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STRIKE ONE, AND YOU'RE OUT: SHOULD BALLPARKS BE STRICTLY LIABLE TO BASEBALL FANS INJURED BY FOUL BALLS?

I. INTRODUCTION

In 1935, Joan Quinn was watching a baseball game between the San Francisco Seals and the Pittsburgh Pirates at Recreation Park in San Francisco. Seated in an unscreened area near first base, she was hit by a foul ball and injured. Ms. Quinn sued and her case eventually reached the California Supreme Court. The court addressed the issue of the ballpark's liability for her injury and issued its opinion in *Quinn v. Recreation Park Association*.¹ In this well-known case, the court defined the ballpark's duty to Ms. Quinn by stating that "[t]he duty imposed by law is performed when screened seats are provided for as many [fans] as may be reasonably expected to call for them on any ordinary occasion."² The court held that the ballpark, having met this duty toward Ms. Quinn and other baseball fans by providing the requisite screened seats, could not be held liable for her injuries.³

The San Francisco Seals no longer play in Recreation Park.⁴ However, the supreme court's opinion continues to play throughout the state, most recently in the California Court of Appeal's decision in *Rudnick v. Golden West Broadcasters*.⁵

In *Rudnick*, the Fourth District Court of Appeal held that the fifty-year-old standard of *Quinn* controlled, despite the changes that have occurred over the years in stadium design, consumer expectations and the "grand old game" itself. The court stuck to the *Quinn* standard even though similar formalistic rules of duty and liability have been modified in light of current economic and public policy considerations, as demonstrated by the California Supreme Court's decisions in *Rowland v. Christian*,⁶ *Li v. Yellow Cab Co.*,⁷ and *Peterson v. San Francisco Community*

1. 3 Cal. 2d 725, 46 P.2d 144 (1935).

2. *Id.* at 729, 46 P.2d at 146.

3. *Id.*

4. The San Francisco Seals went on to play in Seal Stadium before fading into history. At the time *Quinn* was decided in June of 1935, the Seals—with Joe DiMaggio on the team—were in fourth place in the Pacific Division of their league. L.A. Times, June 11, 1935, pt. III, at 15, col. 6.

5. 156 Cal. App. 3d 793, 202 Cal. Rptr. 900 (1984).

6. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (redefining landowner liability).

7. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975) (establishing comparative fault).

*College District.*⁸

As a result of judicial adherence to this standard of limited duty, a baseball spectator hit by a ball fouled into the stands is practically without a remedy, despite the spectator's inability to protect himself from injury and despite his status at the ballgame as a paying business invitee.⁹ A ballpark is not held to the standard of care imposed on other property owners¹⁰ and is without an incentive to periodically review the safety of the ballpark.

This Note considers the issue of a ballpark's duty raised in *Rudnick* and the continued viability of the *Quinn* standard. In addition, this Note reviews the historical doctrine of assumption of risk as it has been applied to baseball spectator injuries and the possible application of comparative negligence. *Rudnick* is then discussed and analyzed to demonstrate the interplay of these basic tort concepts in judicial review of liability for baseball spectator injuries. Following the discussion of *Rudnick*, this Note offers a strict liability approach to the issue of ballpark liability.

II. BACKGROUND

To examine the issue of liability, one should consider the traditional negligence analysis. A court, faced with an injured plaintiff claiming negligence, typically will ask: "Is there a duty? If so, what is the extent of the duty? Has the duty been breached? If so, does the defendant have an affirmative defense available?" Applied to the ballpark, this inquiry generally results in immunity. The theory supporting this result is either that the plaintiff assumed the risk of injury or that the ballpark had satisfied its duty of care as a matter of law.¹¹

8. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984) (enlarging landowner liability).

9. A plaintiff's status—trespasser, licensee or invitee—no longer determines a property owner's liability for a plaintiff's injuries. However, it is a factor to be considered when defining the reasonable standard of care owed to the plaintiff. See generally *Rowland v. Christian*, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); see *infra* notes 55-59 and accompanying text.

10. See, e.g., *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984); see *infra* at text accompanying notes 116-33 for discussion of *Peterson*.

11. If the injured plaintiff is a spectator at the ballpark, the response will be: The ballpark has a duty to protect spectators from injury. To meet this duty, the ballpark must screen some seats. The ballpark need not screen *all* seats because many baseball fans prefer unscreened seats. The extent of the ballpark's duty to protect spectators is limited by the countervailing interest in unscreened seats. If this duty has not been breached, the ballpark has not been negligent and the case would be dismissed. See, e.g., *Quinn v. Recreation Park Ass'n*, 3 Cal. 2d 725, 46 P.2d 144 (1935).

The problem with the analysis stems from the equivocal use of the words "assumption of risk." First, the term has been used as a *reason* for limiting the duty of the ballpark—before any breach of duty has been found. Second, the term has been used as an affirmative defense to negligence—after a breach of duty has been found.¹²

The distinction between these two uses of the assumption of risk concept (and any meaningful role played by assumption of risk) went unexplored until comparative fault was adopted by the majority of jurisdictions because either use resulted in ballpark immunity.¹³ Under comparative fault, most forms of assumption of risk have been redefined as either comparative negligence or as an absence of duty.¹⁴ As a form of comparative negligence, assumption of risk reduces but does not prevent recovery; as a means of negating the duty owed to the plaintiff, assumption of risk prevents recovery.

A. Duty of the Ballpark

The first part of the negligence analysis is a determination of the existence and extent of the duty owed to the plaintiff. The California

12. Compare *Baker v. Topping*, 15 A.D.2d 193, 222 N.Y.S.2d 658 (1961) (baseball spectator precluded from recovery under assumption of risk) with *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 424 N.E.2d 531, 441 N.Y.S.2d 644 (1981) (baseball spectator precluded from recovery because stadium satisfied legal duty). The problem is that the questions asked at the duty stage are different from those asked after negligence has been established.

13. Comparative fault was developed in response to the all-or-nothing recovery allowed under traditional affirmative defenses of assumption of risk and contributory negligence. For example, in an auto accident, if both parties were negligent (one speeding, the other running a red light), neither could recover on the theory that each was contributorily negligent and should not benefit from his own negligence. After comparative fault, each party's actions are assessed and recovery is reduced in proportion to the extent each is negligent. In the context of a spectator being hit by a foul ball at a baseball game, if the ballpark were negligent (e.g., failing to screen any part of the stadium), the plaintiff could be prevented from recovering on the ballpark's affirmative defense that the plaintiff assumed the risk of being hit by a baseball while watching the game. After comparative fault, the fault of the ballpark might be compared with the plaintiff's "fault" (e.g., failing to watch the ball). See, e.g., *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977) (comparative negligence statute does not apply when plaintiff reasonably assumes risk; assumption of risk a complete defense); *Blackburn v. Dorta*, 348 So. 2d 287 (assumption of risk merged into comparative negligence), *on remand*, 350 So. 2d 25 (Fla. 1977); see generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 9.1-9.5 (1974); W. PROSSER & R. KEETON, *PROSSER AND KEETON ON THE LAW OF TORTS* § 68 at 495-98 (5th ed. 1984); *infra* notes 60-68 and accompanying text.

