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Allocation of Risk between Hockey Fans and Facilities: Tort Liability after the Puck Drops

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ALLOCATION OF RISK BETWEEN HOCKEY FANS AND FACILITIES: TORT LIABILITY AFTER THE PUCK DROPS©

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I. INTRODUCTION

The sport of hockey traces its roots back over 500 years ago to Northern Europe.[1] The game came to North America, specifically Canada, in the late nineteenth century.[2] Despite the lore that it is a European or Canadian game, organized professional hockey was actually first played in the United States in 1904.[3] Today, the National Hockey League ("NHL") is the dominant force in professional hockey in the world and includes teams from the United States and Canada. Players in the league come from Europe and North America. The NHL has national television contracts in both Canada and the United States, and its players regularly compete in the Winter Olympics. There are numerous minor leagues and countless sanctioned amateur leagues in the United States and Canada. In addition, hockey is a significant commercial enterprise. Currently the thirty NHL teams together have gross revenues of about $1.9 billion,[4] although questions have been raised about the league's financial health.[5]

During 2002, however, the safety of the enterprise rather than the financial aspects of it grabbed the headlines. And it was not player safety, but spectator safety. On March 16, 2002, during a Columbus Blue Jackets NHL game, a deflected slap-shot struck Brittanie Cecil a thirteen-year-old Ohio girl in the left temple.[6] The impact of the puck fractured her skull and bruised her brain, but more critically caused her head to snap back violently, tearing her right vertebral artery. The torn artery developed a large clot that inhibited the blood supply to Brittanie's brain. She died on March 18, the first fan fatality in the history of the NHL.[7] Just two months earlier, Elizabeth Hahn, a Chicago BlackHawks season ticket holder, had been struck by a puck at a game at the United Center in Chicago.[8] She required surgery to remove a blood clot on her brain.

In July 2002, the NHL responded to these two incidents and mandated that safety netting be installed at all arenas around the league.[9] It also mandated a

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1. NHL.com, *History* <http://nhl.com/hockeyu/history/evolution.html> (accessed Jan. 16, 2003). *See* Stats Hockey, *History of Hockey, 1800 to Present* <http://statshockey.homestead.com/historyof hockey.html> (accessed Jan. 16, 2003).

2. NHL.com, *supra* n. 1.

3. *Id.*

4. *The Inside Track; Q & A with Gary Bettman*, L.A. Times D2 (Oct. 11, 2002) (available in 2002 WL 2509869).

5. *See generally* Mary Ormsby, *NHL's Financial Future: It's Ugly; League at Crossroads As Salaries Keep Rising and Economy Falters*, Toronto Star E1 (Nov. 13, 2001) (available in 2001 WL 29260203). *See* Bruce Cheadle, *Senators File for Bankruptcy Protection; Team's Future in Ottawa Uncertain*, Hamilton Spectator E1 (Jan. 10, 2003) (available in 2003 WL 4547791).

6. L. Jon Wertheim, *How She Died; The Puck That Struck Brittanie Cecil in the Left Temple Fractured Her Skull, but the Cause of Her Death Was a Blood Clot in a Vertebral Artery*, Sports Illustrated 60 (Apr. 1, 2002) (available in 2002 WL 8253608).

7. Donna Spencer, *Slapshot Kills Fan at NHL Game*, Hamilton Spectator A1 (Mar. 20, 2002) (available in 2002 WL 22404809).

8. Art Golab, *Woman Hit by Puck to Sue NHL, Hawks, United Center*, 146 Chi. Sun-Times (Apr. 23, 2002).

9. According to the Detroit Red Wings web site, describing the netting at the Joe Louis Arena:

> Netting is common at hockey games virtually everywhere else in the world, and following the tragic accident in Columbus last spring, a lot of thought and research went into the

standard height of Plexiglas around the rinks.[10] The NHL officially proclaimed its arenas to be safe, and Commissioner Gary Bettman, referring to the safety retrofits, stated, "We're doing it because we think it's the right thing to do after what has happened."[11] Hahn has filed suit against the arena, the team, and the league, and by claiming that defendants willfully and wantonly disregarded the safety of the spectators she is attempting to avoid the application of an Illinois state law[12] that grants hockey venue operators immunity from liability for injuries.[13]

This article explores the liability rules that apply to spectator injuries at hockey games. The article discusses and categorizes the various theories of liability and specific allegations of negligence that are applicable in such cases. The prevailing "limited duty" rule is explored and explained as it impacts spectator recovery and the application of the rule is compared to auto racing, baseball, and golf cases. The article critically examines and interprets recent legislation that has been designed to reduce the liability exposure of sports facilities. This is followed by an examination of the specifics of a currently filed suit in Illinois that illustrates the allegations and evidence in a modern hockey injury case and the potential impact of immunity legislation. The article concludes with the argument that the "limited duty rule," as explained and expanded on herein, continues to be the preferable rule for managing hockey accidents and is beyond doubt preferable to recent statutory "solutions."

II. COMMON LAW SPORTS LIABILITY MODELS

Those injured in sports or recreational activities generally will look to recover from a participant,[14] facility (or team or promoter), or an equipment

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league's decision to mandate netting for all 30 NHL arenas. While the analysis confirmed that NHL buildings are safe, the league felt taking this step was the appropriate response to such a tragedy and would make the spectator areas even safer. The league's objective was to reduce the possibility that a puck would enter the seating area during pregame warm-ups and games, and to attain that goal without unduly interfering with your enjoyment of the game.

Detroit Red Wings.com, *Arena Information* <http://www.detroitredwings.com/tickets/arena_info.asp#> (accessed Jan. 29, 2003).

10. John Wawrow, *NHL Approves Netting for Safety Purposes; Bettman Orders Initiative in Wake of Young Girl's Death*, Chi. Sun-Times 153 (June 21, 2002) (available in 2002 WL 6462140).

11. *Id.*

12. *See infra* n. 189.

13. *Hahn v. NHL Enter. Inc.*, Case No. 02 L 5084 (Cir. Ct. Cook County, Ill. 2002). Further discussion of this litigation is contained in the text accompanying *infra* Part IV(A). No action has yet been filed by the estate of Brittanie Cecil.

14. Generally, courts are moving away from negligence to more intentional theories in the case of co-participant recreational sports cases. *See Crawn v. Campo*, 643 A.2d 600, 601 (N.J. 1994); *Jaworski v. Kiernan*, 696 A.2d 332, 333 (Conn. 1997); *Dare v. Freefall Adventures, Inc.*, 349 N.J. Super. 205, 793 A.2d 125, 130 (N.J. Super. App. Div. 2002); *Mastro v. Petrick*, 112 Cal.Rptr.2d 185, 189 (Cal. App. Dist. 5 2001); *Schick v. Ferolito*, 767 A.2d 962, 970 (N.J. 2001); *Ritchie-Gamester v. City of Berkley*, 597 N.W.2d 517, 527 (Mich. 1999); *cf. Zurla v. Hydel*, 681 N.E.2d 148 (Ill. App. Dist. 1 1997).

supplier.[15] In very broad terms, these actions respectively map to intentional tort, negligence (including premises liability), and strict products liability actions.[16]

Spectator cases have some distinctive characteristics. First, most spectator injury cases occur in a contained area such as a stadium that features compressed seating arrangements, a lack of natural cover, and endless operator-provided entertainments or diversions which distract from the sport itself.[17] Second, although a robust subset of spectator cases deal with crowd management[18] and the general condition of facilities,[19] the growth is in cases involving projectiles leaving the participant area and entering a spectator area. Most projectile cases involve baseball, ice hockey, automobile racing, or golf, although there are a few reported cases involving other types of intrusion.[20]

In a spectator-projectile case, an injured spectator's likely first choice of defendant will be the facility owner or operator or the event promoter—whoever had control over the premises at the time of the incident.[21] Spectators are invitees,[22] although that is a less crucial categorization now that so many jurisdictions have abandoned the old common law licensee-invitee distinction.[23] Today, it is beyond argument that a sports facility owes its spectator customers a duty of reasonable care.[24]

Exceptionally, a spectator in a projectile case will seek recovery against an actor other than the facility. Such actors include the sports team (either for its personal liability or for vicarious liability for a player or other employee, and

15. *See generally* Lee R. Russ, *Products Liability: Competitive Sports Equipment*, 76 A.L.R.4th 201 (1989).

16. Throughout this article, the injured plaintiffs in such cases will be characterized as either "participants" or "spectators," depending on context.

17. *See e.g. Gunther v. Charlotte Baseball, Inc.*, 854 F. Supp. 424 (D. S.C. 1994); *Prochnow v. El Paso Golf Club, Inc.*, 625 N.E.2d 759 (Ill. App. 4th Dist. 1993); *Coronel v. Chi. White Sox, Ltd.*, 595 N.E.2d 45 (Ill. App. 1st Dist. 1992).

18. *See e.g. Williams v. Cloverleaf Enter., Inc.*, 37 Fed.App. 77 (4th Cir. 2002) (available in 2002 WL 1310387); *Hudson v. Riverport Performance Arts Centre*, 37 S.W.3d 261 (Mo. App. 2000).

19. *Godee*, 764 N.E.2d 591 (plaintiff slipped and fell in a drainage ditch by school's field as she walked to her car following her son's soccer game); *Mayhue v. Middle Ga. Coliseum Auth.*, 559 S.E.2d 488 (Ga. App. 2002) (plaintiff alleged that container of nacho cheese on floor outside concession stand presented an unreasonable risk of harm); *Hawkes v. Catatonk Golf Club Inc.*, 732 N.Y.S.2d 132 (N.Y. App. Div. 3d Dept. 2001) (plaintiff injured by flying golf ball alleged that lack of safety barriers and closeness of hard-surfaced parking lot to third tee was unreasonably dangerous); *Meyer v. Sch. Dist. of Colby*, 595 N.W.2d 339 (Wis. 1999) (plaintiff injured at football game when bleachers broke).

20. *See e.g. Bereswill v. Natl. Basketball Assn., Inc.*, 719 N.Y.S.2d 231 (App. Div. 1st Dept. 2001) (professional basketball player dove out of bonds in pursuit of loose ball and injured courtside photographer); *Cannavale v. City of New York*, 683 N.Y.S.2d 528 (N.Y. App. Div. 1st Dept. 1999) (football players); *Daves v. Shepherd Spinal Ctr., Inc.*, 466 S.E.2d 692 (Ga. App. 1996) (wheelchair racer); *Mahan v. Hall*, 897 S.W.2d 571 (Ark. 1995) (rodeo rider on bucking horse); *Kornhuber v. St.*, 601 N.Y.S.2d 354 (N.Y. App. Div. 2d Dept. 1993) (errant ski).

21. *See Restatement (Second) of Torts* § 328E (1965).

22. *See Restatement (Second) of Torts* § 332 (1965).

23. *See* discussion in *Mallet v. Pickens*, 522 S.E.2d 436, 439-46 (W.Va. 1999); *see generally Rowland v. Christian*, 443 P.2d 561, 564-68 (Cal. 1968); *cf. Carter v. Kinney*, 896 S.W.2d 926, 929 (Mo. 1995).

24. *See e.g. Romeo v. Pittsburgh Assoc.*, 787 A.2d 1027, 1030 (Pa. Super. 2001); *Schneider v. Am. Hockey and Ice Skating Center, Inc.*, 777 A.2d 380, 385 (N.J. Super. App. Div. 2001); *Celli v. Sports Car Club of Am., Inc.*, 105 Cal.Rptr. 904, 912 (Cal. App. 1972).

assuming it is legally distinct from the facility or promoter),[25] the player involved,[26] a referee or umpire who allegedly failed to control proceedings,[27] a product supplier responsible for the equipment that caused the injury,[28] or the architect or supplier of the "barrier" that failed to prevent the injurious contact.

Simplified, and removed from the context of a particular case or sport, the spectator-plaintiff in a projectile case will allege lack of reasonable care because of either inadequate safety barriers[29] or a failure to warn.[30] As to the former, the plaintiff will argue negligence in failing to provide sufficient "safe" or protected areas, that the barrier was inadequate in its dimensions or location, or that the barrier was improperly constructed or maintained. The latter, failure to warn allegation, may extend beyond notifying of the dangers associated with certain locations and include identifying the corollary, safe areas within the stadium. Defendants, in addition to contesting the *prima facie* case, likely will assert affirmative defenses such as comparative fault or rely on exculpatory agreements or notices.[31]

III. PROJECTILE CASES AND TORTS DOCTRINE

Premises liability doctrine has long included the concept that the "possessor of land is not liable to his invitees for physical harm caused to them by any activity or condition on the land whose danger is known or obvious to them, unless the possessor should anticipate the harm despite such knowledge or obviousness."[32] As applied, however, the concept has led to some troubling doctrinal constructs. First, courts frequently have failed to place appropriate fact-sensitive limitations on defendants' "obvious risk" arguments. Second, courts and commentators have tended to interweave the "obvious risk" proposition with affirmative defenses based on plaintiff misconduct.

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25. *See* discussion at text accompanying *infra* note 227.

26. *See e.g. A Quick Read on the Top Sports News of the Day; Suspended*, USA Today 1B (Jan. 24, 1995) (compiled by Mark Hayes & Arthur Dixon) (available in 1995 WL 2924263) (Norwegian defenseman broke his aluminum hockey stick against the Plexiglas and then flung the pieces into the stands. A 15-year-old boy lost three teeth and a newspaper photographer was hit in the eye by a splinter.).

27. *See e.g. Santopietro v. City of New Haven*, 682 A.2d 106 (Conn. 1996).

28. *See e.g. Sanchez v. Hillerich & Bradsby Co.*, 128 Cal.Rptr.2d 529 (Cal. App. Dist. 2 2002) (plaintiff presented sufficient evidence against aluminum bat manufacturer of increased risk of injury from bat to overcome grant of summary judgment); *Mohney v. USA Hockey, Inc.*, 5 Fed.App. 450 (6th Cir. 2001) (available in 2001 WL 223852) (reversing defense summary judgment that had been granted to manufacturers of hockey equipment). *See Garcia v. Kusan, Inc.*, 655 N.E.2d 1290 (Mass. App. 1995) (floor hockey). Another example might be a splintered baseball bat.

29. *See e.g. Hawkes*, 732 N.Y.S.2d at 133 (golf patron hit by golf ball in parking lot alleged that lack of effective safety barriers was unreasonably dangerous).

