

Tulsa Law Review

Volume 38
Issue 3 *Torts and Sports: The Rights of the Injured Fan*

Spring 2003

Two Sports Torts: The Historical Development of the Legal Rights of Baseball Spectators

Roger I. Abrams

Follow this and additional works at: <https://digitalcommons.law.utulsa.edu/tlr>



Part of the [Law Commons](#)

Recommended Citation

Roger I. Abrams, *Two Sports Torts: The Historical Development of the Legal Rights of Baseball Spectators*, 38 *Tulsa L. Rev.* 433 (2013).

Available at: <https://digitalcommons.law.utulsa.edu/tlr/vol38/iss3/1>

This Legal Scholarship Symposia Articles is brought to you for free and open access by TU Law Digital Commons. It has been accepted for inclusion in *Tulsa Law Review* by an authorized editor of TU Law Digital Commons. For more information, please contact megan-donald@utulsa.edu.

TWO SPORTS TORTS: THE HISTORICAL DEVELOPMENT OF THE LEGAL RIGHTS OF BASEBALL SPECTATORS

Roger I. Abrams*

“[A] page of history is worth a volume of logic.”—Oliver Wendell Holmes¹

I. INTRODUCTION

Spectators attending sporting events have suffered injuries since time immemorial. Life in the earliest civilizations included festivals involving sports contests. Following the death of Alexander the Great, sports became a professional entertainment for Greek spectators who would pay entrance fees to watch the contests.² Undoubtedly, the spectators who filled the tiered stadia suffered injuries. A runaway chariot or wayward spear thrown in the Roman Coliseum likely impaled an onlooker sitting on the platforms (called *spectacula*, based on their similarity to the deck of the ship and the basis for the English word “spectator”). In fact, it is reported that when the supply of gladiators ran out at the Roman Coliseum, the Emperor ordered some of the spectators slain.³ In one of his letters, the younger Pliny mused: “I am the more astonished that so many thousands of grown men should be possessed again and again with a childish passion to look at galloping horses, and men standing upright in their chariots.”⁴ Modern *panem et circenses* (“bread and circuses”) also created risks for those who observed the contests.

Organized sports became a fixture of European and American entertainment during the nineteenth century. Professional cricket migrated to American shores from England and remained the most popular sports pastime until after the Civil War. Bare-knuckled pugilists boxed for prizes in matches

* Richardson Professor of Law, Northeastern University School of Law. J.D., Harvard (1970); B.A., Cornell (1967).

1. *N.Y. Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

2. Sponsors paid Greek athletes for winning athletic events, most importantly in the Olympiad. Roger I. Abrams, *The Money Pitch: Baseball Free Agency and Salary Arbitration* (Temple U. Press 2000).

3. Keith Hopkins, *Murderous Games*, in *Death and Renewal: Sociological Studies in Roman History* vol. 2 (Cambridge U. Press 1983).

4. Pliny, *Epistles IX, vi* (William Melmoth trans.) (reprinted in H.A. Harris, *Sport in Greece and Rome* 220-21 (Cornell U. Press 1972)).

lasting hours under the blazing sun until one party prevailed.⁵ County fairs featured foot-racing (called “pedestrianism”) and horse-racing events staged by promoters. Cockfighting was another common American pastime, an always fatal enterprise to the fowl participants.⁶

Baseball began as an outdoor athletic diversion in America’s growing East Coast cities in the 1840s. Young men played the new sport, a variation of the bat-and-ball games common in America for centuries, on late weekday afternoons and weekends. The game first took root in Manhattan.⁷ Baseball players formed social and athletic clubs, such as the progenitor, the Knickerbocker Base Ball Club, founded on September 23, 1845.⁸ Rather than being paid for their athletic exhibitions, these club members paid an initiation fee of two dollars and annual dues of five dollars to participate in the athletic activity.⁹ A sumptuous dinner normally followed each contest.

