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The Seventh-Inning Stretch[er]: Analyzing the Antiquated Baseball Rule and How It Governs Fan Injuries at Major League Baseball Games

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The Seventh-Inning Stretch[er]: Analyzing the Antiquated Baseball Rule and How It Governs Fan Injuries at Major League Baseball Games

**THE SEVENTH-INNING STRETCH[ER]?:
ANALYZING THE ANTIQUATED “BASEBALL RULE” AND
HOW IT GOVERNS FAN INJURIES AT MAJOR LEAGUE
BASEBALL GAMES**

*By: Chris Breton**

ABSTRACT

Fan injuries at Major League Baseball games have been an issue for more than a century. Courts have heavily relied on stare decisis in deciding cases involving fans injured by foul balls but have largely ignored the ever-changing realities of the game. Players are bigger, faster, stronger, and bats shatter with an increasing risk of harm. Through the prevalence of cell phone use—and stadiums maximizing the technological and theatrical aspects of attending a baseball game—fans are routinely and deliberately distracted during play. Despite this, fans that are injured have little to no recourse through the judicial system because of the assumption of the risk doctrine and the accompanying “baseball rule.” Some states have enacted legislation giving even greater protection to stadium operators. Historically, Major League Baseball has been reluctant to alter its approach on fan protection as the game is rooted in a tradition that is difficult to change. However, with several high-profile incidents in past seasons, Major League Baseball revised its stance and the Commissioner introduced increased netting protection recommendations. Although the policy was not a league-wide mandate, the introduced guidelines have since been instituted by team owners. However, this has not sufficiently stopped injuries from occurring and consequently, alternative remedies—such as further expansion of the netting, reworking the legal standard for recourse, or a baseball arbitration system for fans—are necessary to lessen or eradicate the impact of the archaic baseball rule that governs fan injury litigation today.

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TABLE OF CONTENTS

I.	INTRODUCTION	211
II.	PREVIEWING THE DEVASTATING EFFECTS OF FAN INJURIES	212
III.	ANALYZING THE JUDICIARY AND STATE LEGISLATURE’S POSITIONS	215
	A. <i>The Development of the Baseball Rule</i>	215
	B. <i>A Minority Rejection of the Baseball Rule</i>	218
	C. <i>Legislative Responses and Responsibilities</i>	219
IV.	MAJOR LEAGUE BASEBALL’S RESPONSE TO THE ISSUE	222
	A. <i>Major League Baseball’s Debate on Fan Safety</i>	222
	B. <i>Major League Baseball Responds</i>	224
V.	POST-RECOMMENDATION INCIDENTS	227
VI.	POTENTIAL REMEDIES TO SUPPORT SPECTATOR SAFETY AND ALLOW FOR RECOVERY	232
	A. <i>Expanding the Scope of the Baseball Rule</i>	233
	B. <i>Adopting a Comparative Negligence Standard with a Distraction-Type Exception</i>	234
	C. <i>Baseball Arbitration Applied to Recovery for Fan Injuries</i>	238
VII.	CONCLUSION	239

I. INTRODUCTION

“About 1,750 spectators get hurt each year by errant balls, mostly fouls, at major-league games. This means that it happens at least twice every three games. That’s more often than a batter is hit by a pitch.”¹ Baseball stadiums have evolved substantially over the past 100 years. For instance, original baseball stadiums did not incorporate netting, leading to the area behind home plate being labeled as the slaughter-pen as fans would routinely be injured by foul balls and broken bats.² As the game has evolved, courts have recognized the necessity in protecting fans, albeit in a very limited fashion. Most courts, but not all, adhere to a limited duty of care frequently called the “baseball rule.”³ Although the baseball rule differs slightly between state laws, the general rule offers a two-prong requirement for stadium owners: (1) the owner must screen the most dangerous section of the field (the area the judiciary believes to be behind home plate); and (2) the screening must be sufficient for spectators who may be reasonably anticipated to want protected seats.⁴ This duty of care owed to fans is generally lower than the reasonable duty of care most owners are held to in a business-invitee tort standard.⁵ A fan attending a baseball game is more vulnerable to an injury by a batted ball than a player is, yet the archaic baseball rule will severely limit the ability for that fan to recover for injuries sustained.

There is no governing body that currently has total authority to regulate fan injuries in Major League Baseball. Major League Baseball Commissioner Rob Manfred has maintained that baseball teams are free to regulate as they see fit in their own stadiums.⁶ However, the judiciary, state and federal legislatures, and Major League Baseball all have the ability to establish sufficient fan safety regulations. Part II of this article focuses on the crippling effects an injured fan may incur, with examples of such injuries. Part III examines the development of the baseball rule and different approaches taken by the judiciary and state legislatures. Part

¹ Complaint at 2, *Payne v. Office of the Com’r of Baseball*, No. 4:15-cv-03229-SC (N.D. Cal. July 13, 2015) (citing David Glovin, *Baseball Caught Looking as Fouls Injure 1,750 Fans a Year*, BLOOMBERG BUSINESS (Sept. 9, 2014, 3:05 PM), <http://www.bloomberg.com/news/articles/2014-09-09/baseball-caught-looking-as-fouls-injure-1-750-fans-a-year> [hereinafter Complaint]).

² *Id.* at 7-8.

³ Matthew J. Ludden, *Take Me Out to the Ballgame ... but Bring a Helmet: Reforming the “Baseball Rule” in Light of Recent Fan Injuries at Baseball Stadiums*, 24 MARQ. SPORTS L. REV. 123, 124 (2013).

⁴ *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 533 (N.Y. 1981).

⁵ Ludden, *supra* note 3, at 124.

⁶ *See generally id.*

IV analyzes Major League Baseball's approach to fan injuries and the new recommendations that have been made and instituted by teams. Part V explores injuries that have occurred after the recommendations had been made by Major League Baseball. And Part VI looks at possible solutions in shifting away from the baseball rule and towards increased protection and recovery for fans.

II. PREVIEWING THE DEVASTATING EFFECTS OF FAN INJURIES

Although Major League Baseball has instituted new recommendations for protective screening at stadiums—extending the protective screening to the side of the dugout closest to home plate—the recommendations were not mandated and have not sufficiently prevented fan injuries from occurring.⁷ From a purely financial standpoint, there is little motivation for Major League Baseball to require expanded screening beyond the recommendations because of the near immunity permitted by the baseball rule. The baseball rule, developed in *Akins v. Glens Falls City School District*, only requires stadium owners to screen the area behind home plate and ensure there are enough protected seats for fans that could be reasonably anticipated to want them.⁸ Fans in all other areas assume the risk. The baseball rule originates from the notion of *volenti non fit injuria* or “to a willing person, injury is not done.”⁹ Historically, the judiciary's view is that the dangers of being struck by a foul ball are obvious, as Justice Cardozo explained, “One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious . . . just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball.”¹⁰ While Major League Baseball's new recommendations offer slightly more protection to fans, the recommendations do nothing to disrupt the judiciary's position. Consequently, if stadium owners have the section behind home plate adequately screened off then both the owner and Major League Baseball are protected from liability. As a result, injured fans are forced to seek recovery for damages through a judicial system that has been historically unsympathetic.¹¹

The devastating effects of fan injuries are apparent from the wealth of examples that exist—examples that are not exclusive to Major League Baseball games. For example, on March 16, 2002, 13-year-old Brittanie

⁷ See *infra* Section IV(B).

⁸ See *Akins*, 424 N.E.2d at 531.

⁹ *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929).

¹⁰ *Id.*

¹¹ See *infra* Section III(A).

Cecil was attending a National Hockey League game at the Nationwide Arena in Columbus, Ohio when she was struck by an errant puck.¹² The force of the impact snapped her head back, causing severe damage to an artery in her neck.¹³ Cecil eventually succumbed to her injuries, dying two days later.¹⁴ In June of that year, NHL Commissioner Gary Bettman quickly reacted to Cecil's death and instituted increased protective screening behind each goal.¹⁵ In response to fan complaints about the obstructed view he simply said, "after three minutes, people don't know it's there."¹⁶ The NHL later settled a lawsuit with Cecil's parents for \$1.2 million.¹⁷

An example of a fatal injury at a Major League Baseball game occurred on May 16, 1970, when 14-year-old Alan Fish was struck above the left ear by a line drive foul ball at a Los Angeles Dodgers game.¹⁸ The adult he was with stated that Fish "remained slumped forward with his chin on his chest, 'out like a light,' for approximately one minute."¹⁹ The boy then "stretched and groaned and commenced speaking in an unintelligible fashion ... followed by a period during which he stuttered and was unable to speak without long pauses between words."²⁰ After ballpark emergency first aid determined that he was okay to go back to his seat, his body language seemingly returned to normal and he watched the remainder of the game.²¹ After the game, his condition worsened considerably and he was taken to the hospital where he ultimately died four days later.²² An autopsy confirmed that the impact of the baseball caused a hairline skull fracture, which led to Fish's brain tissue being contused and lacerated by the displaced portions of his fractured skull.²³ The impact induced intracerebral

¹² John Esterbrook, *Girl Killed by Stray Hockey Puck*, CBS NEWS (Mar. 19, 2002, 4:09 PM), <http://www.cbsnews.com/news/girl-killed-by-stray-hockey-puck/>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ See Bob Nightengale, *Nightengale: MLB Must Increase Netting at All Ballparks*, USA TODAY SPORTS (June 7, 2015, 11:49 PM), <http://www.usatoday.com/story/sports/mlb/2015/06/06/broken-baseball-bat-fan-feway-park-netting-maple-bats/28611829/>.