30. *See e.g. Marshall v. Heartland Park Topeka*, 49 P.3d 501, 502 (Kan. 2002) (spectator alleged negligence in failure to warn that seating area at drag race was dangerous); *Godee v. Ill. Youth Soccer Assn.*, 764 N.E.2d 591, 593 (Ill App. Dist. 2 2002) (plaintiff who slipped and fell in drainage ditch while walking from soccer field to parking lot alleged failure to warn of danger on property).

31. Often confusingly referred to as *express* assumption of risk in contrast to the *implied* primary and secondary assumption doctrines discussed below. *See* text accompanying *infra* notes 43-49.

32. *See Restatement (Second) of Torts* § 343A(1). *See generally* Jerry J. Phillips et al., *Tort Law: Cases, Materials, Problems* ch. 8 (3rd ed., LexisNexis 2002).

An "obvious risk" characterization is premised on the plaintiff and defendant (here spectator and facility) incurring similar information costs with regard to a particular type of accident risk. Information cost parity suggests that the plaintiff is as able as the defendant to avoid the risk (either by avoiding the activity altogether or by taking suitable precautions). Take the example of products liability failure to warn cases. There, courts have repeatedly ruled that the open and obvious nature of the risk serves as a functional replacement for a supplier's warning to the consumer. It follows, therefore, that in cases of obvious danger the supplier is under no duty to provide a functionally duplicative warning.[33]

In contrast, in products liability *design* cases,[34] modern doctrine tells us that the obviousness of a risk is merely one element to be factored into the liability calculus—it is not determinative because the obviousness of the risk does *not* serve the same function as the defendant's duty to design a non-defective product.[35] Herein lies the key to why an open and obvious rule is flawed in most spectator-projectile cases. Only a few plaintiffs in projectile cases argue that they should have been *warned* of the danger; most pursue an inadequate (design, location or maintenance) barrier theory. Yet, it is only in failure to warn cases that obviousness of risk may be functionally duplicative of the defendant's duty.

In sports projectile cases, particularly hockey cases, brought on an inadequate barrier theory, the *hockey* risk is merely background data; the *actual* risk that requires analysis is that the puck would evade a barrier or that the spectator was in an unguarded yet hockey-risky area.[36] These location and barrier risks (particularly the former) are far less likely to be provable as "open and obvious." Equally lacking is any cogent argument consistent with the accident avoidance message implicit in the "obvious risk" characterization;[37] the argument that even a knowledgeable hockey fan is *as a matter of law* better able to prevent injury from a hundred mile per hour puck than an adequate barrier is untenable.[38]

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33. *See e.g. Glittenberg v. Doughboy Recreational Indus.*, 491 N.W.2d 208, 216 (Mich. 1992) ("where the very condition that is alleged to cause the injury is *wholly* revealed by casual observation of a simple product in normal use, a duty to warn serves no fault-based purpose").

34. Admittedly, these products liability cases are brought on a strict liability theory in contrast to the negligence theory used in projectile cases, but that distinction is not decisive on the functional issue argued here.

35. *See e.g. Auburn Machine Works Co. v. Jones*, 366 So.2d 1167, 1169 (Fla. 1979) ("The modern trend in the nation is to abandon the strict patent danger doctrine as an exception to liability and to find that the obviousness of the defect is only a factor to be considered as a mitigating defense in determining whether a defect is unreasonably dangerous and whether plaintiff used that degree of reasonable care required by the circumstances."); *see Ogletree v. Navistar Intl. Transp. Corp.*, 500 S.E.2d 570, 571 (Ga. 1998).

36. Compare a participant case, where arguably it is the *hockey* risk that requires analysis.

37. The person who has the lower risk information costs is in the better position to avoid the risk.

38. An incident that occurred in September 2002 at a Tampa Bay Lightning preseason NHL game illustrates the validity of this proposition. Carol Miller, an experienced hockey fan, was struck by a puck causing a broken nose and extensive stitches inside her nose. A newspaper account of the incident notes:

> Miller was busy talking to her son Terry's new girlfriend and not watching the action.
>
> . . .

A fortiori, and previewing the comparative fault argument made below, the "open and obvious" characterization should be resisted in barrier cases because it is premised on individual knowledge, yet operationalized as a blanket rule that seems not to differentiate between the casual fan and the knowledgeable season-ticket holder.

An additional argument against the "open and obvious" rule operating as a matter of law in the projectile cases may be based on the Restatement's own exceptional language. Section 343A(1) excepts cases where "the possessor should anticipate the harm despite such knowledge or obviousness."[39] This exception is now broadening beyond its initial application in economic compulsion and distraction cases.[40] This is an underused argument in spectator cases.[41] However, in light of the increasing number of literal distractions, such as the diversions and entertainments featured "live" or on video screens in most stadiums, this argument may have increasing effectiveness.

The second major flaw with the application of the "open and obvious" rule in premises liability cases and specifically in sports projectile cases is that it inappropriately interweaves the "obvious risk" proposition with affirmative defenses based on plaintiff misconduct. Lobbyists seeking immunity legislation and even a few courts throw around the phrase "assumption of risk" as though it describes both a self-evident fact and a risk-allocating conclusion (*i.e.,* "spectators know of the risks and so assume them").

Within the torts system, however, the assumption of risk concept has been unpacked[42] and is used to precisely label two distinct arguments, one normative or categorical, the other factual or at least fact-intensive:[43] first, that the plaintiff is one of a class to whom a risk *should* be allocated ("primary assumption of risk"); second, that this particular plaintiff *in fact* voluntarily encountered a risk[44] that he or she knew and appreciated[45] ("secondary assumption"). Contemporary case law

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> "I never saw it coming," Miller said. "The next thing I saw was black and then blood."
>
> Miller vows to be more vigilant, but does not think much would have saved her. . . .
>
> "My husband was watching and he didn't see it," said Miller . . . "Do you know how hard it is to see something black coming at you 100 miles per hour?"

Ed Reed, *Puck Stops Here for Cape Fan, 62*, The News Press (Fort Myers, Fla.) 9A (Sept. 24, 2002) (available in 2002 WL 25955236); *cf.* Dialog between Nicolas Terry and Jonathan Edwards Terry (Jan. 10, 2003) ("I have two words for you, 'Fan Helmets.'") (copy on file with authors).

39. *Restatement (Second) of Torts* § 343A(1).

40. *See e.g. Sollami v. Eaton*, 772 N.E.2d 215, 224-25 (Ill. 2002) (finding that "the likelihood of injury [is] slight when the condition in issue is open and obvious," and that the defendant did not have duty, but that the economic compulsion and distraction exceptions to the open and obvious danger rule did not apply).

41. *Cf.* the factual statement in *Schneider*, 777 A.2d 380: "Plaintiff did not see the puck come off the player's stick because she was looking at another player on the opposite side of the rink." *Id.* at 382.

42. *See generally* Nicolas P. Terry, *Collapsing Torts*, 25 Conn. L. Rev. 717 (1993).

43. A third, its "primary assumption" meaning that refers to express disclaiming of liability is not relevant to this discussion. *See e.g. Schutkowski v. Carey*, 725 P.2d 1057 (Wyo. 1986). For a modern case on disclaimers, *see Dare v. Freefall Adventures, Inc.*, 793 A.2d 125 (N.J. Super. App. Div. 2002).

44. *See e.g. Marshall v. Ranne*, 511 S.W.2d 255 (Tex. 1974).

45. *See e.g. Desai v. Silver Dollar City*, 493 S.E.2d 540 (Ga. App. 1997).

further recognizes that the former sub-type is actually duplicative of the categorical (no) duty inquiry and that the latter, fact-intensive inquiry into this particular plaintiff's reaction to the encountered risk is coterminous with the comparative fault inquiry.[46]

There are, therefore, several lessons that may be drawn from modern doctrine when applying assumption of risk to projectile sports cases. First, if "assumption of risk" is used as a general normative proposition (*i.e.,* "these fans should be held to assume the risk"), then the proposition is a categorical no-duty argument and is subject to the critical comments made above[47] as well as our explanation of the limited duty rule below.[48] Second, if the label "assumption of risk" is directed at a particular plaintiff and his reaction to the projectile, then this is a fact-intensive inquiry, the burden of proof lies with the defendant, and because, today, this involves a *comparative* fault analysis, plaintiff misconduct will not necessarily bar all recovery. Modern premises liability cases have built on these concepts and frequently view the "open and obvious" rule as a categorical application of individual risk-taking and, as a result, inconsistent with the modern doctrine of comparative fault.[49]

Given these observations, how should a projectile case be analyzed as a matter of modern tort law? First, with regard to an inadequate barrier allegation, the "open and obvious" rule is generally inapplicable. Any obviousness of the risks associated with auto racing, baseball, hockey, or golf is not relevant to the plaintiff's allegations of negligent location, construction, or maintenance of a barrier. By default, the resolution of such inadequate barrier allegations is for the fact-finder. However, in contrast to its obviousness, the *level* of the risk is relevant. Thus, in identifying parts of the facility that require barriers, their dimensions and materials should be answered in part by reference to the likelihood of a projectile entering a particular spectator area and its speed and trajectory at that location. This "reasonable care" calculus will be informed by expert testimony on physics, feasible technologies, direct barrier costs, and indirect costs associated with any diminution of enjoyment opaque or transparent barriers would cause. Evidence of custom (such as barriers at comparable facilities) should be admissible but not conclusive.[50] Given the speed and unpredictability of hockey pucks and automobile debris, hockey and auto racing

46. *See generally Howell v. Clyde*, 620 A.2d 1107, 1112-13 (Pa. 1993).

47. *See supra* pt. II(A).

48. *See infra* pt. II(B).

49. *See Harrison v. Taylor*, 768 P.2d 1321, 1324-25 (Idaho 1989); *Ward v. K Mart Corp.*, 554 N.E.2d 223, 228 (Ill. 1990); *Cox v. J.C. Penney Co., Inc.*, 741 S.W.2d 28, 29 (Mo. 1987); *O'Donnell v. City of Casper*, 696 P.2d 1278, 1283-84 (Wyo. 1985); *Koutoufaris v. Dick*, 604 A.2d 390, 398 (Del. 1992) ("adoption of a comparative negligence standard . . . manifests a legislative intention . . . to retreat from a system of inflexible and unforgiving rules in favor of evaluation of the plaintiff's conduct on a case-by-case basis"); *cf. O'Sullivan v. Shaw*, 726 N.E.2d 951, 958-59 (Mass. 2000).

50. In only a small number of cases will defensive custom translate into a successful defense motion for summary judgment. *See e.g. Vuono v. N.Y. Blood Center, Inc.*, 696 F. Supp. 743, 746 (D. Mass. 1988).

facilities are likely to face a greater level of exposure than baseball stadiums for failure to erect barriers to protect spectators in the lower decks.

Second, courts will be on firmer ground in granting defense motions for summary judgment in failure to warn or inadequate warning cases.[51] As previously discussed,[52] it is primarily in warning cases that the obvious risk argument has most relevance. However, prior to granting a defense motion for summary judgment on such a claim, the court should be satisfied that it is dealing with the objective issue of obviousness and not improperly deciding an individual allegation of plaintiff misconduct as a matter of law. There is also room for a less than monolithic approach to projectile cases with regard to the failure to warn. For example, it is arguable that the risks of a foul ball in baseball (particularly in the upper decks) or a golf shot that carries over the green are considerably more obvious than the high velocity, ricochet prone projectiles that can enter almost any part of the spectator area during a hockey game or an automobile race.[53]

Third, although "assumption of risk" has been judicially deconstructed, plaintiff misconduct still may have legal repercussions. Actions brought by an inebriated spectator or one who fails to obey the instructions of safety or security staff or who gets too close to the catch fence at an automobile race or who falls from the upper deck while chasing a foul ball are all candidates for a reduction or negation of recovery based on the affirmative defense of comparative fault with due regard to allocation of the burden of proof. These repercussions, however, are case-by-case ones; they do not support a categorical rule.

IV. HOCKEY CASES AND THE LIMITED DUTY RULE

Historically, hockey cases have not always mapped to the language of these doctrinal constructs.[54] Operationally, however, and for the most part, they satisfactorily track their allocational effect. Specifically, they demonstrate: first, a willingness to allow hockey cases to go to the jury, notwithstanding the reference to limited duty language; second, a general appreciation that the calculus in hockey cases is significantly different from that in baseball cases; and, third, a growing appreciation of the increasingly circumscribed role of "assumption of risk."

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51. A typical modern NHL warning is that given by the Detroit Red Wings on their web site:

> WARNING! Despite enhanced spectator shielding measures, pucks still may fly into the spectator area. Serious injury can occur. Stay alert at all times including during warmup and after play stops. If struck, immediately ask an usher for directions to the medical station.
>
> Joe Louis Arena, like every building in the NHL, has added protective netting above the glass in each end of the rink.

Detroit Red Wings.com, *supra* n. 9.

52. *See* text accompanying *supra* note 33.

53. *See e.g. Alden v. Norwood Arena, Inc.*, 124 N.E.2d 505, 507-08 (Mass. 1955), discussed further in text accompanying *infra* notes 88-89.

54. For older cases, *see* W.E. Shipley, *Liability for Injury to One Attending Hockey Game or Exhibition*, 14 A.L.R. 3d 1018 (1967).

Several modern hockey cases reference baseball's so-called limited duty rule. This is something of a misnomer because, as applied, the rule has little to do with "duty"[55] and is not particularly "limited," especially in hockey cases. The "limited duty" phrase occurs in both participant and spectator cases.[56] As one California court expressed the core concept:

> In the sports setting, however, conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport. In this respect, the nature of the sport is highly relevant in defining the duty of care owed by the particular defendant.
>
> Generally, defendants have no legal duty to eliminate risks inherent in the sport itself, but they have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport.[57]

Viewed as a duty proposition, "limited duty" does little more than express the categorical determination that facilities are not responsible for a sport's inherent dangers. However, it does not follow, and the limited duty jurisprudence does not stand for the proposition, that facilities owe no other duties to spectators. The overwhelming thrust of the decided cases is that facilities have duties to warn (subject to the "obvious risk" rule discussed above)[58] and supply safe areas for seating.