The Knickerbockers limited membership to forty “proper gentlemen.” It conducted regular business meetings in New York’s Fijux’s Hotel. Strict club rules mandated appropriate behavior on and off the field. The club assessed a fine for swearing or similar impropriety. Arguing with the decision of the umpire would cost a player two bits (twenty-five cents).¹⁰

The inaugural participants in what was to become America’s national pastime were true amateurs. They enjoyed the recreation of playing the game, and club membership contributed to good fellowship. At the core of the upper middle-class values of these competitors was sportsmanship and fair play.¹¹

The Knickerbockers had difficulty locating a field on which to play their games on the island of Manhattan. (Their previous field laid out on Madison

5. Although this sport posed an obvious risk to the two participants, spectators rarely suffered physical, as opposed to psychic, injury.

6. Abrams, *supra* n. 2, at ch. 1. Cockfighting still persists today in Louisiana, New Mexico, and Oklahoma. See *Blood Sport Continues While Legal War Unfolds*, Daily Oklahoman 4A (Jan. 16, 2003) (available in 2003 WL 6327700). In November 2002, Oklahoma voters voted to ban cockfighting, but legal challenges have prevented enforcement of the ban in twenty-seven Oklahoma counties. *Id.*

7. *Id.* at 4. Over a century and a half, New York would host professional baseball’s most important historical events on and off the field. Spectators were first charged admission at a challenge match in 1858 between all-stars from New York City and Brooklyn. *Early Innings: A Documentary History of Baseball, 1825-1908*, at 27-29 (U. Neb. Press 1995). In 1876, Chicago’s William Hulbert summoned the owners of the eight most stable baseball franchises to the Central Hotel on Broadway to form the National League. *Id.* at 96-99. Throughout the twentieth century, Gotham’s Yankees, Dodgers, and Giants would dominate baseball’s championships. Today, midtown New York is home to the offices of both Major League Baseball and the Major League Baseball Players Association.

8. Abrams, *supra* n. 2, at 4. Within a few years, athletes formed other baseball associations, such as the Gothams, who played in a village north of Manhattan called Harlem, and the Atlantics of Brooklyn. Today, baseball teams are still referred to as “clubs,” evidencing their social origins. Baseball is the only sport where the field manager wears a uniform and not street clothes, a vestige of the days when managers were also regular participants on the field of play.

9. *Id.* at 4.

10. *Id.* Nonetheless, arguing with umpires became a permanent feature of baseball. On occasion, the umpires struck back. Umpire Tim Hurst once had eight Cleveland players arrested during a game. Few umpires would sink to the level of Robert Ferguson, however, who in 1873 reportedly took a bat and broke both arms of the catcher who had complained about Ferguson’s calls the entire game. After the game, the authorities arrested Ferguson for assault. Roger I. Abrams, *The First World Series and the Baseball Fanatics of 1903*, at 42 (Northeastern U. Press 2003).

11. *Id.*

Square had been appropriated by the railroads for a new station.) Undaunted, most club members crossed the Hudson by ferry to bucolic Hoboken, New Jersey, where they rented the Elysian Fields picnic grove for their exercise.¹² Alexander J. Cartwright, variously described as a surveyor, bookstore owner, and volunteer firefighter, and his committee wrote the first laws of the game. None of Cartwright's rules offered any protection to spectators of the sport because no one could imagine the game attracting onlookers. Cartwright presented twenty rules to Knickerbocker club members at their meeting on September 13, 1845:

Members must strictly observe the time agreed upon for exercise, and be punctual in their attendance.

When assembled for practice, the President, or in his absences, the Vice President, shall appoint an umpire, who shall keep the game in a book provided for that purpose, and note all violations of the By-Laws and Rules during the time of exercise.

The presiding officer shall designate two members as Captains, who shall retire and make the match to be played, observing at the same time that the players opposite to each other should be as nearly equal as possible, the choice of sides to be then tossed for, and the first in hand to be decided in like manner.

The bases shall be from "home" to second base, forty-two paces; from first to third base, forty-two paces, equidistant.