¹⁶ Chris Hine, *Fan's Death Led to NHL's Protective Netting Policy*, CHI. TRIBUNE (Aug. 1, 2015, 8:24 AM), <http://www.chicagotribune.com/sports/hockey/blackhawks/ct-nhl-fan-safety-spt-0802-20150801-story.html>.

¹⁷ Associated Press, *Settlement from NHL and Others Released*, ESPN (Apr. 14, 2004), <http://sports.espn.go.com/nhl/news/story?id=1782097>.

¹⁸ *Fish v. L.A. Dodgers Baseball Club*, 128 Cal. Rptr. 807, 811 (1976).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 811-12.

²³ *Id.*

hemorrhage, killing him.²⁴ Major League Baseball did nothing to increase screening protection following this incident. The family sued the Dodgers for “failure to provide the decedent ‘with a safe place to witness the ball game’” and for wrongful death as a result of the attending doctor’s negligence.²⁵ The lower court granted the defendant’s motion for nonsuit on the cause of action for failure to provide a safe place to witness the baseball game.²⁶ In the end, there was little discussion about the safety of the ballpark in the *Fish* case. But primarily, both the Cecil and the Fish incidents show the perilous dangers fans face when stadiums lack adequate safety netting.

There have been so many fan injuries at Major League Baseball games both before and after the death of Alan Fish that it would be a futile exercise to attempt to list them all.²⁷ A recent injury that may have provided the impetus for Major League Baseball’s new policy recommendations happened in the 2015 season at a Boston Red Sox game. The injury occurred when 44-year-old Tonya Carpenter was struck in the face by a shattered bat after Oakland Athletics third basemen Brett Lawrie’s wooden bat splintered and flew into the stands.²⁸ Carpenter was with her young son and sitting in an area of the stadium not protected by screening.²⁹ Carpenter’s injuries were so excruciating that her screams could be heard throughout the ballpark.³⁰ And the blood from her face was so severe that Red Sox centerfielder Mookie Betts had to turn away.³¹ Carpenter had surgery and recovered, but the severity of the damage was considered life-threatening at the time.³² Prior to the incident, there had been much discussion about the hazards of maple bats, and this occurrence served to

²⁴ *Id.*

²⁵ *Id.* at 810 (the doctor directed the emergency medical facility at the stadium and the Dodgers were included under this theory as being the principal responsible for the negligence of its agent).

²⁶ *Id.*

²⁷ However, for an attempted detailed account see Exhibit B of Complaint, *supra* note 1, at 2-20.

²⁸ ESPN News Services, *Woman Injured by Broken Bat at Fenway Park Remains in Serious Condition*, ESPN (June 8, 2015), http://espn.go.com/mlb/story/_/id/13024139/woman-injured-boston-red-sox-game-serious-condition [hereinafter *Woman Injured by Broken Bat*]; see also Ludden, *supra* note 3, at 125 (A fan was struck by shards of a baseball bat at a Los Angeles Dodgers baseball game, causing a concussion and two jaw fractures. The injury resulted in over \$7000 of medical bills that the Dodgers refused to pay, relying on the baseball rule and the assumption of the risk doctrine).

²⁹ See *Woman Injured by Broken Bat*, *supra* note 28.

³⁰ Nightengale, *supra* note 15.

³¹ *Id.*

³² *Woman Injured by Broken Bat*, *supra* note 28.

elevate the scrutiny on that particular kind of bat.³³ But more importantly, this incident has led to discussions on increased netting and fan protection.

After the incident, Commissioner Manfred stated he would “react strongly” to the event and went on to say, “when you have an issue like this, an incident like this, you have to go back and re-evaluate where you are on all of your safety issues, and trust me, we will do that”³⁴ Commissioner Manfred also stated, “fan safety is our foremost goal for all those who choose to support our game by visiting our ballparks, and we will always strive for that experience to be safe and fan-friendly.”³⁵ It should be noted that Carpenter’s friends set up a “GoFundMe” page—a crowdfunding platform that allows people to raise money for others—to help pay for the costs of her recovery; further evidencing the inability of injured fans to recover damages from stadium operators, team owners, or Major League Baseball.³⁶

III. ANALYZING THE JUDICIARY AND STATE LEGISLATURE’S POSITIONS

The issue of fan injuries at baseball games has been fiercely litigated for over a century.³⁷ Because Major League Baseball has failed to institute a strict policy relating to fans injured by foul balls and broken bats, most of the issues have fallen to the judiciary. Although some courts have delegated that job to state legislatures, the majority of courts still follow the baseball rule. This rule has failed to adapt with the changing nature of the game.

A. *The Development of the Baseball Rule*

One of the earliest cases addressing fan injuries at a baseball park was the 1908 Supreme Court of Michigan case, *Blakeley v. White Star Line*.³⁸ In *Blakeley*, the court held that a spectator’s voluntary position in the stands, and their common knowledge of the game relating to balls and bats reaching them in that position, was an assumption of the risk.³⁹ In 1913,

³³ Billy Baker, *Fenway Incident Puts Scrutiny Back on Maple Bats*, BOSTON GLOBE (June 9, 2015), <https://www.bostonglobe.com/sports/2015/06/08/fenway-incident-puts-scrutiny-back-maple-bats/DTSOKWj3kR6621Fevq9wnN/story.html>.

³⁴ Jeffri Chadiha, *Scary Fenway Incident Puts Fan Safety in Spotlight*, ABC NEWS (June 9, 2015), http://espn.go.com/mlb/story/_/id/13044333/scary-incident-fenway-park-puts-baseball-fan-safety-spotlight.

³⁵ Complaint, *supra* note 1, at 29.

³⁶ *Woman Injured by Broken Bat*, *supra* note 28.

³⁷ See *infra* Section III(A).

³⁸ *Blakeley v. White Star Line*, 118 N.W. 483 (Mich. 1908).

³⁹ *Id.*; see also Gil Fried & Robin Ammon Jr., *Baseball Spectators’ Assumption of*

the Missouri Court of Appeals in *Crane v. Kansas City Baseball and Exhibition Co.*, held that a fan who voluntarily sits in a seat to avoid the obstruction of vision from protective netting assumes the risk and should not be allowed to recover “since his own contributory negligence is apparent and indisputable.”⁴⁰ In 1935 and keeping with the decision of *Crane*, the Supreme Court of California in *Quinn v. Recreation Park Ass'n*, cited *Edling v. Kansas City Baseball & Exhibition Co.*, holding that only ordinary care must be exercised to protect fans from injuries—management does not have to screen all sections—and owners are not required to provide screened seats for every patron, but only to provide screened seats for as many fans as may be reasonably expected to ask for them.⁴¹ If a patron cannot find a screened seat and instead chooses to sit in an unprotected seat, he assumes the risk and is precluded from recovering damages for any injuries sustained.⁴²

Fan injury litigation continued in this thread for several years, which saw the development of the baseball rule. In 1981, the Court of Appeals of New York developed a two-prong requirement in *Akins v. Glens Falls City School District*, holding that “the owner must screen the most dangerous section of the field—the area behind home plate—and the screening that is provided must be sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion.”⁴³ Although there is some difference among state courts in relation to the baseball rule, this two-prong requirement is generally held as the standard in determining liability for stadium owners.⁴⁴

It should be noted that despite the baseball rule’s focus on the area behind home plate, most incidents occur down the first and third base lines. One case, *Costa v. Boston Red Sox Baseball Club*, shows the difficulties fans face when trying to avoid line drive foul balls that are hit towards that area. In *Costa*, Jane Costa was seated in an unscreened section down the first base line and was struck in the face by a foul ball, causing severe and

Risk: Is It “Fair” or “Foul”?, 13 MARQ. SPORTS L. REV. 39, 40 (2002); Mohit Khare, *Foul Ball! The Need to Alter Current Liability Standards for Spectator Injuries at Sporting Events*, 12 TEX. REV. ENT. & SPORTS L. 91, 92 (2010).

⁴⁰ *Crane v. Kan. City Baseball & Exhibition Co.*, 153 S.W. 1076, 1078 (Mo. Ct. App. 1913); Fried & Ammon Jr., *supra* note 39, at 40-41.

⁴¹ *Quinn v. Recreation Park Ass'n*, 46 P.2d 144, 146 (Cal. 1935); Fried & Ammon Jr., *supra* note 39, at 40-41.

⁴² Fried & Ammon Jr., *supra* note 39, at 40-41.

⁴³ *Akins*, 424 N.E.2d at 533.