It is frequently stated that a small number of jurisdictions subscribe to a more literal reading of the limited duty rule and hold that sports facilities owe *no* duty to spectators in projectile cases. In fact, this is not an accurate analysis. Examination of these apparent "no duty" cases reveals a judicial sentiment to deny a duty regarding inherent risks.[59] Similarly, under the limited duty rule, a defendant has no legal duty to eliminate risks inherent in the sport itself. These

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55. *See e.g. Bigbee v. Pacific Tel. & Tel. Co.*, 665 P.2d 947 (1983). Per Justice Kroninger,

> Whether a duty of care is owed in any particular instance is a question of law and "is the court's 'expression of the sum total of those considerations of policy which lead the law to say that the particular plaintiff is entitled to protection.'" There are a number of such considerations; "the major ones are the foreseeability of harm to plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved."

Id. at 955 (Kroninger, J., concurring & dissenting).

56. *See* the participant vs. participant case of *Crawn v. Campo*, 643 A.2d 600.

57. *Yancey v. Super. Ct.*, 33 Cal.Rptr.2d 777, 779-80 (Cal. App. 5th Dist. 1994) (citations omitted).

58. *See supra* pt. II(A).

59. *See e.g. Lang v. Amateur Softball Assn. of Am.*, 520 P.2d 659, 662 (Okla. 1974); *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 548-51 (Pa. 1978); *Modec v. City of Eveleth*, 29 N.W.2d 453, 456-57 (Minn. 1947); *Ingersoll v. Onondaga Hockey Club, Inc.*, 281 N.Y.S. 505, 507-08 (N.Y. App. Div. 3d Dept. 1935). For example, in *Petrongola v. Comcast-Spectacor, L.P.*, 789 A.2d 204 (Pa. Super. 2001), the court held that the owner of a hockey facility had no duty to protect fans from an errant puck entering the seating area of the arena since this was a "common, frequent and expected occurrence at a hockey game." *Id.* at 207. But the court clearly indicated that liability could be incurred if a facility's design or operations deviate from established custom in some relevant fashion. *Id.* at 210.

so-called no duty jurisdictions, therefore, are applying nothing more draconian than the limited duty rule.

The far more important role of the limited duty rule is to inform the standard of care (or, as some courts call it, the scope of the duty). The idea of inherent risk sets the baseline for the standard of care, explicitly informing the calculus that the activity being judged has certain risks and, implicitly, that proximity and visibility are spectator values.[60] In most premises liability cases, an invitee who presents evidence that he or she was struck by the defendant's small dark object traveling at one hundred miles per hour is going to have his or her case presented to the jury. The limited duty rule says that the plaintiff will need to show more if that object happens to be a hockey puck. To an extent, the limited duty language allows the appellate courts to tell trial courts that they should rule for the defendants in the absence of credible offensive evidence that the plaintiff's injuries were caused by something beyond the conditions and conduct inherent in the sport. It is an invitation for a defense motion for summary judgment; it is not a guarantee of the same.

The reported hockey cases are strongly supportive of this relatively narrow interpretation of "limited duty." In the recent case of *Schneider v. American Hockey and Ice Skating Center, Inc.*,[61] the trial court granted the defendant's motion for summary judgment on the basis that it had fulfilled its duty to a spectator struck by a puck between the eyes. The court said that the defendant had fulfilled the duty by installing a Plexiglas shield that protected the first row of seats and by having a fully enclosed room for risk-averse spectators. Affirming, the New Jersey appellate court noted the core doctrine as follows:

> [W]hat has come to be recognized as the prevailing rule is that a sports facility operator's limited duty of care has two components: first, the operator must provide protected seating "sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion," and second, the operator must provide protection for spectators in "the most dangerous section" of the stands. The second component of this limited duty ordinarily may be satisfied by the operator providing screened seats behind home plate in baseball and behind the goals in hockey.[62]

The *Schneider* court's message, however, was not that the defendant owed no duty, but rather that the plaintiff had failed in her evidentiary burden:

> Plaintiff failed to present any evidence to show that defendant breached a sports facility operator's limited duty of care. Defendant admittedly provided viewing areas for spectators who did not wish to be exposed to any risk from flying pucks both in the first row of bleachers and in the enclosed room above the bleachers. . . .

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60. *See e.g. Schneider*, 777 A.2d at 384 ("The critical circumstance that determines the scope of the duty of an operator of a baseball field or hockey rink is that most spectators prefer to sit where they can have an unobstructed view of the game and are willing to expose themselves to the risks posed by flying balls or pucks to obtain that view.").

61. 777 A.2d 380.

62. *Id.* at 384 (citations omitted).

> [P]laintiff did not offer any evidence that the unprotected seats in the side area of the rink pose an unduly high risk of injury from flying pucks.[63]

Attendance at sports facilities is voluntary and projectile cases (and probably most related sports scenarios) involve relatively complex trade-offs between entertainment and safety. The judicial rationale behind using the limited duty is to ensure that plaintiffs respect this complexity and muster the appropriate theories and expert testimony. Defendants should derive no further comfort from the court's choice of language.

V. DUTY AND BREACH IN PROJECTILE CASES

The risks of baseballs, bats, hockey pucks and sticks, golf balls, and racing car parts flying into the spectator areas of sports venues have been well documented in the popular press and likely can be substantiated through expert testimony or the defendant's own records. The frequency of these incidents and the spectator knowledge of such occurrences will vary according to the sport, define the level of "inherent risk," and inform the standard of care.[64]

A relatively recent development is the spectator's thirst for seating close to the action. Team and facility operators are marketing seats that are closer to the playing field than ever before and receiving premium fees for those seats. In baseball, these seats are between first base and third base in the lowest tier of seats. This coincides with what has been termed the most dangerous area for fans to sit. In all stadiums, this area is at least partially screened. But, the screening does not extend beyond the dugout areas, thus leaving some fans that are paying a premium unprotected. As one court has stated:

> [T]here is inherent value in having most seats unprotected by a screen because baseball patrons generally want to be involved with the game in an intimate way and are even hoping that they will come in contact with some projectile from the field (in the form of a souvenir baseball).[65]

As a result, there is an increasing tension between the desire of the fans to have the best view of the action and their safety. The question becomes who should be ultimately responsible for this safety and how? Hockey, like auto racing, has the same issue for fans in the lower tier of seating at its arenas, particularly in the area behind and adjacent to the goals. The following section explores the risks of auto racing and other projectile sports and the analytical treatment they have received in the courts.

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63. *Id.* at 385.

64. *Nemarnik v. L.A. Kings Hockey Club, L.P.*, 127 Cal. Rptr. 2d 10 (Cal. App. Dist. 2 2002).

65. *Benejam v. Detroit Tigers, Inc.*, 635 N.W. 2d 219 (Mich. App. 2001), *rev. denied*, 645 N.W.2d 664 (Mich. 2002).

A. *Auto Racing*

Spectator safety in automobile racing is most often a concern on oval, closed-course, or "super" speedway tracks.[66] On such courses spectator injuries and fatalities usually result from a vehicle colliding with an outer restraining wall (typically, on the outside radius of corners), with debris subsequently flying up and into the spectator area. Complicating the safety issue is the fact that racing automobiles are designed to "come apart" in an accident to dissipate energy more efficiently and so minimize risks to the *driver*.[67]

In July 1998 at Michigan Speedway, three spectators were killed and six injured when debris entered the spectator area after a Turn 4 crash during a Championship Autoracing Teams ("CART")[68] race.[69] In May 1999, after a car hit the outside restraining wall at Lowe's Speedway in North Carolina during an Indy Racing League ("IRL") race, a loose wheel ricocheted off a following car and into the stands, killing three and injuring eight.[70] Perhaps the most frightening crash was the one that led to the fewest injuries—cuts and bruises for five fans. In February 2000, a NASCAR racing truck struck the restraining wall and then cart-wheeled along the spectator fencing in a ball of flames, breaking steel support poles and destroying some fifty feet of fencing.[71]

Racing circuits and sports sanctioning bodies have responded to these accidents by increasing the height and strength of the catch fencing that protects the spectator areas and by introducing wheel tethers.[72] The wheel tether systems, adopted by NASCAR and the leading open wheel series, allow the wheel to fly off but stay restrained, in proximity to the rest of the damaged vehicle.[73] Projectile

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66. The track configuration favored for on oval courses leads to higher cornering speeds in closer proximity to spectators compared to street or in contrast to street or road course circuits such as those favored by Formula One, an International racing series governed by the Fédération Internationale de l'Automobile ("FIA"). *Fédération Internationale de l'Automobile*, http://www.fia.com/> (accessed Jan. 31, 2003). While spectator injuries do occur on street or road courses, most Formula One injuries are suffered by drivers and corner workers. *See infra* n. 74.

67. *See generally* Ed Hinton, *What Price Safety? Deaths in Auto Racing Appear to Be Preventable with New Features, but NASCAR Seems Unwilling to Change Its Attitude*, L.A. Times D1 (Feb. 11, 2001) (available in 2001 WL 2460520).

68. Two open-wheel racing series, Championship Auto Racing Teams ("CART") (<http://www.cart.com>), the Indy Racing League ("IRL"), known from 2003 onwards as the Indycar Series (<http://www.indyracing.com>), and NASCAR (<www.nascar.com>), which runs stock car and truck series, organize the preeminent oval races that take place in the United States.

69. CNN/SI, *Redistributing the Risk; Open-Wheel Drivers, Officials Banking on Space-Age Tethers* <http://sportsillustrated.cnn.com/motorsports/1999/raceday/news/1999/05/29/safety_package/> (May 30, 1999).

70. Curt Cavin, *IRL Confirms Errant Wheel Killed 3 Fans*, Indianapolis Star 1D (May 15, 1999).

71. CNN/SI, *Fiery Crash; Bodine, Fans Injured in 13-Truck Accident* <http://sportsillustrated.cnn.com/motorsports/2000/daytona500/news/2000/02/18/bodine_crash_ap/> (Feb. 22, 2000).

72. CNN/SI, Making changes; *Wheel Tethers, Higher Fences on Their Way to Indy Racing League* <http://sportsillustrated.cnn.com/motorsports/news/1999/05/18/crashes_responses> (May 19, 1999); Dave Kallman, IRL, *CART Unveil Safety Devices for Wheels* <http://www.jsonline.com/sports/race/may99/indy52499.asp> (May 24, 1999).

73. *See generally* Jim Leusner, *NASCAR Leaves Safety to Drivers; Worried about Liability, the Racing Organization Has Avoided Setting Stringent Standards*, Orlando Sentinel A1 (Aug. 20, 2001) (available at <http://www.orlandosentinel.com/news/local/orl-vol-nascar082001,0,3466438.story>).

type incidents still occur, particularly endangering track workers.[74] Some oval racing circuits, led by the Indianapolis Motor Speedway,[75] are now retrofitting their outside track barriers with "soft," energy-absorbing walls that better dissipate energy in high-speed accidents.[76]

Few modern reported auto racing cases[77] have involved spectator injuries.[78] Most of the projectile litigation has involved participants, occasionally drivers,[79] but primarily corner-workers or members of the pit-crew.[80] The excitement and dangers the drivers face in auto racing may entice spectators to the races, but it is safe to assume that the typical patron does not intend to directly participate in the danger.[81] Notwithstanding, historically track operators placed considerable reliance on the assumption of risk defense.[82] Today, however, the dominant issue litigated in the auto racing cases has been the validity and application of releases or disclaimers.[83]

The analytical model applied to defense-proffered disclaimers is relatively straightforward. First, some jurisdictions bring the analysis to a screeching halt by refusing to recognize contractual modifications to such torts duties in most circumstances. Most jurisdictions will perform an initial validity screening (akin to a substantive conscionability analysis) based on whether such a disclaimer is violative of public policy.[84] In auto racing participant cases, the trend is to uphold disclaimers.[85] In contrast, courts will seldom uphold such disclaimers in spectator cases.[86] Second, and even if considered substantively valid, such disclaimers may be challenged on the basis of procedural unconscionability if not comprehensible

74. ATLAS F1 News Service, *FIA to Improve Safety after Monza Death* <http://www.atlasf1.com/news/2000/sep/report.php/id/2924/.html> (Sept. 17, 2000); David Tremayne, *Safety Back under the Microscope* <http://www.grandprix.com/ft/ftdt027.html> (Mar. 21, 2001).

75. Transcript, *Indy Soft Wall Project* (Apr. 10, 2002) (available at <http://my.brickyard.com/500/press/story.php?story_id2=639>).

76. CNN/SI, *'Soft' Wall Works in First Race Test* <http://sportsillustrated.cnn.com/motorsports/2002/indy500/news/2002/05/26/soft_walls_ap/> (May 26, 2002); Dustin Long, *NASCAR Takes Look at Indy's Soft Walls*, Roanoke Times B5 (May 27, 2002) (available in 2002 WL 5432268).

77. For a collection of older cases, *see* H.D. Warren, *Liability of Owner or Operator of Auto Race Track for Injury to Patron*, 37 A.L.R.2d 391 (1954).

78. *See e.g. Harsh v. Lorain County Speedway, Inc.*, 675 N.E.2d 885 (Ohio App. 8th Dist. 1996) (spectator at stock car race struck by out-of-control vehicle); *Sewell v. Dixie Region Sports Car Club of Am., Inc.*, 451 S.E.2d 489 (Ga. App. 1994) (spectator struck by vehicle driven by driver who lost control at non-speed driving skill contest); *Huber v. Hovey*, 501 N.W.2d 53 (Iowa 1993) (spectator at race track injured by detached wheel); *see Gilkeson v. Five Mile Point Speedway*, 648 N.Y.S.2d 844 (App. Div. 3d Dept. 1996) (member of pit crew who was injured qua spectator).

79. *See e.g. Beaver v. Grand Prix Karting Assn., Inc.*, 246 F.3d 905 (7th Cir. 2001).

80. *See e.g. Dean v. MacDonald*, 786 A.2d 834 (N.H. 2001); *Holzer v. Dakota Speedway, Inc.*, 610 N.W.2d 787 (S.D. 2000).

81. Ray Yasser et al., *Sports Law: Cases and Materials* 729 (4th ed., Anderson Publg. Co. 2000).

82. Jason R. Jenkins, Student Author, *Not Necessarily the Best Seat in the House: A Comment on the Assumption of Risk by Spectators at Major Auto Racing Events*, 35 Tulsa L.J. 163, 165 (1999).

83. *See supra* n. 43.