No stump match shall be played on a regular day of exercise.

If there should not be a sufficient number of members of the Club present at the time agreed upon to commence exercise, gentlemen not members may be chosen in to make up the match, which shall not be broken up to take in members that may afterwards appear; but in all cases, members shall have the preference, when present, at the making of the match.

If members appear after the game is commenced, they may be chosen in if mutually agreed upon.

The game to consist of twenty-one counts, or aces; but at the conclusion an equal number of hands must be played.

The ball must be pitched, not thrown, for the bat.

A ball knocked out of the field, or outside the range of the first and third base, is foul.

Three balls being struck at and missed and the last one caught, is a hand-out; if not caught is considered fair, and the striker bound to run.

If a ball be struck, or tipped, and caught, either flying or on the first bound, it is a hand out.

12. *Id.* at 5.

A player running the bases shall be out, if the ball is in the hands of an adversary on the base, or the runner is touched with it before he makes his base; it being understood, however, that in no instance is a ball to be thrown at him.

A player running who shall prevent an adversary from catching or getting the ball before making his base, is a hand out.

Three hands out, all out.

Players must take their strike in regular turn.

All disputes and differences relative to the game, to be decided by the Umpire, from which there is no appeal.

No ace or base can be made on a foul strike.

A runner cannot be put out in making one base, when a balk is made on the pitcher.

But one base allowed when a ball bounds out of the field when struck.¹³

The field was laid out in accordance with his directions.¹⁴ After many intra-club contests, on June 19, 1846, the Knickerbockers played a rival New York club assembled for the occasion in what may have been the first real baseball game. (Most players on the New York nine were former members of the Knickerbocker club who had not traveled to Hoboken for intra-squad practices.) The “proper” Knickerbockers lost the four-inning game by a score of twenty-three to one. Soon, Cartwright’s rules for what became known as the New York Game would be adopted up and down the eastern seaboard. The Knickerbocker club, however, stunned by their defeat, would limit their exercise to intramural activities and not play another outside nine for five years.¹⁵

II. THE FIRST BASEBALL TORT

Despite the lingering myth of Abner Doubleday and the “immaculate conception” of the game of baseball in Cooperstown,¹⁶ most followers of the

13. *Baseball Almanac: The Knickerbocker Rules by Alexander J. Cartwright* <<http://www.baseball-almanac.com/rule11.shtml>> (accessed Jan. 25, 2003).

14. The field was a square—not diamond-shaped—and the diagonals from home to second and first to third, set at forty-two paces apart. A pace was about a yard in length. With diagonals at 126 feet, the distance from base to base was 89.1 feet, later rounded to today’s ninety feet, the perfect distance. One yard longer would make an infield hit impossible; one yard shorter would make an infield hit inevitable.

15. Leonard Koppett, *Koppett’s Concise History of Major League Baseball* 5-8 (Temple U. Press 1998).

16. Albert Spalding, baseball’s premier entrepreneur during its early professional years, felt it imperative to identify an American origin for the National Game. Abrams, *supra* n. 2, at ch. 1. In 1905, he proposed (and personally funded from his sporting goods fortune) a “commission” to investigate the origin of the game. *Id.* at 18. Fortunately (and conveniently), an eighty-year-old miner from Denver, Abner Graves, recalled vividly in a letter to the commission the day in 1839 when Abner Doubleday, who later became a Civil War hero, scratched out the baseball field in the dust next to the hardware store in Cooperstown, New York. *Id.* Based solely on this imaginary tale—Doubleday had never been to Cooperstown in his life and was attending the academy at West Point during the time in question—the commission pronounced in 1908 that indeed baseball was a product of American soil with no progenitors. *Id.*

pastime have accepted the Garden State genesis for the sport. What they have not heard, because it is revealed here for the first time, is that at that very first baseball game in Hoboken, an innocent bystander—baseball's first spectator—William Winslow, suffered a “grievous bodily injury” (or so his attorney would have later alleged in the state courts of New Jersey).¹⁷

