the case was whether stadium owners owe fans a duty to prevent injury from flying pucks in the first place.¹¹⁴ Echoing *Neinstein*, the court reasoned that imposing such a duty “would force defendants to do either of two things: provide a floor to ceiling protective screen around the rink, thereby reducing the quality of everyone’s view; or increase the price of tickets to cover the increased liability costs.”¹¹⁵ Presumably drafted before the NHL’s decision to require exactly that kind of screen, albeit only behind the goals, the court found “neither alternative to be acceptable,” and affirmed summary judgment for the defendant.¹¹⁶

106. See *id.*

107. *Id.*

108. See *id.* at 123. The court noted that “*absent any distraction by the mascot*, th[e] plaintiff could have assumed the risk.” *Id.* at 124.

109. 103 Cal. App. 4th 631 (2002).

110. See *id.* at 634.

111. See *id.* at 636–37.

112. *Id.* at 638–39. This may be because play had not yet begun. The court avoids the more difficult question of whether having one’s view blocked during the warm-up session is an inherent risk of attending a hockey game.

113. *Id.* at 640.

114. See *id.*

115. *Id.* at 641.

116. *Id.*

II. CRITIQUE

A. *Knight's* Primary Implied Assumption of Risk Approach Blurs Important Distinctions

1. *Lowe* and *Nemarnik* Misread *Knight*

Contrary to the prevailing view in the California Court of Appeal, primary implied assumption of risk should not apply to spectators. Under *Quinn*, ballpark owners owed the limited duty of providing an adequate number of screened seats.¹¹⁷ According to *Lowe* and *Nemarnik's* interpretation of *Knight*, baseball and hockey stadium owners now owe no duty to protect fans from errant balls and pucks; instead, they merely owe a duty not to increase their sports' inherent risks.¹¹⁸ Both *Lowe* and *Nemarnik* discover this sea change in the same passage from *Knight*:

Although defendants generally have no legal duty to eliminate (or protect a plaintiff against) risks inherent in the sport itself, it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.¹¹⁹

However, the plurality is not stating a black letter rule; instead, it is *generalizing* about the sports setting in order to support its main point—that duty analysis, based on the relationship between the parties and the character of the activity, provides a workable framework for assumption of risk cases after the abolition of contributory negligence. Indeed, the word “generally” appears twice in the sentence. Moreover, the language from *Knight* deals only with sports *participants*. Thus, *Lowe* makes a leap, by adding without support that “[t]he rule is no different in instances involving spectators.”¹²⁰ *Nemarnik* simply ignores the distinction. In fact, while *Knight* holds that *athletes* owe a duty “not to increase inherent risks,” it never explicitly states that such a standard should replace the screening-based duty of stadium owners.

And while the quote from *Knight* accurately characterizes the legal relationship between athletes,¹²¹ stadium owners and fans do not fit neatly within any

117. See *Quinn v. Recreation Park Ass'n*, 46 P.2d 144, 146 (1935) (per curiam).

118. See *Nemarnik v. L.A. Kings Hockey Club*, 103 Cal. App. 4th 631, 636–37 (2002); *Lowe v. Cal. League of Prof'l Baseball*, 56 Cal. App. 4th 112, 114 (1997).

119. *Nemarnik*, 103 Cal. App. 4th, at 636–37; *Lowe*, 56 Cal. App. 4th at 123 (both quoting *Knight*, 834 P.2d at 708).

120. *Lowe*, 56 Cal. App. 4th at 123.

121. See, e.g., *Mann v. Nutrilite, Inc.*, 289 P.2d 282, 285 (Cal. 1955) (barring a baseball chap-erone from recovery after being hit by a carelessly thrown ball). In fact, such a standard also describes the relationship between plaintiffs and defendants in the other context to which *Knight* indicated primary implied assumption of risk would apply: cases involving the firefighter's rule. See *Walters v.*

paradigm.¹²² Sometimes, courts barred a plaintiff's claim because he was actually aware of the risk.¹²³ Sometimes, courts effectively held ballpark owners to no duty of care—despite claiming to apply the doctrine of assumption of risk—by deciding for themselves that any plaintiff would have appreciated the danger.¹²⁴ Most courts, though, held hockey owners to a duty of reasonable care.¹²⁵ And some courts took *Quinn* at its word, requiring ballpark owners to provide the requisite number of screened seats.¹²⁶ *Knight* is actually more consistent with the latter two views—with the notion that stadium owners still must take steps to discharge their duty.

Indeed, nothing in *Knight* disapproves of the baseball rule as a principle of “limited duty.”¹²⁷ The plurality mentions *Quinn* and *Shurman* together twice: once to illustrate that certain past assumption of risk decisions were “concerned with defining the contours” of a defendant's duty,¹²⁸ and once more to support the assertion that “[o]ther cases . . . have analyzed in a similar fashion the duty of the owner of a ballpark . . . by reference to the steps the sponsoring business entity reasonably should be obligated to take in order to minimize the risks without altering the nature of the sport.”¹²⁹ The fact *Knight* suggests that stadium owners owe a duty with “contours” and are “obligated” to take

Sloan, 571 P.2d 609, 612 (Cal. 1977) (holding that a police officer could not state a negligence claim when injured while trying to break up a party).

122. See *supra* Part I.

123. See, e.g., *Quinn v. Recreation Park Ass'n*, 46 P.2d 144 (Cal. 1935) (per curiam); *Neinstein v. L.A. Dodgers, Inc.*, 185 Cal. App. 3d 176, 184 (1986).

124. See, e.g., *Schentzel v. Phila. Nat'l League Club*, 96 A.2d 181, 188–89 (Pa. 1953); *Keys v. Alamo City Baseball Co.*, 150 S.W. 368, 371 (Tex. Ct. App. 1941).

125. See, e.g., *Shurman v. Fresno Ice Rink, Inc.*, 205 P.2d 77, 80–81 (Cal. Ct. App. 1949); *Thurman v. Ice Palace*, 97 P.2d 999, 1001 (Cal. Ct. App. 1939).

126. See, e.g., *Rudnick v. Golden West Broadcasters, Inc.*, 156 Cal. App. 3d 793, 796 (1984); *Brown v. S.F. Ball Club, Inc.*, 222 P.2d 19, 21 (Cal. 1950).

127. In fact, the baseball rule, like *Knight*, is grounded in duty analysis, and disregards the subjective impressions of a particular plaintiff. Also, in accordance with one of the main virtues the plurality ascribes to a duty-based approach, the baseball rule makes claims amenable to summary judgment. In fact, as *Lowe* illustrates, given the myriad of potentially “inherent” distractions at sporting events, *Quinn*'s screening-based standard actually makes claims *more* likely to be resolved at the summary judgment stage than a duty not to increase inherent risks. After all, as one court noted:

One must remember that baseball games, like other sporting events, routinely involve distractions. For example, soft drink and peanut vendors, giant team mascots, raffles for prizes, and high-tech scoreboards all compete for the attention of patrons who attend athletic events.

Fans who attend games expect, and apparently enjoy, these distractions.