14. See generally *Blackburn v. Dorta*, 348 So. 2d 287 (reasonable assumption of risk reduces duty, unreasonable assumption of risk is contributory negligence and subsumed into comparative fault), *on remand*, 350 So. 2d 25 (Fla. 1977); *Rutter v. Northeastern Beaver County School Dist.*, 496 Pa. 590, 437 A.2d 1198 (1981) (form of assumption of risk that is contributory negligence merged into comparative fault; other forms abolished unless express, preserved by statute or as applied to strict liability actions).

Supreme Court defined this duty in *Quinn v. Recreation Park Association*,¹⁵ the principal case governing ballpark liability for spectator injuries. The facts in *Quinn* were typical of those in early spectator injury cases.¹⁶ Ms. Quinn went to the ballpark and, when purchasing her ticket, requested a screened seat along the first base line.¹⁷ When escorted to her seat, however, she learned that only unscreened seats remained in the area in which she wished to sit. She protested, but the usher asked her to be seated. Ms. Quinn took the unscreened seat and was injured by a batted ball.¹⁸ At trial, she admitted knowing the danger of being struck by a batted ball at the time she accepted the unscreened seat.¹⁹

In order to determine the ballpark's duty to the spectator, the California Supreme Court looked to the law in other jurisdictions and then concluded that the ballpark had met its duty when it provided "screened seats . . . for as many as may be reasonably expected to call for them on any ordinary occasion."²⁰ The evidence at the lower court showed that Recreation Park did provide a sufficient number of screened seats.²¹ Under the traditional negligence analysis, the court could have ended its opinion at this point. (Since the ballpark had met its legal duty, it was not negligent.²²) However, the court went on to discuss the plaintiff's assumption of risk.²³

In a similar case decided fifteen years after *Quinn*, the California

15. 3 Cal. 2d 725, 46 P.2d 144 (1935).

16. The cases usually indicated that the plaintiff *chose* an unscreened seat when buying a ticket. *See, e.g.*, *Crane v. Kansas City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S.W. 1076 (1913) (plaintiff brought unreserved grandstand seat entitling him to select screened or unscreened seat); *Edling v. Kansas City Baseball & Exhibition Co.*, 181 Mo. App. 327, 168 S.W. 908 (1914) (plaintiff bought unreserved grandstand seat entitling him to select screened or unscreened seat); *Blackhall v. Albany Baseball & Amusement Co.*, 157 Misc. 801, 802, 285 N.Y.S. 695, 695-96 (1936) (plaintiff familiar with field selected unscreened seat in bleachers to "receive the benefit of the sun"); *Cates v. Cincinnati Exhibition Co.*, 215 N.C. 64, 1 S.E.2d 131 (1939) (plaintiff bought unreserved seat for 40 cents rather than screened seat for 65 cents); *Ivory v. Cincinnati Baseball Club Co.*, 62 Ohio App. 514, 24 N.E.2d 837 (1939) (plaintiff selected unscreened seat for 10 cents rather than screened seat for 25 cents); *Williams v. Houston Baseball Ass'n*, 154 S.W.2d 874 (Tex. Civ. App. 1941) (plaintiff selected unscreened seat knowing screened seats available).

17. 3 Cal. 3d at 730, 46 P.2d at 146.

18. *Id.*

19. *Id.* at 731, 46 P.2d at 146-47.

20. *Id.* at 729, 46 P.2d at 146.

21. *Id.* at 730, 46 P.2d at 146.

22. Without a breach of a legal duty, there is no negligence. Traditionally, assumption of risk has been a defense to negligence and does not enter the analysis until after negligence is proven. *See supra* note 11 and accompanying text.

23. *See infra* notes 45-48 and accompanying text.

Court of Appeal, in *Brown v. San Francisco Ball Club*,²⁴ reaffirmed a ballpark's limited duty:

[T]he owner of property . . . is not an insurer of safety but must use reasonable care to keep his premises in a reasonably safe condition and give warning of latent or concealed perils. He is not liable for injury to an invitee resulting from a danger which was obvious or should have been observed in the exercise of reasonable care. . . . To the extent that the duty of self-protection rests upon the invitee, the duty of the invitor to protect is reduced.²⁵

The court recognized the ballpark's duty as that established in *Quinn*.²⁶ It concluded that since the stadium had satisfied this legal duty, the plaintiff had failed to state a cause of action.²⁷

As in *Quinn*, the court in *Brown* could have ended its inquiry at that point. Without a breach of duty, there is no negligence and the inquiry ceases. However, it chose to address two arguments presented by the plaintiff. First, Ms. Brown claimed she could not "assume the risk" because she did not know of (and thus could not assume) the risks inherent in watching a baseball game. Second, she alleged that the ballpark had a duty to warn her of possible dangers and was negligent for failing to do so.²⁸ The *Brown* court rejected these arguments, citing with approval a Texas case, *Keys v. Alamo City Baseball Co.*,²⁹ in which the trial judge rejected a jury finding that a ballpark was negligent for failing to warn patrons of the dangers incident to sitting in the unscreened areas and held that the plaintiff had assumed the risk merely by attending the game. This ruling was affirmed by the Texas appellate court. The court noted that the injured spectator's 14-year-old son, who accompanied his mother to the game, was a baseball fan and she had seen him handle baseballs around the home.

This history, coupled with a universal common knowledge, was bound to have acquainted plaintiff with the potential dangers inherent in a baseball in play; with the fact that a flying baseball is capable of inflicting painful, sometimes serious and even fatal, injury; and that when in play it may fly in any direction and strike any bystander not on the alert to evade it.³⁰

24. 99 Cal. App. 2d 484, 222 P.2d 19 (1950).

25. *Id.* at 486-87, 222 P.2d at 20 (citations omitted).

26. *Id.* at 487-88, 222 P.2d at 20-21.

27. *Id.* at 488, 222 P.2d at 21.

28. *Id.*

29. 150 S.W.2d 368 (Tex. Civ. App. 1941).

30. *Id.* at 371.

Thus, the legal duty of the ballpark after *Brown* was further refined such that the ballpark had no duty to warn patrons of the dangers of unscreened seats or notify them of the availability of screened seats. In doing so, the *Brown* court appeared to use assumption of risk as a reason for limiting the ballpark's duty, rather than as an affirmative defense to negligence.

B. Assumption of Risk

Looking again to the traditional negligence analysis, assumption of risk may be present at either the duty stage or the affirmative defense stage. A brief background of assumption of risk doctrine may be helpful.³¹ First, assumption of risk may be broken down into two categories—express or implied.³²

1. Express assumption of risk versus implied assumption of risk

Express assumption of risk is contractual in nature; the parties agree in advance to limit their duties and their liabilities to one another. Subject to general limitations on contract enforceability, these covenants have been held valid.³³ Implied assumption of risk is where one party's actions have implied an agreement to relieve the other party of a duty of

31. The phrase "assumption of risk" is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, indiscriminately used to express different and sometimes contradictory ideas.

Tiller v. Atlantic Coast Line R.R., 318 U.S. 54, 68 (1943) (Frankfurter, J., concurring).