Will, as he was called, had taken the ferryboat to the slip at Hoboken with his older brother Johnny Mack Winslow, who played that day for the New York nine. Young Winslow had never seen this new “base” game played. At the top of the first inning, Will stood off to the left of the infield where he could get a good view of the pitcher. The Knickerbocker pitcher tossed the hand-stitched ball underhanded toward William Tucker, the first batter, who struck at it with the flattened cricket bat, driving it towards Will standing in foul territory. The third baseman, who stood atop the flat stone that served as the third base, lunged for the ball with his bare hands (gloves, or “mittens” as they were called, would not be used for decades), but alas the ball hit young Will, striking him on the forehead.

Will suffered daily headaches for many months, even after the cut on his forehead had healed. His brother suggested he visit an attorney-at-law, and the rest, you might say, is baseball spectator history.

III. AMERICAN TORT LAW IN THE MID-NINETEENTH CENTURY

During colonial times, America imported from England the institutional architecture and legal principles of its system of civil law. Early English common law had stagnated within its archaic system of “writs,” with its baggage of medieval pleading and proof requirements. American civil courts inherited many of these artificial constraints.

By the mid-nineteenth century, private parties whose personal and property interests were injured by others regularly used state civil courts to seek redress and compensation.¹⁸ We can surmise both the basis of Will's hypothetical tort suit for damages and how the New Jersey courts would have resolved the dispute in the 1840s.¹⁹

In the era before the blossoming of the tort of negligence, Will's complaint would have sounded in “trespass,” which the legal historian Maitland called “that fertile mother of actions.”²⁰ A cause of action for trespass to the body (“trespass *vi et armis*”) required proof that the defendant's conduct directly and forcefully caused the plaintiff's injury. The courts abided by the “well-known distinction of

17. Although Will is an imaginary character, Johnny Mack Winslow did play in that first contest.

18. Liability, according to Professor Wigmore, was imposed “on the visible offending source, whatever it be, of a visible evil result.” John H. Wigmore, *Responsibility for Tortious Acts: Its History*, 7 Harv. L. Rev. 315, 319 (1894).

19. Subsequent to Will Winslow's suit, disputes arising out of the business of baseball regularly found their way to court. See generally Roger I. Abrams, *Legal Bases: Baseball and the Law* (Temple U. Press 1998).

20. F.W. Maitland, *The Forms of Action at Common Law: A Course of Lectures* 48 (A.H. Chaytor & W.J. Whittaker eds., Cambridge U. Press 1936).

immediate injury and consequential” damage.²¹ There was no need to prove fault on the part of the defendant. One could recover in trespass for a direct invasion of person or property without regard to fault. If Will could recover by alleging and proving that the defendant “struck . . . [him] with a stick,”²² then he could certainly recover when the defendant “struck him with a ball.” Concepts developed under the rubric of negligence—duty, breach, and proximate cause—were yet to appear on the legal landscape.²³

In a primarily rural country, inadvertent contact between individuals was rare. The protection afforded to a defendant’s free action by the fault principle of negligence was unnecessary. Society was much more concerned about compensating an injured party for a direct injury. An injured individual might no longer be able to contribute to the development of the commonweal or to his own well being. Thus, the party who inflicted that loss should pay for what he broke.²⁴

Will’s cause of action against Tucker would have likely succeeded in the New Jersey courts: “That which is, essentially, a trespass, cannot become lawful from being done with good intentions, neither can the manner of doing the thing affect its intrinsic character. If unlawful in its own nature, it must continue to be so, however carefully or skillfully it may be done.”²⁵

IV. A TORT AT THE FIRST WORLD SERIES?

October 13, 1903, was a cold, dark, and overcast day in Boston, not a great day to celebrate the national game, but there was business to finish at the Hub’s Huntington Avenue Grounds. The Pittsburgh Pirates, the so-called “Champions of the West,” had easily secured their third consecutive National League pennant. The Boston club was the victor of the American League, led by future Hall of

21. *Cole v. Fisher*, 11 Mass. 137, 138 (1814); *Rappelyea v. Hulse*, 12 N.J.L. 257, 258 (1831) (“Under this state of demand, the plaintiff may unquestionably claim recompense for the injury done by driving the one wagon and horses against the other. And this act is the subject of a suit of trespass, not of trespass on the case; whichever of the criteria to distinguish between them may be preferred and adopted. It combines them all; it was unlawful; direct; immediate; wilful and forcible.”).

