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# A FOUL BALL IN THE COURTROOM: THE BASEBALL SPECTATOR INJURY AS A CASE OF FIRST IMPRESSION

J. Gordon Hylton\*

The sight of a fan injured by a foul ball is an unfortunate but regular feature of professional baseball games. Similarly, lawsuits by injured fans against the operators of ballparks have been a regular feature of litigation involving the national pastime.<sup>1</sup> While the general legal rule that spectators are considered to have assumed the risk of injury from foul balls has been reiterated over and over, injured plaintiffs have continued to sue in hope of establishing liability on the part of the park owner.<sup>2</sup> Although the number of such lawsuits that culminated in published judicial reports is quite large, it is somewhat surprising that the first cases to reach the appellate court level did not do so until the early 1910s, nearly a half century after the beginnings of commercialized baseball.<sup>3</sup>

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1. For an exhaustive list of cases involving spectator injuries prior to 1985, see John C. Weistart & Cym H. Lowell, *The Law of Sports* 951-65. (Michie Co. 1979 & Supp. 1985). For more recent cases, see Gil Fried & Robin Ammon, *Baseball Spectators' Assumption of Risk: Is It "Fair" or "Foul"?*, 13 Marq. Sports L. Rev. 39 (2002). See 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); Joshua E. Kastenber, *A Three Dimensional Model of Stadium Owner Liability in Spectator Injury Cases*, 7 Marq. Sports L.J. 187 (1996).

2. For the general rule and the limited number of exceptions that have been recognized, see Ray Yasser et al., *Sports Law: Cases and Materials* 724-26 (4th ed., Anderson Publg. Co. 2000); Michael J. Cozzillio & Mark S. Levinstein, *Sports Law: Cases and Materials* 906 (Carolina Academic Press 1997); and the sources cited in *supra* note 1.

3. "Commercialized" baseball refers to the practice of charging admission to spectators who attend baseball games. Commercialization in baseball began in 1858 in New York City when an admission fee was charged for those who witnessed an all-star game featuring the best players in New York and Brooklyn. However, the real era of commercialization began in 1862 when entrepreneur William H. Cammeyer of Brooklyn began to charge patrons to attend games at the Union Grounds, the first entirely enclosed baseball field in American history. On the beginning of commercialization in baseball and Cammeyer, see Melvin L. Adelman, *A Sporting Time: New York City and the Rise of Modern Athletics, 1820-70*, at 148-54 (U. Ill. Press 1986); Harold Seymour, *Baseball: The Early Years* 48-51 (Oxford U. Press 1960); George B. Kirsch, *The Creation of American Team Sports: Baseball and Cricket, 1838-72*, at 234-37 (U. Ill. Press 1989). Commercialization is thus distinguished from professionalization, which refers to the use of players who are paid for their participation. Commercialization preceded professionalization in baseball, but not by very much. The first openly professional baseball team, the famous Red Stocking Club of Cincinnati, began play with a full roster of paid players in 1869. Seymour, *supra*, at 56-58.

While there were earlier lawsuits that were resolved at the trial court level,<sup>4</sup> the first appellate court opinion dealing with a spectator injured by a foul ball at a professional baseball game was *Crane v. Kansas City Baseball & Exhibition Co.*,<sup>5</sup> decided in 1913 by the Kansas City division of the Missouri Court of Appeals. In *Crane*, the court upheld a lower court dismissal of a lawsuit filed by a fan injured by a foul ball during a minor league baseball game in Kansas City,<sup>6</sup> and, in the process, articulated a conceptual framework for the resolution of ballpark operator liability cases which would be followed for the rest of the twentieth century.

This article examines the reasons for the relatively late judicial resolution of the foul ball injury question. It also explores the circumstances that brought this issue before the Missouri Court of Appeals in 1913, and the general legal principles upon which the court drew in formulating its decision. Finally, it looks at the process by which the *Crane* decision came to be accepted as the definitive statement of the rules applying to spectator injuries at baseball games.

### I. SPECTATOR INJURIES AND THE EARLY HISTORY OF BASEBALL

Why it took so long for the issue of ballpark operator liability for spectator injuries to reach the appellate court level is one of many perplexing “why” questions associated with the game of baseball. Whatever the answer, it was certainly not that foul balls were a rare occurrence. In 1914, a Missouri court estimated that during a typical professional baseball game and the batting practice that preceded it, approximately seventy balls were “fouled by the batters in every possible direction.”<sup>7</sup> However, it is true that the problem of foul balls was probably not as acute in the formative era of American baseball as it was after the mid-1880s. In their mid-nineteenth century form, the rules of baseball required the pitcher to deliver the ball in an under-handed fashion without bending his

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4. One such case involved Washingtonian Aaron Harvey Potts, who filed suit against the Washington Statesmen of the National League in April of 1888. According to a newspaper account, Potts had been injured on April 11 of the previous year. His complaint alleged that shortly after he entered baseball grounds controlled by the defendant, he was “suddenly, forcibly, and violently assaulted by the defendant by being struck across the bridge of his nose by a certain base-ball recklessly, carelessly, and negligently thrown, tossed, pitched, or batted . . .” *Struck by a Base-Ball*, Washington Evening Star 6 (Apr. 10, 1888). Because of the broad language of the complaint, it is not clear whether Potts was struck by a thrown or batted ball. Unfortunately, nothing else is known about this case except that it did not result in a published judicial opinion. A search of the Lexis database reveals no cases decided in Maryland, Virginia, or the District of Columbia between 1888 and 1900 involving a party named Aaron Potts, Aaron Harvey Potts, or A. H. Potts.

5. 153 S.W. 1076 (Mo. App. 1913). Two slightly earlier appellate cases had involved injuries resulting from baseballs, but neither had occurred at a professional baseball game. Moreover, in each of these cases, the injured party had not been watching the game from which the ball had emanated. *Williams v. Dean*, 111 N.W. 931 (Iowa 1907) (patron injured at agricultural fair while watching horse a race held simultaneously with a baseball game); *Blakeley v. White Star Line*, 118 N.W. 482 (Mich. 1908) (patron injured at dance at summer resort by ball thrown by practicing baseball players).

6. *Crane*, 153 S.W. at 1078.

7. *Edling v. Kansas City Baseball & Exhibition Co.*, 168 S.W. 908, 909 (Mo. App. 1914).

elbow.<sup>8</sup> As long as such a restriction on pitching remained in place, skilled batters had little trouble hitting the ball squarely, and thus sharply hit foul balls infrequently entered the areas in which spectators were likely to be situated, especially the territory behind the home plate area and along the foul lines. Such rules also guaranteed that offense would dominate over defense. In the 1860s, single digit run totals were rare, and nine inning scores of more than one hundred runs were not unheard of. In 1867, the Athletic Club of Philadelphia, probably the best team in the United States, scored more than fifty runs in twenty of its forty-seven games, with a single game high of 118.<sup>9</sup> That same year, the National Club of Washington, D.C., broke the century mark on three different occasions.<sup>10</sup> Even the Eckford Club of Brooklyn, whose record of 6-16-1 was the worst of any of the nation's top teams, scored twenty or more runs in thirteen of its games.<sup>11</sup> Concern that batters were too dominant prompted the adoption of a number of pitching rules in the 1860s and 1870s designed to allow pitchers to throw the ball with greater speed.