⁴⁴ Khare, *supra* note 39, at 93-94.

permanent injuries.⁴⁵ Costa retained the services of a professional engineer to testify to the virtual impossibility of evading a foul ball when sitting in that area.⁴⁶ The engineer, using a range finder, determined the distance from her seat to home plate was forty-seven yards, or 141 feet.⁴⁷ He then studied videotape of the game and concluded that the minimum speed of the baseball when it struck Costa was ninety miles per hour, or 132 feet per second.⁴⁸ He concluded that Costa had a mere 1.07 seconds to react and take evasive actions after the ball was hit, making it effectively impossible to avoid the ball.⁴⁹

In *Davidoff v. Metropolitan Baseball Club, Inc.*, a 14-year-old girl, sitting down the first base line was struck in the eye by a foul ball at a game at Shea Stadium.⁵⁰ She suffered serious injuries and lost the vision in one eye.⁵¹ Her seat was protected by a mere three foot high fence.⁵² The same Court of Appeals of New York that developed the two-prong baseball rule requirement in *Akins* held that she could not recover because there were screened sections available behind home plate and that fans choose to sit in unscreened sections of the field to satisfy their desire to see the game unobstructed.⁵³ A sharply written dissent by Chief Judge Cook—which perfectly sums up the absurdity of the baseball rule—highlighted the irrational logic of it, arguing “it cannot be said as a matter of law that plaintiff here was exposed to any less of a risk than that experienced by a spectator sitting 20 rows behind home plate, where protective screening is required.”⁵⁴

Similarly, in *Friedman v. Houston Sports Ass'n*, an 11-year-old girl, again sitting down the first base line, was struck near her right eye by a foul ball.⁵⁵ The jury found that the stadium operator was negligent for failing to warn of the dangers of being struck by a baseball when sitting down the first base line.⁵⁶ The jury awarded Karen Freidman and her father

⁴⁵ *Costa v. Bos. Red Sox Baseball Club*, 809 N.E.2d 1090, 1091 (Mass. App. Ct. 2004).

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Davidoff v. Metro. Baseball Club, Inc.*, 463 N.E.2d 1219, 1220 (N.Y. 1984).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1221.

⁵⁵ *Friedman v. Hous. Sports Ass'n*, 731 S.W.2d 572, 573 (Tex. App. 1987).

⁵⁶ *Id.*

\$55,000 in actual damages and \$125,000 in punitive damages.⁵⁷ However, the trial judge awarded the defendant's motion for judgment notwithstanding the verdict, invoking the baseball rule and emphasizing the fact that Freidman chose to sit in an unscreened portion of the stadium.⁵⁸

B. A Minority Rejection of the Baseball Rule

The United States Supreme Court has never addressed the baseball rule. But while the majority of state courts follow the rule, there is a minority that have rejected it. This rejection has mainly been limited to courts in Idaho, Indiana, and New Mexico.⁵⁹ For example, in *Rountree v. Boise Baseball, LLC*, the Supreme Court of Idaho, citing a district court opinion, stated that baseball stadium owners will be held to the same standard that all business owners are held to, "the duty to exercise ordinary care to prevent unreasonable, foreseeable risks of harm to others."⁶⁰ Consequently, the court refused to adopt the baseball rule, instead agreeing with the district court that it is up to the legislature to adopt that kind of rule as the legislature is much more in tune with the public policy considerations involved in the issue.⁶¹ The court then cited several state laws that had been enacted in various jurisdictions to address the issue.⁶²

In *South Shore Baseball, LLC v. DeJesus*, the Supreme Court of Indiana rejected the baseball rule, asking, "But are stadiums and franchises, by virtue of baseball's status as our national pastime, governed not by our standard principles of premises liability but rather entitled to a special limited-duty rule? We think not."⁶³ The court rejected the notion that any sport, even baseball, should be given special treatment and subject to a special rule of liability.⁶⁴ Similar to the decision in *Rountree*, the court also held that fan injuries are a public policy issue best resolved by the

⁵⁷ *Id.*

⁵⁸ *Id.* at 573-75.

⁵⁹ Ed Edmonds, *Baseball Needs to Reduce the Risk of Fan Injury*, CHL TRIBUNE (Aug. 24, 2015, 4:18 PM), <http://www.chicagotribune.com/news/opinion/commentary/ct-baseball-fans-injuries-mlb-bat-line-drive-ball-perspec-0825-jm-20150824-story.html>.

⁶⁰ *Rountree v. Boise Baseball, LLC*, 296 P.3d 373, 377 (Idaho 2013).

⁶¹ *Id.* at 379 (citing *Anstine v. Hawkins*, 447 P.2d 677, 679 (Idaho 1968)).

⁶² *Id.* (citing ARIZ. REV. STAT. ANN. § 12-554 (West 1999); COLO. REV. STAT. ANN. § 13-21-120 (West 1994); 745 ILL. COMP. STAT. ANN. 38/10 (West 1992); N.J. STAT. ANN. §§ 2A:53A-43—48 (West 2006)).

⁶³ *S. Shore Baseball, LLC v. DeJesus*, 11 N.E.3d 903, 904 (Ind. 2014).

⁶⁴ *Id.* at 909.

legislature.⁶⁵

In *Crespin v. Albuquerque Baseball Club, LLC*, the Court of Appeals of New Mexico also declined to adopt the baseball rule.⁶⁶ The court relied on New Mexico law, supporting legal commentary, and the Restatement (Third) of Torts: Apportionment of Liability.⁶⁷ The court pointed to the direction of New Mexico law moving away from “judicially declared immunity or protectionism” and toward a universal standard of ordinary care.⁶⁸ The court was also persuaded by legal commentary criticizing the baseball rule as a “throw-back to the days when assumption of the risk was a sub-category of contributory negligence” and also claiming that the rule has failed to adapt to baseball’s evolution.⁶⁹ In analyzing the Restatement (Third) of Torts: Apportionment of Liability, the court found a shift toward modern tort standards and a rejection of per se rules like the baseball rule.⁷⁰ Ultimately, recourse for fans injured at games continues to be limited by the majority baseball rule as most courts have proved to be very reluctant to go against over a century of precedent despite reasonable alternatives.

C. Legislative Responses and Responsibilities

A small number of state legislatures have already begun adopting statutes for regulating baseball fan injuries.⁷¹ Because there is no national standard, and because the Supreme Court has not spoken on the issue, every state has the power to institute regulations. The current statutes that have been enacted are much more favorable to stadium operators than the fans that are injured, and, thus, are on par with the majority baseball rule. Furthermore, the statutes are usually comprehensive and much more specific than judicial opinions. For example, an Arizona statute specifies that owners—defined as a “person, city, town, county, special district, limited liability company . . . or university that is in possession and control

⁶⁵ *Id.*

⁶⁶ *Crespin v. Albuquerque Baseball Club, LLC*, 216 P.3d 827, 834 (N.M. Ct. App. 2009).

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.* at 833-34 (citing Fried & Ammon Jr., *Baseball Spectators' Assumption of Risk: Is It 'Fair' or 'Foul'?*, 13 MARQ. SPORTS L. REV. 39, 54-59 (2002) (emphasizing the increased level of spectators' distraction and the high price of seats behind home plate rendering those protected seats unavailable to the casual fan)).

⁷⁰ *Id.* at 834.

⁷¹ See ARIZ. REV. STAT. ANN. § 12-554 (West 1999); COLO. REV. STAT. ANN. § 13-21-120 (West 1994); 745 ILL. COMP. STAT. ANN. 38/10 (West 1992); N.J. STAT. ANN. §§ 2A:53A-43-48 (West 2006).

of a baseball team or facility in which baseball games are played”—are not liable to spectators that are injured by baseballs or other equipment used by players during a game unless the owner “does not provide protective seating that is reasonably sufficient to satisfy expectation” or “intentionally injures a spectator.”⁷² Note that the language in the statute concerning the protective screening basically mirrors the baseball rule.

Interestingly, Colorado passed the Colorado Baseball Spectator Safety Act of 1993, which moderately increases the duty of care that stadium owners owe to fans.⁷³ Although the statute increases the duty of care, the general assembly, in arguing for greater attendance by fans and families, points out that expanding liability for stadium owners could potentially increase operating costs and make tickets less affordable for fans.⁷⁴ Consequently, the statute does not increase the duty of care to a point that completely breaks away from the baseball rule. However, where the statute does differ from the baseball rule is the duty it places on the stadium owner to (1) “make a reasonable and prudent effort to design, alter, and maintain the premises of the stadium in reasonably safe condition[s] relative to the nature of the game of baseball,” and (2) post and maintain required warning signs.⁷⁵ The warning signs, which are required to be placed in conspicuous locations at the entrances outside the stadium and at stadium facilities where tickets are sold, dictate:

Warning under Colorado Law, a spectator of professional baseball assumes the risk of any injury to person or property resulting from any of the inherent dangers and risk of such activity and may not recover from an owner of a baseball team or an owner of a stadium where professional baseball is played for injury resulting from the inherent dangers and risks of observing professional baseball, including, but not limited to, being struck by a baseball or a baseball bat.⁷⁶

Thus, although the Colorado statute requires stadium owners to make reasonable efforts to keep the stadium in a reasonably safe condition, it is evident that the stadium operators still enjoy great protection from liability.

⁷² ARIZ. REV. STAT. ANN. § 12-554 (A)(1), (2) (West 1999).

⁷³ COLO. REV. STAT. ANN. § 13-21-120 (West 1994); Ludden, *supra* note 3, at 134.

⁷⁴ COLO. REV. STAT. ANN. § 13-21-120(2) (West 1994).

⁷⁵ COLO. REV. STAT. ANN. § 13-21-120(5)(a)(c) (West 1994).

⁷⁶ COLO. REV. STAT. ANN. § 13-21-120(6)(a)(b) (West 1994).