22. Dan B. Dobbs, *The Law of Torts* 25 (West 2000); see generally Francis H. Bohlen, *Studies in the Law of Torts* (The Bobbs-Merrill Co. 1926).

23. Of course, early actions based on indirect injury that fell outside of the writ of trespass laid the groundwork for negligence. Many legal historians regard *Brown v. Kendall*, 60 Mass. 292 (1850), as the first true negligence case, although the principles announced there by Chief Judge Lemuel Shaw of the Massachusetts Supreme Judicial Court resonated with concepts developed in earlier decisions both in America and England. See Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951).

24. Professor Holdsworth stated that: “[T]he dominant conception of Anglo-Saxon law” was “that a man acts at his peril.” Sir William Holdsworth, *A History of English Law* vol. 2, at 51-52 (4th ed., 2d impression, Methuen & Co. Ltd & Sweet & Maxwell Ltd 1966). See Sir Frederick Pollock, *The Law of Torts: A Treatise on the Principles of Obligations Arising from Civil Wrongs in the Common Law* 14-16 (10th ed., Stevens & Sons, Ltd. 1916).

25. *Bruch v. Carter*, 32 N.J.L. 554, 562 (1867). Compare *id.* with *Morrill v. Morrill*, 142 A. 337, 339 (1928) (“legal . . . injury which presents the basis of the suit must be predicated upon the violation, neglect, or omission of some legal duty . . . , which constitute[s] the proximate cause of the damage.”).

Famers Cy Young and Jimmy Collins. The press called the Boston team the Americans. They would not obtain their scarlet hosiery nickname until 1907.²⁶

The 1903 season was the first year under the Cincinnati Peace Agreement that had created the Major Leagues after two years of economic warfare between the National League and the upstart American League. Ban Johnson, a former sportswriter from Cincinnati, had converted the minor Western League into a rival for the established circuit and in 1901 and 1902 confronted the magnates at the box office. He secured well-known stars from National League clubs by offering a few extra hundred dollars in salary. By the end of the 1902 season, the National League owners sued for peace. The resulting treaty coordinated playing rules, schedules and the reserve system for players, but it did not provide for a post-season playoff between the victors of the two leagues.²⁷

Pirates owner Barney Dreyfuss challenged Boston's owner Henry Killilea (a lawyer who spent most of that season involved in his law practice in Milwaukee) to a best of nine-game tournament. After receiving permission from American League President Ban Johnson, Killilea accepted the challenge.

Dreyfuss knew his squad was first-rate. With Honus Wagner, perhaps the best player in the game, at shortstop, Pittsburgh enthusiasts were certain they would triumph. Much to the surprise of almost all observers, however, the Americans led the best-of-nine challenge series four games to three, and this would be the deciding game.²⁸

The ball field at the Huntington Avenue Grounds was an open spot of land surrounded on three sides by wooden grandstands. A fifteen-foot high fence guarded the outfield. The grass—where there was grass—was not tended. The infield was strewn with rocks and pebbles. The weather did not chill the enthusiasm of the Boston crowd, however, led by the ubiquitous leprechaun, Mike “Nuf Ced” McGreevey.²⁹ McGreevey owned the Third Base Saloon across the

26. General Charles Taylor, the publisher of the Boston Globe, purchased the club in early 1904 for his son, John I. Taylor, a character fit for a role in an F. Scott Fitzgerald novel. “John I,” as he was called, ran the franchise until 1911. In 1907, he bestowed the moniker “Red Sox” on his club. When he tired of the sport by the end of the decade, he developed family property in the Fens section of Boston by building a new concrete stadium, Fenway Park. He sold the club and stadium to James McAleer who would operate the Sox for only two seasons. Today, after a hiatus of more than ninety years, the Boston Globe is once again part of the ownership group of the Boston franchise. I tell the complete story of the 1903 World Series and the players and spectators who participated in the event in Abrams, *supra* n. 10.