84. *See generally Tunkl v. Regents of U. of Cal.*, 383 P.2d 441 (Cal. 1963); *Restatement (Second) of Torts* § 496B cmt. e.

85. *See e.g. Dean*, 786 A.2d at 838-40; *Beaver*, 246 F.3d at 910.

86. *See e.g. Gilkeson*, 648 N.Y.S.2d 845-46 (applying a New York statute, N.Y. Gen. Obligations L. § 5-326, voiding such releases).

or readable. Finally, even valid disclaimers have to be interpreted as to their scope[87] and may be subject to a "willful and wanton" exception.[88]

Somewhat contrary to this trend in spectator cases is *Huber v. Hovey*.[89] The plaintiff was injured by a racing car's detached wheel while in the pit area. He had paid a special admittance fee for that area and signed a release. The court upheld the release, noting that "there is no valid legal distinction between a release signed by a spectator permitted entry into a restricted area, and a release signed by a participant."[90] Given that the cases cited by the court generally concerned participants or spectators in restricted areas and the fact that the court would have been willing to listen to an argument that the risk faced was unusual or exceptional (such as the wheel eluding the safety catch-fencing), *Huber* is not fatal for spectator-projectile cases.

Disclaimer issues aside, even the older auto racing cases recognize a duty of reasonable care owed by a facility to a spectator. For example, in *Alden v. Norwood Arena, Inc.*,[91] a wheel flew off a stock car, killing a spectator. The track was surrounded by a chain link fence and a guard rail. There was evidence that wheels had become detached from cars but not that those wheels or any other projectiles had previously entered the spectator area. The court was dismissive of the defendant facility's assumption of risk argument, stating,

> While the deceased and the plaintiffs . . . were not unfamiliar with stock car racing, the jury could have found that none of them had ever seen a wheel fly off during a race. And the evidence falls far short of showing that this was a hazard which was so open and obvious that as matter of law they must be taken to have assumed it. On the contrary the evidence shows that the flying off of a wheel was a somewhat infrequent occurrence.[92]

The court was faced with a far closer call on the issue of the defendant's negligence given the relative paucity of evidence. Notwithstanding, the court concluded:

> The plaintiffs do not contend that the defendant ought to have taken greater precautions by way of screens, fences, or guard rails than it did. The breach of duty on which the plaintiffs rely was the failure of the defendant to warn of the danger. There was no such warning here and we are of opinion that the defendant could have been found to be negligent in this respect. It is true that the flying off of a wheel did not happen with great frequency but it was by no means an isolated or highly improbable occurrence. The jury could have found that the danger was such that the defendant should have anticipated it and given suitable warning.[93]

87. *See e.g. Dean*, 786 A.2d at 838; *Beaver*, 246 F.3d at 911.
88. *See e.g. Holzer*, 610 N.W.2d at 793-94; *Harsh*, 675 N.E.2d at 888.
89. 501 N.W.2d 53.
90. *Id.* at 56.
91. 124 N.E.2d 505.
92. *Id.* at 507-08.
93. *Id.* at 508.

Overall, the courts have held track operators to a reasonable care standard and, cognizant of the severity of risk if not its probability, have not made strong evidentiary demands on plaintiffs before allowing juries to hear the cases.[94]

Cortwright v. Brewerton International Speedway, Inc.,[95] illustrates the relatively unimportant role the limited duty rule plays in auto racing cases (and, as argued in this article, should play in hockey cases). In *Cortwright*, a racing car hit a stone on the track, throwing it high into the stands. The same jurisdiction's baseball rule as expressed in *Akins v. Glens Falls City School District*,[96] holding that the defendant must provide protected seats in the area of greatest danger, was premised on the limited duty rule.[97] However, in *Cortwright* the court required barrier protection to be provided to *all* spectators, stating:

> The danger of a foul ball traveling to a seat exists only when a batter swings at a pitched ball, a particular moment in time during which a viewer's attention is normally directed at the batter. The danger of a stone flying from the track is a constant threat during a race when cars are speeding by. A patron watching race cars positioned around the track is not able to remain vigilant against such a danger.[98]

These are premises and a position that should resonate with hockey litigants.

B. Baseball

It is estimated that forty-five to fifty baseballs per game find their way into the spectator seating areas, of which a significant majority are balls fouled off by batters.[99] Foul balls enter the spectator areas at speeds upward of eighty to one hundred miles per hour.[100] Stadium-initiated distractions aside, the attentiveness of spectators, of course, is a factor beyond the control of the facilities operators. It is, however, somewhat easier to follow a baseball than a hockey puck. The action typically begins with the pitcher throwing to a batter. It can be expected that the attentive fan will follow that pitch and then follow the path of the ball if it is hit. Most fans sitting in the areas where foul balls are most likely to be hit will be especially attentive, frequently because of their desire to catch such a ball. But there is an inherent danger due to the speed with which the balls enter the stands. The danger is higher in certain locations in the lower tier of seats from the dugouts out toward the outfield. The danger is also greater for the fan dealing with a concessionaire, watching the team mascot, or simply carrying on a conversation with a companion.

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94. *See e.g. Capital Raceway Promotions, Inc. v. Smith*, 322 A.2d 238, 241-42, 246 (Md. App. 1974).
95. 539 N.Y.S.2d 599 (N.Y. App. Div. 4th Dept. 1989).
96. 424 N.E.2d 531 (Ct. App. N.Y. 1981); *see* text accompanying *infra* notes 106-11.
97. *Akins*, 424 N.E.2d at 533.
98. *Cortwright*, 539 N.Y.S.2d at 601; *see Smith v. Lebanon Valley Auto Racing Inc.*, 598 N.Y.S.2d 858, 860 (N.Y. App. Div. 3d Dept. 1993).
99. *See generally* Sarah Treffinger, *Girl Hit by Ball Is Recovering; Fan Injured at Indians Game*, Plain Dealer (Cleveland, Ohio) 1B (June 2, 2001); Jay Hinton, *Foul Play*, Deseret News (Salt Lake City, Utah) D1 (July 4, 1998).
100. *See generally* Treffinger, *supra* n. 99; Hinton, *supra* n. 99.

In recent years, the trend of the judicial decisions has been to apply the limited duty rule to the stadium owners and operators in baseball.[101] The plaintiff in *Benejam v. Detroit Tigers, Inc.*,[102] was seated close to the field along the third base line. She was seated behind netting that the team had installed behind home plate and that extended part way toward first and third bases. A fragment of a broken bat that curved around the net struck and injured her. The plaintiff's contention was that the netting was not long enough and that the team should have been more aggressive in issuing warnings to spectators about the dangers of projectiles leaving the playing field.[103] Adopting the limited duty rule, the court stated, "[A] baseball stadium owner is not liable for injuries to spectators that result from projectiles leaving the field during play if safety screening has been provided behind home plate and there are a sufficient number of protected seats to meet ordinary demand."[104]

The court began its analysis with the premise that most people are very aware of the risks inherent in watching a baseball game, most notably that objects do with some regularity leave the playing field. A counterbalancing concept is that many fans want to be close to the field in seats with unobstructed views of the playing field. The court also recognized that the area immediately behind home plate, extending at least part-way down the first and third base lines is the most dangerous area in a stadium. The court believed that utilizing an ordinary negligence standard would restrict the enjoyment of the spectators because:

> For most fans, the everyday reality of attending a baseball game includes voluntarily subjecting oneself to the risk that a ball or bat might leave the field and cause injury. The limited duty rule comports more nearly with that everyday reality than would usual invitor-invitee principles of liability. While requiring that protected seats be provided for those who want them, the limited duty rule leaves the baseball stadium owner free, without fear of liability, to accommodate the majority of fans who prefer unobstructed and uninsulated contact with the game. Under usual invitor-invitee principles of liability, fear of litigation would likely require screening far in excess of that required to meet the desires of baseball fans.[105]

Benejam relied on *Akins*.[106] The *Akins* plaintiff was injured while watching a high school baseball game. She was hit by a foul ball while standing behind a three-foot fence along the third base line. There was no screen or netting to provide protection from projectiles. This case was the first baseball spectator

101. For cases applying the limited duty rule, *see e.g. Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219 (Mich. App. 2001), *rev. denied*, 645 N.W.2d 664 (Mich. 2002); *Lawson by and through Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013 (Utah 1995); *Bellezzo v. St.*, 851 P.2d 847 (Ariz. 1993); *Arnold v. City of Cedar Rapids*, 443 N.W.2d 332 (Iowa 1989); *but see Neinstein v. L.A. Dodgers, Inc.*, 229 Cal. Rptr. 612 (Cal. App. 2d Dist. 1986); *Jones v. Three Rivers Mgt. Corp.*, 394 A.2d 546 (Pa. 1978). *Neinstein* and *Jones* hold that the law imposes "no duty" on sports facilities to protect spectators from risks that are "common, frequent, and expected" in the sport at hand. *Neinstein*, 229 Cal. Rptr. at 616; *Jones*, 394 A.2d at 551. But as noted earlier, this is actually a misnomer and inaccurate.

102. 635 N.W.2d 219.

103. *Id.* at 220.

104. *Id.*

105. *Id.* at 224.

106. *Id.* at 223.

injury case to reach New York's highest court in the days following the adoption of comparative negligence. The court noted initially that the facility operator is not an insurer of spectator safety.[107] Rather, it is similar to any other owner of land in that its duty is to exercise reasonable care under the circumstances to prevent injury to those in attendance at games.[108] The court recognized that spectators have a desire to be close to the action and want an unobstructed view of the playing field. The court also observed that while there are inherent dangers in watching a baseball game, the risk to a spectator is not so high as to require protective screening around the entire facility.[109] This left the obvious question of how much protection will be sufficient for a stadium operator to discharge its duty to spectators. Ultimately, the court established a two-step analytical process: First, has the stadium provided protective screening for the area of the field behind home plate where the danger is the greatest? Second, does the screening extend to a sufficient range on either side of home plate to "provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game"?[110] The *Akins* court thus thoroughly addressed the realities of modern spectator sports and balanced them against public policy considerations related to the operation of a facility accommodating thousands of members of the public. The ruling allows for the marketing of premium seats with unique views of the field, but with some degree of protection from liability for the stadium owner, and yet provides a mechanism for protection of those closest to the action.[111]

Most recently, the Virginia Supreme Court has weighed in on spectators and projectile injuries. In *Thurmond v. Prince William Professional Baseball Club, Inc.*,[112] the court affirmed the granting of summary judgment to a defendant facility operator.[113] The plaintiff had been injured while sitting with her family and friends high in the bleachers on the third base side of the stadium. While there were warnings printed on the tickets, she had not read the warnings due to her husband having possession of the ticket. She remained alert during the game for foul balls, but was nonetheless struck by a line drive foul in the eighth inning. She apparently saw it coming, but did not have time to react. Her complaint alleged negligence in the failure of the defendant to provide adequate warning signs and

107. *Akins*, 424 N.E.2d at 533.
108. *Id.*
109. *Id.*
110. *Id.*
111. While this approach has been adopted by numerous jurisdictions, there has been some rejection of it by state legislatures. Two Illinois cases, notably, followed the same approach, but are no longer useful precedent for an injured spectator. *Yates v. Chi. Natl. League Ball Club, Inc.*, 595 N.E.2d 570 (Ill. App. 1st Dist. 1992); *Coronel*, 595 N.E.2d 45. The Illinois General Assembly promptly enacted the Baseball Facility Liability Act, 745 Ill. Comp. Stat. § 38/1, *et seq.*, which immunizes baseball stadium operators from liability for injuries to spectators absent proof of a defect in the protective screening or willful or wanton conduct on the part of the operator. *See Jasper v. Chi. Natl. League Ball Club, Inc.*, 722 N.E.2d 731 (Ill. App. 1999) (statute not unconstitutional as special legislation). For a discussion of this and similar statutes, *see infra* pt. III.
112. 574 S.E.2d 246 (Va. 2003).
113. *Id.* at 251.

to operate and maintain the stadium in a safe condition.[114] Defendant responded with a motion for summary judgment, contending among other arguments, that the plaintiff had assumed the risk of injury when she chose to sit in an unscreened part of the stadium.[115]

The court reviewed the collective work of baseball cases from the other jurisdictions and ultimately arrived at a result not inconsistent with the tenor of the limited duty rule. However, in upholding the trial court's grant of summary judgment, the court relied exclusively on an analysis of the principles of assumption of the risk and implicitly adopted the limited duty rule in the process.[116] The articulated key to the court was a determination of whether the plaintiff fully understood the nature and extent of the dangers presented by a live baseball game. However, the court's analysis placed more emphasis on objective factors. It proceeded to carefully discuss all aspects of the plaintiff's contentions regarding seating location, stadium dimensions, lighting, and warnings. It concluded that an "adult spectator of ordinary intelligence"[117] who is familiar with the game assumes the normal risks of watching the game, including an injury of this nature.[118]

While we believe the ultimate result of the court's decision is correct, there is an inherent inconsistency in it. It is difficult to reconcile the court's valid assessment of the subjective nature of the assumption of risk doctrine with a granting of summary judgment. If the court was unwilling to allow the plaintiff to present evidence, a more logical manner of resolving the matter would be a ruling on the basis of negligence. Assuming an accurate record was presented to the court, it appears that summary judgment would be proper on this basis. The other aspect of the court's opinion worthy of consideration is the focus of the ruling on the adult plaintiff familiar with the game. Can it be understood to mean that a minor plaintiff attending their first baseball game would have a greater chance of recovery in a case involving a similar injury? If so, this is the first court to inject this wild card into the analysis.[119]

C. Golf

Golf tournaments are held in perhaps the safest of venues among those analyzed herein. Experts posit that more claims are traditionally made as a result of slips and falls at tournaments than for injuries related to golf shots.[120] Further, there is a higher incidence of spectators hit by shots during the Pro-Amateur

114. *Id.* at 248.
115. *Id.*
116. *See id.* at 249-51.
117. *Thurmond*, 574 S.W.2d at 250.
118. *Id.*
119. What then would become of a foreign national, with no previous knowledge of baseball, in a similar situation? *See e.g. Ramirez v. Plough, Inc.*, 863 P.2d 167 (Cal. 1993) (discussing extent of supplier responsibilities to warn non-English speaking consumer).
120. Dan Aznoff, *Fans' Enthusiasm Creates Risks for Pro Sports Leagues, Their Insurers*, Natl. Underwriter Prop. & Cas.-Risk & Benefits Mgt. 11 (August 5, 2002) (available in 2002 WL 9936142).

phase of tournaments than when the professionals are the only players on the course.[121] Notwithstanding, golf spectators do suffer projectile injuries. In subsequent actions against tournament operators and golf course owners, the courts generally have applied similar doctrines to those found in the baseball and hockey cases.[122]

Typically the actions are brought against the owner of the golf course or the sponsor of the tournament.[123] The same, familiar confusion of doctrinal labels is to be found, with courts sloganizing that golf spectators assume the risks associated with being on a golf course, yet still holding facilities responsible to their spectators under the same standard used in the other sports discussed herein.[124]

Case law does provide some guidance into what would be the appropriate standard of care to be provided by a course owner or tournament promoter. In *Grisim v. Tapemark Charity Pro-Am Golf Tournament*,[125] a Minnesota court wrestled with the issue of whether the owners and promoters had a duty to provide marshals and barricades as added protection against errantly hit golf balls.[126] In this case, a spectator was struck by an errant shot while sitting under a tree near the eighteenth green. There were bleachers behind the green, but they were crowded and virtually inaccessible at the time of the plaintiff's injury.