The "stiff arm" restriction was abandoned in 1868, but scores remained quite high.<sup>12</sup> To compound the problem, beginning in 1871, batters were permitted to call for a high or low pitch and if the pitcher failed to accommodate, a ball was called. The balance began to change in 1872, when pitchers were permitted to bend their elbows, making it possible to throw underhanded curve balls. In 1878, the pitcher was permitted to raise the ball as high as his waist before delivering it to the batter, and in 1883 the line was elevated to the pitcher's shoulder, making "side-arm" pitching legal for the first time. The next year modern over-handed pitching was permitted.<sup>13</sup>

Although a number of pitchers had been able to throw the ball underhanded with impressive velocity, there is no question that the introduction of overhand pitching in the mid-1880s led to greatly increased pitching speed and with it an increase in foul balls headed toward spectators.<sup>14</sup> Greater pitching speed also

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8. The discussion of the changing rules regarding the pitcher's delivery of the baseball is based upon David Nemeč, *The Rules of Baseball: An Anecdotal Look at the Rules of Baseball and How They Came to Be* 35-36, 151-54 (Lyons & Burford 1994).

9. Marshall D. Wright, *The National Association of Base Ball Players, 1857-1870*, at 143 (McFarland & Co., Inc. 2000).

10. *Id.* at 144.

11. *Id.* at 168.

12. In 1869, the top teams continued to score runs in large quantities. The Red Stockings of Cincinnati, the Athletic Club of Philadelphia, the Union Club of tiny Lansingburgh, New York, and the Forest City Club of Rockford, Illinois, all scored more than one hundred runs in a single game against top competition. *Id.* at 242-55.

13. See Nemeč, *supra* n. 8.

14. While there are obviously no statistics regarding total number of foul balls, the effect of the pitching rule changes in the 1880s can be seen in an increased number of strike outs. In 1882, when underhand pitching was still required, the average number of strikeout for both teams in a National League game was 3.2. In 1883, with sidearm pitching, it was 3.6. In 1884, with no restrictions on pitching motion, it was 4.7. These calculations are based on games played and strikeout data in *STATS All-Time Baseball Sourcebook* 24-32 (Bill James et al. eds., STATS Publg. 1998). The number of allowed strikes remained at three during all three seasons, although it was later briefly increased to four to eliminate the pitcher's new advantage.

made catching a more precarious position, which led to the introduction of the catcher's mask (1870s) and the chest protector (1880s) in this same era.<sup>15</sup> From the point of view of spectators, the area directly behind home plate became particularly dangerous with the faster pace of pitching. The frequency of injuries suffered by those who continued to watch games from that vantage point earned it the nickname the "slaughter pen."<sup>16</sup>

The absence of reported cases also cannot be attributed to protective features of nineteenth and early twentieth century ballparks since there was little in the design of early baseball parks that offered protection against these types of injuries. Even wire backstops were not a standard feature in parks before the 1880s.<sup>17</sup> Diagrams of fields from the 1870s show a "catcher's fence" approximately thirty feet behind home plate, but these wooden fences were designed more for the containment of passed balls and wild pitches than they were for the protection of fans.<sup>18</sup> Spectator seating areas were rudimentary at best, and early grandstands contained little in the way of protective features.

Concern for the safety of spectators seated behind the playing field—or at least concern that the increased number of foul balls might drive away customers—eventually led most ballpark operators to screen in portions of their seating areas. The first professional team to do this was apparently the Providence Grays of the National League who did so in 1879.<sup>19</sup> Other teams soon followed suit. In spite of the safety they provided, the new screens were not always well received. In Milwaukee, then a member of the minor league Northwestern League, a wire screen was erected in front of the grandstand on June 25, 1884, but was removed seven days later because of fan complaints about the obstructed view.<sup>20</sup> Nevertheless, by the late 1880s, it was commonplace for owners of baseball parks used by professional teams to screen in the portion of the grandstand directly behind home plate.<sup>21</sup> However, other parts of the grandstand and all bleacher seats remained unscreened and unprotected. It is also probably true that most injuries resulting from foul balls in the nineteenth century were, as

15. Bill James, *The New Bill James Historical Baseball Abstract* 16, 43 (Free Press 2001).

16. David Nemeč, *The Great Encyclopedia of 19th-Century Major League Baseball* 125 (Donald I. Fine Books 1997).

17. Shortly before the opening of Detroit's Recreation Park in 1879, the Detroit Post and Tribune informed its readers that "It is intended to put up a wire screen behind the catcher instead of the unsightly boards generally used." Det. Post & Trib. (Apr. 28, 1879).

18. See *Spalding's Official Base Ball Guide for 1878*, at 3 (A.G. Spalding & Lewis Meacham eds., A.G. Spalding & Bro. 1878). For even earlier references to backstops, see N.Y. Clipper (Feb. 19, 1870) (referring to the new grounds of the Washington, D.C. Olympics) and the Cincinnati Commercial (May 21, 1870) (quoting a story from the Chicago Tribune describing the park used by the Atlantic Club of New Orleans).

19. Nemeč, *supra* n. 16, at 125. Nemeč's book also contains a reproduction of a photograph of Messer Park which clearly illustrates where the screened part of the park was located. *Id.* For a further discussion of the Messer Park screen, see Frederick Ivor-Campbell, *Editor's Notes*, *Nineteenth Century Notes* (Summer/Fall 1995).

20. Milwaukee Daily J. 1 (July 3, 1884). The park, the Wright Street Grounds, had opened on May 1, 1884. Philip J. Lowery, *Green Cathedrals* 177 (Addison-Wesley Publ. 1992).

21. For a photograph of the partially screened grandstand used in the ballpark in Wheeling, West Virginia, in 1887, see *Baseball* <<http://wheeling.weirton.lib.wv.us/events/sports/bball04.htm>> (accessed Feb. 16, 2003). Wheeling played in the minor league Ohio State League that year.

today, insufficiently serious to warrant a lawsuit. However, there is no reason to think that some of the injuries incurred before 1913 were not substantial. In 1888, Washingtonian Aaron Potts claimed that his injuries stemming from being hit by a baseball at a major league game amounted to \$5,000.<sup>22</sup> Moreover, there were several cases decided between 1914 and 1920 that featured significant injuries, and there was no significant difference in the equipment used to protect fans from injuries during this period that would explain an increase in serious injuries over the earlier period.<sup>23</sup> It is possible that ballpark owners paid the medical expenses of injured fans, but given what we know about the business history of professional baseball, that seems unlikely. On the other hand, cultural attitudes may have been at play, and baseball fans of the Gilded Age and Progressive Era may have felt reluctant to blame their injuries on the ballpark owner. Instead, they may have attributed their misfortune to either bad luck, their own bad judgment, or fate. This would be consistent with the view of the late nineteenth century as an era of individualism and individual accountability, or as legal historian G. Edward White once put it, “an age entranced with the idea that each man was equally capable of protecting himself against injury.”<sup>24</sup>

Of course, the most critical question regarding the paucity of foul ball cases was whether or not a spectator injured by a foul ball had a right to sue the operator of the ballpark under any circumstances. Obviously, one explanation for the lack of lawsuits could be a widespread understanding that there was no right to sue. Was it the conventional wisdom before 1913 that a suit against the ballpark operator was doomed to fail? That is, of course, an extremely difficult question to answer since there were no previous cases or statutes directly on point. However, an examination of the relevant legal principles in the late nineteenth and early twentieth centuries suggests that the issue of liability was at least a debatable proposition.