The New Jersey Baseball Spectator Safety Act of 2006 is almost identical to the Colorado Baseball Spectator Safety Act of 1993. Both acts require warning signs to be posted—with very similar language—and both provide that the assumption of the risk shall be a complete bar to any lawsuit and shall serve as a complete defense for an owner sued by an injured spectator.⁷⁷ However, one difference is that the New Jersey statute explicitly states that the limited duty of providing protection to spectators is satisfied by screening the area behind home plate.⁷⁸

Perhaps the most intriguing statute is the Illinois Baseball Facility Liability Act. The statute was enacted in reaction to a case, *Yates v. Chicago National League Ball Club*, in which an appellate court upheld a trial court's decision finding a baseball team liable for a fan's injury.⁷⁹ The fan in the case, a young boy, was struck in the face by a foul ball causing bleeding and a knot to form under his eye.⁸⁰ The young boy underwent surgery and had to stay in the hospital for five days.⁸¹ The aftermath left him with “excruciating headaches” and severely affected his ability to continue playing baseball.⁸² He prevailed in his lawsuit on the theory that the defendant was (1) negligent in providing adequate screening in the area behind home plate, and (2) negligent in failing to warn as to allow him to avoid harm.⁸³ The Illinois statute was enacted quickly after the case was decided.⁸⁴

The language of the Illinois statute is markedly different from other state legislation relating to baseball stadium liability. Unlike the Arizona, Colorado, and New Jersey statutes, the Illinois statute limits the liability of stadium owners unless, (1) the screen or netting is defective—in a manner other than width or height—because of the negligence of the stadium owner or baseball facility or (2) the injury is caused by willful and wanton conduct—defined as “actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property.”⁸⁵ And unlike Colorado or New Jersey, Illinois baseball stadiums are not required to post warning signs

⁷⁷ COLO. REV. STAT. ANN. §§ 13-21-120(4)(b), (6)(a)(b) (West 1994); N.J. STAT. ANN. §§ 2A:53A-46(b)(1), -48(6)(a) (West 2006).

⁷⁸ N.J. STAT. ANN. § 2A:53A-47(5)(b) (West 2006).

⁷⁹ Ted J. Tierney, *Heads Up! The Baseball Facility Liability Act*, 18 N. ILL. U. L. REV. 601, 608 (1998) (citing *Yates v. Chi. Nat'l League Ball Club*, 595 N.E.2d 570, 573 (Ill. App. Ct. 1992)).

⁸⁰ *Yates*, 595 N.E.2d at 573.

⁸¹ *Id.*

⁸² *Id.*

⁸³ *Id.*

⁸⁴ Tierney, *supra* note 79, at 601.

⁸⁵ 745 ILL. COMP. STAT. ANN. 38/5, 38/10 (West 1992).

alerting fans to their assumption of the risk at the stadium.⁸⁶ Essentially, these various statutes, while worded differently in some aspects, all have a common thread; they severely limit recovery for fans that are injured at stadiums unless the fan can prove the stadium operator failed to reasonably maintain the premises, was grossly negligent, or failed to provide adequately protected seating.

IV. MAJOR LEAGUE BASEBALL'S RESPONSE TO THE ISSUE

A. Major League Baseball's Debate on Fan Safety

Although fans have been resistant to increased netting protection, Major League Baseball responded to the wave of fan injuries in the 2015 season and recognized the need for a new policy.⁸⁷ Nevertheless, this initiative was not without a historical reluctance. John McHale, Major League Baseball's executive vice-president who oversees stadium security stated, "there is no epidemic of foul ball damage that would warrant some sort of edict of action by the Commissioner's office."⁸⁸ Commissioner Manfred also stated,

We are engaged in really detailed examination of the 30 different ballparks and how they are laid out . . . [and] what we would have to do from a netting perspective in order for it to be effective. We're looking at the different materials that are available for netting. I know this sounds crazy, but there have been real advances in netting and how you see through it. The biggest challenge for us is that our ballparks are really different.⁸⁹

Prior to a 2015 Major League Baseball owner's meeting in Dallas, Commissioner Manfred said that a simple rule to remedy fan injuries is difficult to achieve, given the variations in stadium designs.⁹⁰ He argued

⁸⁶ *Id.* (absence language in the statute requiring stadium owners to post warning signs).

⁸⁷ See Edmonds, *supra* note 59 (in addition to Tonya Carpenter's injury, there were at least five other incidents).

⁸⁸ Complaint, *supra* note 1.

⁸⁹ Jayson Stark, *Commissioner Rob Manfred Talks About Difficulty of Improving Slide Rule*, ESPN (Oct. 13, 2015), http://espn.go.com/mlb/playoffs2015/story/_id/13881339/2015-mlb-playoffs-commissioner-rob-manfred-talks-difficulty-improving-slide-rule.

⁹⁰ Peter Abraham, *MLB to Consider Adding More Protective Netting at Ballparks*, BOS. GLOBE (Nov. 10, 2015), <http://www.bostonglobe.com/sports/2015/11/10/mlbnets/CMDbyNEaGE4JyJILIV3etM/story.html>.

that a uniform net to the edges of the dugout is not possible because of the differences in the ballparks across the league.⁹¹

One of the difficulties, apart from the difference in ballpark structure, is the notion that increased netting will alter the fan experience. Commissioner Manfred has stated, “There's a big issue on one side, which is fan safety. It's paramount for us . . . on the other side of it is, you're changing the ballpark experience . . . you want to find a way to balance the two that's appropriate.”⁹² The main argument to refute that reasoning is the fact that many of the highest priced tickets are behind home plate, an area that is totally protected by netting. Arizona Diamondbacks reliever Brad Zeigler, a member of the negotiating committee for the player's union, echoes this refutation:

[The owners] seem afraid that fans will lose access to the players—autographs, getting baseballs, etc. . . . —and that will cause those ticket holders to be unhappy. Or, that they'd have to watch the game through a net. [But] fans behind home plate pay the highest prices, have the same issues, and yet those seats are always full.⁹³

Several other Major League Baseball players have discussed the increased netting issue.⁹⁴ After a fan was struck by a foul ball at a Detroit Tigers game All-Star pitcher Justin Verlander lobbied that increased netting “needs to be addressed immediately” and appealed to the league to do something “before it's too late.”⁹⁵ Verlander's teammate, Nick Castellanos, echoed this concern, stating, “nets need to go up all around baseball, without a doubt . . . if today doesn't get nets up, what is it going to take?”⁹⁶ Carlos Villeneuve, a players union representative, stated that there should be more protection because of the age gap between fans that attend games and the inability for

⁹¹ *Id.*

⁹² Nightengale, *supra* note 15.

⁹³ Ken Rosenthal, *MLB Players: Broken-Bat Injury Could Have Been Prevented*, FOX SPORTS (June 7, 2015, 8:23 AM), <http://www.foxsports.com/mlb/story/boston-red-sox-fenway-park-mlb-broken-bat-injured-fan-safety-netting-060715>.

⁹⁴ See ESPN News Services, *Justin Verlander Cautions MLB: Extend Netting 'Before it's Too Late'*, ABC NEWS (Aug. 22, 2015, 12:23 AM), <http://abcnews.go.com/Sports/justin-verlander-cautions-mlb-extend-netting-late/story?id=33243239>. (Justin Verlander, Nick Castellanos arguing for increased netting) [hereinafter *Justin Verlander Cautions MLB*]; Rosenthal, *supra* note 93 (Brad Zeigler, CJ Wilson, and Chris Capuano discussing the netting issue); Complaint, *supra* note 1, at 26 (Derek Holland discussing the netting issue).

⁹⁵ ESPN News Services, *supra* note 94.

⁹⁶ *Id.*

even normal aged fans to react to a 100mph ball being hit into the stands.⁹⁷ A class action lawsuit against Major League Baseball and Commissioner Manfred alleges that many injuries could have been prevented if Major League Baseball had listened to the players proposals for increased netting down the first and third base line during labor agreements in 2007 and 2012.⁹⁸

An incident that took place at the Texas Ranger's ballpark shows the fact that Major League Baseball teams themselves have the ability to increase regulations. On July 7, 2012, 39-year-old Shannon Stone fell over a guardrail in left-center field at a Texas Rangers game after reaching for a ball thrown into the stands by Ranger's player Josh Hamilton.⁹⁹ The height of the guardrail was below Stone's waist and he fell twenty feet to a concrete floor below.¹⁰⁰ He died as a result of his injuries.¹⁰¹ The Texas Rangers subsequently inspected the ballpark's railings and decided to raise the railing height in the front row to forty-two inches.¹⁰² This safety improvement cost the team just over one million dollars.¹⁰³ The Ranger's swift response closely parallels the reaction by the NHL after Brittanie Cecil's death.¹⁰⁴ Although it is understandable for Major League Baseball and its teams to place fan enjoyment at a premium, fan enjoyment should certainly not outweigh fan safety.

B. Major League Baseball Responds

Finally, after much debate on the issue, and roughly seven months after Tonya Carpenter's injury, Major League Baseball introduced new recommendations for fan protection which began in the 2016 season. The

⁹⁷ Paul Sullivan, *Baseball Debates Adding Netting for Fan Safety or Sticking to Status Quo*, CHL TRIBUNE (Aug. 2, 2015, 9:20 AM), <http://www.chicagotribune.com/sports/baseball/ct-fan-safety-cubs-white-sox-spt-0802-20150801-story.html>.

⁹⁸ Complaint, *supra* note 1, at 27; *see also* Rosenthal, *supra* note 93 (“the owners, however, rejected the proposals for the 2007 and 2012 labor agreements, citing concerns that additional netting would detract from the experience....”); Sullivan, *supra* note 97 (quoting Carlos Villeneuve, “in the last two rounds of collective bargaining we’ve made proposals to increase netting ... we’ve gotten some resistance.”).

⁹⁹ Ludden, *supra* note 3, at 126; Richard Durrett, *Rangers Start to Raise Railings*, ESPN (Jan. 5, 2012), http://www.espn.com/dallas/mlb/story/_/id/7428500/texas-rangers-start-raise-railings-fan-shannon-stone-death.