32. See generally, *Rutter v. Northeastern Beaver County School Dist.*, 496 Pa. 590, 437 A.2d 1198 (1981); *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Meistrich v. Casino Arena Attractions, Inc.*, 54 N.J. Super. 25, 148 A.2d 199 (1959); W. PROSSER, *supra* note 13, at § 68.

33. In California, contracts expressly limiting one party's liability for negligence will not be enforced if the transaction has some or all of the following characteristics:

It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

Tunkl v. Regents of Univ. of Cal., 60 Cal. 2d 92, 98-101, 383 P.2d 441, 445-46, 32 Cal. Rptr. 33, 37-38 (1963).

reasonable care.³⁴

a. primary implied assumption of risk

Implied assumption of risk has been further divided into two categories—primary and secondary. Primary assumption of risk has been defined as where the defendant cannot be held negligent because he is under no duty to the plaintiff, or there has been no breach of duty because plaintiff's conduct has limited the duty owed him by defendant.³⁵ Baseball spectators have been analyzed within this category. According to Dean Prosser, the spectator

may enter a baseball park, sit in an unscreened seat, and so consent that the players may proceed with the game without taking any precautions to protect him from being hit by the ball. . . . [T]he legal result is that the defendant is simply relieved of the duty which would otherwise exist.³⁶

Because there is no longer a duty, there is no negligence and the plaintiff's suit may be summarily dismissed.

b. secondary implied assumption of risk

Secondary implied assumption of risk has been defined by the *Restatement (Second) of Torts* as follows:

[A] plaintiff who *fully understands* a risk of harm to himself . . . caused by the defendant's conduct or by the condition of the defendant's land or chattels, and who nevertheless *voluntarily* chooses to enter or remain . . . within the area of that risk, *under circumstances that manifest his willingness to accept it*, is not entitled to recover for harm within that risk.³⁷

Under secondary implied assumption of risk the defendant is negligent to some degree, while under primary assumption of risk the defendant cannot be negligent because he has no duty.³⁸

Secondary assumption of risk is further divided into two categories—reasonable and unreasonable.³⁹ These two classifications were dis-

34. See *supra* note 32; V. SCHWARTZ, *supra* note 13, at § 9.1-9.5.

35. See *supra* notes 32 & 34; Kionka, *Implied Assumption of the Risk: Does It Survive Comparative Fault?*, 1982 S. ILL. U. L.J. 371.

36. W. PROSSER, *supra* note 13, at 481.

37. RESTATEMENT (SECOND) OF TORTS § 496(C)(1) (1965) (emphasis added).

38. See *supra* note 35.

39. See *supra* note 35; James, *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185 (1968).

tinguished in *Gonzalez v. Garcia*.⁴⁰ According to the court, unreasonable implied assumption of risk occurs "where the plaintiff acts *unreasonably* in voluntarily exposing himself to a risk created by defendant's negligence," while reasonable implied assumption of risk occurs "where plaintiff acts *reasonably* in voluntarily encountering a risk *with the knowledge* that defendant will not protect him."⁴¹

As mentioned, under primary assumption of risk, the baseball stadium's duty has been limited by the spectator's assumption of risk and the negligence inquiry, "Is there a duty?" is resolved at that point. On the other hand, secondary reasonable implied assumption of risk can be a defense to negligence when the plaintiff voluntarily, with full knowledge and appreciation of the risk, nonetheless chooses to expose himself to that risk.⁴² His subjective decision to assume the risk may be inferred from his actions.⁴³ In the baseball injury case, the analysis could be that the ballpark is negligent by failing to warn. However, the ballpark is relieved of liability because the spectator, knowing or *assumed* to know that baseballs travel unpredictably and may injure one seated in an un-screened area, has chosen to assume the risk of this negligence, as evidenced by his sitting in the un-screened area.⁴⁴

Historically, the ballpark has escaped liability under either the primary (duty) or secondary (assumption of risk) analysis. Thus the courts did not need to carefully articulate which rationale they were relying upon when denying the injured spectator relief for his injuries.⁴⁵ For ex-

40. 75 Cal. App. 3d 874, 142 Cal. Rptr. 503 (1977). In *Gonzalez*, the plaintiff, defendant and two other people left work together and drank beer, tequila and other beverages for over three hours. The plaintiff, Gonzalez, had made some attempts to obtain a ride home from someone other than the drunken defendant, but was unsuccessful. On the way to Gonzalez' house, defendant lost control of the car and Gonzalez suffered a concussion and fracture. *Id.* at 875-77, 142 Cal. Rptr. at 503-04.

The court held that Gonzalez acted unreasonably in accepting a ride home with the drunken defendant. However, Gonzalez was allowed a reduced recovery under principles of comparative fault. *Id.* at 881, 142 Cal. Rptr. at 507. It is ironic that under California law, Gonzalez' unreasonable behavior resulted in some compensation for his injuries while a reasonable baseball spectator receives nothing.

41. *Id.* at 878, 142 Cal. Rptr. at 505 (emphasis added).

42. See *supra* note 37 and accompanying text.

43. *Id.*

44. Curiously, the courts seem to impute to the plaintiff not only knowledge of the risks in selecting an un-screened seat, but also knowledge that there is an alternative—that, by law, the ballpark has a duty to provide a reasonable number of seats for those fans requesting them. Query what would be more reasonable: imposing on the ballparks a duty to warn spectators of the risk of fast-moving baseballs or imposing on the ballparks a duty to inform spectators of their right to request a screened seat.

45. See, e.g., *Vines v. Birmingham Baseball Club, Inc.*, 450 So. 2d 455 (Ala. 1984);

ample, in *Quinn v. Recreation Park Association*,⁴⁶ after holding that the ballpark had met its legal duty to provide a reasonable number of screened seats, the court went on to recite detailed facts demonstrating that Ms. Quinn, in temporarily accepting the unscreened seat with full knowledge of the potential danger involved, *assumed the risk of injury*, precluding recovery of damages.⁴⁷ It appears that the court did consider Ms. Quinn's actual subjective knowledge to have some bearing on the question of the ballpark's liability and, had the ballpark been found negligent, would still have held for the ballpark based on the plaintiff's secondary reasonable assumption of risk.⁴⁸

The same assumption of risk issue was addressed in *Brown v. San Francisco Ball Club*.⁴⁹ Ms. Brown argued that she did not know of the dangers inherent in watching a baseball game and could not be held to have assumed the risk.⁵⁰ The plaintiff alleged that she had never attended a baseball game, although she had watched one game from a distance while seated in an automobile. She also argued that she had only been at the game for about an hour before being injured and she had spent the entire time "visiting with a friend," oblivious to the ball in play.⁵¹ Nonetheless, the court upheld the application of *Quinn*, stating that "by voluntarily entering into the sport as a spectator [s]he knowingly accepts the reasonable risks and hazards inherent in and incident to the game."⁵²

III. DEVELOPING TORT LAW

In the years since the *Quinn v. Recreation Park Association* and *Brown v. San Francisco Ball Club* decisions, the law of negligence has substantially changed, particularly in the analyses of duty and negligence. Two of the California Supreme Court's decisions, *Rowland v. Christian*⁵³ and *Li v. Yellow Cab Co.*,⁵⁴ and their applicability to baseball

O'Bryan v. O'Connor, 59 A.D.2d 219, 399 N.Y.S.2d 272 (1977); Stradtner v. Cincinnati Reds, Inc., 39 Ohio App. 2d 199, 316 N.E.2d 924 (1972).