27. See Abrams, *supra* n. 2, at 17-18.

28. The Series had commenced almost two weeks earlier with a surprisingly poor showing from hurler Cy Young that led to Boston's defeat in game one. The Boston nine could manage only one win in the first three games before the teams traveled west to the Smoky City for the next four contests, if all were necessary before the Pirates prevailed. After losing the first game in Pittsburgh's Exposition Park, the Americans rallied for three straight victories away from home. Now leading the Series four games to three, the Americans were ready to close out the tournament with one final win in the Hub. Abrams, *supra* n. 10, at ch. 8.

29. McGreevey's nickname derived from the method of alternative dispute resolution he employed to resolve verbal disputes in his drinking establishment. After an argument had raged for a while, McGreevey would intone “nuf ced,” and the argument would cease. See *In the Beginning: When Red Sox Nation Was Pilgrim Nation* <<http://www.redsoxdiehard.com/history/1901.html>> (accessed Jan. 25, 2003).

railroad tracks from the Grounds. He was the self-appointed caliph of the Boston Royal Rooters, a band of baseball fanatics who would root their hometown team on to victory in this first post-season tournament of the modern baseball era.³⁰

In the bottom of the fifth inning of the eighth game of the first modern World Series, Pittsburgh's shortstop extraordinaire, Honus Wagner, fielded a sharply hit ground ball off the bat of Chick Stahl of the Boston Americans. He threw it across the diamond toward William Bransfield, called "Kitty" because of his feminine hairstyle,³¹ who anchored first base. The result of his toss would give rise to our second hypothetical sports tort.

Sports historians say of Wagner's fielding that he would scoop up a ground ball with whatever detritus lay in its path and toss the amalgam toward first base. The first object to arrive was probably the baseball. The remainder of the accompanying rocks headed for the inhabitants of the bleachers.

It had been a long and arduous season for Wagner. By the eighth game, he was nursing injuries and battling fatigue.³² He was also peeved with the antics of the Royal Rooters who had razed him incessantly during the Pittsburgh contests, parodying the popular song "Tessie" with lyrics that inquired, "Honus, why do you play so badly?"

At the time of his injury, McGreevey was dancing a jig on the top of the roof that covered the players' bench. There were no dugouts in 1903, only a crude shelter for the fourteen players who made up the squad. With his megaphone in hand, McGreevey was leading his avid followers in still another chorus of "Tessie," their irritating theme song.

McGreevey turned toward the diamond to see the action. Wagner's throw had gone askew. The toss to first sailed towards the Americans' bench. McGreevey avoided the ball, but was hit by the accompanying stones. Undaunted, he continued the rooting, taunting the great Wagner incessantly.

By the top of the ninth inning with Boston leading three-to-zero, it was Wagner's turn at bat. The Boston Post related the story to its readers the next morning:

It fell to the great Honus Wagner, premier batsman of the National League, to make the last protest against Boston's claim to the world's championship, and as the mighty Dutchman came to the plate in the ninth, after two of his teammates had succumbed to Boston's play, the dramatic possibilities of the situation forced themselves on the mind of every excited "fan." Great big goose eggs hung from every one of the eight Pittsburgh frames on the score board, and it was up to the greatest hitter of the National League to make his mark in the last one. From Boston's frames the three runs stood out in deep relief.

30. *See id.*

31. Roger I. Abrams, *Constructing Baseball: Boston and the First World Series*, 23 *Cardozo L. Rev.* 1597, 1607 (2002).

32. The following week Wagner would make his annual announcement that he was retiring, only to retract the empty threat before spring training.