¹⁰⁰ Ludden, *supra* note 3, at 126.

¹⁰¹ *Id.*

¹⁰² Durrett, *supra* note 99.

¹⁰³ *Id.*

¹⁰⁴ *See* Hine, *supra* note 16.

recommendations proposed that all Major League Baseball teams should lengthen the protective netting at their stadiums.¹⁰⁵ Teams should either expand netting that is already in place or add some kind of extended protective barrier (plexiglass for example).¹⁰⁶ The recommended increase expanded the netting at least 70 feet from home plate to the near side of the dugout.¹⁰⁷ That is, the side of the dugout closest to home plate. The recommendations did not suggest that teams should expand the netting to cover the entire dugout. The Commissioner stated that the new policy is an attempt to strike a balance between fan interaction and fan protection.¹⁰⁸ Major League Baseball also said that it encourages teams to continue to educate fans about the dangers of foul balls and broken bats and remaining alert at all times in injury prone areas.¹⁰⁹

However, unlike the NHL's reaction to Brittanie Cecil's death, the new Major League Baseball recommendations were not mandatory and each team had the option to ignore the guidelines.¹¹⁰ It should be noted that NHL arenas follow a much more uniform design, as opposed to the unique layouts seen in Major League Baseball stadiums, making the increased protection more difficult to institute. Nevertheless, the owners reaction to Major League Baseball's proposed guidelines was enthusiastic and several teams immediately stated they would adopt the new recommendations.¹¹¹ The Philadelphia Phillies, Los Angeles Dodgers, Chicago Cubs, Texas Rangers, and Tampa Bay Rays all announced their intention to comply with the new policy.¹¹² The Phillies planned to comply both at their home stadium and spring training stadiums.¹¹³ The expansion at the Phillies stadium only required them to expand the netting approximately ten feet on each side.¹¹⁴ Perhaps most important for the future of protective netting, the Phillies planned to replace all screening with a newer material that is

¹⁰⁵ Paul Hagen, *MLB Recommends Netting Between Dugouts*, MLB.COM (Dec. 9, 2015), <http://m.mlb.com/news/article/159233076/mlb-issues-recommendations-on-netting>.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Joe Nocera, *Baseball Has a New Policy on Netting, But There's a Catch*, N.Y. TIMES (Dec. 18, 2015), http://www.nytimes.com/2015/12/19/sports/baseball/baseball-has-a-new-policy-on-netting-but-theres-a-catch.html?_r=0.

¹¹¹ Hagen, *supra* note 105.

¹¹² *Id.*; see also Associated Press, *Rangers Add More Protective Netting at Ballpark*, ESPN (Feb. 18, 2016), http://espn.go.com/mlb/story/_/id/14801353/texas-rangers-extend-safety-netting-dugouts.

¹¹³ Hagen, *supra* note 105.

¹¹⁴ *Id.*

stronger and more transparent.¹¹⁵ In the future, advanced netting technology should be the cornerstone of Major League Baseball's protection policies.

Some teams, such as the Cincinnati Reds, Houston Astros, and Minnesota Twins already met the standards recommended and thus did not have to make any changes.¹¹⁶ However, the Minnesota Twins, whose lower-level seats are closer to home plate than any other stadium, planned to go above and beyond the recommendations.¹¹⁷ The Twins opted to install protective screening that ran the length of both dugouts and extend roughly seven feet high.¹¹⁸ The President of the Twins, Dave St. Peter, recognized the necessity in expanded nets by reminding that "based on the proximity of those seats, the reaction time above our dugouts, particularly in those first few rows, is quite limited."¹¹⁹ Like the Phillies, the Twins also plan to take advantage of the newest screening technology available.¹²⁰ Ultimately, after the 2016 recommendations, sixteen teams added netting to the inner edge of the dugout.¹²¹ Three teams—the Kansas City Royals, Minnesota Twins, and Washington Nationals—went beyond the recommendations by Major League Baseball and extended the netting to the outer edge of the dugout.¹²² Eleven teams already met the requirements that were advised in the recommendations.¹²³ In February 2018, Major League Baseball announced that all thirty teams would extend the protective netting at their stadiums "to at least the far end of each dugout."¹²⁴ This response came on the heels of several other incidents that occurred after the recommendations were made by Major League Baseball.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ Associated Press, *Minnesota Twins to Add Protective Netting Above Dugouts*, USA TODAY SPORTS (Dec. 16, 2015, 5:46 PM), <http://www.usatoday.com/story/sports/mlb/2015/12/16/minnesota-twins-adding-protective-netting-above-dugouts/77429898/>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ Claire McNear, *The New Era of Baseball's Protective Nets*, SB NATION (last visited Jan. 15, 2018), <http://www.sbnation.com/a/mlb-preview-2016/nets>.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ Tom Schad, *All 30 Teams Will Extend Protective Netting This Season*, USA TODAY SPORTS (Feb. 1, 2018, 12:23 PM), <https://www.usatoday.com/story/sports/mlb/injuries/2018/02/01/mlb-teams-extend-protective-netting-season/1086019001/>.

V. POST-RECOMMENDATION INCIDENTS

While the heightened awareness surrounding injuries at Major League Baseball games has been a step in the right direction—and while all teams will now institute the recommendations—none of this has stopped incidents from occurring both at stadiums that have adopted the recommendations and stadiums that did not initially adopt the recommendations. For example, on July 3, 2016, Patricia Dowdell was struck by the bat of Orioles hitter Chris Davis when he lost his grip on it.¹²⁵ The bat flew into the fourth row where it struck Dowdell in the head, inducing injuries including “skull and orbital fractures and brain swelling.”¹²⁶ Dowdell ultimately filed a lawsuit against the Orioles seeking more than \$75,000 in damages in addition to an injunction against the team to require the installation of netting to the outfield side of each dugout.¹²⁷ Dowdell also claimed that she was unaware that bats could even fly into the stands and injure spectators, stating “[h]onest to God, I had no idea a bat could fly into the stands.”¹²⁸ Her lawsuit is still pending.

Also in late-July 2016, Martha Muir West was struck by a ball hit down the right-field baseline at a Cleveland Indians game.¹²⁹ It is possible that she was momentarily blinded by the sun, but the impact broke her cheekbone and she required stitches to a cut on her cheek.¹³⁰ She eventually had to be stretchered out of the stadium.¹³¹ Muir West had to have surgery on her eye, but she was expected to be okay.¹³² It is interesting to note that in November 2013—before the recommendations from Major League Baseball—there was a lawsuit filed against the Cleveland Indians by Keith Rawlins.¹³³ Rawlins was struck by a baseball which broke several bones in his face and left him blind in his left eye.¹³⁴

¹²⁵ Jeff Barker, *Injured by Errant Bat at Orioles Game, Woman Sues for More Protection*, BALT. SUN (Apr. 21, 2017), <http://www.baltimoresun.com/business/bs-bz-orioles-fan-lawsuit-20170419-story.html>.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ Darcie Loreno, *Woman Hit by Foul Ball at Tribe Game to Undergo Surgery*, FOX 8 CLEV. (July 27, 2016), <http://fox8.com/2016/07/27/woman-hit-by-foul-ball-at-tribe-game-to-undergo-surgery/>.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Id.*

¹³³ See generally Cory Shaffer, *Jury Sides with Cleveland Indians in Suit Brought by Fan Blinded by Foul Ball*, CLEV.: METRO NEWS (Mar. 26, 2017), http://www.cleveland.com/metro/index.ssf/2017/03/jury_sides_with_cleveland_indi_1.html.

¹³⁴ *Id.*

Regarding the injury, Rawlins recounted, “[m]y face exploded . . . I knew what happened instantly.”¹³⁵ Rawlins stated that he may still need future surgeries and may be required to use a prosthetic eye.¹³⁶ These injuries left him unable to perform his job as a tool and die machinist.¹³⁷ In March 2017, a jury returned a verdict siding with the Indians and awarding Rawlins no money.¹³⁸ Before the verdict was read, the foreman of the jury actually expressed how terribly the jury felt about the injury.¹³⁹ But ultimately it was not enough to overcome the baseball rule.

Another incident occurred on April 15, 2016 when a fan was struck in the eye by a foul ball and had to be taken out of the stadium on a stretcher.¹⁴⁰ The noteworthy aspect to this injury was the fact that the Tampa Bay Rays had increased the netting as per the league recommendations, however, the fan was struck when the ball came through a gap in the protective netting in an area for photographers.¹⁴¹ The Rays remedied this gap the next day.¹⁴² Although the odds of her being hit where she was sitting were low, due to the netting and only an exposed gap, this incident serves to show how diligent Major League Baseball teams needs to be when it comes to addressing the screening issue. Even simple gaps in the netting protection can lead to significant injuries.

At a Philadelphia Phillies game on August 20, 2016—after the recommended protection was put in place—Phillies shortstop Freddy Galvis hit a line drive into the stands that struck a nine-year-old girl in the face as she sat behind the visitors’ dugout.¹⁴³ She suffered swollen lips and broken teeth and had to be transferred to the Children’s Hospital of

¹³⁵ Jen Steer, *Jury Decides Cleveland Indians Not at Fault for Fan Hit by Ball*, FOX 8 CLEV. (Mar. 27, 2017), <http://fox8.com/2017/03/27/jury-decides-cleveland-indians-not-at-fault-for-fan-hit-by-ball/>.