46. 3 Cal. 2d 725, 46 P.2d 144 (1935).

47. *Id.* at 731, 46 P.2d at 147.

48. A commentator at the time *Quinn* was decided believed that: "The California court in the *Quinn* case stressed the fact that the plaintiff's assumption of risk was based upon her knowledge and appreciation of the danger." Comment, *Torts: Liability of Exhibitors to Spectators at Public Exhibitions: Assumption of Risk*, 24 CAL. L. REV. 429, 440 (1936).

49. 99 Cal. App. 2d 484, 222 P.2d 19 (1950).

50. *Id.* at 488, 222 P.2d at 21.

51. *Id.* at 488-89, 222 P.2d at 21.

52. *Id.* at 487, 222 P.2d at 20.

53. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

54. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

spectator injury cases, were considered by two of the judges in *Rudnick v. Golden West Broadcasters*. *Rowland* was analyzed because of its reformation of the duty inquiry; *Li* was considered because of its discussion of assumption of risk after comparative fault.

A. *Rowland v. Christian*

In *Rowland v. Christian*,⁵⁵ the plaintiff, Mr. Rowland, was visiting Ms. Christian at her apartment. While using the bathroom, he turned the porcelain handle of the cold water faucet. The handle broke, severely injuring his hand. Ms. Christian had known the handle was cracked, had told her landlord the handle was cracked, but had failed to warn Mr. Rowland of the danger. The California Supreme Court reversed the lower court's holding in favor of Ms. Christian's motion for summary judgment, and reevaluated the foundations of the landowner's traditional duty of care.

The court in *Rowland* emphasized that the basic California policy, as stated in California Civil Code section 1714, is "[e]very one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person, except so far as the latter has . . . brought the injury upon himself."⁵⁶ Exceptions to this general rule must be "clearly supported by public policy."⁵⁷

As a guide to determining what policy considerations dictate imposing a duty, the court set out a balancing test involving the following factors:

[1] the foreseeability of harm to the plaintiff, [2] the degree of certainty that the plaintiff suffered injury, [3] the closeness of the connection between the defendant's conduct and the injury suffered, [4] the moral blame attached to the defendant's conduct, [5] the policy of preventing future harm, [6] 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 [7] the availability, cost and prevalence of insurance for the risk involved.⁵⁸

55. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968).

56. *Id.* at 111-12, 443 P.2d at 563-64, 70 Cal. Rptr. at 99-100. The statute was reinterpreted seven years later to create California's law of comparative negligence. See *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); see *infra* text accompanying notes 60-69 for a discussion of *Li*.

57. *Rowland*, 69 Cal. 2d at 112, 443 P.2d at 564, 70 Cal. Rptr. at 100.

58. *Id.* at 112-13, 443 P.2d at 564, 70 Cal. Rptr. at 100.

In sum, *Rowland* held that the liability of a landowner is to be determined by the general policies underlying tort law, rather than by the formalistic distinctions of trespasser, licensee and invitee derived from ancient property law.⁵⁹

B. *Li v. Yellow Cab Co.*

Assumption of risk as an affirmative defense to negligence—the possible alternate basis for denying liability in *Brown v. San Francisco Ball Club* and *Quinn v. Recreation Park Association*—was partly eliminated by California's adoption of a system of comparative fault in *Li v. Yellow Cab Co.*⁶⁰ The court in *Li* held that assumption of risk, where the plaintiff's conduct is unreasonable, was considered contributory negligence and became an element of the comparative fault scheme.⁶¹ A plaintiff's negligence, to the extent that it contributed to his injuries, was no longer a complete bar to recovery, but only reduced his recovery in proportion to his culpability. The court's opinion on the future of reasonable assumption of risk is less clear. As a result, the lower courts have disagreed on the proper application of reasonable assumption of risk after *Li*.⁶² The court's entire statement on assumption of risk follows:

As for the assumption of risk, we have recognized in this state that this defense overlaps that of contributory negligence to some extent and in fact is made up of at least two distinct defenses. "To simplify greatly, it has been observed . . . that in one kind of situation, to wit, where a plaintiff *unreasonably* undertakes to encounter a specific known risk imposed by a defendant's negligence, plaintiff's conduct, although he may encounter that risk in a prudent manner, is in reality a form of contributory negligence Other kinds of situations within the doctrine of assumption of risk are those, for example, where plaintiff is held to agree to relieve defendant of an obligation of reasonable conduct toward him. Such a situation would not involve contributory negligence, but rather a reduction of defendant's duty of care." *We think it clear that the adoption of a system of comparative negligence should entail the merger of the defense of assumption of risk into the general scheme of assessment of liability in proportion to fault in those particular cases in*

59. *Id.* at 118-19, 443 P.2d at 568, 70 Cal. Rptr. at 104.

60. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975).

61. *Id.* at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73.

62. Compare *Rudnick v. Golden W. Broadcasters*, 156 Cal. App. 3d 793, 202 Cal. Rptr. 900 (1984) with *Segoviano v. Housing Auth.*, 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983).

which the form of assumption of risk involved is no more than a variant of contributory negligence.⁶³

Clearly, unreasonable assumption of risk, as a "variant of contributory negligence," is to become part of the comparative fault scheme. Thus, the plaintiff who acts negligently or unreasonably may recover, but his recovery will be reduced to the extent he contributed to his own injury.⁶⁴ What is left unclear after *Li* is whether a reasonable act, such as attending a ball game, may be subject to the comparative fault framework, or whether the reasonable actor may be subject to assumption of risk as a complete affirmative defense, freeing the ballpark from liability for spectator injuries.

To complicate the possibilities further, the court in *Li* also recognized that assumption of risk can act to reduce or relieve the defendant's initial duty of care.⁶⁵ This assumption of risk, corresponding to primary assumption of risk,⁶⁶ may be by express waiver or by some action that implies an agreement reducing the defendant's duty of care.⁶⁷ Courts in other jurisdictions adopting comparative fault have held that the ballpark injury cases illustrate this reduction of a defendant's duty.⁶⁸

63. *Li*, 13 Cal. 3d at 824-25, 532 P.2d at 1240-41, 119 Cal. Rptr. at 872-73 (citations omitted) (emphasis added in last quoted sentence).

64. *Id.* at 828-29, 532 P.2d at 1243-44, 119 Cal. Rptr. at 875-76; see generally *V. SCHWARTZ*, *supra* note 13, at § 9.1-9.5. For a criticism of this view, see Fleming, *The Supreme Court of California 1974-1975. Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CALIF. L. REV. 239 (1976).

65. See *supra* note 63 and accompanying text.

66. See *supra* text accompanying notes 35-36.

67. See *supra* notes 32, 35 & 39.

68. The New York Court of Appeals applied the baseball spectator's assumption of risk to the state's comparative negligence statute in *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 424 N.E.2d 531, 441 N.Y.S.2d 644 (1981). Under the New York statute, assumption of risk no longer bars recovery. N.Y. CIV. PRAC. LAW § 1411 (McKinney 1976) ("In any action to recover damages for personal injury, . . . the culpable conduct attributable to the claimant . . . including . . . assumption of risk, shall not bar recovery . . .") Faced with a baseball spectator's suit, the court held that the stadium met its legal duty under a standard similar to that of *Quinn*, and therefore was not negligent. The court reasoned that without negligence on the part of the defendant ballpark, the comparative negligence statute did not apply. *Akins*, 53 N.Y. 2d at 333, 424 N.E.2d at 535, 441 N.Y.S.2d at 648.