## II. THE LEGAL DUTIES OF BALLPARK OWNERS

In formal legal terms, the paying spectator at a professional baseball game was a licensee, which meant that he or she was on the premises with the owner's permission. The traditional duty owed to a licensee by the landowner who “invited” him on to his property was only to protect the licensee from unforeseeable hazards incident to the condition of the premises. Responsibility for ordinary risks incident to the condition of the premises was assumed by the

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22. *See supra* n. 4.

23. *Wells v. Minneapolis Baseball & Athletic Assn.*, 142 N.W. 706 (Minn. 1913); *Edling*, 168 S.W. 908; *Kavafian v. Seattle Baseball Club Assn.*, 181 P. 679 (Wash. 1919). On the other hand, it is likely that a number of changes in the early 1920s—the introduction of a more resilient baseball, the dramatic increase in the number of new baseballs used in each game, and the abolition of the spitball and other pitches where the pitcher altered the surface of the ball—led to an increase in sharply hit foul balls, just as they led to an increase in home runs. However, the incidents in these cases all occurred during the so-called “dead ball” era. *See James, supra* n. 15, at 120-22; *Nemec, supra* n. 8, at 5.

24. G. Edward White, *Tort Law in America: An Intellectual History* 41 (Oxford U. Press 1980).

licensee, and the landowner was not obligated to protect licensees against known hazards or unsafe conditions, or even warn them of their existence.<sup>25</sup> If this were the controlling standard, it would be nearly impossible for a spectator to recover against a ballpark operator since the possibility of a foul ball injury was not “unforeseeable” but simply an ordinary risk which would fall on the licensee.

However, by the 1870s, it was widely accepted that a landowner owed a greater duty to a licensee who was on the premises to conduct business beneficial to both parties. In such circumstances, the licensee was known as an “invitee,” or “business visitor.” This modification of the law of licenses was usually traced to the 1866 English case of *Indermaur v. Dames*,<sup>26</sup> where the court held that an owner was obligated to protect the business visitor against dangers of which he (the proprietor) knew or should have known.<sup>27</sup> The “business visitor” rule of *Indermaur* was quickly embraced by both American courts and treatise writers. It was endorsed by the Supreme Judicial Court of Massachusetts less than two years after the English case was decided, and over the course of the next twenty years the English case was cited with approval in at least twenty-six different judicial opinions by a variety of American courts, including the United States Supreme Court.<sup>28</sup> In 1883, the Supreme Judicial Court of Massachusetts first applied the rule to a place of public amusement when it held that a proprietor of a dance hall open to the ticket-buying public was obligated to maintain the hall in a reasonably safe condition.<sup>29</sup> Both Judge Thomas Cooley and legal scholar Seymour Thompson endorsed the application of the rule to such establishments in their highly influential tort treatises.<sup>30</sup> As Thompson put it: “The duties thus imposed on the owners of business houses apply with special force to proprietors of public exhibitions, public-houses, and other establishments to which the public are invited to resort in large numbers.”<sup>31</sup> Presumably, baseball parks were included in this category.

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25. William L. Prosser, *Handbook of the Law of Torts* 626 (West Publ. Co. 1941) (citing Francis H. Bohlen, *The Duty of a Landowner Towards Those Entering His Premises of Their Own Right*, 69 U. Pa. L. Rev. 142, 237, 340 (1921)). For judicial endorsement of this principle in the nineteenth century, see *Brown v. S. Kennebec Agric. Socy.*, 47 Me. 275 (1859); *Bennett v. Louisville & N.R. Co.*, 102 U.S. 577 (1880); and *Low v. Grand Trunk R. Co.*, 72 Me. 313 (1881).

26. 1 L.R.-C.P. 274, *aff'd*, 2 L.R.-C.P. 311 (Ct. of Exchequer Chamber 1866).

27. See Fowler Vincent Harper, *A Treatise on the Law of Torts: A Preliminary Treatise on Civil Liability for Harms to Legally Protected Interest* 226 (Bobbs-Merrill Co. Publishers 1933).

28. *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216 (1868). A Lexis search of all cases prior to 1889 revealed twenty-six citations to *Indermaur v. Dames*. The United States Supreme Court case was *Bennett*, 102 U.S. 577.

29. *Currier v. Boston Music Hall Assn.*, 135 Mass. 414 (1883).

30. Thomas H. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 605 (Callaghan & Co. 1880); Thomas H. Cooley, *A Treatise on the Law of Torts or the Wrongs Which Arise Independent of Contract* 718-19 (2d ed., Callaghan & Co. 1888); Seymour D. Thompson, *The Law of Negligence in Relations Not Resting in Contract* vol. 1, at 307-11 (Bancroft-Whitney Co. 1886).

31. Thompson, *supra* n. 30, at 311.

By the end of the first decade of the twentieth century, the business visitor rule had been applied to a wide variety of public amusements and exhibitions.<sup>32</sup> The 1901 edition of Thompson's treatise on the law of negligence described the proprietors of public exhibitions as having "a special duty imposed by the principles of the law to exercise reasonable care in construction, maintenance and management, to the end of protecting the public so coming upon their premises."<sup>33</sup> Reasonable care, according to Thompson, was "a degree of care proportioned to the danger incurred, and to the number of persons who will be subjected to that danger."<sup>34</sup> Or, as the Illinois Supreme Court described it in 1895,

If an owner or occupier of land either directly or by implication induces persons to come upon his premises, he thereby assumes an obligation that such premises are in a reasonably safe condition, so that the persons there by his invitation shall not be injured by them, or in their use for the purpose for which the invitation was extended.<sup>35</sup>

Under this definition of duty, an injured spectator could argue that a ballpark with unprotected seats was not in a safe condition, particularly given the predictability of foul ball related injuries and their potential for serious harm.<sup>36</sup>

The business visitor rule seemed to suggest that a ballpark operator had a duty to protect his patrons from harm, but there were problems in applying the rule to injuries from foul balls. First of all, the cases in which the business visitor rule had been applied almost always involved defects in the premises or dangerous conditions of which the invitee was unaware when he entered the property and which were not immediately apparent. This, of course, could not be said for most potential plaintiffs in foul ball cases. Few who attended professional baseball games would have been unaware of the frequency of foul balls or the damage that they could do. While a patron at a baseball game could maintain in good faith that he had no reason to assume that the grandstand in which he was seated was