The court applied the limited duty rule in sending the case back to the trial court.[127] It observed that the jury should have heard evidence relating to whether the tournament had provided adequate protected seating.[128] There are standards utilized by the various golf associations for the operation of tournaments, location of bleachers, barricades, concession stands, and spectator walk-ways.[129] Consistent with our analysis of the limited duty rule, the *Grisim* court held that the finder of fact must assess whether appropriate protective measures have been taken by a tournament operator and whether adequate appropriate seating has been provided.[130]

An Illinois court utilized essentially the same reasoning in a case in which a spectator was hit with a ball while standing at a concession stand located between

121. *Id.*
122. John J. Kircher, *Golf and Torts: An Interesting Twosome*, 12 Marq. Sports L.J. 347 (2001); *see generally Grisim v. TapeMark Charity Pro-Am Golf Tournament*, 394 N.W.2d 261 (Minn. App. 1986), *rev'd in part*, 415 N.W.2d 874 (Minn. 1987) (en banc); *Duffy v. Midlothian Country Club*, 415 N.E.2d 1099 (Ill. App. 1980).
123. Louis J. DeVoto, *Injury on the Golf Course: Regardless of Your Handicap, Escaping Liability Is Par for the Course*, 24 U. Toledo L. Rev. 859, 872 (1993).
124. *Id.*
125. 394 N.W.2d 261.
126. *Id.* at 264.
127. *Id.* at 263-64.
128. *Id.* at 264.
129. *Id.*
130. *Grisim*, 394 N.W.2d at 263-64.

two parallel fairways.[131] The court determined that the course could avoid liability if it had discovered dangers associated with the way in which the tournament course was laid out and had taken reasonable steps to protect spectators from those dangers.[132] The evidence indicated that shots had landed in the same spot during earlier stages of the tournament. It also indicated that the spectator who was injured was standing in a roped-off area, giving her somewhat of an expectation of safety.

A golf course that takes affirmative steps to maintain safe conditions and warn spectators of possible dangers creates a strong case for avoiding liability. Obviously, aesthetics and tradition militate against protective netting or Plexiglas barriers. It seems feasible, however, to have roped-off spectator areas that are not in the normal line of flight of shots, even those slightly off-line. It also seems reasonable to require the tournament organizers to have marshals vigilantly warning spectators of incoming shots and moving them out from unauthorized viewing areas. The difficulty of fulfilling these responsibilities however is evident when reading of incidents where fans have broken down barriers in an effort to get close to Tiger Woods.[133]

VI. HOCKEY, BASEBALL, AND UNIQUE TREATMENT

"Unique treatment" has entered the lexicon of hockey and projectile injury cases in at least two senses. First, those who would lobby for immunity legislation clearly have such a result in mind. Second, hockey defendants surely salivate over the "national past time" emotional strain detectible in some of the baseball foul ball cases and hope for the extension of any such "unique" treatment.

As has been noted throughout this article, courts in hockey cases have applied doctrine very similar to that used in other spectator-projectile sports cases. This article takes the position that different results in baseball cases do not follow from any explicit unique treatment sub-rule, but from discrete weighing of elements in the calculus of risk, or from failure by plaintiffs to proffer evidence of reasonable precautions. If a true case for "unique treatment" is to be made, then it is hockey (perhaps along with automobile racing) cases that require distinctive treatment. This section first argues that spectator expectations and risks in hockey have differentiating characteristics. Second, decided hockey cases are analyzed, and it is argued that courts are well aware of the special risks associated with the sport and have applied the generalized doctrine with this consideration in mind, concluding that sufficient distinctiveness is achieved through the *application* of the doctrine.

It is important to note hockey's unique characteristics. Hockey is played in arenas with a variety of levels of lighting. The athletes move across the ice on

131. *Duffy*, 415 N.E.2d at 1103; *see generally* Luke Ellis, *Talking about My Generation: Assumption of Risk and the Rights of Injured Concert Fans in the Twenty-First Century*, 80 Tex. L. Rev 607, 625 (2002).

132. *Duffy*, 415 N.E.2d at 1103.

133. *See* Aznoff, *supra* n. 120.

skates at speeds higher than athletes on foot. Each generation of players has become faster and stronger. Training techniques and dietary supplements add to their capabilities. They are attempting to move a puck across the ice, toward the goal, and sometimes taking shots with speeds in excess of one hundred miles per hour. All of this leads to one conclusion: the direction and trajectory of the puck can be extremely unpredictable.

According to NHL rules, "The puck shall be made of vulcanized rubber, or other approved material, one inch (1") thick and three inches (3") in diameter and shall weigh between five and one-half ounces (5½ oz.) and six ounces (6 oz.)."[134] The pucks have well-defined razor sharp edges. NHL rules also provide that the pucks are frozen prior to use so that they will slide across the ice with less friction.[135] Teams freeze the pucks prior to the game to about twenty degrees Fahrenheit and keep them chilled rink-side in buckets of ice.[136] Obviously, the speed and behavior of the puck is also a function of how it is struck, an aspect of the game that the NHL attempts to somewhat govern with certain rules that regulate the length and other characteristics of hockey sticks.[137] These sticks are now made of carbon-fiber, which allows for shots of greater velocity than wooden sticks.

Once the puck goes airborne, even an attentive spectator may have difficulty following its trajectory. Due to the unpredictability of the puck's flight, even the most knowledgeable hockey fan is at a safety disadvantage compared to even a casual fan at a baseball game. Further, many baseball spectators want to be in foul ball territory; for them, competing for a ball fouled into the stands is part of the entertainment. For obvious reasons this is not part of the culture of hockey.

In baseball it is predictable that balls and even occasionally bats or bat fragments will enter the stands and may strike spectators. These risks occur at relatively determined moments. The primary action is always initiated by the pitcher throwing the ball towards a waiting batter at home plate. Other than at the moment of the bat making contact with the ball, there is only a small risk of projectiles entering the spectator areas at dangerous speeds. In hockey, the puck is continually moving and is being passed from player to player and deflected and stolen by opposing players. While the object of the puck's travels is ultimately the goal, it can take a very unpredictable course along the way, with a possibility of leaving the ice at virtually any place in the arena. Simply watching the player with the puck is not sufficient, for deflections can instantly send the puck in an unexpected direction.

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134. *NHL Rulebook*, Rule 24(a) <http://www.nhl.com/hockeyu/rulebook/rule24.html> (accessed Jan. 29, 2003); *see Did You Know*, Washington Post E6 (June 11, 1998) (available at <www.washingtonpost.com/wp-srv/sports/capitals/longterm/1998/stanleycup/articles/know11.htm>).

135. *NHL Rulebook*, Rule 24(b) <www.nhl.com/hockeyu/rulebook/rule24.html> (accessed Jan. 29, 2003).

136. *See Did You Know*, *supra* n. 134.

137. *NHL Rulebook*, Rule 19 <http://www.nhl.com/hockeyu/rulebook/rule19.html> (accessed Jan. 29, 2003).

The speed of the action and the generally non-stop nature of it is another factor different from baseball. Just this season, the NHL imposed a new rule that actually speeds up play by limiting the time play is stopped prior to a face-off.[138] This is likely to catch some fans off guard, as they may think there is a lull in the action, when in reality play will begin anew within twenty seconds under the new rule. In short, there is very little predictability from one moment to another as to the direction the puck will be traveling next.

The inherent dangers of the game itself have caused the league to impose some safety requirements for the players and have caused the players themselves to take some precautions. The NHL mandates that players wear helmets[139] and goalies have for several decades worn protective masks for, among other things, protection from pucks.[140] It seems reasonable that if the players are concerned about safety, then the arenas should at least provide some protection to those fans most exposed to dangers. The inquiry must then focus on what level and type of protection. Who needs this protection? Is it for every spectator? Is it only for attentive spectators? Is it only for those with little experience at hockey games? Is it only for one gender in light of studies showing that women are more frequently injured by flying pucks than men? Should there be greater protection provided during pre-game warm ups when there are multiple pucks on the ice and fans are just arriving at the arena and settling into their seats? These are among the considerations that the courts applying the limited duty rule to hockey will take into account. Some are relevant and some are not. Ultimately, relevance will depend upon the specific allegations and evidence presented. In other words, is there some arena related reason for a fan not being attentive? Is there some particular nuance of the game that might put an inexperienced spectator at more risk than an experienced one?

Historically, the courts have treated hockey somewhat differently from baseball. This is appropriate given that even under the rubric of the same limited duty rule, the evidence, feasible precautions, and weight given to the various factors in the calculus will be different. Over time, however, the rationales behind the disparate treatment have shifted. In the early hockey cases, the courts appeared to treat hockey differently because of a belief that spectators were not as knowledgeable about the game, its complexities, and nuances.[141]

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138. *NHL Rulebook*, Rule 54 <http://www.nhl.com/hockeyu/rulebook/rule54.html> (accessed Jan. 29, 2003) ("As soon as the line change procedure has been completed by the Referee and he lowers his hand to indicate no further changes, the Linesman conducting the face-off shall blow his whistle. This will signal to both Teams that they have no more than five (5) seconds to line up for the ensuing face-off. At the end of the five (5) seconds (or sooner if both centers are ready), the Linesman will conduct a proper face-off.").

139. *NHL Rulebook*, Rule 22(b) <http://nhl.com/hockeyu/rulebook/rule22.html> (accessed Jan. 29, 2003).

140. NHL.com, *History* <http://nhl.com/hockeyu/history/evolution.html> (accessed Jan. 29, 2003) (quoting John Davidson & John Steinbreder, *Hockey for Dummies* (IDG Books Worldwide, Inc. 1997).

141. *See e.g. Tite v. Omaha Coliseum Corp.*, 12 N.W.2d 90, 97 (Neb. 1943); *James v. R.I. Auditorium, Inc.*, 199 A. 293, 297 (R.I. 1938); *Shanney v. Boston Madison Square Garden Corp.*, 5 N.E.2d 1 (Mass. 1936).

In 1952, the Ohio Supreme Court, in *Morris v. Cleveland Hockey Club, Inc.*,[142] adhered to what appeared to be the prevailing view when it held that hockey should not be treated the same as baseball. In *Morris*, a spectator attending his first hockey game was seated directly behind one of the team benches and was struck by a misdirected puck during the game. The location of this seat was on the side of the rink, in an area with no screening or glass to protect the spectators.[143] Although there was screening provided in the areas behind the goals, there were, however, no warning signs or cautionary announcements at the facility.

The court in *Morris* discussed at length the general familiarity that the public had at the time with baseball. It predictably referred to it as "the national pastime."[144] The court noted that the baseball is quite easy to follow in its various trajectories and that the dangers are quite obvious even to the casual observer. In contrast, hockey at the time was not as popular either as a spectator or participant sport. The court relied on several factors in finding the dangers to be less obvious than in baseball. It pointed out that the arena is much smaller, no warnings are given, and the object is for the puck to slide along the ice, thus leading the spectators to be less on guard for airborne objects at a hockey game than at a baseball game. In determining to follow the lead of other jurisdictions by not following the baseball rule, the court stated: "Although hockey is becoming ever more popular, it is not nearly so universally played as is baseball and, as we have pointed out, its dangers are certainly not so obvious to a stranger to the game as would be the dangers incident to baseball."[145]

The availability of a screened seating area was raised by the defendant. However, the court clearly was unimpressed, as the plaintiff had a ticket for an unscreened seat and was given no warning, either on the face of the ticket or by a particularized or general announcement in the arena, of the dangers of flying pucks. The court thus concluded that the injured spectator had not, as a matter of law, assumed the risk of injury.[146]

In subsequent years, the courts have recognized the increasing popularity of hockey and the increased fan knowledge of the nuances and dangers of the game.[147] As a result, courts now seem reluctant to draw distinctions based on fans'

142. 105 N.E.2d 419 (Ohio 1952) (comparing the perceived dangerousness of baseball and hockey from a spectator's perspective).

143. *Id.* at 426. Interestingly, even half a century ago, there was screening behind the goals, providing protection for approximately one-third of the spectators.

144. *Id.*

145. *Id.* Interestingly, the court does note that Canadian courts at this time did hold to the notion that the spectator assumes the risk of injury from a flying puck. *Id.* at 425-26. Implicit in this reference is the concept that hockey in the middle of the century was thought to be a Canadian game. Indeed, in the cases the court noted, the plaintiffs each had either attended or played in hockey games prior to being injured. *Id.* (citing *Elliott v. Amphitheater, Ltd.* 3 W. Wkly. Reps. 225 (Manitoba King's Bench 1934); *Mlle. Gervais v. Canadian Arena Co.*, 74 Rapports Judiciares de Quebec 389 (C.S. 1934)).

146. *Morris*, 105 N.E.2d at 426.

147. An exception to this is *Riley v. Chicago Cougars Hockey Club, Inc.*, 427 N.E.2d 290 (Ill. App. 1st Div. 1981) (noting fundamental differences between hockey and baseball and the dangers inherent, as well as fan knowledge thereof).

knowledge of the game of hockey compared to the national pastime.[148] At the same time, the modern cases continue to recognize that the two sports and their inherent dangers are different in operationalzing the limited duty rule through the reasonable care standard.