The dissent disagreed and argued that the majority's decision was contrary to § 1411: [T]he majority, although it speaks in terms of the defendant's duty of reasonable care, has effectively resurrected those doctrines [of contributory negligence and assumption of risk] as total bars to recovery. By holding as a matter of law that the defendant's duty of reasonable care extends only to the construction of a backstop of specific proportions, the majority forecloses a jury from considering any other factors that might be present in an individual case. This rule of law denies recovery to injured spectators as effectively as the old doctrines of assumption of the risk and contributory negligence ever did, and uses a fundamentally similar rationale to do so.

Id. at 337, 424 N.E.2d at 537, 441 N.Y.S.2d at 650 (Cooke, C.J., dissenting). It appears that

In addition, *Li* failed to clearly address the future of the defense of secondary assumption of risk—where the plaintiff, acting reasonably, knowingly and voluntarily, agrees to assume the risk created by defendant's actual negligence. Baseball cases such as *Quinn* and *Brown*, which were decided before comparative fault was adopted, did not distinguish between the "no duty" defense and secondary assumption of risk because both led to the same result—no recovery for the plaintiff. Since *Li* is silent on secondary assumption of risk, and the precedent baseball cases are unclear about the theory on which their decisions were based, the court in *Rudnick v. Golden West Broadcasters*⁶⁹ was divided on the applicability of comparative fault to the baseball spectator injury case.

IV. THE CASE: *RUDNICK V. GOLDEN WEST BROADCASTERS*

*Rudnick v. Golden West Broadcasters*⁷⁰ exemplifies the difficulty in reconciling modern tort law with the baseball stadium's historically limited liability. Ms. Rudnick was watching the California Angels play a major league game at Anaheim Stadium in Anaheim, California. She was seated in an unscreened area near first base when a player hit a foul ball. The baseball smashed into Ms. Rudnick's face and broke her cheekbone.⁷¹

Ms. Rudnick filed a personal injury action against Golden West Broadcasters, the Angels' corporate owner. She alleged two causes of action: one for negligent construction, maintenance, operation and repair of the stadium's premises and a second for breach of an implied warranty that spectators seated in the unscreened areas would be protected from baseballs hit in their direction.⁷² The trial court granted Golden West's motion for summary judgment based on the stadium manager's declaration that the screen was in place and covered the area behind home plate. In granting summary judgment, the court did not distinguish between the negligence and breach of implied warranty theories.⁷³

The court of appeal reversed and remanded, stating that Golden

the New York court was required to define assumption of risk in terms of duty in order to reach the result it did and avoid the constraints of the statute. For a review of the *Akins* case, see Recent Development, *Akins v. Glens Falls City School District: A Crack in the Wall of Comparative Negligence*, 46 ALB. L. REV. 1533 (1982).

69. 156 Cal. App. 3d 793, 202 Cal. Rptr. 900 (1984).

70. *Id.*

71. *Id.* at 795, 202 Cal. Rptr. at 901; telephone conversation with Ms. Rudnick's attorney in August, 1984.

72. *Rudnick*, 156 Cal. App. 3d at 795, 202 Cal. Rptr. at 901.

73. *Id.*

West's declarations were insufficient to support the judgment that it had met its legal duty. Recognizing that the *Quinn v. Recreation Park Association* standard controlled, the court noted that the declarations failed to indicate how many baseball fans requested, or could be reasonably expected to request, screened seats. The declarations also failed to correlate the number of seats available with the number of requests reasonably expected. The court observed that only 2300 screened seats were available for the 23,000 to 46,000 spectators regularly attending Angel baseball games.⁷⁴

On appeal, Ms. Rudnick alternatively argued⁷⁵ that the *Quinn* rule was eliminated by *Rowland v. Christian*⁷⁶ and *Li v. Yellow Cab Co.*⁷⁷ Judge Crosby, writing only for himself, used Ms. Rudnick's argument as a vehicle to state that, in his opinion, *Quinn* was still the standard of the ballpark's duty.⁷⁸ Judge Trotter, concurring in the result only, disagreed and argued that *Rowland* and *Li* require the trier of fact to resolve the issue of the ballpark's liability.⁷⁹

A. Judge Crosby's Opinion

Judge Crosby first reviewed the baseball cases—*Quinn v. Recreation Park Association*,⁸⁰ *Ratcliff v. San Diego Baseball Club*⁸¹ and *Brown v. San Francisco Ball Club*.⁸² He maintained that before *Quinn* all specta-

74. *Id.* at 796, 202 Cal. Rptr. at 901-02.

75. *Id.*, 202 Cal. Rptr. at 902.

76. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968). *See supra* notes 55-59 and accompanying text.

77. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975). *See supra* notes 60-68 and accompanying text.

78. *Quinn*, 156 Cal. App. 3d at 797-802, 202 Cal. Rptr. at 902-05 (Crosby, J., concurring).

79. *Id.* at 802-05, 202 Cal. Rptr. at 906-07 (Trotter, P.J., concurring).

80. *See supra* notes 15-23, 47-48 and accompanying text.

81. 27 Cal. App. 2d 733, 81 P.2d 625 (1938). In *Ratcliff*, the plaintiff was hit by a bat as she was on her way to her seat. The court allowed her to recover, affirming the jury's finding that the ball club had a duty to protect patrons from flying bats and that the ball club was negligent. The court held that "[w]hile the appellant was required to exercise only ordinary care in protecting [Ms. Ratcliff] from such an injury as this . . . that duty was not performed if such an occurrence . . . should have been reasonably anticipated by the [ball club]." *Id.* at 738, 81 P.2d at 627. The court recognized *Quinn* and evidently interpreted its holding to be limited to injuries from batted or thrown balls. The court in *Ratcliff* held that if the injury was caused in some other way, the extent of the ballpark's duty was a jury question. *Id.*, 81 P.2d at 628.

See also *Jones v. Three Rivers Mgmt. Corp.*, 483 Pa. 75, 394 A.2d 546 (1978) (plaintiff hit during batting practice while standing on interior walkway presented jury question on assumption of risk); *Maytnier v. Rush*, 80 Ill. App. 2d 336, 225 N.E.2d 83 (1967) (plaintiff does not assume risk of being hit by ball thrown by pitcher in warm-up area when plaintiff watching game in play); *Cincinnati Baseball Club Co. v. Eno*, 112 Ohio St. 175, 147 N.E. 86 (1925) (plaintiff does not assume risk when more than one ball in play).