¹³⁶ Shaffer, *supra* note 133.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ Associated Press, *Fan Struck in Head by Foul Ball at Rays Game in Stable Condition*, L.A. TIMES (Apr. 16, 2016, 3:45 PM), <http://www.latimes.com/sports/la-sp-baseball-notes-20160417-story.html>.

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ See generally Todd Zolecki, *Galvis Wants More Protective Netting for Fans*, MLB.COM (Aug. 21, 2016), <http://m.mlb.com/news/article/196870620/freddy-galvis-still-shaken-after-ball-hit-fan/>.

Philadelphia.¹⁴⁴ Galvis was visibly shaken and upset after the game and called for further protection for fans beyond what the Phillies instituted in the 2016 season.¹⁴⁵ Galvis, a described “passionate advocate for installing more protective netting down the left- and right-field lines,” explained his position after the game:

If I hit her in one eye and she loses that, what are they going to do? It's going to be a big deal for two, three days. Everybody in TV, media, whatever. But after three days, what's going to happen? They're going to forget. But that family won't forget that.¹⁴⁶

At the very next Phillies game a woman, Erin Neyer, was struck in the mouth by a foul ball while she was trying to protect her six-year-old daughter from being hit by the ball.¹⁴⁷ Neyer's bottom teeth were chipped and she now has a crack through the top of her front tooth.¹⁴⁸ Additionally, and again the day after Galvis expressed his discontent with the system, another fan was injured by a line drive at a Milwaukee Brewers game.¹⁴⁹ Colorado player Nick Hundley hit a line drive that struck a women in her left ear resulting in a delay in the game while medical personnel attended to her for around eight minutes.¹⁵⁰ She was eventually taken out on a stretcher and transported to a nearby hospital.¹⁵¹

At a San Diego Padres game on May 4, 2017, a fan was injured when Padres hitter Hector Sanchez's bat flew out of his hands and struck a fan in the head.¹⁵² It left a roughly two- to three-inch laceration with an indentation and the game had to be stopped for thirteen minutes while she was attended

¹⁴⁴ NBC10 Staff & Wire Reports, *Foul Balls Strike Young Girl, Woman in Back to Back Phillies Games*, NBC PHILA. (Aug. 24, 2016), <http://www.nbcphiladelphia.com/news/local/Phillies-Cardinals-Foul-Ball-Baseball-Girl-MLB--390865401.html>.

¹⁴⁵ See generally Zolecki, *supra* note 143.

¹⁴⁶ *Id.*

¹⁴⁷ NBC10 Staff & Wire Reports, *supra* note 144.

¹⁴⁸ *Id.*

¹⁴⁹ See Tribune News Services, *Fan Injured by Line Drive at Miller Park*, CHI. TRIBUNE (Aug. 23, 2016), <http://www.chicagotribune.com/sports/baseball/ct-mlb-brewers-fan-injured-spt-20160823-story.html>.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Kirk Kenney, *Fan Injured by Bat at Petco Park During Rockies-Padres Game*, SAN DIEGO UNION-TRIBUNE (May 4, 2017, 5:30 PM), <http://www.sandiegouniontribune.com/sports/padres/sd-sp-padfan-injured-by-bat-0405-story.html>.

to.¹⁵³ The Padres had extended their netting as recommended by Major League Baseball and released this statement in response to the injury: “Last season, we extended our backstop netting in accordance with Major League Baseball’s recommendations. Any injury at the ballpark warrants evaluation and discussion of current practices.”¹⁵⁴ Again, the instituted recommendations did not offer sufficient protection.

On August 29, 2017, another devastating injury occurred when John Loos was struck in the head by a foul ball at a Chicago Cubs game.¹⁵⁵ The ball broke his nose and six bones around his left eye.¹⁵⁶ He has since undergone three surgeries and two additional surgeries are expected.¹⁵⁷ He also stated that he may have to replace his left eye with a prosthetic and that his vision problems in his right eye include issues adjusting to light and shadows.¹⁵⁸ Loos has filed a lawsuit against the Chicago Cubs and Major League Baseball, seeking at least \$50,000 in damages.¹⁵⁹ The basis of the lawsuit is the Cubs’ negligence in not having enough netting to protect him from being injured.¹⁶⁰ The Cubs were also a team that extended the netting after Major League Baseball’s recommendations.¹⁶¹ Loos’s lawsuit is still pending.

Perhaps the most high-profile incident of the 2017 season occurred at a New York Yankees game on September 20, 2017.¹⁶² During that game, a two-year-old girl was struck in the face by a foul ball.¹⁶³ The father recalled the horror of the situation, describing how he:

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ Elvia Malagon, *Schaumburg Man Hit, Blinded by Foul Ball at Wrigley Field Suing Cubs*, *MLB*, CHI. TRIBUNE (Oct. 9, 2017), <http://www.chicagotribune.com/news/local/breaking/ct-met-cubs-lawsuit-foul-ball-netting-20171009-story.html>.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² Billy Witz, *Father of Girl Hit by Ball Recounts Ordeal, and the Yankees Promise Fixes*, *N.Y. TIMES* (Oct. 1, 2017), <https://www.nytimes.com/2017/10/01/sports/baseball/yankee-stadium-netting-foul-ball.html>.

¹⁶³ *Toddler Hit by Foul Ball at Yankee Stadium ‘Okay,’ Players Call for More Protection*, *FOX NEWS* (Sept. 21, 2017), <http://www.foxnews.com/sports/2017/09/21/toddler-hit-by-foul-ball-at-yankee-stadium-okay-players-call-for-more-protection.html>.

Walk[ed] into a hospital room to find his daughter . . . connected to tubes and machines. Her eyes were swollen shut, she had multiple facial fractures—including those of her orbital bone and nose—and doctors were monitoring the bleeding on her brain, fearing that it might lead to seizures . . . [a]nd on her forehead . . . was an imprint left by the stitches of the baseball that hit her.¹⁶⁴

The speed of the ball off the bat of New York Yankees hitter Todd Frazier was measured at 105 mph.¹⁶⁵ Some players even had to fight back tears upon witnessing the injury to the girl.¹⁶⁶ Earlier in the season the Yankees posted on the team website that they were seriously exploring extending the netting prior to the 2018 season.¹⁶⁷ Ultimately, after the two-year-old girl's injury, the Yankees finally decided to “significantly expand” the netting at Yankees stadium.¹⁶⁸ The New York Mets, after the 2017 All-Star break, decided to extend their netting as well.¹⁶⁹ Shortly before this injury, New York City Councilman Rafael Espinal Jr. introduced a bill that would require stadiums that have a capacity of at least 5,000 people to increase its netting from foul pole to foul pole.¹⁷⁰ On the topic of fan injuries, Espinal Jr., stated “[n]ot only are these injuries preventable, but the MLB, Yankees and Mets have been slow to implement a simple solution that would prevent families’ fun-filled ballpark outings from turning into nightmares.”¹⁷¹ That bill is still under consideration.¹⁷²

Although it is encouraging to see Major League Baseball take a proactive approach to the situation and receive a positive response from the owners, it is clear that the recommendations are not, and have not, sufficiently prevented these injuries from occurring. Thus, it is likely necessary to go beyond these recommendations and to seek other remedies.

¹⁶⁴ Witz, *supra* note 162.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Toddler Hit by Foul Ball at Yankees Stadium*, *supra* note 163.

¹⁷⁰ Michael McCann, *Yankees Incident Revives an Old Question: How Responsible Are Teams for Foul Balls Injuries?*, SPORTS ILLUSTRATED (Sept. 21, 2017), <https://www.si.com/mlb/2017/09/21/new-york-yankees-netting-ballpark-injury>.

¹⁷¹ Rafael Espinal Jr., *NYC Councilman Rafael Espinal Jr.: Why I Have a Bill to Extend Nets at Citi Field, Yankees Stadium*, N.Y. DAILY NEWS: SPORTS (May 10, 2017 2:06 AM), <http://www.nydailynews.com/sports/baseball/mets/espinal-jr-bill-extend-nets-nyc-ballparks-article-1.3151940>.

¹⁷² N.Y. City Council Committee on Consumer Affairs, Int. No. 1593 (2017), <http://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3042792&GUID=B307C877-0F6A-49B2-ADAF-FE2FCCAFB0CB&FullText=1>.

VI. POTENTIAL REMEDIES TO SUPPORT SPECTATOR SAFETY AND ALLOW FOR RECOVERY

Because there are at least three different bodies able to increase regulation of fan injuries at Major League Baseball games, there is a wealth of existing solutions to remedy the situation. Thus far, the judiciary has handled most of the problems involving fan injuries, with state legislatures supplementing, and at times, creating judicial solutions. Major League Baseball—after opting to limit liability by posting warnings signs, making announcements at the stadiums, and printing exculpatory warnings on the back of tickets—introduced new recommendations for increased screening. The new recommendations resulted from a rash of fan injuries in recent seasons that have heightened the awareness and necessity for Major League Baseball to take initiative and increase protection.

Although there has been some change in the judiciary's stance on the baseball rule, the rule still governs as the majority standard. The same is true for the few state legislatures that have enacted statutes relating to fan injuries at baseball stadiums. There have been several articles that call for a different standard to be implemented by the courts or legislatures.¹⁷³ Some different standards called for include: a distraction-type exception to the assumption of the risk doctrine and a comparative negligence and reasonable care standard.¹⁷⁴ Ultimately, judiciary and legislatures should match or go beyond Major League Baseball's semi-progressive approach and endeavor to ensure sufficient fan safety regulations and adequate potential for injured fans to recover damages. There are many reasonable alternatives to the system that currently governs. The judiciary can (1) keep the baseball rule but extend the netting requirement to include the area down the first and third baseline; (2) abolish the baseball rule and adopt a comparative negligence standard with a distraction-type exception; or (3) abolish the baseball rule and allow fans to recover directly from the teams through a baseball arbitration type system applied to fan injuries.