Recently, the New Jersey court, in *Schneider v. American Hockey and Ice Skating Center*, had occasion to explore the recent history of such cases and determined that the rule that had previously been applied in baseball cases should also be imposed in hockey cases.[149] The case involved a plaintiff who had attended over 400 hockey games and who testified that she had observed pucks entering the bleacher area at least once a game.[150] She was injured while sitting in the second row of bleachers in an unprotected portion of the arena during a game in which her son was a participant.[151] The court looked to both decisions indicating that facilities operators have "'no duty' to provide spectators with protection from flying balls or pucks"[152] and to those holding facilities operators to a limited duty of care to spectators.[153] It determined that the better approach was to adopt the limited duty rule as explained herein, requiring the facility to provide the option of safe seating and protection for dangerously located spectators.[154]

The court indicated that an owner could satisfy the latter part of the rule by providing screening behind the goals in a hockey venue.[155] The court also noted that ultimately a question of fact would be presented regarding the facility operator's compliance with this standard. In other words, has the operator provided sufficient seating that is screened for those fans reasonably expecting to be protected? Has the operator screened those obviously, highly dangerous areas? In reaching this decision, the court did recognize the desire of many fans to be close to the action.[156]

There is a segment of the spectator population that does want to be close enough to the ice to clearly see the speeding puck, the collisions between the players, and most important to some hockey fans, the punches thrown and blood drawn during the heat of the moment. Under the limited duty rule, those fans desiring seating of this nature along the sides of the arena may not have any recourse against the team or facility owner if they are struck by a puck leaving the

148. *Schneider*, 777 A.2d at 384; *Moulas v. PBC Prods., Inc.*, 570 N.W.2d 739, 745 (Wis. App. 1997); *Pestalozzi v. Phila. Flyers Ltd.*, 576 A.2d 72, 73-74 (Pa. Super. 1990).

149. *Schneider*, 777 A.2d at 383-84.

150. *Id.* at 381.

151. *Id.* at 382.

152. *Id.* at 384 (citing *Lang*, 520 P.2d at 662; *Jones*, 394 A.2d at 548-51). The underlying premise for this position is that a person who attends a sporting event assumes any risks inherent in watching that particular sport. *Id.*

153. *See* cases in *supra* n. 148.

154. *Schneider*, 777 A.2d at 384.

155. A legitimate question is raised whether simply providing netting behind the goals is sufficient to satisfy this standard in light of the injury to Elizabeth Hahn in Chicago and the tragic death of Brittanie Cecil in Columbus. The NHL has now implicitly designated a wider area as the most dangerous with it a mandate to league teams to provide netting behind the goals and around to the corners of the rinks. *See* Detroit Red Wings.com, *supra* n. 9.

156. *Schneider*, 777 A.2d at 384.

playing surface. Those content or desiring to sit in the most dangerous areas (*i.e.*, behind the goals) will be protected. In *Schneider*, the facility had no seating behind the goals, which the court correctly described as the most dangerous area, and the plaintiff offered no evidence that the unprotected seating area on the side of the rink was unduly dangerous.[157] In this instance, summary judgment for the defendant was appropriate.

The risks peculiarly inherent in hockey were viewed through a slightly different analytical prism in the California case of *Nemarnik v. Los Angeles Kings Hockey Club, L.P.*[158] There, the plaintiff claimed that the defendant's poor crowd control was the reason she was hit by a puck.[159] The plaintiff was a season ticket holder with seats in the fourth row in an area not protected by glass or screening. She was struck in the face by a puck, receiving severe injuries. The accident happened during pre-game warm ups, when multiple pucks were in play on the ice, and when the plaintiff's view of the rink was blocked by other spectators milling around and moving to their seats.

The gist of her action was that the arena had not adequately protected her under the circumstances of the situation, specifically that the ushers should have moved the spectators out of her line of sight of the ice.[160] To that end, the plaintiff introduced evidence of written policies of the arena for its ushers that spoke to situations where latecomers might block the view of seated spectators or groups of milling spectators could create congestion. The court noted that flying pucks are an inherent risk at hockey games.[161] It also noted that fan familiarity with this danger is now consistent with the familiarity baseball fans have with that game's inherent risks.[162] The plaintiff argued that the presence of fans blocking other spectators' clear view of the ice was not an inherent risk.[163] The court found to the contrary, indicating that spontaneous and unpredictable behavior by fans blocks views of others with such regularity as to be an inherent part of the game of hockey.[164]

Multiple pucks on the ice at the same time, blocked views, and failure of ushers to move spectators from non-seating areas are all factors that may come into play in a different way in hockey than in other sports. No court, however, has yet imposed a legal duty to prevent crowds from obscuring views during pre-game warm ups. Indeed, it is to be expected that commotion will ensue prior to the start of a game when people are still arriving and moving toward their assigned seats.

The issue of arena design was introduced by the plaintiff in the recent Pennsylvania case, *Petrongola v. Comcast-Spectacor, L.P.*[165] Here again, the court

157. *Id.* at 385.
158. 127 Cal. Rptr. 2d 10.
159. *Id.* at 12.
160. *Id.*
161. *Id.* at 15.
162. *Id.*
163. *Nemarnik*, 127 Cal. Rptr. 2d at 15.
164. *Id.*
165. 789 A.2d 204.

was presented with a plaintiff who was a season ticket holder, thus presumably knowledgeable of the inherent risks of hockey. He was seated on the side of the arena directly behind the area made up of the players' bench and a path leading from the bench to the dressing room. While the remainder of the rink was surrounded by dasher boards and a Plexiglas shield, at this point there was a five foot gap in the shield. An errant puck flew through this gap and struck the plaintiff. The court held that the arena had no duty to protect the spectators from a flying puck since such occurrences were "common, frequent and expected" at a hockey game.[166] However, the court noted that a facility could be held liable if it were shown to have deviated from established custom in some way.[167]

The plaintiff's contention was that the gap in the Plexiglas was directly contrary to established design standards established by the American Hockey League, of which the defendant team was a member. These standards were derived from a guide for hockey arenas issued by the American Society for Testing Materials ("ASTM").[168] Here the argument was flawed because the league standards applied only to facilities built after 1996 and the defendant's facility was built in the early 1970s.[169] The court also rejected the claim that by erecting the shield in the first place that a duty of reasonable care was created and subsequently breached by the presence of the gap.[170] Once again, a court looked closely at the unique characteristics of the game and its arenas. But, in the end it applied the same general standards to the unique facts, as it would have in a baseball case.

VII. SPORTS INJURY IMMUNITY LEGISLATION

A. *Legislative Models*

Three broad types of statutory provisions have modified the rights of those involved in sports or recreational pastimes by limiting or excluding recovery. First, many jurisdictions have what are known as recreational use statutes.[171] Such legislation is generally activity-agnostic[172] and reduces or eliminates the premises

166. *Id.* at 215.
167. *Id.*
168. *Id.* at 209.
169. *See id.* at 211-12.
170. *Petrongola*, 798 A.2d at 213.
171. *See e.g.* Colo. Rev. Stat. § 33-41-101, *et seq.*, 745 Ill. Comp. Stat. § 65/1, *et seq.*, O.C.G.A. § 51-3-20, *et seq.*, Code of Ala. § 35-15-1; N.D. Cent. Code § 53-08-01. *See generally* Robin Cherl Miller, *Effect of Statute Limiting Landowner's Liability for Personal Injury to Recreational User*, 47 A.L.R.4th 262 (1986).
172. *See e.g.* Colo. Rev. Stat. § 33-41-102(5) (2002):

> "Recreational purpose" includes, but is not limited to, any sports or other recreational activity of whatever nature undertaken by a person while using the land, including ponds, lakes, reservoirs, streams, paths, and trails appurtenant thereto, of another and includes, but is not limited to, any hobby, diversion, or other sports or other recreational activity such as: Hunting, fishing, camping, picnicking, hiking, horseback riding, snowshoeing, cross country skiing, bicycling, riding or driving motorized recreational vehicles, swimming, tubing, diving, spelunking, sight-seeing, exploring, hang gliding, rock climbing, kite flying, roller skating,

liability of landowners, so encouraging them to open their property to the public.[173] A few broadly written recreational use statutes may apply to protect, for example, some municipal hockey[174] or baseball facilities,[175] but generally will be inapplicable to commercial facilities.[176]

Second, several jurisdictions have what may be termed "participant" legislation that applies to certain high risk sports or recreational pastimes, such as horseback riding,[177] skiing,[178] and even some amusement park rides.[179] A few lower risk sports have attracted similar legislation when they face difficulties obtaining affordable indemnity insurance.[180] Such statutes tend to mimic the traditional common law position by distinguishing between inherent and extraordinary risks of the sport, allocating the former risks to the individual participants but allowing liability rules to shift some of the latter risks to those who supply services, locations, or equipment.[181] Such statutes frequently call for specific warning signage or other disclosures of risk.[182] A few states have extended protection from suit to select sports participants such as volunteer referees or coaches.[183]

Third, and of primary concern in the ice hockey scenario, a small number of legislatures have passed what may be termed "spectator" statutes that externalize some spectator injury risks, immunizing facilities or participants. These spectator statutes tend to be sport-specific, applying, for example, to baseball,[184] automobile racing,[185] or ice hockey.[186]

The prototypical projectile sports immunity statutes are those that apply to baseball facilities. Arizona,[187] Colorado,[188] and Illinois[189] have passed such

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bird watching, gold panning, target shooting, ice skating, ice fishing, photography, or engaging in any other form of sports or other recreational activity.

Id.

173. Colo. Rev. Stat. § 33-41-101 (2002).

174. *See e.g.* Tex. Civ. Prac. & Remedies § 75.002(e)(1) (Supp. 2003).

175. *See e.g. Brooks v. Northwood Little League, Inc.*, 489 S.E.2d 647 (S.C. 1997) (applying South Carolina recreational use statute, S.C. Code Ann. § 27-3-30).

176. Most recreational use immunities are premised on free-of-charge access to the premises. *See e.g. Jansen v. Howard*, 263 Cal. Rptr. 776 (Cal. App. 3d Dist. 1989) (six dollar entry fee constituted entry for consideration under the applicable statute).

177. *See e.g.* Ariz. Rev. Stat. § 12-553 (Supp. 2002); 745 Ill. Comp. Stat. § 47/1, *et seq.* (2002).

178. *See e.g.* Colo. Rev. Stat. § 33-41-112 "no skier may make any claim against or recover from any ski area operator for injury resulting from any of the inherent dangers and risks of skiing"; *see* Utah Code Ann. § 78-27-51, *et seq.* (2002).

179. *See e.g.* Utah Code Ann. § 78-27-61 (2002).

180. *See e.g.* 745 Ill. Comp. Stat. § 72/1, *et seq.* (2002) (roller-skating).

181. *See supra* nn. 177-79.

182. *See supra* nn. 177-79.

183. *See e.g.* 745 Ill. Comp. Stat. § 80/1 (2002).

184. *See e.g.* Ariz. Rev. Stat. § 12-554 (Supp. 2002), 745 Ill. Comp. Stat. § 38/1 (2002); *cf. Hills v. Bridgeview Little League Assn.*, 745 N.E.2d 1166 (Ill. 2000).

185. *See e.g.* Ariz. Rev. Stat. § 12-556 (Supp. 2002) (having both "spectator" and "participant" applicability).

186. *See infra* pt. III(B)(1).

187. Ariz. Rev. Stat. § 12-554.

188. Colo. Rev. Stat. § 13-21-120 (2002).

legislation. Typically, such legislation immunizes a baseball team owner or facility from liability when baseballs or other equipment strike spectators.[190]

While the Illinois statute, like its almost identically worded hockey sibling,[191] seems primarily aimed at delivering immunity for facilities, the Arizona and Colorado statutes are conceptually more interesting.

In Arizona, the immunity is lost if the facility "[d]oes not provide protective seating that is reasonably sufficient to satisfy expected requests."[192] The premise seems to be that the information costs as to the projectile dangers of the sport *and* the dangerous locations in the stadium are quite low. As a result, the facility should only be liable for inherent risks when spectators are unable to operationalize a risk-averse choice because there are insufficient "safe" areas.

The Colorado statute is less friendly towards spectators in that the stadium owner's responsibility is to post signage rather than explicitly provide an adequate number of safe or protected seats.[193] However, such a duty could be implied from the more general obligation that survives the immunity to "make a reasonable and prudent effort to design, alter, and maintain the premises of the stadium in reasonably safe condition relative to the nature of the game of baseball."[194]

The reason this "safe or protected" approach has not been tried in a hockey immunity statute may be due to the fact that there are few, if any, "good" seats in a hockey stadium that are risk-free in the absence of protective barriers. Further, it is possible that legislators are conscious that in a hockey game the puck is in constant motion; in a baseball game, the ball is thrown and batted at predictable times and in predictable directions.

B. Hockey Legislation Analyzed

Only two states, Illinois and Utah, have passed legislation immunizing hockey facilities. While the passage of the statutes may be linked to specific events within the jurisdictions, it is more difficult to discern any specific *need* for the legislative intervention,[195] such as keeping the state competitive at a time of increased franchise movement, or responding to large increases in liability insurance that would affect the viability of a franchise.[196]

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189. 745 Ill. Comp. Stat. § 38/1. *See generally* Ted J. Tierney, Student Author, *Heads Up!: The Baseball Facility Liability Act*, 18 N. Ill. U.L. Rev. 601 (1998) (discussing Illinois' Baseball Facility Liability Act and arguing that the Act should be repealed).

190. The Illinois baseball facility immunity statute was enacted in response to two Illinois appellate decisions that applied a reasonable care standard in foul ball cases involving the White Sox and the Cubs. *See Jasper*, 722 N.E.2d at 735 (discussing *Coronel*, 595 N.E.2d 45, and *Yates*, 595 N.E.2d 570).

191. *See* text accompanying *infra* note 196.

192. Ariz. Rev. Stat. § 12-554(A)(1).

193. Colo. Rev. Stat. § 13-21-120(5)(c).

194. Colo. Rev. Stat. § 13-21-120(5)(a).

195. It is possible that the Illinois hockey statute was enacted at the urging of the owner of the Chicago BlackHawks after the Illinois court's ruling in *Riley v. Chicago Cougars Hockey Club, Inc.*, 427 N.E.2d 290. The *Riley* court may have signaled additional exposure for hockey clubs when it distinguished the baseball cases. *See supra* n. 147.