82. *See supra* notes 24-30, 49-52 and accompanying text.

tors assumed the risk of being hit by baseballs in the course of the ballgame, but after *Quinn* spectators choosing screened seats did not assume any risk.⁸³ Judge Crosby construed *Quinn* as limiting the ballpark's assumption of risk defense by enlarging the ballpark's legal duty.⁸⁴ The duty was increased by requiring ballparks to provide screened seats for a reasonable number of fans. In Judge Crosby's view, *Ratcliff* further limited the assumption of risk defense and enlarged the ballpark's duty by holding that spectators do *not* assume the risk of flying bats or other unusual but foreseeable hazards.⁸⁵ Judge Crosby recognized the dual roles assumption of risk plays in ballpark liability when stating that *Brown* was based on an absence of duty, and thus a finding of no negligence, as much as on assumption of risk.⁸⁶

Judge Crosby also emphasized that duty may be defined by judicial decision; that the ballpark's duty was established long ago and is settled; and that there is no reason to question the *Quinn* analysis.⁸⁷ He argued that *Rowland v. Christian*⁸⁸ did not apply for three reasons. First, *Rowland* did not raise the duty a landowner owes to a business invitee so the ballpark's duty to a spectator was not increased.⁸⁹ Second, *Rowland* addressed only hidden dangers, while the dangers at the ballpark were obvious.⁹⁰ Third, *Rowland* did not hold that a summary judgment based on a lack of duty was improper.⁹¹

Judge Crosby concluded that the ballpark's duty did not need to be reexamined.⁹² At the same time, he recognized that Anaheim Stadium did not, and most likely could not, meet the *Quinn* rule. In fact, Judge Crosby made a statement that may apply to every major league stadium:

It is doubtful any seats behind the screen are ever available from the box office for a single . . . game. . . . Application of *Quinn* is thus really a means of imposing a more certain burden on [the stadium]. It has but two choices: (1) provide adequate numbers of unreserved, screened seats or (2) secure insurance coverage for the statistically predictable numbers who will suffer injury by spreading the cost to all patrons. I suspect the

83. *Rudnick*, 156 Cal. App. 3d at 797-98, 202 Cal. Rptr. at 902 (Crosby, J., concurring).

84. *Id.* (Crosby, J., concurring).

85. *Id.* (Crosby, J., concurring).

86. *Id.* at 798, 202 Cal. Rptr. at 903 (Crosby, J., concurring).

87. *Id.* at 801-02, 202 Cal. Rptr. at 905 (Crosby, J., concurring).

88. 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968); see *supra* notes 55-59 and accompanying text.

89. *Rudnick*, 156 Cal. App. 3d at 800, 202 Cal. Rptr. at 904 (Crosby, J., concurring).

90. *Id.* (Crosby, J., concurring).

91. *Id.* at 801, 202 Cal. Rptr. at 905 (Crosby, J., concurring).

92. *Id.* at 802, 202 Cal. Rptr. at 905 (Crosby, J., concurring).

latter approach is more economical, more practical—and presently in effect.⁹³

Judge Crosby also considered assumption of risk as a possible defense. He recognized the overlap between the secondary “reasonable assumption of risk” doctrine and the primary “no duty” analysis, and then looked at the impact of comparative fault on the spectator injury case. He concluded that *Li v. Yellow Cab Co.*⁹⁴ only affected *unreasonable* assumption of risk as it merges with contributory negligence.⁹⁵ He relied on various secondary sources, other jurisdictions and the language in *Li* that suggested that reasonable implied assumption of risk—as it acts to reduce the defendant’s initial duty of care—has not been affected by the adoption of comparative fault.⁹⁶ In Judge Crosby’s view, *Li* excepted this area from comparative fault in its statement recognizing that reasonable implied assumption of risk, as it reduces duty, is not contributory negligence, and then expressly including only contributory negligence in its comparative fault scheme.⁹⁷

Judge Crosby essentially argued that *Li* did not change the assumption of risk analysis when the plaintiff’s conduct is defined as reasonable. If the plaintiff acted reasonably in selecting a screened or unscreened seat at the baseball game, he has relieved the ballpark of its duty toward him. Any duty other than that required by *Quinn* is negated by the spectator’s seat selection.

B. Judge Trotter’s Opinion

Judge Trotter maintained that summary judgment was never proper in a spectator injury case. He first criticized his colleagues’ reliance on *Quinn v. Recreation Park Association* arguing that their adherence to the “old rule” ignored California’s common law tradition.⁹⁸ Judge Trotter also argued that *Rowland v. Christian* has changed a ballpark’s duty toward its patrons and that, under *Li v. Yellow Cab Co.*, assumption of risk does not apply.⁹⁹

Judge Trotter argued that *Rowland* marked “a significant departure from prior adherence to rigid common law classifications which blindly

93. *Id.* at 804 n.5, 202 Cal. Rptr. at 905-06 n.5 (Crosby, J., concurring).

94. 13 Cal. 3d 804, 532 P.2d 1226, 119 Cal. Rptr. 858 (1975); see *supra* text accompanying notes 60-69.

95. *Rudnick*, 156 Cal. App. 3d at 798, 202 Cal. Rptr. at 903 (Crosby, J., concurring).

96. *Id.* at 799-800, 202 Cal. Rptr. at 903-04 (Crosby, J., concurring).

97. See *supra* text accompanying note 63 for language Judge Crosby relies upon.

98. *Rudnick*, 156 Cal. App. 3d at 802-05, 202 Cal. Rptr. at 906-07 (Trotter, P.J., concurring).

99. *Id.* (Trotter, P.J., concurring).

conditioned a given plaintiff's right to recovery" on "the status of the plaintiff as a trespasser, licensee or invitee."¹⁰⁰ He submitted that the more recent cases of *Beauchamp v. Los Gatos Golf Course*¹⁰¹ and *Slater v. Alpha Beta Acme Markets*¹⁰² have interpreted *Rowland* as having "transmuted" the issue of a landowner's liability from one of law to one of fact.¹⁰³ Judge Trotter argued that the reasonableness of a landowner's conduct in the management of his property should be determined by the trier of fact, based on the factors set forth in *Rowland*.¹⁰⁴ Judge Trotter held that this triable issue of fact always exists in the ballpark liability cases; thus, summary judgment is never appropriate.¹⁰⁵

Judge Trotter also stated that under the *Li* scheme of comparative fault, neither contributory negligence nor assumption of risk is an absolute bar to recovery.¹⁰⁶ This implies that the reasonableness or unreasonableness of a spectator's actions in selecting a seat at the ballpark should be an issue of fact. The court would then weigh the spectator's actions against those of the ballpark. If a spectator acted reasonably, the trier of fact could find his behavior more reasonable than that of the ballpark. In that case, the spectator would be allowed some recovery. Judge Trotter concluded by emphasizing that since *Quinn* was decided in 1935, changes in tort law and in the "grand old game" itself compel a reexamination of

100. *Id.* at 804, 202 Cal. Rptr. at 907 (citation omitted) (Trotter, P.J., concurring).

101. 273 Cal. App. 2d 20, 77 Cal. Rptr. 914 (1969). In *Beauchamp*, a woman was injured when she slipped on a cement golf course ramp while wearing golf shoes. The court held as follows:

Under *Rowland v. Christian* . . . we are impelled to conclude that the obvious nature of the risk, danger or defect . . . can no longer be said *per se* to . . . derogate [the landowner's] duty of care, so as to make his liability solely a matter of law to be determined on a nonsuit. By that decision, this matter of law for the court is transmuted to a question of fact for the jury; namely, whether a possessor of land even in respect to the obvious risk has acted reasonably in respect to the probability of injury to an invitee

Id. at 33, 77 Cal. Rptr. at 923.