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32. See, for example, *Dunn v. Brown County Agric. Socy.*, 18 N.E. 496 (Ohio 1888) (agricultural fairs); *Boyce v. Union P. Ry. Co.*, 31 P. 450 (Utah 1892) (bathing beaches); *Dickson v. Waldron*, 34 N.E. 506 (Ind. 1893) (theaters); *Brotherton v. Manhattan Beach Improvement Co.*, 67 N.W. 479 (Neb. 1896) (beaches); *Thompson v. Lowell, Lawrence & Haverhill St.-Ry. Co.*, 49 N.E. 913 (Mass. 1898) (shooting exhibitions); *Mastad v. Swedish Brethren*, 85 N.W. 913 (Minn. 1901) (public picnic for Swedish Americans); *Curran v. Olson*, 92 N.W. 1124 (Minn. 1903) (restaurants and saloons); *Blakeley*, 118 N.W. 482 (resort which included a baseball field); *Scott v. U. of Mich. Athletic Assn.*, 116 N.W. 624 (1908) (college football park). For a complete listing of such cases decided prior to 1913, see *Annotation: Duty and Liability of Owner or Keeper of Place of Amusement Respecting Injuries to Patrons*, 22 A.L.R. 610 (1923).

33. Seymour D. Thompson, *Commentaries on the Law of Negligence in All Relations* vol. 1, at 912 (Bowen-Merrill Co. 1901).

34. *Id.* at 913.

35. *Hart v. Washington Park Club*, 41 N.E. 620, 620-21 (Ill. 1895) (citations and quotation marks omitted).

36. A paying spectator at a sporting or entertainment event arguably had an even stronger argument for the application of a higher standard of care than a patron in a commercial establishment or a patron of a public fair or other event that did not charge admission to the grounds. By purchasing a ticket, the former had a contractual relationship with the landowner prior to entry, and it could be argued that a reasonably safe place to watch the event was an implied term of the contract. For one judicial effort to link the duty of care directly to the contract between the landowner and the ticket purchaser, see the 1908 case, *Scott v. U. of Mich. Athletic Assn.*, 116 N.W. 624.



anything but properly constructed in regard to its ability to support the weight of the spectators, he could not claim that he assumed that an unscreened grandstand would protect him from foul balls.

How patron knowledge of a defect or problem affected the duty of the proprietor under the business visitor rule had been infrequently litigated, particularly in the context of places of public amusement and exhibition. However, one could find language in judicial opinions that suggested that such knowledge excused the proprietor from liability. In *Carleton v. Franconia Iron & Steel Co.*,<sup>37</sup> the 1866 Massachusetts case mentioned above, future United States Supreme Court Justice Horace Gray addressed this very question when he wrote:

The owner or occupant of land is liable in damages to those coming to it, *using due care*, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land or of the access to it, which is known to him *and not to them*, and which he has negligently suffered to exist and *has given them no notice of*.<sup>38</sup>

Gray's opinion suggested a number of problems for an injured spectator trying to sue a ballpark operator for negligence. First, the language suggested that no further duty might lie if the invitee either knew of, or was warned about, the dangerous situation. Moreover, his formulation of the rule suggested that the defenses of contributory negligence and assumption of risk might be available to the proprietor even if it was found that he had breached the duty of care owed to his business invitees. In the tort law of the late nineteenth and early twentieth centuries, contributory negligence by the plaintiff operated as an absolute bar in actions for negligence.<sup>39</sup> (The one widely recognized exception—the doctrine of last clear chance—would be of no value here since it would be the spectator who had the last chance to avert the accident.) If the plaintiff knew of the danger of foul balls and chose to sit in an unprotected seat, then he or she opened himself to the charge that his or her own negligence—that is, his or her own failure to act in a reasonable fashion—had contributed to the cause of his or her own injury.

Moreover, during the same period, the doctrine of assumption of risk became a universal principle of American tort law.<sup>40</sup> It had long been recognized

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37. 99 Mass. 216.

38. *Id.* at 217 (emphasis added).

39. See White, *supra* n. 24, at 45-46.

40. Traditionally, the concept of assumption of risk had been limited to the master-servant relationship which would have made it unavailable for a proprietor to assert in a dispute with a customer. Francis Hilliard, *The Law of Torts or Private Wrongs* vol. 2, at 467 (3rd ed., Little, Brown & Co. 1866); Thomas G. Shearman and Amasa A. Redfield, *A Treatise on the Law of Negligence* 121 (2d ed., Baker, Voorhis & Co. 1870); Seymour D. Thompson, *The Law of Negligence in Relations Not Resting in Contract* vol. 2, at 1147-48 (Bancroft-Whitney Co. 1886); Joel Prentiss Bishop, *Commentaries on the Non-Contract Law and Especially as to Common Affairs Not of Contract or the Every-Day Rights and Torts* 311-12 (T.H. Flood & Co. 1889). However, the late nineteenth and early twentieth centuries saw the expansion of the principle from a rule of master-servant law to a general limitation on liability. See e.g. Francis Wharton, *A Treatise on the Law of Negligence* 178-80 (2d ed., Kay & Brother 1878); Charles Warren, *Volenti Non Fit Injuria in Actions of Negligence*, 8 Harv. L. Rev. 457 (1895); Francis Bohlen, *Voluntary Assumption of Risk*, 20 Harv. L. Rev. 14, 91 (1906). For the history of the development of the assumption of risk principle, see White, *supra* n. 24, at 41-45.

that a licensee on the land of another assumed responsibility for any risk not covered by the landowner's duty, but the formal doctrine of assumption of risk meant that even in areas where the landowner owed a duty of care, that duty could be obviated by the licensee's remaining on the premises after becoming aware of the problem. Similarly, if the ticket buyer was aware that the defendant had negligently failed to place screens in front of all the seats in the ballpark, then the ticket buyer had assumed the risk of injury by sitting there. To make matters worse for the potential plaintiff, in 1908, the Michigan Supreme Court had used the example of the baseball fan who watches a game from a position where he knows that he might be struck by a batted ball as an illustration of an obvious example of the assumption of a risk.<sup>41</sup>

To prevail over such defenses, the plaintiff would have to persuade a court that the landowner's duty was such that a mere general awareness that the plaintiff might be injured was insufficient to relieve the landowner of the higher duty owed to the business invitee. In spite of the power of the doctrine of assumption of risk, such limitations did exist. Certain types of businesses, like common carriers and innkeepers, could not avoid liability for failure to provide safe premises even if their patrons were aware of the business's negligence. In addition, it was frequently stated that when one person owed a duty to another, "the person for whose protection the duty exists cannot be held to have assumed risks of injury created solely by a negligent breach of such duty."<sup>42</sup> Moreover, if the landowner assured his or her customers that the premises were safe, the invitee did not assume the risk that the premises were unsafe.<sup>43</sup> Finally, there was no assumption of risk where the defendant left the plaintiff with no reasonable alternative. Thus, it had been held that a tenant did not assume the risk of the landlord's negligence in maintaining the entrance to a building when there was no other way in or out of the building, nor did a landowner assume the risk of defective highway when it was the only available route away from his property.<sup>44</sup> If a court could be convinced that the spectator at a baseball game was in an analogous situation, then liability might very well attach.