196. *Cf.* Illinois' *Roller Skating Rink Act*, 745 Ill. Comp. Stat. § 72/1, *et seq.*, which begins with the legislative finding that "owners of roller skating rinks face great difficulty in obtaining liability

1. Illinois

The Illinois Hockey Facility Liability Act immunizes owners or operators of hockey facilities from liability to spectators who suffer personal or property injuries when hit by a hockey stick or puck.[197] The immunity applies to most forms of ice hockey,[198] be it amateur or professional, and includes practice.[199] The immunity does not apply specifically to the activity itself but rather to the facility within which it is played.[200] The immunity applies whether or not the facility is used exclusively for hockey and regardless of whether it is owned by, for example, professional sports teams, private colleges, or municipal school districts.[201] Although the intent of the legislation may have been to protect facilities against actions by spectators, the statute is not so limited, applying to actions brought by "any person,"[202] presumably including actions brought by team or facility employees or by the players.[203]

The statute admits of two limited exceptions that render inapplicable the facility immunity. The first depends on where the injured spectator was located;[204] the second depends on the mental state of the actor who causes the injury.[205]

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insurance coverage at an affordable cost. . . ." 745 Ill. Comp. Stat. § 72/5. Compare also the Colorado baseball statute that states, "Limiting the civil liability of those who own professional baseball teams and those who own stadiums where professional baseball games are played will help contain costs, keeping ticket prices more affordable." Colo. Rev. Stat. § 13-21-120(2).

197. 745 Ill. Comp. Stat. § 52/10.

198. Illinois has a separate "participant" statute that applies to Roller Skating Rinks. *See* 745 Ill. Comp. Stat. § 72/1, *et seq*.

199. 745 Ill. Comp. Stat. § 52/5. Section 52/5 of the Act states:

> "Hockey" includes the game of ice hockey, including practice, regardless of whether it is played on a professional or amateur basis and regardless of whether it is played under an organized or league structure or outside of any such structure. "Hockey" does not include field hockey, roller hockey, or any other form of hockey that is not played on ice.

Id.

200. 745 Ill. Comp. Stat. § 52/10.

201. 745 Ill. Comp. Stat. § 52/5. Section 52/5 provides:

> "Hockey facility" means any rink, stadium, or other facility that is used for the play of ice hockey (regardless of whether it is also used for other purposes) and that is owned or operated by any individual, partnership, corporation, unincorporated association, the State or any of its agencies, officers, instrumentalities, elementary or secondary schools, colleges, or universities, unit of local government, school district, park district, or other body politic and corporate.

Id.

202. 745 Ill. Comp. Stat. § 52/10.

203. Issues outside of the scope of this article.

204. 745 Ill. Comp. Stat. § 52/10(1). Section 52/10 states:

> The owner or operator of a hockey facility shall not be liable for any injury to the person or property of any person as a result of that person being hit by a hockey stick or puck unless: the person is situated behind a screen, protective glass, or similar device at a hockey facility and the screen, protective glass, or similar device is defective (in a manner other than in width or height) because of the negligence of the owner or operator of the hockey facility . . . .

Id.

205. 745 Ill. Comp. Stat. § 52/10(2). Section 52/10 states:

> The owner or operator of a hockey facility shall not be liable for any injury to the person or property of any person as a result of that person being hit by a hockey stick or puck

Presumably, the location exception was intended to negate the immunity where a spectator believed he or she was in safe territory behind the glass but the puck still made it through. In one way, however, the exception may be narrower than intended and, in another, may be broader than makes good sense. As to the former, the legislation refers to "a screen, protective glass, or similar device."[206] Arguably, the *ejusdem generis* rule might need some stretching to cover the netting now installed in many hockey arenas. As to the latter and more serious issue, the immunity is negated only if the "device is defective . . . because of the negligence of the owner or operator of the facility . . . ."[207] A non-existent device can hardly be described as a defective device. Arguably, therefore, an arena that fails to install a glass or netting is in a better position than one that does. A contrary legislative intent is very hard to find given that the statute specifically excludes "width or height" from its view of "defective."[208] The statutory language is at its grayest when it comes to location of the device. Can a poorly located screen or glass be viewed as "defective"? Or, running in the contrary direction, is the location of a device a function of its "width or height"?

The second scenario in which the facility would lose its immunity is where there has been "willful or wanton conduct."[209] This is a familiar exception in legislative immunity models such as "good Samaritan"[210] or recreational use statutes.[211] What is oddly different in the Hockey Facility Liability Act is that immunity can be lost because of the "willful or wanton conduct" of *another* party. This other party ("any hockey player or coach employed by the owner or operator") arguably is a party that the defendant would not normally be responsible for as a matter of tort law. More importantly, the defendant is not in a position to control this other party in any way that would minimize the risk of spectator injury. In passing, note that for the "willful and wanton conduct" to apply, that conduct must be "in connection with the game of hockey."[212] Thus, if a player or coach threw a stick at a spectator because of some preexisting animosity, the defendant might argue that the willful and wanton exception was not applicable.[213]

> unless . . . the injury is caused by willful and wanton conduct, in connection with the game of hockey, of the owner or operator or any hockey player or coach employed by the owner or operator.

Id.

206. 745 Ill. Comp. Stat. § 52/10.

207. *Id.*

208. *See supra* n. 204.

209. 745 Ill. Comp. Stat. § 52/10. "Willful or wanton" is defined in 745 Ill. Comp. Stat. § 52/5 as "a course of action which shows an actual or deliberate intention to cause harm or which, if not intentional, shows an utter indifference to or conscious disregard for the safety of others or their property."

210. *See e.g.* N.M. Stat. Ann. § 24-10-3 (2002) (providing an exception for "gross negligence").

211. *See e.g.* Colo. Rev. Stat. § 33-41-104(1)(a) (2002).

212. 745 Ill. Comp. Stat. § 52/10.

213. Although given that scenario, it would be relatively difficult to make an effective primary or vicarious liability argument against the facility.

The viability of spectator cases in the future will depend on how nimble plaintiffs are in exploiting some severe gaps in the statutory scheme. Several interpretative lacunae require careful consideration, particularly given that the Illinois statute is probably under study as a model for deployment in other states.

By its own terms, the statutory immunity may not apply to a dependent action or an independent action brought by someone other than the person ("that person")[214] actually hit by the stick or puck.[215] Several scenarios could trouble the legislative scheme. The statute is silent as to how to deal with a derivative wrongful death, survivor,[216] or consortium[217] claim brought by a relative of the spectator. Similarly, the statute does not expressly immunize facilities from independent claims (such as by a contemporaneously observing family member) brought on a bystander emotional distress theory[218] or on a rescuer theory.[219]

Second, the statutory immunity is premised on a stick or puck making contact with the spectator ("being hit by").[220] The statute is silent with regard to any form of indirect contact, such as a ricochet. Thus, if the puck hit the Plexiglas,

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214. 745 Ill. Comp. Stat. § 52/10.

215. Compare the language of the Colorado baseball statute that arguably avoids many of these problems.

> Except as provided in subsection (5) of this section, an owner shall not be liable for an injury to a spectator resulting from the inherent risks of attending a professional baseball game, and, except as provided in subsection (5) of this section, no spectator nor spectator's representative shall make any claim against, maintain an action against, or recover from an owner for injury, loss, or damage to the spectator resulting from any of the inherent risks of attending a professional baseball game.

Colo. Rev. Stat. § 13-21-120(4)(b).

216. *See e.g. Alden*, 124 N.E.2d 505. For a discussion of *Alden*, *see* text accompanying *supra* notes 92-93.

217. *See e.g. Kennedy v. Providence Hockey Club, Inc.*, 376 A.2d 329, 331 (R.I. 1977) (hockey puck injury case included loss of consortium claim by spouse); *see Huber*, 501 N.W.2d at 57 (auto racing case; "we are not persuaded that the injured party's release erases the underlying tort. The tort was still committed, and it still caused harm to the nonreleasing spouse, whether the injured spouse's claim has been abandoned or not."); *cf. Sewell*, 451 S.E.2d at 491 (dependent action must also fail).

218. *See Rickey v. Chi. Transit Auth.*, 457 N.E.2d 1 (Ill. 1983) (minor brought action for emotional distress suffered as a result of witnessing brother choke when his clothing was caught in subway escalator); *Calhoun v. Jumer*, 686 N.E.2d 406 (Ill. App. 4th Dist. 1997) (mother brought claim to recover for her own emotional distress after son was sexually molested one room away, "within ten feet" of her); *Villamil v. Elmhurst Meml. Hosp.*, 529 N.E.2d 1181 (Ill. App. 1988) (parents brought emotional distress action after newborn daughter fell from delivery room table, resulting in her death).

219. *Seibutis v. Smith*, 404 N.E.2d 950, 954 (Ill. App. 1st Dist. 1980) (citations omitted):

> The rescue doctrine arises when a plaintiff brings an action based on negligence against a defendant whose negligence has placed a third party in a position of peril. If the plaintiff is injured in the attempt to rescue that third party, then he is allowed to negate a presumption that his intentional act of rescue is the superseding cause of his injuries, thereby allowing him to prove that defendant's negligence is the proximate cause of his injuries. . . .
>
> The Illinois courts have not yet had an opportunity to consider this extension of the rescue doctrine, and the facts in the present case do not require our consideration of the issue. . . . The mere failure of the courts to have an opportunity to extend a rule of law, and the mere failure of the courts to make a finding concerning a rule of law for a number of years, does not render a rule of law, once created, nonexistent.

220. 745 Ill. Comp. Stat. § 52/10.

somehow shattering it and sending dangerous debris into the spectator area,[221] the statute would not appear to apply. The statute is less than clear with regard to how it would treat concurrent injuries suffered by the person actually struck. If the injured spectator received substandard care from the facility's medical staff,[222] it seems to be a stretch of the legislative language to view such a concurrently caused harm as "any injury . . . as a result of that person being hit . . . ."[223]

Third, the statutory immunity is clearly limited to "the owner or operator of a hockey facility."[224] Arguably, injured spectators still would be free to sue players, the team ownership,[225] the NHL, architects, or product suppliers without worrying about the intercession of the Hockey Facility Liability Act.[226]

Fourth, there is at least one argument against application of the statutory immunity even where the team and facility ownership are the same. Assume that the negligent act complained of was team-centric (for example, negligent coaching) rather than facility-centric (for example, glass height). Given the general interpretative position taken by courts when construing limitations on established common law rights, it could be argued that the statutory immunity would not apply if the action was brought against the ownership *qua* team as opposed to *qua* facility. Illinois has recognized such a "dual capacity" or "dual entity" rule in its products liability jurisprudence,[227] permitting actions to be brought by an employee against a product-modifying employer notwithstanding the workers' compensation immunity.

2. Utah

The Utah statute was enacted in 1998[228] and its intent appears to be almost identical to the Illinois statute in seeking to immunize ice hockey facilities from spectator suits.

The reach of the immunity is clearly narrower than that found in Illinois. This is due primarily to a narrower definition of "hockey facility" as "a facility where hockey is customarily played or practiced and the general public is charged an admission fee to attend."[229] As in Illinois, there is no requirement that hockey

221. *See e.g.* Tony Cooper, *Sharks Recover to Top Nashville; Two Shorthanded Goals Fuel Win*, S.F. Chron. E3 (Mar. 3, 2000); Tarik El-Bashir, *Isles Get on the Box; Can't Stay Out of Box*, N.Y. Times D2 (Oct. 22, 1998).

222. *See generally* Michael J. Stuart, *On-Field Examination and Care: An Emergency Checklist*, 26 Phys. & SportsMedicine 51 (November 1998) (available at <http://www.physsportsmed.com/issues/1998/11nov/stuart.htm>).

223. 745 Ill. Comp. Stat. § 52/10.

224. *Id.*

225. Subject to the team and facility being under separate ownership, itself subject to the dual capacity argument, *see infra* text accompanying note 228.

226. The issue here, of course, would be identifying actionable negligence in one of these other actors, or a product defect in the case of strictly liable suppliers.

227. *See Marcus v. Green*, 300 N.E.2d 512, 517-18 (Ill. App. 5th Dist.1973); *Toth v. Westinghouse Elevator Co.*, 449 N.E.2d 1005, 1006-07 (Ill. App. 1st Dist. 1983); *Hyman v. Sipi Metals Corp.*, 509 N.E.2d 516, 517-20 (Ill. App. 1st Dist. 1987).

228. Utah Code Ann. § 78-27-62.

229. Utah Code Ann. § 78-27-62(1).

be the principal business of the facility. Again, the scope of the Utah statute is marginally narrower because of the "customarily played" language. Equally, the "admission fee" requirement may shut out some school or community groups that have free admission. Strategic behavior is likely to occur (or be encouraged by insurers) leading to such groups charging nominal admission fees. It may have been this more restrictive approach to the definition of eligible facility that led the Utah legislature not to include a definition of "hockey." Unlike the Illinois statute, that excludes field hockey or roller hockey,[230] there is no explicit requirement in Utah that the game in question be *ice* hockey.

Although the Utah statute generally is both briefer and somewhat clearer than the Illinois legislation, nevertheless it contains some of the same indeterminacies. For example, its narrow focus on "that person being hit by a hockey puck or stick"[231] raises similar interpretative issues as to the scope of the immunity in ricochet scenarios[232] or where the suit is brought by someone other than the person actually hit by the stick or puck.[233] Equally, injured spectators may still bring actions against actors other than the facility.

Utah has exceptions from the statutory immunity that appear to mimic the Illinois provisions.[234] There are, however, important differences. First, the Utah version of the spectator location exception may be even more difficult to extend to retrofitted protective nets, referring as it does to "a board, glass, or similar barrier."[235] On the other hand, if nets are included, the Utah statute provides more scope for arguing that the net (or other barrier) is defective because of its width, height, or location.