102. 44 Cal. App. 3d 274, 118 Cal. Rptr. 561 (1975). In *Slater*, a supermarket customer was pushed to the floor by another customer during an armed robbery. The supermarket had been robbed before and, at the time of Ms. Slater's injury, plainclothes police officers were present at the supermarket's request. Ms. Slater argued that the supermarket had a duty to warn her that a robbery might occur and that its failure to warn was negligent. The appellate court held that it was for the trial judge, as the trier of fact, to determine any unformulated standard of reasonable conduct the supermarket would be held to in light of California Civil Code § 1714 and *Rowland v. Christian*. *Id.* at 278, 118 Cal. Rptr. at 562-63. The trial court had held that by notifying the police of the robberies and arranging for plainclothesmen, the supermarket had acted reasonably toward its customers. The appellate court affirmed the trial court's judgment for the supermarket. *Id.* at 279, 118 Cal. Rptr. at 563-64.

103. *Rudnick*, 156 Cal. App. 3d at 804, 202 Cal. Rptr. at 907 (Trotter, P.J., concurring).

104. *See supra* note 58.

105. *Rudnick*, 156 Cal. App. 3d at 804, 202 Cal. Rptr. at 907 (Trotter, P.J., concurring).

106. *Id.* (Trotter, P.J., concurring).

ballpark liability.¹⁰⁷

V. ANALYSIS

Quinn v. Recreation Park Association was decided in 1935. Since that time, major changes have occurred in California tort law, particularly when the issue before the court involves a landowner's duty or limits to his liability. The decision in *Rudnick v. Golden West Broadcasters* presents two views (reflected in Judge Trotter's and Judge Crosby's contradictory concurrences) on the effect these changes have had on two basic questions. First, do *Rowland v. Christian* and its progeny compel a reevaluation of a ballpark's duty or of the standard of care that must be exercised toward baseball spectators? Second, should the doctrine of assumption of risk apply in the baseball spectator injury cases, either in the duty analysis or under comparative fault?

A. Duty of the Ballpark After Rowland

Courts in most jurisdictions with some form of comparative fault have backed away from applying an assumption of risk rationale to the baseball spectator injury cases.¹⁰⁸ Instead, their analysis for denying the spectator any compensation for his injury has been that the ballpark has a limited duty of care toward the plaintiff; and, if the ballpark satisfies this limited duty, it cannot be held negligent. Without a finding of negligence, it cannot be liable.¹⁰⁹

Of course, it has never been argued that the ballpark owes *no* duty to the spectator.¹¹⁰ The principle of *Quinn v. Recreation Park Association* is that such a duty exists but, as advocated by Judge Crosby in *Rud-*

107. *Id.* at 804-05, 202 Cal. Rptr. at 907 (Trotter, P.J., concurring).

108. *But see* Kennedy v. Providence Hockey Club, Inc., 119 R.I. 70, 376 A.2d 329 (1977) (spectator at hockey game hit by puck; assumption of risk terminates duty owed to spectator and remains complete defense despite adoption of comparative fault statute).

109. *See* Akins v. Glens Falls City School Dist., 53 N.Y.2d 325, 424 N.E.2d 531, 441 N.Y.S.2d 644 (1981); *see supra* note 68.

110. An early case settling the ballpark's duty was *Crane v. Kansas City Baseball & Exhibition Co.*, 168 Mo. App. 301, 153 S.W. 1076 (1913) (defendant's duty of reasonable care met when screened seats were provided and plaintiff had opportunity to occupy screened seat). *Crane* cited two cases in support of its holding: *King v. Ringling*, 145 Mo. App. 285, 130 S.W. 482 (1910) and *Murrell v. Smith*, 152 Mo. App. 95, 133 S.W. 76 (1910). Although neither involved baseball, they were cited as authority in early baseball cases and are interesting examples of early duty analyses.

In *King*, defendant Ringling had erected a tent for its circus. A violent wind came up and the tent began to sway. The ringmaster asked that the spectators crawl under the seats so that they would be protected if one of the large tent poles were to fall. In the ensuing commotion, a board fell on the plaintiff, breaking her leg. She sued, claiming the tent was negligently erected. The court held for the circus.

nick v. Golden West Broadcasters, judicial decision has established that duty.¹¹¹ While such a rule provides certainty, it should not be immune from periodic scrutiny. Judge Crosby took the position that the ballpark's duty did not need to be reexamined.¹¹² However, he also recognized that Anaheim Stadium in *Rudnick* and probably other major league baseball stadiums had not met this historical standard of duty.¹¹³ He pointed out that the seats behind the screening—those behind home plate and along part of the first and third base lines—are generally not available for the general public. This is because they are considered among the "best" seats available and are either reserved by longtime season ticket holders or are the first seats to sell out.¹¹⁴

Judge Trotter's position, that *Rowland v. Christian* requires reexamination of the formalistic limited duty of the stadium, is supported not only by California's strong common law tradition,¹¹⁵ but also by the California Supreme Court's recent decision in *Peterson v. San Francisco Community College District*.¹¹⁶ Although *Peterson* was decided four months after *Rudnick*, it supports Judge Trotter's position that *Rowland* and its progeny compel a new analysis of the ballpark's liability for spectator injuries.

In *Peterson*, a female community college student was assaulted while

Unquestionably, the collapse [of the tent] was due to the breaking of the poles, and this was caused by the violent whipping of the canvas under successive inflations and deflations. In the grip of this mighty power the heavy poles were but as reeds. We say that the plain and undisputed physical facts of the situation fail to show any relation between the injury of plaintiff and the negligence asserted. If these facts left any room for a reasonable difference of opinion, we would say that an issue of fact was in the case for the triers of fact to solve, but there is no room for a reasonable difference of opinion, and it is our duty to hold as a matter of law that plaintiff has failed completely to sustain her burden of proof.

145 Mo. App. at 294-95, 130 S.W. at 485.

In *Murrell*, a child playing under a bandstand at a street fair was crushed when the bandstand collapsed. The court held that the organizer of the fair was negligent, emphasizing that the duty of the promoter was a jury question.

[T]he issue was presented to the jury whether a reasonably prudent man, under all the circumstances, would have had reasonable grounds to anticipate the platform was likely to collapse and injure those around it, and whether the defendants used reasonable care to prevent the catastrophe.

152 Mo. App. at 118, 133 S.W. at 83.

111. "[T]he proper conduct of a reasonable person under particular situations may become settled by judicial decision." *Rudnick v. Golden W. Broadcasters*, 156 Cal. App. 3d 793, 801, 202 Cal. Rptr. 900, 905 (1984) (Crosby, J., concurring) (quoting *Satterlee v. Orange Glenn School Dist.*, 29 Cal. 2d 587, 177 P.2d 279 (1947)).

112. See *supra* notes 87-93 and accompanying text.

113. See *supra* note 93 and accompanying text.

114. *Rudnick*, 156 Cal. App. 3d at 801, 202 Cal. Rptr. at 905 (Crosby, J., concurring).