### III. *CRANE V. KANSAS CITY BASEBALL & EXHIBITION CO.*

It was against this doctrinal backdrop that S.J. Crane brought his suit against the Kansas City Baseball and Exhibition Company. The defendant owned and operated the Kansas City Blues of the minor league American Association. The Blues played their home games at Association Park, located at the intersection of

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41. *Blakeley*, 118 N.W. 482.

42. *Edling*, 168 S.W. at 910.

43. See, for example, *McKee v. Tourtellotte*, 44 N.E. 1071 (Mass. 1896); *Brown v. Lennane*, 118 N.W. 581 (Mich. 1908); *Manks v. Moore*, 122 N.W. 5 (Minn. 1909).

44. *Looney v. McLean*, 129 Mass. 33 (1880) and *Dollard v. Roberts*, 29 N.E. 104 (N.Y. 1891) (landlord-tenant example); *City of Altoona v. Lotz*, 7 A. 240 (Pa. 1886) and *Pomeroy v. Inhabitants of Westfield*, 28 N.E. 899 (Mass. 1891) (highway example). All of the examples in this paragraph are suggested by Prosser, *supra* n. 25, at 388-91, 389-90 nn. 91, 92.

19th and Olive Streets in Kansas City.<sup>45</sup> The game at which Crane was injured was apparently played in 1910.<sup>46</sup>

Upon his arrival at the park, Crane paid fifty cents for a general admission ticket. (The other option was a twenty-five cent bleacher seat.) Since there were no reserved seats, Crane's ticket entitled him to sit in any unoccupied seat in the 6000 to 7000 seat grandstand.<sup>47</sup> The grandstand was located behind home plate and extended in foul territory down the third base line past third base and into the outfield. Bleachers then continued from the end of the grandstand to the left field wall. There were apparently no seats located on the right field side of the park.<sup>48</sup> The portion of the grandstand behind home plate and extending down the foul line to third base was protected by "intervening wire netting of very loose mesh."<sup>49</sup> Crane could have taken a seat behind the wire netting but chose instead to sit in an unprotected seat in the grandstand beyond third base. At some point during the game, Crane was struck by a foul ball. The nature of his injuries were not described by the court, but they were apparently not too serious, as he requested only one hundred dollars in damages.<sup>50</sup>

Sometime after the game, Crane filed a civil action against the team in the Jackson County Circuit Court. In his complaint, Crane asserted that the ballpark owner had been negligent in failing to screen in the entire grandstand and that this negligence was the proximate cause of his injury. In response, the defendants issued a general denial of the plaintiff's claim and further maintained that the plaintiff was guilty of contributory negligence and had assumed the risk of his injuries.<sup>51</sup>

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45. Association Park was the home of the Kansas City team in the American Association from the time of its construction in 1903 until 1922. The park burned to the ground September 22, 1912, but was rebuilt in time for the next season. See *Unions to Royals: The Story of Professional Baseball in Kansas City* 25, 48-49 (Lloyd Johnson et al. eds., McFarland & Co., Inc. 1996). Additional information about the configuration and seating capacity of Association Park is contained in *Edling*, 168 S.W. 908, which was decided the following year. The Kansas City Baseball & Exhibition Company was controlled by George "White Wings" Tebeau, a Missouri native and a former professional baseball player who played in the major leagues from 1887 to 1895. See *Unions to Royals, supra*, at 49; Nemeck, *supra* n. 16, at 739. Kansas City was a charter member of the American Association, which was organized in 1902 and was widely recognized as one of the most advanced minor leagues.

46. Because of the paucity of details in the court's opinion, we now do not know the precise date of Crane's injury. However, another spectator injury case decided the following year by the same court involved an incident that occurred in the same ballpark on May 31, 1911. *Edling*, 168 S.W. 908. The events in *Crane* almost certainly preceded those in *Edling*, particularly since both were tried by the same circuit court. *Id.*; *Crane*, 153 S.W. 1076. In 1910, the Kansas City Blues compiled a winning record of 85-81, but still finished fifth in the eight-team league. For the 1910 Kansas City Blues, see Marshall D. Wright, *The American Association: Year-by-Year Statistics for the Baseball Minor League, 1902-1952*, at 51-52 (McFarland & Co., Inc. 1997).

47. Although the Kansas City Blues finished second in attendance in the American Association in 1910, their per game attendance was only about 2300 per game. Consequently, during any typical game there were many seats from which a fan like Crane could choose. American Association attendance data can be found in *The Encyclopedia of Minor League Baseball* 168 (Lloyd Johnson & Miles Wolff eds., 2d ed., Baseball Am., Inc. 1997).

48. The configuration of Association Park is described in *Crane*, 153 S.W. at 1077.

49. *Id.* at 303. The wire was apparently of the type known as "chicken netting" or "chicken meshing." *Edling*, 168 S.W. at 909.

50. *Crane*, 153 S.W. at 1076.

51. *Id.* at 1077.

Crane's case turned entirely on the question of the extent and nature of the duty owed by the defendant to its patrons. Because there was no disagreement as to what had happened, the two parties submitted an agreed upon statement of facts. Both stipulated that if the court found that these facts gave rise to a legally recognized cause of action, defendants were liable for one hundred dollars plus court costs. In this statement, Crane admitted that he was knowledgeable about baseball and was aware of the possibility of an injury like the one he suffered, or, as the statement put it: "Baseball is our national game, and the rules governing it and the manner in which it is played and the risks and dangers incident thereto are matters of common knowledge."<sup>52</sup> Circuit Court Judge W.O. Thomas refused to accept Crane's argument that the defendants' duty included an obligation to screen in the entire grandstand. Instead, he dismissed Crane's complaint on the grounds that he was not entitled to recover under the facts as a matter of law.<sup>53</sup> Crane then filed an appeal, which under Missouri law was heard by the Court of Appeals for western Missouri.

The ruling that Crane sought from the appellate court would have had dramatic consequences for the professional baseball industry, since the rule he advocated would have required every ballpark owner to screen in the entire seating area—something that was not done in any baseball park in the United States—or else be prepared to pay the medical expenses and other costs of every fan who was struck by a ball that went into the stands. Implementing these changes would be quite difficult. While grandstands could presumably be screened simply by extending the existing screen to both ends of the structure, providing protection for bleacher seats would have required the construction of a large free standing screen, which would basically convert the bleachers into a grandstand (and presumably lead to an increase in ticket prices). Furthermore, until the mid-1930s, it was a common practice during sold out games to allow standing room only fans to stand in a roped-off area in the outfield.<sup>54</sup> Obviously, the only way to protect such fans from injury by fair balls as well as foul ones would be to terminate the practice altogether. More significantly, a screening requirement would almost certainly disappoint large numbers of baseball fans. Then, as now, the screened-in seats behind home plate were not necessarily the most popular places to sit. In spite of the possibility of injury, many fans preferred the unobstructed view of an unscreened seat, a fact that would be noted in the court's opinion.<sup>55</sup> If every seat in the ballpark was behind a screen, attendance would more likely go down than up.<sup>56</sup>

Finally, Crane's case presented no special circumstances that might allow the court to decide in his favor on a more narrow basis. He was not a child; he was

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52. *Id.*

53. *Id.* at 1076, 1078.