Gunther v. Charlotte Baseball, Inc., 854 F. Supp. 424, 429–30 (D. S.C. 1994). No two stadiums are alike, and baseball and hockey take many forms, ranging from pick-up games—in which neither mascots nor crowds are “inherent”—to the big leagues. Some professional baseball teams do not have mascots; yet some college teams do. The ease with which plaintiffs may be able to raise issues of material fact about whether a particular feature of a sport is inherent thus contradicts *Knight*'s emphasis on summary judgment.

128. *Knight v. Jewett*, 834 P.2d 696, 699 (Cal. 1992).

129. *Id.* at 709–10.

reasonable safety precautions seems more consistent with *Quinn*'s screening mandate or a hockey arena owner's duty of reasonable care—with the existence of some affirmative duty—than with the no duty regime. The plurality mentions *Quinn* a final time, reiterating that “in the sports setting, as elsewhere, the nature of the applicable duty or standard of care frequently varies with the role of the defendant whose conduct is at issue.”¹³⁰ Yet *Lowe* and *Nemarnik* read *Knight* as holding all sports setting defendants to the same, static no duty standard.

That *Quinn* survived *Knight* is further evidenced by the fact that the plurality discusses *Ratcliff v. San Diego Baseball Club*¹³¹ to support its contention that “the scope of the legal duty owed by a defendant frequently will also depend on the defendant's role in, or relationship to, the sport.”¹³² In *Ratcliff*, a baseball spectator was injured when a bat slipped out of a player's hands.¹³³ According to *Knight*:

[T]he [Ratcliff] court implicitly recognized that two different potential duties were at issue—(1) the duty of the ballplayer to play the game without carelessly throwing his bat, and (2) the duty of the stadium owner to provide a reasonably safe stadium with regard to the relatively common (but particularly dangerous) hazard of a thrown bat. Because each defendant's liability rested on a separate duty, there was no inconsistency in the jury verdict absolving the batter of liability but imposing liability on the stadium owner for its failure to provide the patron 'protection from flying bats, at least in the area where the greatest danger exists and where such an occurrence is reasonably to be expected.’¹³⁴

Knight's approval of *Ratcliff* distinguishing the duty owed by an athlete from that owed by a stadium owner further elucidates that the plurality did not group all sports setting defendants into the same no duty category.¹³⁵

130. *Id.* at 710 (emphasis added).

131. 81 P.2d 625 (Cal. Ct. App. 1938).

132. *Knight*, 834 P.2d at 709 (emphasis added). The word “scope” also indicates that the plurality did not mean to reduce all defendants' duties to a single standard; instead, it implies a range of possible duties.

133. See *Ratcliff*, 81 P.2d at 626.

134. *Knight*, 834 P.2d at 709 (quoting *Ratcliff*, 81 P.2d at 626) (emphasis added).

135. In addition to blurring the line between athletes and fans, *Lowe* and *Nemarnik*'s reading of *Knight* glosses over the fact that courts and legislatures have long recognized “fundamental differences in the way baseball and hockey are played and the dangers incident to the games.” *Riley v. Chi. Cougars Hockey Club, Inc.*, 427 N.E.2d 290, 292 (Ill. Ct. App. 1981). Compare *Ingersoll v. Onondaga Hockey Club*, 281 N.Y.S. 505, 512 (App. Div. 1935) (Rhodes, J., dissenting) (“In the present case the plaintiff was not a participant in the game; she was a spectator.”) with *Brown v. S.F. Ball Club, Inc.*, 222 P.2d 19, 20 (Cal. 1950) (“In baseball, one of these factors is that the patron participates in the sport as a spectator and in so doing subjects himself to certain risks. . . .”). Not only do hockey fans try to catch the puck less often than baseball fans try to catch foul balls, but approximately ten times more baseballs enter the stands per game than pucks. Compare *Fitzpatrick*, *supra* note 4 with *Crowe*, *supra* note 7. In addition, the three states that have addressed spectator

Admittedly, *Knight* refers to athletes and spectators interchangeably at times.¹³⁶ For example, the plurality claims that under primary implied assumption of risk, “[e]ven where the plaintiff, who falls while skiing over a mogul, is a total novice and lacks any knowledge of skiing whatsoever, the ski resort would not be liable for his or her injuries.”¹³⁷ The plurality then cites *Brown*, which it parenthetically summarizes as “baseball spectator’s alleged ignorance of the game did not warrant imposing liability on stadium owner for injury caused by carelessly thrown ball.”¹³⁸ However, both *Brown* and the outcome in the hypothetical skier case are explained by the fact that neither defendant breached its particular duty. As *Knight* explains, a ski resort owner owes “no duty to remove moguls from a ski run.”¹³⁹ In *Brown*, the defendant “fully discharged its duty toward [plaintiff], as concerns the risk to her of being hit by thrown or batted baseballs, when it provided screened seats for all who might reasonably be expected to request them.”¹⁴⁰ Again, *Knight* mentions spectators merely to demonstrate the duty concept’s relevance for deciding cases previously resolved under the rubric of assumption of risk.¹⁴¹

Indeed, it makes no sense to treat such different types of conduct alike. Participating in a sport involves a vastly greater degree of risk than watching one. Players often come into contact with obstacles and each other, while spectators sit. In many sports, the benefits of the activity spring directly from

injuries through legislation have treated baseball and hockey separately. Utah crafted special legislation for hockey. See UTAH CODE ANN. § 78-27-62 (1998). Colorado, on the other hand, held that the Colorado Baseball Spectator Liability Act of 1993, COLO. REV. STAT. § 13-21-120(4)(a) (1999), only applies to baseball. See *Teneyck v. Roller Hockey Colo., Ltd.*, 10 P.3d 707, 710 (Colo. Ct. App. 2000). Illinois has enacted separate, although similar, rules for both sports. See 745 ILL. COMP. STAT. 52/5 (West Supp. 1998). A duty of reasonable care, however, would account for the distinction between the sports by requiring arena owners to undertake safety precautions that reflect the specific manner in which fans are hurt. See *infra* Part III.A.1.

136. Another counterargument to my reading of *Knight* is that, when first articulating primary implied assumption of risk, the plurality explains that the doctrine “embodies a legal conclusion that there is ‘no duty’ on the part of the defendant to protect the plaintiff from a particular risk.” *Knight*, 834 P.2d at 703. The words “legal conclusion” may indicate that *Knight* meant to group cases in which courts often have found that a limited duty was not breached, such as sports spectators, with cases in which courts have held defendants to no duty of care, such as athletes and situations involving the firefighter’s rule.

137. *Id.* at 709.

138. *Id.*

139. *Id.* at 708.

140. *Brown v. S.F. Ball Club, Inc.*, 222 P.2d 19, 21 (Cal. 1950).