Far more troubling for hockey facilities seeking to rely on their new statutory immunity must be the wording of the willful and wanton exception.[236] At first sight, the provision seems identical to that in Illinois.[237] On closer examination, however, the Utah statute includes (and so excludes from the immunity) "*negligent* conduct . . . by the owner or operator or any hockey player, coach, or manager . . . ."[238] This provision appears to create a bizarre result. The allegation most likely to be brought against a hockey facility in the wake of a spectator projectile accident is operator negligence. Yet, this seems to be the very

230. *See supra* n. 199.
231. Utah Code Ann. § 78-27-62(2).
232. *See supra* n. 220.
233. *See supra* n. 218.
234. 745 Ill. Comp. Stat. § 52/10(1)(2); *see supra* nn. 204-05.
235. Utah Code Ann. § 78-27-62(2)(a).
236. The statute provides:

> The owner or operator of a hockey facility is not liable for any injury to the person or property of any person as a result of that person being hit by a hockey puck or stick unless . . . (b) the injury is caused by negligent or willful and wanton conduct in connection with the game of hockey by the owner or operator or any hockey player, coach, or manager employed by the owner or operator.

Id.
237. 745 Ill. Comp. Stat. § 52/10(2); *see supra* n. 205.
238. Utah Code Ann. § 78-27-62(2)(b) (emphasis added).

allegation preserved by the exceptional clause. Unless the purpose of the statute was to exclude some unidentified threat of strict liability, it seems to have failed its immunizing goal.

C. *Sports Projectile Legislation in the Courts*

Neither the Illinois nor Utah hockey statutes have yet been subjected to judicial interpretation or scrutinized for constitutionality. However, there has been one case involving the conceptually similar Illinois baseball statute,[239] a case involving a foul ball injury during a Chicago Cubs game. *Jasper v. Chicago National League Ball Club, Inc.*,[240] is an intrinsically interesting projectile case. The plaintiff alleged that the facility originally had installed protective netting in the upper deck area behind home plate but had subsequently removed the netting when it built some new skyboxes just below that area.[241]

Assuming the facts to be true, they would have made for a "good" case; the defendant had already set its own standard and the skybox motivation "angle" would have made for a good jury "story." Faced with the Illinois statutory immunity, however, the plaintiff was forced to challenge the statute on constitutional grounds and, assuming that the challenge would fail, the plaintiff also alleged that the conduct came within the statute's willful and wanton exception.[242] This latter argument was not made before the Illinois appellate court. Rather, the appeal concerned the plaintiff's arguments that the Baseball Act was unconstitutional special legislation under the Illinois Constitution and violated the equal protection guarantees of both the state and federal constitutions. As is the case with most challenges to tort reform legislation, the court applied the lowest level of scrutiny, "rational basis."[243] Responding to these challenges, the court stated,

> The Baseball Act encourages use of parks for a recreational activity in a way that is not arbitrary, capricious, or unreasonable. . . .
>
> . . .
>
> We believe the sport of baseball does have unique characteristics that would reasonably prompt a legislature to enact limited liability legislation. The inherent danger of a sport may be reason enough to prompt the legislature to enact a limited liability statute.
>
> Foul balls travelling [sic] at high speeds are common at baseball games. The speed and frequency of foul balls distinguish baseball from most other spectator sports. In this respect, basketball and football spectators, for example, are not similarly

239. 745 Ill. Comp. Stat. 38/1, *et seq*.
240. 722 N.E.2d 731.
241. *Id.* at 733.
242. *Id.* at 734.
243. *See generally* Stephen J. Werber, *Ohio: A Microcosm of Tort Reform Versus State Constitutional Mandates*, 32 Rutgers L.J. 1045, 1056 (2001); Victor Schwartz, *Judicial Nullification of Tort Reform: Ignoring History, Logic, and Fundamentals of Constitutional Law*, 31 Seton Hall L. Rev. 688, 691 (2001).

> situated. Plaintiff notes that errant balls are also a danger to golf spectators, but owners of golf courses are not treated similarly to owners of baseball parks. Plaintiff, who has the burden of proof, cites nothing to show that spectator injuries during golf games occur with the same frequency as they occur at baseball games. Even if such evidence were available, the Baseball Act, to survive scrutiny, need not apply to all sports that may present similar dangers.[244]

D. Sports Injuries Compounded by Legal Barriers

It seems likely that hockey facility immunity legislation was triggered by little more than a "me too" reaction to baseball statutes.[245] Those baseball statutes may themselves have been an angry response to liability rulings,[246] rulings that may have been misinterpreted as an abandonment of the limited duty rule rather than its contemporary application. It is relatively easy to criticize the recent hockey immunity legislation for its amateurish drafting. Furthermore, plaintiffs' counsel will likely take some comfort from exploring the various gaps in the legislation or by filing suit against other industry actors, thus minimizing any economic relief. There are, however, more serious objections to lodge. Courts across the country in countless hockey cases spread over several decades have never perceived a need to treat hockey more favorably than other sports. Indeed, if there is any prevailing view, it is that highly dangerous projectile sports such as hockey and auto racing should absorb more of the spectator injury risks than, say, baseball. The hockey legislation, particularly in Illinois, reverses that course and seems difficult to justify as anything other than a financial break for ownership.

Hockey immunity legislation fails to share responsibility for accident avoidance meaningfully between stadium and spectator by encouraging "safe or protected" areas, and it fails to provide any incentives in stadium ownership to provide for effective, additional barriers. Its most pernicious message, however, is contained in the Illinois legislation's disastrously worded defective barrier exception.[247] In excluding most allegations, including "width or height," the statute encourages a far more dangerous scenario than any overzealous application of limited duty could conjure up—spectators may now believe themselves to be safe and pay far less attention to the game swirling around in front of them, only to find out later that they have no redress when they are failed by a woefully inadequate safety barrier.

VIII. THE CHICAGO BLACKHAWKS CASE

As noted above,[248] on January 6, 2002, two months before the death of Brittanie Cecil, Elizabeth Hahn and her husband attended a Chicago BlackHawks game at the United Center in Chicago. The Hahns were season ticket holders.

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244. *Jasper*, 722 N.E.2d at 735 (citations omitted).
245. *See supra* pt. III(A).
246. *See supra* n. 190.
247. *See supra* n. 205.
248. *See* text accompanying *supra* note 8.

Their seats were located directly behind one of the goals, in an area generally considered to be the most dangerous in a hockey arena.[249] Early in the second period of the game, Mrs. Hahn bent over to pick up a napkin and was struck in the side of the head by a puck that had been shot over the protective glass. She required surgery to relieve a blood clot on her brain.[250] At this point in time, the NHL did not require safety netting, nor had the United Center or the BlackHawks voluntarily installed it.

Mrs. Hahn filed an action against the BlackHawks, the United Center, and the NHL alleging that all three acted willfully and wantonly in failing to provide adequate protection for spectators in the danger zones of the arena. Specifically, the complaint alleges that the defendants knew that installation of protective netting or alternative safety measures was economically and structurally feasible.[251] The complaint further alleges the three defendants willfully and wantonly disregarded knowledge of a study conducted by Dr. David Milzman.[252]

Plaintiffs presumably have taken the view that allegations of willful and wanton conduct are necessary to overcome the new Illinois immunity statute. The complaint alleges that the defendants knew of the effectiveness of netting in preventing injury in the danger zones of the facility. It also alleges that installation of netting was economically feasible and that it was being used at the time of the incident in other facilities in the United States, including America West Arena (the home of the Phoenix Coyotes of the NHL), and in many locations in Europe.[253] As noted above, the statute was apparently intended by the Illinois General Assembly to protect the United Center from just this type of legal action.

The Milzman study, conducted over a two-year period at the MCI Center in Washington, D.C., indicated a significant number of hockey pucks flew into the seating area and injured spectators at that venue.[254] Obviously several questions

249. *Hahn*, Case No. 02L 005084 (Circuit Court, Cook County Illinois 2002) (Complaint) (A copy of the complaint, other pleadings, and documents are on file with the authors.).

250. *Id.*

251. *Id.*

252. *Id.*; *see* David Milzman, *Hockey Puck Injuries*, Annals Emerg. Med. (Oct. 2000).

253. *Hahn*, Case No. 02L 005084. Subsequent to the filing of this action, at the time of the mandate from the NHL, reports circulated estimating the cost of netting to range from $3,500 to $57,000, depending upon the arena's size and configuration. *See e.g.* Scott Radley, *Net Result of Better Protection Is Worth It*, Hamilton Spectator B3 (Nov. 4, 2002) (available in 2002 WL 101894024); Hank Lowenkron, *Safety Netting Applauded by Ice Personnel, Fans*, Indianapolis Star 3D (Nov. 1, 2002) (available in 2002 WL 102184086).

254. *Hahn*, Case No. 02L 005084. The report was circulated by the doctors who conducted the study to the NHL and apparently to the member teams of the league. The report takes the position that "hockey remains perhaps the professional sport most notable for the frequency of its spectators requiring medical attention." Milzman, *supra* n. 252, at 5. The study covered eighty-two regular season games and thirteen playoff games. The average attendance at these games was 16,200. *Id.* at 6. The authors reported that during the study period, there were 122 puck induced spectator injuries requiring medical attention. *Id.* "An additional 3.6 pucks per game entered the stands resulting in either no direct spectator contact or no injury requiring medical work-up." *Id.* The report also indicated that the seating area immediately behind and adjacent to the goals were the site of eighty-two percent of the injuries. *Id.* Eighty-eight percent of the injuries resulted in facial trauma. *Id.* at 7. Interestingly, while the majority of NHL fans are male, females suffered injury 2.6 times more frequently than males.

will arise regarding the significance of the Milzman study. There are questions raised in the litigation about the dissemination of the study, although the plaintiff alleges that the NHL had provided information related to it to the teams in the league and the facilities operators around the league. Who had the information and when may be key issues. There also may be a question raised regarding the NHL's decision to mandate netting in the Danger Zone at all league facilities.[255] Is this an indication that the league believed that its arenas were not providing adequate protection for spectators prior to the mandate?

The plaintiff has, of course, the initial major challenge presented by the immunity statute. "'Conduct is gross, willful, wanton, or reckless when a person acts or fails to act, with a conscious realization that injury is a *probable*, as distinguished from a *possible* (ordinary negligence), result of such conduct.'"[256] One court in a sports projectile case has defined willful and wanton conduct as follows:

> The actor's conduct is in reckless disregard of the safety of others if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[257]

In this Ohio case, the plaintiff alleged that the defendant failed to install recommended safety measures at an auto race track. The court found that these allegations presented material questions of fact regarding whether the defendant's conduct was willful and wanton.[258] The plaintiff thus survived a motion for summary judgment.

In the Hahn case, key questions likely will focus on the Milzman report and its dissemination. Also material, if allowed by the court, will be the evidence the plaintiff intends to present from a recognized hockey safety expert regarding general safety considerations at hockey arenas, the number of pucks entering the

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Id. It is important to note that while most of the injuries occurred in the so-called Danger Zone, nearly twenty percent of the injuries occurred in areas not directly in the logical path of a shot on goal. This becomes critical in considering what measure of protection will be adequate to absolve a facilities operator of liability. It is an affirmation of sorts of the notion that no matter how attentive a knowledgeable spectator may be at a hockey game, the puck is extremely difficult to follow, traveling at speeds in excess of one hundred miles per hour and is quite unpredictable in its flight, particularly considering the multitude of deflections occurring during a game. Add to these considerations the size and speed of the players and the power provided by carbon fiber sticks and it might be surprising that the reported injuries are as few as they are.

255. *See supra* n. 9. The American Hockey League, the Eastern Hockey League, and the Central Hockey League have now also mandated protective netting be installed at their member arenas. These leagues are the significant minor professional hockey leagues in North America.

256. *Holzer*, 610 N.W.2d at 793 (quoting *VerBouwens v. Hamm Wood Prods.*, 334 N.W.2d 874, 876 (S.D. 1983) (emphasis in *VerBouwens* opinion)).

257. *Harsh*, 675 N.E.2d at 888 (quoting *Restatement (Second) of Torts* § 500 (1965) (quotation marks omitted)).

258. *Id.* at 889.

danger zone, and the efficiency of netting.[259] It is also conceivable that some of the drafting flaws noted in the statute will become relevant as the Illinois courts address the substance of the statute for the first time. Further, it will be very interesting to see how the court resolves the allegations specifically against the NHL, inasmuch as it is not an owner or operator of a hockey facility as stated in the immunity statute. The control the league has over its teams is quite extensive and it is not beyond logic to argue, as the plaintiff has, that the league could have taken steps to protect spectators.[260] Should the court conclude that the statute does not cover the league, presumably it would revert to application of the limited duty rule as it examines the allegations and evidence proffered by the plaintiff.

IX. CONCLUSION

Hockey franchises, legislators, and the media have operated in a state of relative ignorance as to the level of liability risk for spectator injuries at hockey games. A little knowledge of the baseball cases led to exaggerated reliance on the limited duty and assumption of risk mantras. As the reality of modern sports projectile cases dawned, at least two jurisdictions have overreacted by passing poorly conceptualized and executed legislation.

There are innumerable problems with the modern torts system, from uneven access to unfathomable awards. There is, however, little indication that professional sports is in the grip of an inefficient or franchise-threatening litigation frenzy. Flinching when the puck hits the glass is as much a part of the fabric of modern stadium sports as getting soaked with beer when the guy next to you jumps for a foul ball, and no more appropriately the subject for litigation. But we could reduce some of the more serious risks occurring in stadiums that feature projectile sports.

To be reasonably safe at a sports stadium, the fan needs some information and some reassurance. The information required is information as to the relative levels of safety in different parts of the stadium. The reassurance is that the areas that involve risks that the fan cannot readily avoid have been adequately protected. Now that high profile tragedy has struck our hockey arenas, it is important that the courts send an appropriate and reasonable fan message to the facilities by applying the limited duty rule as interpreted herein and with due regard to the different traditions, conditions, and levels of risk in the different projectile sports. Hockey safety will never be one hundred percent, but on the record as we see it today, it is better left in the hands of the courts than the legislatures.

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259. Affidavit of Steve Bernheim (copy on file with the authors). Bernheim is a former NHL official and board certified as a Forensics Examiner. He is co-drafter of the *ASTM Standard Guide for Ice Hockey Playing Facilities*. This guide, incidentally, provides that "safety nets *shall* be installed at the ends and sides of the arena *to protect* spectators." Bernheim states that approximately twenty-four to twenty-six pucks leave the ice either unobstructed or obstructed each game in the NHL.

260. *See generally NHL Rulebook*, <http://nhl.com/hockeyu/rulebook.html>. The league sets standards for rink size, rink design, board height, glass height, and now safety netting behind and adjacent to the goals.