¹⁷³ See Kenneth R. Swift, *I Couldn't Watch the Ball Because I Was Watching the Ferris Wheel in Centerfield*, 24 ENT. & SPORTS LAW 1, 33 (2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1961780; David Horton, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. REV. 339 (2003); James G. Gaspard, *Spectator Liability in Baseball: Nobody Told Me I Assumed the Risk*, 15 REV. LITIG. 229 (1995) (arguing that the Texas judiciary should adopt Section 343A of the Restatement (Second) of Torts in relation to fan injuries); Mary C. St. John, *Strike One, and You're Out: Should Ballparks be Strictly Liable to Baseball Fans Injured by Foul Balls?*, 19 LOY. L. A. L. REV. 589 (1986) (arguing that major league commercial baseball stadium should be strictly liable for fan injuries, forcing the stadium to update protection of its facilities); Khare, *supra* note 39; Ludden *supra* note 3.

¹⁷⁴ See Swift, *supra* note 173; Khare, *supra* note 39; Ludden, *supra* note 3.

A. *Expanding the Scope of the Baseball Rule*

Despite its prevalence, at its most basic premise the baseball rule is fundamentally unsound. The judiciary believes that the area behind home plate is to be considered the most dangerous section of the field, when in reality the area is one of three different sections of the field that should be regarded as most dangerous.¹⁷⁵ Because the area behind home plate is screened off, the most dangerous sections of the field have now become the areas down the first and third base lines, especially above the team dugouts.¹⁷⁶ Fans simply do not have the reaction time necessary to shield themselves from a ball pulled by a Major League hitter down either base line,¹⁷⁷ especially when factoring in other fans moving out of the way at the last second.

After a fan was struck in the head by a foul ball hit by Detroit Tigers player Anthony Gose last season, Gose commented after the game how he felt the woman might have died if the ball had hit her flush in the face.¹⁷⁸ He further reiterated the issue with fan reaction time, “Pitchers can’t react fast enough on the mound. How’s a fan going to react? . . . They can’t. They physically can’t.”¹⁷⁹ The force with which Major League players strike a ball has reached such a level that pitchers are experimenting with protective head gear in response to a series of incidents in recent seasons.¹⁸⁰ In 2012 pitcher Brandon McCarthy was struck in the head by a line drive with such force that he sustained a life-threatening injury.¹⁸¹ He had to undergo surgery to alleviate the pressure in his head after it was revealed he suffered a skull fracture, brain contusion, and epidural hemorrhage.¹⁸² In 2016 pitcher Matt Shoemaker was hit in the head by a line drive off the bat of Seattle Mariners third

¹⁷⁵ See *supra* notes 45-58.

¹⁷⁶ *Id.*

¹⁷⁷ See *supra* notes 47-49.

¹⁷⁸ Edmonds, *supra* note 59.

¹⁷⁹ *Id.*

¹⁸⁰ See Edmonds, *supra* note 59 (Yankees pitcher Bryan Mitchell was struck in the face causing a concussion and small nasal fracture); see also William Weinbaum, *Pitchers to Debut New Protective Headware in Spring Training*, ESPN (Feb. 12, 2016), http://espn.go.com/mlb/story/_/id/14765775/mlb-players-association-work-together-develop-more-protective-pitching-hat (in 2014 pitcher Dan Jennings was struck by a 101mph line drive, five other pitchers were struck in the head in the 2015 season).

¹⁸¹ Jane Lee, *McCarthy Resting, ‘Alert’ After Surgery on Head*, MLB.COM (Sep. 6, 2012), <http://m.mlb.com/news/article/37940042/>.

¹⁸² *Id.*

baseman Kyle Seager.¹⁸³ The impact caused a small skull fracture and a hematoma and Shoemaker had to have surgery to stop additional brain bleeding.¹⁸⁴ It was calculated that Seager's line drive had an exit velocity of 105 mph.¹⁸⁵ As previously noted,¹⁸⁶ sufficient reaction time at those speeds is incredibly difficult, if not nearly impossible. And if professional baseball players cannot protect themselves from the obvious perils of line drives, how can the common fan be expected to? When factoring in the increased strength and power of Major League players it is simply not feasible.

Essentially, the baseball rule shields stadium operators from liability if a patron chooses to sit anywhere except behind home plate and flatly ignores the dangers of sitting down the first and third base lines at baseball games. Major League Baseball's new policy recommendation will protect some fans down the first and third baselines, but in most stadiums the absence of screening will fail to protect them above the dugouts and beyond. Furthermore, the baseball rule extends to all baseball stadiums, not just Major League Baseball facilities. In fact, the injury that occurred in the case that solidified the baseball rule, *Akins v. Glens Falls City School District*, happened at a high school baseball game.¹⁸⁷ As it stands, there is no financial motivation for facility owners to increase protection, but if the judiciary extends the baseball rule to include the areas down the first and third baseline it would force facility owners to upgrade the protective netting. Because the stadium owners would either have to upgrade or face liability, it would also supply incentive to develop stronger and more transparent screening in an effort to provide fans with a better view of the game. This solution should be attractive to the judiciary and state legislatures because it would not require them to completely abolish the baseball rule, only re-work it to provide a motive for increased protection for fans.

*B. Adopting a Comparative Negligence Standard with a
Distraction-Type Exception*

A comparative negligence and reasonable duty of care standard would have multiple benefits. The standard would (1) dispel a confusing and archaic

¹⁸³ ESPN News Services, *Angels' Shoemaker Has Surgery to Stop Bleeding in His Skull*, ESPN (Sept. 5, 2016), http://www.espn.com/mlb/story/_/id/17470954/angels-matt-shoemaker-surgery-head-taking-liner.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *See supra* notes 45-49.

¹⁸⁷ *Akins*, 424 N.E.2d at 532.

baseball rule, and (2) force stadium owners to upgrade their facilities to decrease the chance of litigation by protecting the fans from harm.¹⁸⁸ And because it is a comparative negligence standard, a fan's behavior could be taken into account, limiting the liability for the stadium owner.¹⁸⁹ The Restatement (Third) of Torts: Apportionment of Liability, outlines this principle while shifting away from a doctrine such as the baseball rule, "[P]laintiff's negligence is defined by the applicable standard for a defendant's negligence. *Special ameliorative doctrines* for defining plaintiff's negligence are abolished."¹⁹⁰ The Restatement provides an example of a fan attending a baseball game to illustrate a comparative negligence standard.¹⁹¹ If a fan sits in an unscreened section and is aware that balls are hit into the stands, this is not assumption of the risk and does not bar recovery.¹⁹² The fan's conduct and knowledge of the risk while seated in that area is relevant when determining the percentage of responsibility a fact finder attributes to that fan.¹⁹³ But sitting in the stands itself is not unreasonable conduct.¹⁹⁴ This comparative negligence standard would allow fans to recover for injuries notwithstanding their own negligence and taking into account reasonableness of their actions.¹⁹⁵

However, in the technological era that currently influences society, and consequently baseball games, fans should be able to have their apportionment of responsibility reduced if they can prove they were deliberately distracted at the game. When discussing the technological advancements that have been developed at baseball stadiums, interesting issues arise that have not been addressed by the judiciary or legislature thus far. For example, Major League Baseball's adoption of a cell-phone application (app) called "MLB.com Ballpark." The app allows fans to use their cell-phones to utilize a wealth of different features at baseball stadiums. In particular, and subject to certain baseball stadiums, fans can check-in to the stadium using iBeacon, upload and share personal photos from each ballpark visit, access a social media clubhouse, upgrade seats,

¹⁸⁸ Ludden, *supra* note 3, at 135.

¹⁸⁹ *Id.*

¹⁹⁰ *Crespin v. Albuquerque Baseball Club, LLC*, 216 P.3d 827, 834 (N.M. Ct. App. 2009) (citing Restatement (Third) of Torts: Apportionment of Liability § 3 (Am. Law Inst. 2000)).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

and order food and beverages and merchandise.¹⁹⁶ Major League Baseball incorporates its own technology driven subsidiary, named, MLB Advanced Media (“MLBAM”).¹⁹⁷ Joe Inerillo, Vice President and CTO for MLBAM points to the younger generation of fans, and the advent of social media, for the reasons Major League Baseball is deciding to strive for a more technologically advanced baseball experience.¹⁹⁸ Inerillo believes that it is necessary for Major League Baseball to refrain from separating the younger generation from Twitter and Facebook or email and instant messaging, so MLBAM is attempting to support a sense of connectivity younger fans can feel at baseball games.¹⁹⁹ This leads to interesting legal issues in relation to deliberate distraction of fans.