141. In fact, the plurality simply claims that the *Brown* and the skier example show that “[c]ontrary to the [dissent’s] implied consent approach to the doctrine of assumption of risk . . . the duty approach provides an answer which does not depend on the plaintiff’s subjective knowledge or appreciation of the potential risk.” *Knight*, 834 P.2d at 709 (emphasis added).

its risks.¹⁴² For example, throughout *Knight*, the plurality returns to a single example to which the “duty not to increase inherent risks” applies: that of a skier. The ski resort owner does not have a duty to remove moguls because “the challenge and risks posed by the moguls are part of the sport of skiing.”¹⁴³ Other sports also feature an interplay between risk and benefit, albeit to the lesser extent that injury is intrinsic to rapid physical movement, and such movement is part of what makes playing the sport worthwhile. However, this connection between risk and benefit is absent for most fans. While some spectators enjoy the “challenge” of trying to catch foul balls or errant pucks—a circumstance for which comparative fault could account—many others do not. Thus, while it may be logical to release defendants in the participant context from a duty to eliminate inherent risks because “[a] player will ordinarily expect to incur some risk of injury from an athletic contest, and he obviously prefers taking that risk to not playing,”¹⁴⁴ only a select group of spectators actually derive pleasure from the risk of foul balls or errant pucks. As I will discuss, the key question then becomes how to identify those fans.

In addition, unlike sports participants, who engage in spontaneous, unpredictable behavior, fans occupy precisely the kind of controlled environment that lends itself to safety regulation. Stadium owners, who track the rate and severity of injuries in different parts of their facilities, are better situated to avoid harm than fans.¹⁴⁵ Moreover, for athletes, the

142. *Knight* spawned a series of cases that hinged on whether the endeavor that injured the plaintiff was a “sport.” In *Record v. Reason*, 73 Cal. App. 4th 472 (1999), the court held that a sport “is done for enjoyment or thrill, requires physical exertion as well as elements of skill, and involves a challenge containing a potential risk of injury.” *Id.* at 482. *Accord* *Shannon v. Rhodes*, 92 Cal. App. 4th 792, 797–98 (2001); *Bjork v. Mason*, 77 Cal. App. 4th 544, 550 (2000). Notably, this definition emphasizes characteristics—physical exertion, skill, and an interplay between risk and benefit—that further delineate the boundaries between sports participants and spectators.

143. *Knight*, 834 P.2d at 708.

144. Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 274 (1987).

145. However, the California Supreme Court apparently no longer subscribes to the theory that defendants who are in a better position to prevent injuries should bear responsibility for doing so. See generally Stephen D. Sugarman, *Judges as Tort Law Un-Makers: Recent California Experience With “New” Torts*, 49 DEPAUL L. REV. 455 (1999) [hereinafter Sugarman, *Judges As Tort-Law Un-Makers*]. Professor Sugarman’s article details the rise and fall of the “cheapest cost-avoider” theory in the California Supreme Court. The idea that “[o]ne should rather ask whether, in general, for the type of injury involved, defendants or plaintiffs are more likely to be best positioned to know about the risks and to take precautions designed to avoid the accident” reflects the work of tort scholar Guido Calabresi. *Id.* at 458 (citing GUIDO CALABRESI, *THE COST OF ACCIDENTS* (1970)). According to Sugarman, in the mid-1980s, Calabresian analysis led the Court to “hold defendants responsible for injuries suffered either on the defendants’ properties or from use of the defendants’ properties.” *Id.* at 459. However, in the last fifteen years, the court has backed away from assigning defendants a duty of care due to the fact they are the “cheapest cost-avoider.” See *id.* at 472.

presence of rules, referees, and sanctions from league officials means that, to some extent, tort law is redundant, as "there already exists, outside the formal legal system, an elaborate structure to deal with goals of deterrence, punishment and justice."¹⁴⁶ No similar circumstances exist in the spectator context.

Finally, the notion that participants and spectators should be treated alike rests on the assumption that nothing can be done to make sports safer without changing them in some essential way.¹⁴⁷ Since *Quinn*, courts have posed this issue as the false dichotomy of forcing the stadium owner to choose between "screening the entire ballpark" or "spreading the cost of compensating fans by increasing ticket prices."¹⁴⁸ Such reasoning wholly neglects intermediate safety measures, like the NHL's decision to extend screening in some high-risk areas of the arena.¹⁴⁹ In addition, as I will argue, thorough warnings could allow fans to make informed decisions about their seating choices without altering the game in any way.

2. Holding Stadium Operators Reasonable as a Matter of Law Reflects Outmoded Tort Principles

That a hazard occurs frequently during the course of an activity does not change the fact that it may cause injury. Thus, if *Knight* immunized all defendants in the sports setting from liability arising from an activity's "inherent risks," it also branded a broad range of risky activities inherently reasonable. Doing so begs the question of whether a particular activity's benefits truly outweigh its dangers.

Of course, the benefits of athletic competition, although impossible to quantify, are substantial. *Knight's* standard recognizes that in the heat of intense physical activity, players may not be able to avoid conduct that would otherwise be classified as negligent. Although rules help reduce risky behavior, it would be impossible to eliminate the potential for carelessness without fundamentally altering the nature of the sport.¹⁵⁰ Thus, a doctrine

146. Sugarman, *Assumption of Risk*, *supra* note 24, at 848.

147. See *Neinstein v. L.A. Dodgers, Inc.*, 185 Cal. App. 3d 176, 181 (1986).

148. See *id.*; *Nemarnik v. L.A. Kings Hockey Club, L.P.*, 103 Cal. App. 4th 631, 641 (2002); *Quinn v. Recreation Park Ass'n*, 46 P.2d 144, 146 (Cal. 1935) (*per curiam*).

149. According to League Commissioner Gary Bettman, this course of action "reduce[s] the incidence of pucks entering the stands without 'interfering with the game, or the fans' enjoyment of the game.'" Crowe, *supra* note 7 (quoting NHL Commissioner Gary Bettman).

150. Sports do change in some ways in response to safety concerns. For example, in 1935, when *Quinn* was decided, neither batters in baseball nor hockey players wore helmets.

acknowledging that, for participants, sports are more valuable than risky,¹⁵¹ while not uncontroversial,¹⁵² is defensible.

However, although professional sports are important to fans and even entire communities,¹⁵³ this value is captured in the profits of teams and stadium owners.¹⁵⁴ The imprimatur of reasonableness confers reciprocal burdens and benefits on athletes, preventing them from recovering for negligently inflicted injuries but also allowing them to play enthusiastically without worrying about liability stemming from their own negligence. However, this reciprocity does not exist in the spectator context, in which stadium owners reap the benefits of the activity

151. High-risk activities such as hang-gliding, rock-climbing, and skydiving pose special problems. For some people, called risk preferrers, these activities' benefits outweigh their risks. See generally Donald P. Judges, *Of Rocks and Hard Places: The Value of Risk Choice*, 42 EMORY L.J. 1 (1993). However, whether this is true normatively is another question. As Professor Simons puts it, "[w]ould the reasonably prudent person ever try the experimental sport of hang gliding?" Simons, *supra* note 144, at 234. In addition, if a plaintiff is culpable for engaging in a hazardous activity, then the defendant is also at fault for offering him the opportunity to do so in the first place.