54. James, *supra* n. 15, at 28.

55. Crane, 153 S.W. at 1077-78.

56. For a discussion of this phenomenon by a noted legal scholar of the 1940s, see Wex S. Malone, *Contributory Negligence and the Landowner Cases*, 29 Minn. L. Rev. 61, 75-80 (1945).

not elderly; he was not a woman who had been admitted to the park free of charge on Ladies Day; he was not nearly blind or deaf; he was not an uneducated fan attending his first baseball game; he had not been denied the opportunity to sit in a protected seat; he had not been directed to the wrong seat by an usher; his injury was not the result of an unusual occurrence during the game; the ball that had struck him was the ball in play during the game itself; and the ball had not curved in some improbable way—the very sorts of factors that would characterize much of this litigation in future years.<sup>57</sup> Moreover, his injuries had not been very severe to begin with, and more than two years had passed between the time of the injury and the appeal, factors that made Crane an unlikely candidate for special sympathy from the court.

Given the above considerations, it is hardly surprising that the three-judge Court of Appeals unanimously affirmed the decision of the circuit court.<sup>58</sup> In a decision dated February 17, 1913, Judge J.M. Johnson had little trouble seeing this case as a classic application of the principles of assumption of risk and contributory negligence. Citing the earlier dicta of the Michigan Supreme Court that spectators at baseball games who voluntarily chose to stand where they might be hit by a batted ball assume the risk of injury, Johnson asserted that Crane had “assumed the ordinary risks of such position” when he chose to sit in an unprotected seat.<sup>59</sup> And if, for any reason, he could not be said to have assumed the risk, he was clearly guilty of contributory negligence because his decision to sit in a seat that he knew was less safe than one behind the screen was unreasonable. As Johnson put it, “One invited to a place, who is offered a choice of two positions, one of which is less safe than the other, cannot be said to be in the exercise of reasonable care if, with full knowledge of the risks and dangers, he chooses the more dangerous place. That is a fundamental rule of the law of negligence.”<sup>60</sup> Johnson apparently viewed this assertion as so well established that he cited no authority (other than a passing reference to the previously mentioned Michigan case) for his conclusion.

More interesting than the dismissal of Crane’s appeal on assumption of risk and contributory negligence grounds, however, was the court’s insistence that it was *not* saying that the ballpark operator owed no duty of care to his customers or that this duty could always be abrogated by spectators assuming the risk of injury. After summarizing the facts of the case, Judge Johnson began his analysis by stating what he viewed as the nature of the ballpark owner’s duty to his customers, which was essentially a paraphrase of the business visitor rule: “Defendants were not insurers of the safety of spectators; but, being engaged in the business of providing a public entertainment for profit, they were bound to exercise

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57. Such factors appear in many of the cases cited in Weistart & Lowell, *supra* n. 1, at 952-53, and Fried & Ammon, *supra* n. 1.

58. The court was composed of Presiding Judge James Ellison and Associate Judges J.M. Johnson and Francis H. Trimble. *Crane*, 153 S.W. 1076; *The Southwestern Reporter* vol. 153, at v (West 1913).

59. *Crane*, 153 S.W. at 1077-78. The case cited was *Blakeley*, 118 N.W. 482.

60. *Crane*, 153 S.W. at 1078.

reasonable care, i.e., care commensurate to the circumstances of the situation, to protect their patrons against injury.”<sup>61</sup>

While “care commensurate to the circumstances of the situation” did not require ballpark owners to place a screen in front of every seat, it did, the court concluded, require that *some* protected seats be available at every game for those fans who wanted them.<sup>62</sup> In other words, the risk of injury from foul balls, particularly in the area directly behind home plate, *required* the club to make protected seats available for those who desired them. This responsibility could not be shirked, and it did not matter if the patron either knew of the danger before attending or was warned of it upon entering the park. If the spectator who asked for a protected seat was denied one, his or her decision to remain at the park anyway would not constitute an assumption of risk, and if they were injured by a ball batted or thrown in the stands, the operator would be liable.

However, if protected seats were offered, Judge Johnson’s opinion suggested that the duty of care had been “fully performed.”<sup>63</sup> There was no suggestion that the issue of whether the operator had a duty to screen any particular seat would have been a proper question for the jury, had Crane decided to request a jury trial.<sup>64</sup> Nor was there any indication that the operator had a duty to warn patrons of the danger of sitting in unprotected seats (although this issue would arise in later cases in other jurisdictions). The decision in *Crane* announced the existence of a limited but unwaivable duty, and at the same time offered ballpark owners clear directions as to how to satisfy their obligations. In many ways, it was a decidedly practical solution and one that accepted the current practices of the industry as reasonable. Park owners were not strictly liable for injuries that occurred on the premises, but at the same time they could not relieve themselves

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61. *Id.* at 1077.

62. *Id.* In support of this legal proposition, Judge Johnson cited only two cases and no secondary authorities. *Id.* The two cases were both recent decisions of the Missouri Appellate Court, and neither of them were discussed in the opinion. *King v. Ringling*, 130 S.W. 482 (Mo. App. 1910), was a Johnson opinion which dealt with the liability of the Ringling Brothers Circus for injuries suffered by patrons trying to escape when a fierce storm damaged the tent in which a circus performance was taking place. In *King*, the court found that the circus had breached no duty owed to its customers, given the unusual and unforeseeable nature of the storm. *Id.* at 485. The second case, *Murrell v. Smith*, 133 S.W. 76 (Mo. App. 1910), decided by a different division of the Court of Appeals, involved a stage used by performers at a street fair. A young boy playing underneath the stage was killed when the stage collapsed under the weight of a group of patrons who had climbed on to the stage. *Id.* In *Murrell*, the court upheld the jury verdict for the child’s parents, finding sufficient evidence in the record that the defendants had breached a duty of care. *Id.* at 89. Read together, the cases suggested that the duty of the operator extended to maintaining the premises in a reasonable fashion (*Murrell*) but did not require him to take steps to protect against every possible injury (*King*).

63. *Crane*, 153 S.W. at 1077.

64. Judge Johnson did not specifically state that the protected seats had to be the seats behind home plate, but the high risk of injury there probably made it axiomatic that they would be the screened seats. This was, in fact, the universal practice. Johnson also realized that a more complicated issue of duty would arise if a patron sought to sit in a protected seat after all of those seats were occupied. Without specifically deciding this question, Johnson clearly hinted that liability was likely to attach in such a case. *Id.* One academic commentator later argued that the logic of the Crane opinion created an absolute duty to place screens behind home plate and as far up the foul lines toward first and third base as necessary to protect those who be in greatest danger from foul balls. E.R.S., Student Author, *Negligence—Theaters and Shows—Assumption of Risk—Spectators at a Baseball Game*, 17 Mich. L. Rev. 594, 596 (1919).

of all liability by relying on their patrons' prior knowledge of the danger posed by foul balls.