As the theatrical aspects of attending a Major League Baseball game increase so too does the potential for fan distraction during play. This may occur because of deliberate stadium decisions or because of the fan’s own negligence but the consequent increased risk when considering foul balls and the possibility of injury is undeniable. Thus, a fan distraction theory in relation to injuries and remedies naturally arises. A fan distraction theory is not without precedent in the judiciary, at least with respect to denying a summary judgment motion that stadium owners are usually granted on an assumption of the risk theory.²⁰⁰ In *Lowe v. California League of Professional Baseball*, a fan was seriously injured after he was struck in the face by a foul ball while attending a Class A professional baseball game.²⁰¹ The man was distracted when the team mascot repeatedly bumped him with his tail, forcing him to turn towards the mascot, where he was subsequently struck in the face when he turned his attention back to the game.²⁰² The California Court of Appeals reversed a trial court’s decision granting summary judgment, citing a case, *Knight v. Jewett*, and holding that the defendant baseball stadium had a duty “not to increase the inherent risks to which spectators at professional baseball games are regularly exposed and which they assume.”²⁰³ The court highlighted the fact that foul balls are an

¹⁹⁶ Mark Newman, *Home Openers Near, At the Ballpark App Gets Update*, MLB.COM (Mar. 27, 2014), http://wap.mlb.com/ari/news/article/2014032770214274/?locale=es_CO.

¹⁹⁷ See generally MLBAM, <http://www.mlbam.com/> (last visited Jan. 15, 2018).

¹⁹⁸ Teena Hammond, *Stadiums Race to Digitize: How Sports Teams are Scrambling to Keep Millennials Coming to Games*, TECH REPUBLIC, <http://www.techrepublic.com/article/how-sports-teams-are-scrambling-to-keep-millennials-coming-to-games/> (last visited Jan. 15, 2018).

¹⁹⁹ *Id.*

²⁰⁰ See *Lowe v. Cal. League of Prof. Baseball*, 56 Cal. Rptr. 2d 105 (1997).

²⁰¹ *Id.* at 106.

²⁰² *Id.*

²⁰³ *Id.*; see also *Knight v. Jewett* 834 P.2d 696 (Cal. 1992).

inherent part of the game, which would be impossible to eliminate.²⁰⁴ However, in keeping with the decision in *Knight*, the court found that a mascot is not so integral to the game that the game would be impaired by the mascot's absence. The court held that the mascot was a "marketing tool . . . not essential to the game of baseball."²⁰⁵ Finally, the court recognized that the mascot created a distraction that was not an essential aspect of the game itself.²⁰⁶

Although it has not been the basis of litigation yet, this poses an interesting question, does a cellphone app that is specifically meant to be used by fans at Major League Baseball and in fact disseminated by Major League Baseball itself, constitute a distraction like the mascot in *Lowe*? The app is clearly a marketing tool. And it seems unlikely that a court would find the app to be "an essential part of the game." It is also likely unreasonable to expect fans to only use the app in-between pitches, considering the plethora of features MLBAM has developed for it; features that are fully accessible while the game is in play. So what happens when a fan is struck by a foul ball while using the MLB.com at Bat application? Under a distraction-type exception to the comparative negligence standard, it is possible the fan's apportionment of responsibility would be eliminated or substantially lowered. One commenter has explained that this exception would allow a fan to recover if Major League Baseball or the stadium owner deliberately distracted the fan in a manner that "causes the fan to look away from the game while the ball is in play or creates a situation where a fan is unable to reasonably observe the game."²⁰⁷

However, a fan's own negligence would still be applicable to most foul ball injuries, and the exception would be limited to instances where, for example, a mascot is performing and the fan necessarily has to watch.²⁰⁸ Conversely, if a fan simply looks away to get food from a roving vendor, then fans could not invoke the exception.²⁰⁹ It is clear that a fan should not be able to utilize the exception simply because the fan was using his or her phone at the time. But when Major League Baseball purposely causes that fan to use his or her phone, or deliberately distracts the fan through some theatrical aspect of the ballpark, a question arises as to whether the fan should be shielded from responsibility.

²⁰⁴ *Lowe*, 56 Cal. Rptr. at 111; Fried & Ammon Jr., *supra* note 39, at 52-53.

²⁰⁵ Fried & Ammon Jr., *supra* note 39, at 53.

²⁰⁶ *Id.*

²⁰⁷ Swift, *supra* note 171, at 36.

²⁰⁸ *Id.*

²⁰⁹ *Id.*

C. Baseball Arbitration Applied to Recovery for Fan Injuries

Interestingly, the concept of baseball arbitration applying to fan injury recovery is an idea that derives from an injury sustained by an attorney.²¹⁰ The injured fan, Andy Zlotnick, was attending a New York Yankees game in August 2011 and sitting three rows up from the field, about 50 feet past the first base line.²¹¹ There was a rain delay and several patrons had brought umbrellas.²¹² Some stadiums forbid the use of umbrellas except during rain delays, while two stadiums forbid them from the park completely.²¹³ At the time, the Yankees policy is to allow umbrellas as long as they do not interfere with the other fans enjoyment of the game.²¹⁴ This has now changed to “permissible use” as long as the umbrella does not obstruct a fan’s view.²¹⁵ Zlotnick could not see the batter or the pitcher because of the opened umbrellas around him.²¹⁶ The batter, Hideki Matsui, pulled a foul ball into the stands which connected with Zlotnick’s face, breaking the bones around his left eye socket, fracturing his sinus and upper jaw, and overall extensively damaging the left side of his face.²¹⁷ His plastic surgeon later told him that his injuries were similar to being punched in the eye with brass knuckles.²¹⁸ His medical bills totaled \$100,000, and he had to pay roughly \$25,000 out of pocket.²¹⁹ Although on the surface the injury appears to have healed, the area where he was struck is still painful to the touch, he has blurred vision, and persistent numbness in his mouth.²²⁰ Zlotnick sued the New York Yankees arguing that allowing open umbrellas “negligently increased the danger posed by the game of baseball.” He eventually lost his case.²²¹

Ultimately, the best solution to the fan injury issue may not come from a court or a legislature, or even a legal commentator—rather, the best

²¹⁰ Joe Nocera, *Danger at the Ballpark, and in a Baseball Ticket’s Fine Print*, N.Y. TIMES (Nov. 20, 2015), <http://www.nytimes.com/2015/11/21/sports/baseball/danger-at-the-ballpark-and-in-a-baseball-tickets-fine-print.html>.

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.*

²²¹ John Harper, *MLB’s Announcement of Extended Netting is a Long Overdue Win for Those Seriously Injured by Foul Balls*, N.Y. DAILY NEWS: SPORTS (Feb. 1, 2018), <http://www.nydailynews.com/sports/baseball/extended-netting-long-overdue-win-injured-foul-balls-article-1.3793772>.

proposed solution may come from someone who intimately appreciates the issue, a victim. Zlotnick's ordeal lead him to develop an idea for how teams could compensate injured fans at games.²²² Basically, the idea is rooted in a fundamental arbitration system. When a fan is injured at a baseball game, that fan would submit all the necessary documentation to prove the severity of the injury, i.e. medical bills, lost wages, and testimony of any permanent damage that might have been sustained.²²³ In addition, the fan would submit a dollar amount for just compensation.²²⁴ In turn, the baseball team submits a dollar amount for what it would deem reasonable to compensate for the injury.²²⁵ A neutral arbitrator would then make a decision based off of all the materials submitted and that decision would be binding on both parties.²²⁶ The arbitrator would not be allowed to split the difference.²²⁷

One advantage to this system would be to take the issue out of the hands of the judiciary and its unsympathetic baseball rule. It would also lessen the need for expensive litigation, while hopefully eliminating frivolous lawsuits and deterring fans wishing to cash in on less serious injuries.²²⁸ It is unlikely that personal injury lawyers—who are already weary of fan injury cases because of the difficulty in winning them—would agree to prepare the necessary work for arbitration if the injury was not serious. And Major League Baseball, which generated \$9.5 billion in revenue in 2015, would easily be able to handle the payouts decided by the arbitrator.²²⁹ Additionally, it would give Major League Baseball increased motivation to institute a concrete policy regarding netting recommendations at stadiums instead of the mere suggestions they presented for the 2016 season.²³⁰

VII. CONCLUSION

American's pastime has hit a critical point in terms of fan safety. As athletes increase in strength and size, fans become more and more vulnerable to injuries, often serious and sometimes fatal, while simply watching a ballgame. It is inconceivable to require the average adult spectator to react fast enough to a line drive foul ball; not to mention a child. If a Major

²²² Joe Nocera, *Baseball Has a New Policy on Netting, but There's a Catch*, N.Y. TIMES (Dec. 18, 2015), <https://www.nytimes.com/2015/12/19/sports/baseball/baseball-has-a-new-policy-on-netting-but-theres-a-catch.html>.

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

League pitcher, who plays the game at the highest level, and has his glove to assist him, is unable to protect himself then how can a fan be expected to bear the burden of avoiding injury?

The judiciary and state legislatures have options to establish sufficient fan injury remedies and protections. There is simply a refusal to act. Very few courts have recognized the flaws in the baseball rule. It is antiquated. It is unfair. It is rooted in a historical precedence that should not be regarded with such importance as it has failed to adapt to a game that has substantially changed over the past century. If there is a reluctance to abolish the baseball rule, then at the very least it must be re-worked to include the areas down the first and third base line. This easy remedy would spark a chain reaction that would force stadium owners to significantly improve their safety policies for fans or face a wealth of litigation.

With Major League Baseball venturing to improve fan safety, the judiciary must follow suit. The devastation for injured spectators is two-fold, not only are they sustaining serious injuries, they have almost no recourse to recover damages. The blanket shield for stadium owners is skewed so heavily in their favor that there is nothing a spectator can do after suffering harm at a baseball game except bear the cost of damages. Major League Baseball is finally beginning to adjust its fan protection policies to reflect the current nature of the game, but ultimately the judiciary and state legislatures should seek to definitively remedy this severe inequity.