In *Knight*, the plurality notes:

[A] jury in a "secondary assumption of risk" case would be entitled to take into consideration a plaintiff's voluntary action in choosing to engage in an unusually risky sport, *whether or not the plaintiff's decision to encounter the risk should be characterized as unreasonable*, in determining whether the plaintiff properly should bear some share of responsibility for the injuries he or she suffered.

Knight v. Jewett, 834 P.2d 696, 707 (Cal. 1992) (plurality opinion) (emphasis added). This cannot be correct. If the plaintiff's decision to engage in the activity is reasonable, then he is not at fault, and there is no basis upon which to reduce his recovery under comparative negligence. The plurality's flawed statement illustrates that tort law, grounded in the objective reasonable person standard, simply does not deal well with idiosyncratic plaintiffs who actively seek thrills through dangerous, socially sanctioned activities.

152. See, e.g., Sugarman, *Judges as Tort Law Un-Makers*, *supra* note 145, at 485 (disagreeing with *Knight* about "the policy judgment that recreational activities are an appropriate place for such a 'no duty' rule"); Teri Brummet, Comment, *Looking Beyond the Name of the Game: A Framework for Analyzing Recreational Sports Injury Cases*, 34 U.C. DAVIS L. REV. 1029, 1061 (2001) (contrasting California's primary implied assumption of risk approach to athlete injuries with Florida's subjective standard).

153. See, e.g., *Metro. Sports Facilities Comm'n v. Minn. Twins P'ship*, 638 N.W.2d 214, 224-25 (Minn. Ct. App. 2002) (affirming a preliminary injunction ordering the Minnesota Twins to remain in Minneapolis because allowing the Twins to move would "irreparably injure" the community); James G. Gaspard II, Note, *Spectator Liability in Baseball: Nobody Told Me I Assumed the Risk!!!*, 15 REV. LITIG. 229, 230 (1996) (noting that "American courts have been very solicitous to the game of baseball, and it always has been held in high esteem"). Indicative of baseball's perceived value is the fact that it has long enjoyed an exemption from antitrust laws. See *Fed. Baseball Club v. Nat'l League*, 259 U.S. 200, 209 (1922).

154. The NHL is "a nearly \$2 billion business that receives roughly 60% of its revenue from the gate." Farber, *supra* note 6. In baseball, different means of measuring revenues and operating costs lead to drastically different determinations about the profitability of teams. Compare Stefan Fatsis, *Sports Teams for Sale*, WALL ST. J., Feb. 13, 2003, at B1 (noting that, in 2002, "[v]irtually every team . . . had heavy losses") with Kurt Badenhausen, *Double Play: Why a Money-Losing Baseball Team Is Worth \$700 Million*, FORBES, April 15, 2002, at 92 (finding teams actually earned profits of \$75 million).

without internalizing its costs.¹⁵⁵ Such a view of the relationship between business entities and consumers mirrors the caveat emptor ideology of tort law in the early twentieth century, when the baseball rule was born.¹⁵⁶ Since then, “values have changed, new understandings have emerged about behavioral responses to rules, and new notions of judicial competence have arisen.”¹⁵⁷ As these norms have evolved, they have prompted a concomitant shift in the duty line between plaintiffs and defendants.¹⁵⁸ Tort rules gradually have begun to embody the insight that in many situations, it is both more equitable and efficient to ask defendants to assume responsibility for injuries arising from their activities—a movement that culminated with recognition of the doctrine of strict product liability.¹⁵⁹ Today, purveyors of “inherently dangerous” products or services are sometimes held to a more demanding standard than reasonable care, even when they produce tremendous social value.¹⁶⁰ When strict liability does not apply, traditional negligence analysis almost always does, and therefore a rule absolving a defendant from a duty of care because its product or service is “inherently dangerous” is an aberration.¹⁶¹ Thus, for better or worse, contrary to *Lowe* and *Nemarnik*, *Knight* should not be interpreted to overrule *Quinn*.

B. The Baseball Rule: An Awkward, Anachronistic Principle

Nevertheless, *Quinn*’s limited duty standard is hopelessly anachronistic. For instance, *Rudnick* and *Neinstein* illustrate the pragmatic difficulty of applying an old rule to a sport that has changed tremendously in the last seventy

155. As Professor Sugarman argues, injured baseball spectators lose because “the defendant’s conduct was reasonable. Surely it cannot be negligent merely to promote the national pastime.” Sugarman, *Assumption of Risk*, *supra* note 24, at 836. Tellingly, Professor Sugarman couches his claim to the point it becomes circular, “assuming” both that the stadium has taken the precaution of screening seats “where the risk from foul balls is especially great” and that the plaintiff “[was] struck in a location where no case for screening could reasonably be made.” *Id.* at 836–37. In other words, stadium owners are not negligent because they have exercised reasonable care.

156. *See id.* at 844.

157. *Id.*

158. *See id.* (noting that in the latter half of the twentieth century, “many . . . sweeping no duty rules have been thrown over”).

159. *See, e.g., Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 462 (Cal. 1944) (en banc) (Traynor, J., concurring) (imposing a duty on manufacturers of products that may cause harm if defective). Another example of this trend is the recognition of a duty not to cause emotional harm. *See* Sugarman, *Assumption of Risk*, *supra* note 24, at 844.

160. For example, prescription drug makers are held to a standard of strict liability in some jurisdictions, and simple negligence in others. *See Brown v. Superior Court*, 751 P.2d 470, 476 (Cal. 1998) (collecting cases).

161. *See id.* at 475. There are few exceptions: for instance, California has exempted makers of guns and ammunition from products liability actions based on the fact their product is likely to cause injury. *See* CAL. CIV. CODE § 1714.4 (West 1985 & Supp. 2003).

years. Requiring stadium owners to provide screened seats “for as many [fans] as may be reasonably expected to call for them on any ordinary occasion”¹⁶² saddles them with an impossible task, considering that fans now place a tremendous premium on such seats, which offer close proximity to the action.¹⁶³ Indeed, as *Rudnick* acknowledged, seats behind home plate are pre-sold to season ticket holders, and thus are never available immediately before a game.¹⁶⁴ Currently, no professional baseball team claims otherwise.¹⁶⁵

Similarly, although *Neinstein* devotes a considerable amount of space to justifying the duty line between fans and stadium owners, it ultimately dismisses the plaintiff’s claim based on assumption of risk.¹⁶⁶ By doing so, the court directs attention away from the fact that application of *Quinn* would result in a verdict for the plaintiff. Just as in *Rudnick*, the defendant “ha[d] no information as to how many of the screened seats were left unsold for the game at which plaintiff was injured,”¹⁶⁷ and thus would have failed to meet its burden of proof. The court mentions the 26,000 unscreened seats far enough away from the playing field that someone sitting there would probably not be struck by a foul ball,¹⁶⁸ the plaintiff’s familiarity with baseball,¹⁶⁹ the warning on the back of her ticket,¹⁷⁰ the fact that no spectator had ever requested seats in the screened area for reasons of protection¹⁷¹—further reinforcing the artificiality of the baseball rule’s assumption that fans who want to avoid foul balls will seek screened seats—and the fact that if a fan did ask for a screened seat, Dodgers personnel swore “every effort would be made to accommodate them.”¹⁷² None of these details

162. *Quinn v. Recreation Park Ass’n*, 46 P.2d 144, 146 (Cal. 1935) (per curiam).