#### IV. REFINING CRANE: *EDLING V. KANSAS CITY BASEBALL & EXHIBITION CO.*

Judge Johnson and the *Crane* court had the opportunity to elaborate on the rule pertaining to the duty of care owed to spectators less than a year later when a second ballpark injury case made its way onto the court's docket. In *Edling v. Kansas City Baseball & Exhibition Co.*,<sup>65</sup> the court was faced with a situation in which a fan had taken a protected seat but was nevertheless injured by a foul ball. Charles A. Edling had been struck in the face by a foul ball at a Kansas City Blues game on May 31, 1911. Like *Crane*, he had paid fifty cents for a grandstand seat, but unlike *Crane* he had taken a seat behind the screen. In fact, Edling had chosen to sit directly behind home plate, so that he could see the pitcher "curve the ball."<sup>66</sup> Edling's seat was approximately halfway up in the grandstand, a location that should have provided him complete protection from foul balls. Nevertheless, during the game, a foul ball passed through the screen, striking Edling in the face, breaking his nose, and injuring one of his eyes.<sup>67</sup> Edling later testified that he was watching the game at the time the incident occurred, but had lost track of the ball once it hit the bat. Thus, he testified, he was not aware that it had passed through the screen until it hit his face.<sup>68</sup>

The defendant demurred to the evidence, arguing that Edling had assumed the risk of injury by entering the ballpark and that he was contributorily negligent as a matter of law. The defendants' counsel, the Kansas City law firm of Hadley, Cooper & Neel, had represented the defendant in *Crane*, and the lawyers clearly attempted to rely on assumption of risk/contributory negligence aspects of the *Crane* decision.<sup>69</sup> In doing so, they advanced a number of arguments, including the claim that their client's duty had been satisfied by providing screened seats and that the defendant was not responsible for balls that might pass through the screen. (In this regard, they interpreted the "duty" portion of *Crane* quite narrowly.) They also insisted that Edling's failure to make an effort to catch or at least dodge the foul ball constituted contributory negligence as a matter of law.<sup>70</sup>

Trial Judge Joseph A. Guthrie rejected the defendant's motion for summary judgment, finding that the facts in this case created a legal question different from that involved in *Crane*. It appears that Guthrie was particularly dismissive of the argument that Edling had been negligent in failing to avoid the ball once it passed through the screen. Guthrie probably agreed with the statement of the plaintiff's

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65. 168 S.W. 908 (Mo. App. 1914). There was no change in the composition of the Kansas City branch of the Missouri Court of Appeals between *Crane* and *Edling*. See *The Southwestern Reporter* vol. 168, at v (West 1914).

66. *Edling*, 168 S.W. at 909.

67. *Id.*

68. *Id.*

69. In *Crane*, the team had been represented by Hadley, Cooper, Neel & Wilson. *Crane*, 153 S.W. 1076. All but Wilson are listed as counsel in the *Edling* case. *Edling*, 168 S.W. 908.

70. *Edling*, 168 S.W. at 910.

counsel that “[i]f the Kansas City Blues had kept their eyes on the ball with the accuracy defendant says plaintiff should have displayed, they would have attained a higher place in the race for the pennant.”<sup>71</sup> Consequently, Guthrie submitted the question of the defendant’s negligence to the jury on the issue of whether the team had exercised reasonable care in the maintenance of the screen.<sup>72</sup>

At the trial, the officers and employees of the team testified that the fence was well-maintained, that consideration for the fans’ view of the game required that relatively thin wire be used for the screen, and that the passage of the ball through the screen was a freak occurrence which could not have been anticipated.<sup>73</sup> Edling’s evidence was in sharp contrast, portraying the team as careless in its maintenance of the screen and the screen itself as “old, worn, and defective” and containing several holes, including one almost a square foot in area (through which the ball that struck Edling had passed).<sup>74</sup> The jury clearly believed Edling’s witnesses and returned a verdict of \$3,500.<sup>75</sup>

On appeal, the Court of Appeals had little trouble upholding the trial court verdict under the standard it had set forth in *Crane*. In another opinion written by Judge Johnson, the *Edling* court emphasized that its *Crane* holding had established that the park owner’s duty to his patrons required the provision of “seats protected by screening from wildly thrown or foul balls for the use of patrons who desired such protection.”<sup>76</sup> Now the court elaborated on what that duty entailed and in doing so invoked principles of contract law as well as tort law. When an operator addressed this duty by screening off part of the grandstand, Johnson explained, he “impliedly assured spectators who paid for admission to the grand stand that seats behind the screen were reasonably protected”<sup>77</sup> and that the operator had exercised “reasonable care to keep the screen free from defects.”<sup>78</sup> (In other words, the “contract” between the spectator and the park owner contained implicit terms guaranteeing that the screen would ordinarily protect them from the possibility of injury.) The possibility of being struck by a foul ball was “[o]ne of the natural risks encountered by spectators of a professional baseball game,”<sup>79</sup> but a spectator who sat in a protected seat “did not assume the risks resulting from such negligence.”<sup>80</sup> Although the plaintiff *might* have been guilty of contributory negligence if he had known about the hole in the fence and had declined to move, Edling’s testimony was that he had not noticed the

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71. *Edling*, 168 S.W. at 910. In 1913, when the trial court opinion was handed down, the Blues had finished the season tied for sixth in the eight team league. Wright, *supra* n. 46, at 70. In 1914, when the Court of Appeals handed down its decision, they were on their way to another sixth place finish. *Id.* at 76. In 1911 and 1912, the team had finished second and fourth, respectively. *Id.* at 56, 63.

72. *Edling*, 168 S.W. at 910.

73. *See id.* at 909.

74. *Id.*

75. *Id.*

76. *Id.* (citing *Crane*, 153 S.W. 1076).

77. *Edling*, 168 S.W. at 909-10.

78. *Id.* at 910.

79. *Id.* at 909.

80. *Id.* at 910.



defective feature of the screen until after his injury. Consequently, the court found that the issues of the defendant's negligence and the plaintiff's attentiveness were properly questions for the jury, and if the jury had found that it had been negligent, then nothing pertaining to Edling's conduct relieved it of liability.<sup>81</sup> In other words, while not obligated to screen every seat in the park, the team was obligated not only to provide protected seats for those fans who desired them, but also to maintain those seats in a reasonable manner.