In the gathering gloom, “Big Bill” [Dineen, the Boston pitcher,] was shooting the new white ball over so fast that it looked like a will-o’-the-wisp. The big crowd hung on the moment of eager expectation and hardly a sound was heard. Then in a great stage whisper came “Strike Him Out!” as the stands realized no more artistic conclusion to the great series was possible. “Strike one!” called O’Day and a hysterical yell broke out on the air and then subsided as quickly. “Strike two!” called O’Day, and the whispered “Strike him out” became a wild, incoherent, roaring demand.

Slowly the big pitcher gathered himself up for the effort, slowly he swung his arms above his head. Then the ball shot away like a flash toward the plate where the great Wagner stood, muscles drawn tense waiting for it. The big batsman’s mighty shoulders heaved, the stands will swear that his very frame creaked, as he swung his bat with every ounce of power in his body, but the dull thud of the ball, as it nestled in Criger’s waiting mitt, told the story.³³

The Americans prevailed in the contest and the series, which led to a night of libations, celebrations, and profits for McGreevey at the Third Base Saloon.³⁴ The next day, however, McGreevey could feel the pain from the rocky onslaught and sought medical—and then legal—help. He wanted to sue Honus Wagner.

V. A CAUSE OF ACTION IN NEGLIGENCE

By 1903, civil courts across the country had developed the modern common law tort of negligence with all its nuances and defenses.³⁵ To establish his cause of action, McGreevey would have had to demonstrate that Wagner owed him a duty of care that was breached in this instance, that the breach was the actual and proximate cause of his injury, and that he suffered damages as a result. As his lawyer, John Chipman Gray,³⁶ would have advised him, that would be difficult here and Wagner had a failsafe defense of assumption of the risk.

Wagner acted as a reasonably prudent ballplayer in the same or similar circumstances. At times, even the best infielder makes an errant throw to first. (The fact that Wagner had been incensed by McGreevey’s incessant carping might

33. Abrams, *supra* n. 10, at 167-68.

34. McGreevey advertised with the memorable slogan: “You have to stop at Third Base on your way home!”

35. Massachusetts courts took the lead among American jurisdictions in establishing the “fault” principle as central to recovery for unintended injury. In *Brown v. Kendall*, 60 Mass. 292 (1850), Chief Justice Lemuel Shaw emphasized that simple direct causation of a personal injury would not suffice to establish a cause of action: “[T]he plaintiff must come prepared with evidence to show either that the intention was unlawful, or that the defendant was in fault; for if the injury was unavoidable, and the conduct of the defendant was free from blame, he will not be liable.” *Id.* at 295-96 (emphasis omitted).

36. Gray and his boyhood friend John Codman Ropes formed the Boston firm of Ropes and Gray in 1865. By the turn of the century, the firm had swollen in size to five lawyers. Grey handled litigation matters, among other things. Today, Ropes & Gray boasts more than 400 lawyers in six offices around the world, including my friend and classmate Steve Perlman. I am indebted to Mr. Perlman for his research into the firm’s history.

suggest a cause of action in battery,³⁷ but Gray thought that it would be a hard case to prove against one of the most level-headed ballplayers in the game.)

McGreevey's greatest obstacle, even assuming a prima facie case of negligence could be made out, lay in the defenses Wagner could assert to defeat his suit. As a regular "baseball fanatic," McGreevey certainly knew that spectators and flying baseballs often would come into contact.³⁸ It was part of the game, and he was a "voluntary spectator."³⁹ Even though in 1903 fans were required to return the baseball to the field for further play, the sphere regularly exacted a toll on those in attendance. McGreevey knew the dangers, and he accepted them.⁴⁰ It was too late now to complain. He had assumed the risk.⁴¹