163. See, e.g., *Fitzpatrick*, *supra* note 4; *Verducci*, *supra* note 4. In addition, courts have gradually exhibited “caution in framing standards of behavior that amount to rules of law.” *Pokora v. Wabash Ry. Co.*, 292 U.S. 98, 105 (1934).

164. *Rudnick v. Golden W. Broadcasters*, 156 Cal. App. 3d 793, 802 n.5 (1984).

165. Only the Seattle Mariners address the issue in their ballpark policy. See Official Site of the Seattle Mariners, Ballpark Guide A-to-Z, http://seattle.mariners.mlb.com/NASApp/mlb/sea/ballpark/sea_ballpark_guide.jsp (last visited Sept. 7, 2003) (noting “[i]f you would like to lessen your risk, the Mariners will exchange your ticket for one in the upper deck prior to the first pitch being thrown”). Of course, even this would not suffice to discharge the stadium owners’ duty under the baseball rule. See also *Davidoff v. Metro. Baseball Club, Inc.*, 463 N.E.2d 1219, 1221–22 (Cooke, C.J., dissenting) (“Certainly, there is no policy at a major league stadium that would permit any and all spectators sitting in areas other than behind home plate, at any point in the game, to switch seats to those located in the ‘choice’ area behind home plate.”).

166. See *Neinstein v. L.A. Dodgers, Inc.*, 185 Cal. App. 3d 176, 181–82 (1986).

167. *Id.* at 180 n.2.

168. See *id.* at 180.

169. See *id.*

170. See *id.*

171. See *id.*

172. *Id.*

prove that the defendant provided a sufficient number of screened seats. The court cannot, and does not, apply *Quinn* and still find for the defendant.¹⁷³

And yet, as Chief Judge Cooke argued eighteen years ago in *Akins v. Glens Falls City School District*,¹⁷⁴ the baseball rule

foreclose[s] juries in the future from considering the wide range of circumstances of individual cases, as well as new developments in safety devices or procedures. Unless the court plans to periodically take up such cases in the future to adjust its rule, it has frozen a position that is certain to become outdated, if it is not already.¹⁷⁵

The fact that it took a publicity-generating tragedy to get the NHL to install screens behind the goals, despite the prevalence of similar protective measures virtually everywhere else hockey is played,¹⁷⁶ suggests Chief Judge Cooke may have been right. While the new netting may have ameliorated the problem in hockey, tort law continues to provide arena owners with little incentive to reexamine their safety guidelines as the game evolves. Moreover, in baseball, thirteen new stadiums have opened in the last thirteen years, all of which place fans dangerously close to the playing field.¹⁷⁷ The time has come to abandon a fiction that allows ballpark owners to fulfill their legal obligation by taking a single safety measure, especially one marked only by a tenuous relationship to the sport's modern form.

III. REASONABLE CARE AS AN ALTERNATIVE

In this part, I present and evaluate my thesis: that a duty of reasonable care makes sense in the spectator context.

A. The Benefits of a Reasonable Care Standard

Stadium owners should owe a duty of reasonable care to their patrons. Such a standard would force stadium owners to modernize their protective measures and then stay abreast of new means of keeping fans safe. Stadium owners would likely achieve this goal by basing safety measures on data about fan injuries and exploring new means of informing fans of a sport's risks.¹⁷⁸

173. The plaintiff argued that "even if *Quinn* is still the law, in the instant case there remain questions of fact which should have been submitted to a jury: to wit, the adequacy of the number of screened seats available." *Id.* at 182. The court never addresses this argument.

174. *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531 (N.Y. 1981) (Cooke, C.J., dissenting).

175. *Id.* at 537 (Cooke, C.J., dissenting).

176. See Schmidt, *supra* note 3.

177. See *supra* text accompanying note 4.

178. Stadium owners could also experiment with contractual releases of liability. A bargained-for transaction in which a plaintiff agrees to encounter certain risks in return for benefits—sometimes called

1. Safety Standards Would Be Responsive to Injuries

The “duty not to increase inherent risks” approach and the baseball rule allow stadium owners to discharge their legal obligations without taking corrective measures designed to counteract the specific manner in which fans are hurt. Both doctrines ignore variables such as the frequency and gravity of injuries in particular parts of the stadium or the cost of screening those areas, regulating who may sit there, or providing effective warnings.¹⁷⁹ However, negligence analysis hinges on precisely these issues: whether the burden of an untaken precaution outweighs the probability of injury multiplied by the severity of likely damages.¹⁸⁰ Thus, a reasonable care regime would highlight commonsense factors for courts and stadium owners in their efforts to reduce fan injuries.

2. Stadium Owners Would Not Be Required to Take Excessive Precautions

In addition, negligence analysis would account for many concerns that underlie the rules holding stadium operators to a limited or “no” duty. For example, early cases noted that many fans prefer unscreened seats “doubtless for the purpose of avoiding the annoyance of the slight obstruction to vision offered by the netting.”¹⁸¹ While screening has since become thinner and less

“express assumption of risk”—is valid unless contrary to public policy. “In the free market place, a potential plaintiff may exchange a potential tort claim for an appropriate value.” Diamond, *supra* note 91, at 746. Although most teams print disclaimers on the backs of tickets, they are not binding contracts. For instance, in *Yates v. Chi. Nat’l League Ball Club, Inc.*, 595 N.E.2d 570, 581 (Ill. Ct. App. 1992), the court held that exculpatory language on the back of the ticket was too small to give the plaintiff adequate notice.

179. For example, in *Akins*, the baseball rule precluded the jury from considering that installing “wings” on the backstop, stretching from first to third base, would have only cost an additional \$209 when the stadium was built. See *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 536 (N.Y. 1981) (Cooke, C.J., dissenting). In *Davidoff v. Metropolitan Baseball Club, Inc.*, 463 N.E.2d 1219 (N.Y. 1984), the court refused to consider that many fans had been injured while sitting in the area where the plaintiff was hurt. See *id.* at 1220.

In addition, such an approach would force stadium owners to release information about fan injuries, which they currently do not do. See Crowe, *supra* note 7 (noting that Los Angeles-area teams “decline[] to release fan-injury statistics”). Similarly, concern about the dearth of information about injuries at rap and rock concerts lead to the introduction of the California Concert and Rave Safety Law, which called for an injury-tracking system to get a handle on the number of concert-goers who were hurt each year. See Luke Ellis, Note, *Talking About My Generation: Assumption of Risk and the Rights of Injured Concert Fans in the Twenty-First Century*, 80 TEX. L. REV. 607, 631 (2002) (citing A.B. 1714, 1999–2000 Reg. Sess. (Cal. 2000)). However, due to “powerful lobbying efforts,” neither that bill nor a toned-down version made it out of committee. See *id.* at 631–32 (citing S.B. 2184, 1999–2000 Reg. Sess. (Cal. 2000)).

180. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (articulating the famous negligence equation—“B < PL”—authored by Judge Learned Hand).

181. *Crane v. Kansas City Baseball & Exhibition Co.*, 153 S.W. 1076, 1078 (1913).

visible,¹⁸² if extending it had a detrimental effect on ticket sales, or otherwise interfered with the manner in which the game is played, such factors would weigh heavily on the "burden" side of the liability equation. Indeed, negligence does not ask defendants to take unreasonable measures.

Thus, concern that a duty of reasonable care would greatly increase liability is specious. Many spectators' claims would be barred under traditional negligence principles if the jury determined that the stadium owner had pursued reasonable means of providing a safe stadium. For example, suppose the plaintiff suffers a broken jaw after being hit by a foul ball while sitting in an unscreened box seat. If the cost of extending a screen far enough to protect the plaintiff's seat exceeded his damages, the jury should conclude that the stadium owner had not been negligent. Also, if few fans have been hurt in that area of the stadium, the stadium owner will have a strong argument that the injury was unforeseeable. As *Neinstein* suggests, stadium owners currently employ a host of precautions that, while insufficient to satisfy the baseball rule, may nevertheless prove that they are doing everything in their power to provide a reasonably safe stadium.¹⁸³ Moreover, stadium owners could fulfill their duty solely through alerting fans to the sport's dangers, which could be accomplished with minimal financial burden and without any physical alteration of their facilities.

3. Warnings Would Allow Fans to Make Informed Choices

Because stadium owners currently provide warnings before and during the game,¹⁸⁴ courts and scholars have been skeptical about the efficacy of imposing a duty to warn:

If an effective warning really were required, then making an announcement over the public address system once people are already in their seats would seem hardly sufficient. It is implausible to expect people already sitting in the open to at that point ask for new seats Hence, a thorough warning would have to come before tickets are purchased.¹⁸⁵

182. In fact, the NHL conducted extensive testing to find ways to minimize the obstruction caused by its new netting. In addition, evidence suggests that only some fans mind the netting. See *Crowe*, *supra* note 7 (noting only a third of hockey fans polled mentioned that they would try to avoid sitting behind them).

183. See *supra* text accompanying notes 165–172.

184. See *supra* text accompanying note 10.

185. Sugarman, *Assumption of Risk*, *supra* note 24, at 837 n.13 (emphasis added); see also *Keys v. Alamo City Baseball Co.*, 150 S.W.2d 368, 371 (Tex. Ct. App. 1941) (opining "[i]t would have been absurd, and no doubt would have been resented by many patrons, if the ticket seller, or other employees, had warned each person entering the park that he or she would be imperiled by vagrant baseballs"). Regardless of what one thinks of this sweeping claim, courts have generally not found a duty to warn in the spectator context. *Falkner v. John E. Fetzer, Inc.*, 317 N.W.2d 337, 339 (Mich. Ct. App. 1982) is the lone

With an increasing number of tickets sold over the Internet and automated telephone services, however, teams could easily provide warnings at the point of sale. Fans could be required to view or listen to statistics about injuries in certain parts of the stadium before they purchase a seat there.¹⁸⁶ In addition, as ski resorts demarcate the different risks of specific slopes, stadium owners could flag certain areas of the stadium according to the frequency with which foul balls or pucks enter the stands. In return, the more fans know about the potential danger posed by balls or pucks, the easier it will be to pinpoint fans who enjoy the challenge of trying to catch foul balls despite the risk.¹⁸⁷ Also, women and children, who according to the ACEP study are likely injured at disproportionate rates because they pay less attention to the game,¹⁸⁸ may behave differently when aware of the sport's risks.¹⁸⁹ While this may seem to transform a leisure activity into a responsibility, it also sorts out fans who truly understand the risks but nevertheless prefer close proximity to the action in the fairest possible manner: by letting them vote with their feet.¹⁹⁰

4. Comparative Fault Is Flexible

Comparative fault would then weed out unmeritorious claims and reduce plaintiffs' recoveries in proportion to their responsibility. *Neinstein* and *Nemarnik* contended that in the spectator context, a "plaintiff's conduct did not constitute 'fault' and thus c[an] not be 'compared' to anything It is neither negligent nor blameworthy to attend a ball game and sit in a 'good seat' in the unscreened area."¹⁹¹ This frames the issue too narrowly; indeed, it is akin to saying that comparative fault cannot apply to car accidents because it is not negligent to drive. Although attending a game may not be "unreasonable," attempting to

case in which a court has held that "the adequacy of a warning is a jury question." *But cf.* *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 226 (Mich. Ct. App. 2001) (disapproving of *Falkner*). However, these cases reject a freestanding, wholly independent duty to warn. I simply argue that warnings could be one precaution among several that stadium owners could take to discharge a duty of reasonable care.

186. Of course, this information could also be conveyed in person or by flyer at ticket booths.

187. See *supra* Part III.A.1.

188. See Milzman et al., *supra* note 7.

189. In addition, for the purposes of determining liability, the "heeding presumption" provides that "[w]here warning is given, the seller may reasonably assume that it will be read and heeded." RESTATEMENT (SECOND) TORTS § 402A(j) (1965). Thus, a plaintiff would not be able to claim that they did not hear or read a stadium owner's warning.

190. In passing, Kenneth Simons praises a similar approach. See Simons, *supra* note 144, at 279 ("[S]uppose that the spectator, aware of the risk of injury, nevertheless prefers an unscreened to a screened seat, because it provides a slightly better view. Then she fully prefers to take the risk, and should ordinarily be barred from recovery.") (footnotes omitted).

191. *Neinstein v. L.A. Dodgers*, 185 Cal. App. 3d 176, 186 (1986); *Nemarnik v. L.A. Kings Hockey Club, L.P.*, 103 Cal. App. 4th 631, 641 (2002) (quoting *Neinstein*, 185 Cal. App. 3d at 183).

catch a sharply hit foul ball, or not paying attention, or drinking too much can be, especially when the plaintiff has been warned that they sit in a high-risk area of the stadium. Even *Nemamik* lists various ways in which, after seated, the plaintiff “could have reduced her risk of injury.”¹⁹²

Although this approach has never been embraced by a court, it has been suggested by the proposed Restatement (Third) of Torts, which “rejects all forms of implied assumption of risk.”¹⁹³ An illustration to section 3 provides:

A attends a baseball game at B's ballpark. A sits in a portion of the stands beyond the point where the screen prevents balls from entering the seats. A is aware that balls occasionally are hit into the stands. The fact that A knew balls are occasionally hit into the stands does not constitute assumption of risk. The fact that A knew balls occasionally are hit into the stands is relevant in evaluating whether A acted reasonably by engaging in particular types of conduct while sitting in the stands (sitting in the stands would not itself constitute unreasonable conduct). If the factfinder concludes that A did not act reasonably under the circumstances, A's knowledge of the risk is relevant to the percentage of responsibility the factfinder assigns to A If B could reasonably assume that A and other fans are aware that balls are occasionally hit into the stands, this fact is also relevant to whether B acted reasonably in relying on A to watch out for balls instead of constructing a screen or providing warnings.¹⁹⁴