#### V. THE LEGACY OF *CRANE* AND *EDLING*

Although the Kansas City branch of the Missouri Court of Appeals was hardly one of the most prestigious courts in the United States, its focus on the qualified duty of the ballpark operator has governed the way in which spectator injury issues have been treated down to the present day. Less than five months after the decision in *Crane*, and before the decision in *Edling*, the Minnesota Supreme Court handed down a decision involving a similar lawsuit by a spectator against the Minneapolis club of the American Association. In *Wells v. Minneapolis Baseball & Athletic Association*,<sup>82</sup> Minnesota's highest court borrowed liberally from the decision in *Crane* to overturn a jury verdict in a case involving a female spectator, Echo L. Wells, who had apparently come to the park as part of a ladies' day promotion. Large portions of the *Crane* opinion were quoted verbatim, and the court accepted the Missouri court's formulation that the operator of the ballpark had a duty of reasonable care upon which spectators could rely.<sup>83</sup> However, the *Wells* court held that the duty did not extend to an obligation to screen in the entire park or to absolutely guarantee the safety of spectators.<sup>84</sup>

In 1919, the Supreme Court of Washington held that a baseball fan who chose to sit in an unscreened rather than a screened seat was barred, as a matter of law, from suing the operator of the ballpark for negligence when struck by a foul ball.<sup>85</sup> In doing so, the court reversed an earlier decision.<sup>86</sup> The issue was whether the plaintiff stated a cause of action in arguing that the ballpark operator was negligent in deciding which parts of the park should be screened. The court, citing *Crane* and *Wells*, held that he could not.<sup>87</sup> Having provided a screened in section of the park, the operator had satisfied his responsibility, and by choosing to sit elsewhere the plaintiff now bore the responsibility for his injury.<sup>88</sup> In the next two

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81. *Id.* at 910.

82. 142 N.W. 706 (Minn. 1913).

83. *Id.* at 708.

84. *Id.* at 709.

85. *Kavafian*, 181 P. 679.

86. The earlier case was *Kavafian v. Seattle Baseball Club Assn.*, 177 P. 776 (Wash. 1919). In the earlier decision, the court had ruled that the issue of the plaintiff's assumption of risk or contributory negligence could go to the jury since the plaintiff claimed that defendant's original plans for the ballpark had indicated that a screen would be in place in front of the plaintiff's actual seat.

87. *Kavaian*, 181 P. at 679.

88. *Id.*

decades, courts in a variety of other jurisdictions followed suit and adopted the rule in *Crane*.<sup>89</sup> Moreover, even though the issue was repeatedly raised in Missouri courts, there was no movement away from the decisions of 1913 and 1914.<sup>90</sup>

By the 1930s, *Crane* was widely recognized as a leading case in the law of landowner liability generally, as well as the principal case regarding the liability of the operators of sporting arenas and stadiums. It was the only baseball case mentioned in Chapter 7, *Conduct Required to Prevent Risk of Harm—Affirmative Obligations*, of Harper's influential 1933 treatise on torts,<sup>91</sup> as well as the only such case cited in the *Business Visitors* section in the first edition of *Prosser on Torts*.<sup>92</sup> It was cited approvingly in at least thirty-seven subsequent judicial opinions, many of which involved sports or activities other than baseball.<sup>93</sup> While neither *Crane* nor *Edling* has been cited in a judicial opinion in recent years, the principle for which they stand has not been overruled.<sup>94</sup> Rather, the principle for which the cases stand has been recited so many times in subsequent judicial opinions, courts and treatise writers have been satisfied to cite sources of more recent vintage rather than trace the principle back to its origins.<sup>95</sup>

While the names S.J. Crane, Judge J.M. Johnson, and Charles Edling appear in none of the standard histories of professional baseball, their contribution to the development of the legal framework of professional spectator sports was of great significance. Even if the rule adopted in *Crane* only reasserted the conventional wisdom on issues of liability, it was still the first clear judicial expression of this point of view, and every subsequent opinion was written in response to *Crane*. At

89. *Cincinnati Baseball Club Co. v. Eno*, 147 N.E. 86 (Ohio 1925); *Curtis v. Portland Baseball Club*, 279 P. 277 (Or. 1929); *Lorino v. New Orleans Baseball & Amusement Co.*, 133 So. 408 (La. App. 1931); *Brisson v. Minneapolis Baseball & Athletic Assn.*, 240 N.W. 903 (Minn. 1932); *Quinn v. Recreation Park Assn.*, 46 P.2d 144 (Cal. 1935); *Blackhall v. Albany Baseball & Amusement Co.*, 285 N.Y.S. 695 (N.Y. Co. Ct. 1936); *Ratcliff v. San Diego Baseball Club P. Coast League*, 81 P.2d 625 (Cal. App. 1938); *Adonnino v. Village of Mt. Morris*, 12 N.Y.S.2d 658 (N.Y. Sup. 1939); *Cates v. Cincinnati Exhibition Co.*, 1 S.E.2d 131 (N.C. 1939); *Ivory v. Cincinnati Baseball Club Co.*, 24 N.E.2d 837 (Ohio App. 1939).

90. The issue of ballpark operator liability reached appellate courts more frequently in Missouri than in any other state in the years before 1950. In addition to *Crane* and *Edling*, see *Grimes v. Am. League Baseball Co.*, 78 S.W.2d 520 (Mo. App. 1935); *Olds v. St. Louis Natl. Baseball Club*, 104 S.W.2d 746 (Mo. App. 1937); *Olds v. St. Louis Natl. Baseball Club*, 119 S.W.2d 1000 (Mo. App. 1938); *Brummerhoff v. St. Louis Natl. Baseball Club*, 149 S.W.2d 382 (Mo. App. 1941); *Hudson v. Kansas City Baseball Club*, 164 S.W.2d 318 (Mo. 1942); *Anderson v. Kansas City Baseball Club*, 231 S.W.2d 170 (Mo. 1950).

91. Harper, *supra* n. 27, at 196-250.

92. Prosser, *supra* n. 25, at 635-48.

93. See e.g. *Sellmer v. Ringling*, 62 Pa.Super. 410 (1915); *Berberet v. Elec. Park Amuse. Co.*, 3 S.W.2d 1025 (Mo. 1928); *Morrison v. Union Park Assn.*, 149 A. 804 (Me. 1930); *Myers v. Kansas City Junior Orpheum Co.*, 73 S.W.2d 313 (Mo. App. 1934); *Hammel v. Madison Square Garden Corp.*, 279 N.Y.S. 815 (N.Y. Sup. 1935); *Ingersoll v. Onondaga Hockey Club, Inc.*, 281 N.Y.S. 505 (N.Y. App. Div. 1935); *Campion v. Chi. Landscape Co.*, 14 N.E.2d 879 (Ill. App. 1st Dist. 1938).

94. Two relatively recent cases which cited directly to *Crane* are *Akins v. Glen Falls School District*, 424 N.E.2d 531 (1981) and *King v. Kayak Manufacturing Corporation*, 387 S.E.2d 511 (W. Va. 1989).

95. For example, in *Friedman v. Houston Sports Association*, 731 S.W.2d 572 (Tex. App.—Houston 1st Dist. 1987), the court considered the case of an eleven-year-old girl who had been injured by a foul ball at a Houston Astros game. While the court analyzed in light of the considerations set out in *Crane*, the court cited only to earlier Texas and New York decisions which in turn had cited directly to *Crane*.

least in the annals of the legal history of American sports, the participants in *Crane v. Kansas City Baseball & Exhibition Co.* deserve far greater recognition than they have received.