Moreover, McGreevey was closer to the action than the other fans, having mounted the player's bench roof to lead his chorus in song. Were there any doubt—and there was little—that McGreevey would be barred from recovery, that vanished once he moved closer to the zone of danger. He failed to exercise care for his own safety and would be barred from recovery by the absolute defense of contributory negligence.⁴² McGreevey would have to bear his own loss, a sting that was salved by Boston's momentous victory.⁴³

37. Battery would require proof of intent on the part of the defendant. Mass. Tort Damages 2d Sec. 9-2 (2001).

38. *Cincinnati Baseball Club Co. v. Eno*, 147 N.E. 86, 87 (Ohio 1925) ("[I]t is common knowledge that in baseball games hard balls are thrown and batted with great swiftness, that they are liable to be thrown or batted outside the lines of the diamond, and that spectators in positions which may be reached by such balls assume the risk thereof.").

39. *Scanlon v. Wedger*, 31 N.E. 642, 642 (Mass. 1892).

40. *Dobbins v. Lang*, 63 N.E. 911, 911-12 (Mass. 1902) ("The danger of such an accident as that by which the plaintiff was hurt was not only obvious, but was so clearly and fully known to him and so clearly appreciated by him that solely because of it he stopped work and left his machine and went to find one of the defendants in order to have the cause of danger removed. Not finding the person whom he sought he went back to the machine and resumed work perfectly aware of the danger. This was not due care and was an assumption of the risk. He was old enough and intelligent enough to have known better and as he acted under neither ignorance nor constraint he has no cause of action and the jury should have been so told.").

41. In *Steele v. City of Boston*, 128 Mass. 583 (1880), the Massachusetts Supreme Judicial Court ruled that a person hit by a sledding youth while walking across the Boston Common would have no cause of action: The City might, if it "saw fit, set apart and fit for use one of the paths for the recreation of youth in coasting, and if any one should, as was the case with the plaintiff, choose to enter upon the path, seeing that it was set apart for this purpose, he would do so at his own risk, and could not hold the owner responsible if he was injured by a passing sled." *Id.* at 584.

42. *Messenger v. Dennie*, 5 N.E. 283, 284 (Mass. 1886) ("The plaintiff was engaged in the dangerous sport of riding upon the runners of a sleigh in the public street; he suddenly left the runner of the sleigh on which he was riding, while it was in motion, in front and within a few feet of the sleigh driven by the defendant, who was driving at a moderate rate of speed. If, as is now claimed, the plaintiff saw the defendant's team approaching, it does not help his case. He thoughtlessly and imprudently put himself in a position of danger, and, upon the facts, his injury is attributable to his own carelessness, and not to any negligence of the defendant.").

43. Compare *Quinn v. Recreation Park Assn.*, 46 P.2d 144 (Cal. 1935) ("one of the natural risks assumed by spectators attending professional games is that of being struck by batted or thrown balls.") with *Edling v. Kansas City Baseball Exhibition Co.*, 168 S.W. 908, 910 (Mo. App. 1914) ("It was the duty of defendant to exercise reasonable care to keep the screen free from defects and if it allowed it to become old, rotten and perforated with holes larger than a ball, the jury were entitled to infer that it did not properly perform that duty, but was guilty of negligence."). See generally Roger I. Abrams, *The All Star Baseball Law Team*, 1 Seton Hall J. Sport L. 201 (1991).

VI. CONCLUSION

The national game has gone in and out of fashion for more than 150 years, but it retains its attraction for fans of all ages and social classes. Like all sports, there are risks of injury in baseball, both to players and spectators. There might be civil remedies for some fans injured by flying bats and balls, but they are as much of a long shot as the 1969 Mets—who we know did win the World Series. They are as likely as any ballplayer breaking the great Babe’s home run record which, of course, has happened repeatedly in recent seasons.

It is prudent, then, to take care when someone “takes you out to the ball game.” Buy peanuts and Cracker Jack, but keep your eye on the happenings on the field. Personal safeguarding is a far better strategy than post-injury litigation—and it does not hurt as much.