That injuries stem from fans being inattentive is apparent even from the case law. For example, in *Brown*, the plaintiff “paid no particular attention to the game and spent her time visiting with a friend.”¹⁹⁵ In *Keys v. Alamo City Baseball Co.*,¹⁹⁶ the plaintiff “was paying no attention to the game, or to the players or the ball; her head was turned away from the field and she was looking back and talking to a friend seated several rows back up the incline behind her.”¹⁹⁷ Under a duty of reasonable care, even if a jury determined that the stadium owner was negligent, these plaintiffs' recoveries would be drastically reduced under comparative fault. In addition, unlike the current doctrines, comparative fault would distinguish between situations in which a plaintiff was hurt while trying to catch a ball or puck and those—like the *Brittanie Cecil* incident—in which the projectile is impossible to avoid. In the former circumstance, the plaintiff's conduct would be relevant to fault apportionment; in the

192. See *Nemamik*, 103 Cal. App. 4th at 642.

193. William Powers, Jr., *Sports, Assumption of Risk, and the New Restatement*, 38 WASHBURN L.J. 771, 775 (1999). See *supra* text accompanying note 47, for how the second Restatement dealt with injured baseball spectators.

194. RESTATEMENT (THIRD) OF TORTS § 3 cmt. c, illus. 6 (2000).

195. *Brown v. S.F. Ball Club, Inc.*, 222 P.2d 19, 21 (Cal. Ct. App. 1950).

196. 150 S.W. 368 (Tex. Ct. App. 1941).

197. *Id.* at 370.

latter, comparative fault would solve the seemingly unfair result of plaintiffs being held wholly responsible for an unavoidable injury.

Comparative fault also has the advantage of allocating recovery equitably in cases where the plaintiff's knowledge of the danger represents an extreme side of the spectrum. For example, courts have noted qualms about the baseball rule as applied to children. In *Friedman v. Houston Sports Ass'n*,¹⁹⁸ an eleven-year-old girl was injured while sitting in an unscreened area of the Houston Astrodome. Although concurring with the majority opinion affirming the trial court's grant of judgment notwithstanding the verdict, Justice Cohen noted strong reservations about the state of the law when applied to a young plaintiff:

[A]dult plaintiffs must lose when their injuries result from the game's obvious hazards It may even be a good rule, when applied to adults. I am not convinced, however, that it is the rule, and certainly not a good rule, to apply this principle, as a matter of law, in a case involving an 11-year-old child as a plaintiff. *Some 11-year-olds will know the dangers of baseball, and some will not* In my opinion, a landowner who invites an . . . 11-year-old child to its premises should not be surprised if a court imposes liability upon finding that the child is unaware of some particular danger, and thus more in need of warning, than its parents or older siblings.¹⁹⁹

Comparative fault, however, applies special negligence rules, holding children to "the standard of conduct . . . of a reasonable person of like age, intelligence, and experience under the circumstances."²⁰⁰ Thus, in *Friedman*, if the stadium owner failed to exercise a duty of reasonable care, fault apportionment would turn on the very question Justice Cohen urged asking: whether the plaintiff actually realized the danger she faced. On the other hand, negligence calculus takes into account "such superior . . . knowledge . . . as the actor himself has."²⁰¹ Therefore, if the plaintiff is a season ticket holder, and well acquainted with the sport's risk, this fact would drastically reduce, or even eliminate, liability. In this way, comparative fault would reincorporate a subjective inquiry into fault apportionment. Instead of the all-or-nothing determination that characterized the old doctrine of assumption of risk, however, the question about the plaintiff's perceptions would allow fact-

198. 731 S.W.2d 572 (Tex. Ct. App. 1987); see also *City of Atlanta v. Merritt*, 323 S.E.2d 680, 682-83 (Ga. Ct. App. 1984) (upholding a denial of summary judgment in a case in which the plaintiff, an eight-year-old boy, alleged the area in which he sat should have been screened).

199. *Friedman*, 731 S.W.2d at 576 (Cohen, J., concurring) (emphasis added). Justice Cohen agreed with the result reached by the majority because the plaintiff was accompanied by her father. See *id.*

200. See RESTATEMENT (SECOND) OF TORTS § 283A (1965).

201. RESTATEMENT (SECOND) OF TORTS § 289(b).

finders to allocate damages with greater precision, piercing the objective reasonable person veil in a small group of cases.²⁰²

5. Custom Would Help Define Safety Measures

Finally, a duty of reasonable care would allow tort law to be the impetus for establishing uniform safety guidelines in baseball stadiums and hockey arenas. Since the current approaches to liability impose no specific obligations, safety standards are left entirely to teams and stadium owners.²⁰³ As the ACEP report, Brittanie Cecil's death, and the NHL's belated decision to install netting reveal, self-regulation may not be effective. However, because negligence analysis often looks to custom as evidence of whether a defendant has behaved reasonably,²⁰⁴ stadium owners would likely compare different measures in different arenas in an attempt to standardize them.²⁰⁵

Although stadiums' dimensions vary widely,²⁰⁶ establishing minimum guidelines could still be worthwhile. For instance, in baseball, teams could decide whether or not to screen a certain area of the stadium depending on how far it is from home plate. The NHL could create durability requirements for each rink's Plexiglass barriers, which occasionally shatter. In addition, teams could prohibit young children from sitting in highly dangerous parts of the stadium, and develop systematized means of providing warnings before tickets are purchased. Because adhering to custom is not dispositive, if these standards proved ineffective, stadium owners would be forced to adjust them. On the other hand, if successful over time, entrenched customs could be a powerful tool to limit liability, as "[a] defendant who can prove that it has adhered to a prevailing custom may eliminate what might otherwise be a jury question."²⁰⁷

202. *But cf.* *Knight v. Jewett*, 834 P.2d 696, 706 (Cal. 1992) (plurality opinion) (rejecting a consent-based approach to assumption of risk because it would mean that "the basic liability of a defendant who engages in a sport would depend on variable factors that the defendant frequently would have no way of ascertaining . . . rather than on the nature of the sport itself"). However, under my proposal, the only circumstance in which the plaintiff's subjective perceptions would expose stadium owners to greater liability would involve children. Like Justice Cohen, I submit that this is a burden stadium owners should properly bear.

203. See *supra* text accompanying note 3.

204. See, e.g., *Tex. & Pac. Ry. Co. v. Behym*, 189 U.S. 468, 470 (1903) ("What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not.").

205. See, e.g., *Shurman v. Fresno Ice Rink, Inc.*, 205 P.2d 77, 81 (Cal. Ct. App. 1949) (granting the defendant's motion for a new trial because it should have been allowed to compare its safety measures with those taken at similar arenas).

206. See Golab, *supra* note 3.

207. FRANKLIN & RABIN *supra* note 25, at 70.

B. Drawbacks to a Reasonable Care Standard

In this subpart, I advance what I perceive to be potential criticisms of my proposal: that it would lead to excessive liability, burden courts, and place decisionmaking authority in the hands of unreliable juries. For various reasons, I conclude that a duty of reasonable care is nevertheless preferable to the duty not to increase inherent risks and to the baseball rule.

1. Greater Liability and Burgeoning Litigation

Admittedly, a duty of reasonable care would result in more tort claims being filed. I have tried to show that this would not necessarily lead to greater liability—after exhausting the reasonable means of providing a safe arena, stadium owners would not be negligent; even if they were, due to the apparent correlation between spectators' poor attention spans and injury,²⁰⁸ comparative fault would often reduce damages. In addition, if injuries really are rare, stadium owners can reasonably undertake fewer safety measures. If stadium owners were forced to purchase insurance against fan injuries, due to the fact millions of people attend professional baseball and hockey games annually, stadium owners could spread this cost among fans without drastically increasing ticket prices.²⁰⁹ As stadium owners adjusted to the reasonable care standard, the decrease in successful tort claims would drive premiums down.

A spike in the number of tort claims brought could both overload courts and force stadium owners to pay more in litigation expenses. These burdens, though, are easy to exaggerate. Although more lawsuits would likely proceed through final judgment at first, the relatively few number of variables at play—the plaintiff's age and experience with the sport, their conduct, and the area in which they were sitting—would make the outcome of claims relatively predictable, and thus amenable to settlement. In addition, stadium owners and courts would still have summary judgment, directed verdict, judgment notwithstanding the verdict, and remittitur at their disposal. Egregious plaintiff conduct could be considered "unreasonable" enough to bar recovery as a matter of law. Moreover, in the many jurisdictions that apply "modified" comparative fault, stadium owners would only need to show that they were less blameworthy overall than the plaintiff to bar recovery.²¹⁰ Therefore, a duty of reasonable care may not tax stadium owners or the legal system as badly as one might fear.

208. See Milzman et al., *supra* note 7.

209. See Crowe, *supra* note 7.

210. See *supra* text accompanying note 67.

2. Distrust of Juries

One might contend that a supposed virtue of reasonable care—that responsibility will be allocated precisely—suffers from the faulty premise that juries are reliable arbiters. Indeed, jury decisionmaking has fostered a certain wariness.²¹¹ In particular, critics claim that juries are prone to render verdicts that capriciously favor individuals over corporations.²¹² Yet, as mentioned, courts and stadium owners would be able to police jury verdicts through judgment notwithstanding the verdict and remittitur. Moreover, despite these perceived flaws, since *Rowland*²¹³ juries have traditionally decided “[w]hat safety precautions may reasonably be required of a landowner.”²¹⁴ Exceptions to this phenomenon “occur only in those narrow classes of cases where an identical set of facts is likely to recur with regularity, and ‘such holdings today are rare.’”²¹⁵

Moreover, juries might not be sympathetic to tort claims brought by spectators. Longstanding rules barring injured fans from recovery may embody a “normative consensus”²¹⁶ that stadium owners should not be liable. Sports may be so ingrained in our society that judges, scholars, and even fans would rather spectators bear the cost of injuries than stadium owners.²¹⁷

Yet this consensus has eroded. Since contributory negligence’s abolition, several courts have broken with precedent and ruled in favor of spectator plaintiffs.²¹⁸ Other judges have issued stinging dissents.²¹⁹ As discussed, many

211. See, e.g., Jon D. Hanson & Kyle D. Logue, *The Costs of Cigarettes: The Economic Case for Ex Post Incentive-Based Regulation*, 107 YALE L.J. 1163, 1282–83 (1998).

212. See *id.* (noting that “[s]ome argue there is a tendency for juries to award irrationally exorbitant damages, especially in cases involving wealthy . . . corporate defendants”).

213. See *supra* text accompanying notes 62–65.

214. *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 535 (N.Y. 1981) (Cooke, C.J., dissenting) (quoting *Nallan v. Helmsley-Spear, Inc.*, 407 N.E.2d 451, 458 n.8 (N.Y. 1980)).

215. *Id.* (Cooke, C.J., dissenting) (quoting 2 FOWLER V. HARPER & FLEMING JAMES, JR., THE LAW OF TORTS § 17.2 (1956)).

216. *Diamond*, *supra* note 91, at 741. John Diamond notes certain similarities in the resolution of cases between jurisdictions that purport to apply assumption of risk in different ways, which “suggests the possibility that there are normative principles governing the appellate courts that are not articulated in current alternative doctrines.” *Id.* at 742.

217. Until Brittanie Cecil’s death, a “perceived low risk” to fans led courts and commentators to assume spectator injuries were not serious enough to warrant corrective measures. See Milzman et al., *supra* note 7; Sugarman, *Assumption of Risk*, *supra* note 24, at 837 (noting that “if foul ball injuries were much more common and much more harmful, we might well think differently about the precautions that stadium operators should take”).

218. See, e.g., *Rudnick v. Golden W. Broadcasters*, 156 Cal. App. 3d 793 (1984); *City of Atlanta v. Merritt*, 323 S.E.2d 680, 682 (Ga. Ct. App. 1984); *Coronel v. Chi. White Sox, Ltd.*, 595 N.E.2d 45 (1992), superseded by legislation, 745 ILL. COMP. STAT. 52 (West. Supp. 1998); *Yates v. Chi. Nat’l League Ball Club, Inc.*, 595 N.E.2d 570 (Ill. Ct. App. 1992).

219. See, e.g., *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 536 (N.Y. 1981) (Cooke, C.J., dissenting); *Friedman v. Houston Sports Ass’n*, 731 S.W. 572 (Tex. Ct. App. 1987) (Cohen, J., concurring); *Moulas v. PBC Prod., Inc.*, 570 N.W.2d 739, 752 (Wis. App. 1997) (Fine, J., dissenting).

no duty rules have been abandoned as part of a "larger movement toward liberalizing recovery in tort actions."²²⁰ Moreover, the publicity surrounding Brittanie Cecil's death may have forever altered the public's perception of fan safety.²²¹ The fact that norms regarding fan safety are far from certain simply suggests that jury decisionmaking is unlikely to be one-sided. In an area of law where judges have long purported to speak for the public—deciding for themselves that the benefits of sports outweigh the costs of taking substantial safety measures—the jury would be a fitting way to reexamine common preferences in light of recent changes.

CONCLUSION

The black netting hanging behind goals in NHL arenas is a reminder that fan safety is a serious issue. Until stadium owners are forced to take more than token safety measures, however, spectators will remain at risk. Holding stadium owners to a duty of reasonable care would force them to implement new safety measures and means of informing fans of a sport's danger. In turn, comparative fault would soften the harshness of all-or-nothing results. A black-and-white approach to liability that excludes an entire class of plaintiffs and bestows a subsidy on sophisticated business enterprises represents the central tenets of a bygone era.

220. Simons, *supra* note 144, at 214. Simons notes that "[t]he concept of duty is unruly enough." *Id.* at 242.

221. See *supra* text accompanying notes 3–6. If this is true, it might account for the comparatively weak opposition to the NHL's netting mandate after years of strong resistance. See Crowe, *supra* note 7; see also *supra* text accompanying note 11.