115. *Rudnick*, 156 Cal. App. 3d at 802-03, 202 Cal. Rptr. at 906 (Trotter, P.J., concurring).

116. 36 Cal. 3d 799, 685 P.2d 1193, 205 Cal. Rptr. 842 (1984).

in the stairway of the school's parking lot.¹¹⁷ She sued the community college district for damages from the assault, alleging that the district had a duty to warn her of the danger and/or to protect her from assaults by third persons.¹¹⁸ The lower court had sustained defendant's demurrer to plaintiff's complaint. The California Supreme Court reversed, holding that the community college had both a duty of care to protect the plaintiff from reasonably foreseeable assaults and a duty to warn her of the known dangers.¹¹⁹

In its analysis, the court emphasized that "[t]he question of a duty ' . . . is . . . only an expression of the sum total of those considerations of policy which lead the law to say that a particular plaintiff is entitled to protection.'"¹²⁰ The policy considerations are those set out in *Rowland*.¹²¹ The court recognized additional guidelines for determining duty of care.¹²² In particular, the court emphasized the high duty a landowner has to protect members of the public from foreseeable injury while they are on his premises.¹²³ The duty of care the ballpark owes to specta-

117. *Id.* at 805, 685 P.2d at 1195, 205 Cal. Rptr. at 844.

118. *Id.*, 685 P.2d at 1195-96, 205 Cal. Rptr. at 844-45.

119. *Id.* at 815, 685 P.2d at 1202-03, 205 Cal. Rptr. at 851-52. However, the court held that the college, as a public entity, was not liable for failing to provide police protection. *Id.* at 844, 685 P.2d at 1202, 205 Cal. Rptr. at 851.

120. *Id.* at 805-06, 685 P.2d at 1196, 205 Cal. Rptr. at 845 (citing *Dillon v. Legg*, 68 Cal. 2d 728, 734, 441 P.2d 912, 916, 69 Cal. Rptr. 72, 76 (1968)).

121. *Id.* at 806, 685 P.2d at 1196, 205 Cal. Rptr. at 845. *See supra* text accompanying note 58.

122. The court's statement on a landowner's duty follows:

As a general rule one has no duty to control the conduct of another, and no duty to warn those who may be endangered by such conduct. A duty may arise, however, where "(a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which gives the other the right to protection." Among the commonly recognized special relationships are that between a common carrier and its passengers, that between an innkeeper and his or her guests, and that between a possessor of land and members of the public who enter in response to the landowner's invitation.

Id. (citations omitted) (quoting *Davidson v. City of Westminster*, 32 Cal. 3d 197, 203, 649 P.2d 894, 897, 185 Cal. Rptr. 252, 255 (1982)).

123. The court discussed the duty a landowner owes to a business invitee as follows:

It has long been recognized that "a possessor of land who holds it open to the public for entry for business purposes is subject to liability to members of the public while they are upon the land for such a purpose, for physical harm caused by the *accidental*, negligent or intentionally harmful acts of third persons . . . and by the failure of the possessor to exercise reasonable care to (a) discover that such acts are being done or are likely to be done, or (b) give a warning adequate to enable the visitors to avoid the harm, or otherwise to protect them against it."

Id. at 807, 685 P.2d at 1197, 205 Cal. Rptr. at 846 (emphasis added) (citations omitted) (quoting *Slater v. Alpha Beta Acme Mkts., Inc.*, 44 Cal. App. 3d 274, 279 n.3, 118 Cal. Rptr. 561, 563 n.3 (1975); *see also supra* note 102 and accompanying text).

tors paying to come see the ball game should be considered in light of *Peterson* and its interpretation of the policy factors of *Rowland*.

Under the reasoning in *Peterson*, it appears that the ballpark may be liable for physical injuries to plaintiffs even when the injury is caused by the acts of third persons (i.e., the man at bat or some other player). The ballpark should also be liable for failing to warn that the ballpark does not otherwise protect the spectator from the risk.¹²⁴ The ballpark could still avoid liability on that basis by giving actual notice to spectators that (1) they may be injured by baseballs if they are sitting in the unscreened area and (2) that they have a legal right to request a screened seat in order to avoid the injury.

Applying the *Rowland* factors, the duty of the ballpark toward spectators should be increased to provide them greater protection. The first factor in *Rowland* is the "foreseeability of harm to the plaintiff."¹²⁵ Clearly, it is foreseeable that a baseball may enter the stands and injure a spectator. The assumption of risk analysis discussed in the baseball cases assumes that both the ballpark and the spectator know that injury is foreseeable. The second factor in *Rowland* is the "degree of certainty that the plaintiff suffered injury."¹²⁶ Again, common sense and a glance at the spectator injury cases demonstrate that those spectators hit by fast-moving baseballs suffer serious injuries.¹²⁷

124. The Los Angeles Times carried a brief article on a Texas trial court decision in which the Houston Sports Association, owner of the Houston Astros, was found negligent for failing to warn baseball spectators "of the hazard posed by foul balls hit during baseball games at the Astrodome." L.A. Times, July 11, 1985, pt. III, at 13, cols. 1-2. According to the Times, an 11-year-old girl was hit in the head by a ball estimated to be traveling at 125 miles per hour. A jury awarded her and her father \$55,000 in compensatory damages and \$125,000 in punitive damages. *Id.* The trial court's decision, *Friedman v. Astrodomain Corp.*, No. 79-27215 (unpublished opinion) has been appealed to the Texas Court of Civil Appeals. See Nat'l L.J., Aug. 19, 1985, at 3, col. 1.

It will be interesting to see whether this decision is overturned on appeal. Texas has a comparative fault statute (see TEX. REV. CIV. STAT. ANN. art. 2212(a) § 1 (Vernon Supp. 1985)) and its position on primary assumption of risk is not clear. Compare *Parker v. Highland Park, Inc.*, 565 S.W.2d 512 (Tex. 1978) with *Farley v. MM Cattle Co.*, 529 S.W.2d 751 (Tex. 1975). See also *infra* note 154.

125. See *supra* text accompanying note 58.

126. *Id.*

127. Although many of the baseball cases fail to specify the nature of the injury, of those that do so eye injuries are the most prevalent. In at least three cases, the plaintiff lost the sight in one eye. See *Davidoff v. Metro. Baseball Club, Inc.*, 61 N.Y.2d 996, 463 N.E.2d 1219, 475 N.Y.S.2d 367 (1984); *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 424 N.E.2d 531, 441 N.Y.S.2d 644 (1981); *Clapman v. City of New York*, 63 N.Y.2d 669, 468 N.E.2d 697, 479 N.Y.S.2d 515 (1984) (extent of injury documented in lower court's unpublished opinion, N.Y.L.J., Nov. 24, 1982, at 13, col. 4).

California fans have also been seriously injured. In *Fish v. Los Angeles Dodgers Baseball Club*, 56 Cal. App. 3d 620, 128 Cal. Rptr. 807 (1976), a 14-year-old boy died after being hit by

The next factor to consider is "the closeness of the connection between the defendant's conduct and the injury suffered."¹²⁸ In *Peterson*, this factor was analyzed as follows: "[G]iven that the defendants were in control of the premises and that they were aware of the prior assaults, it is clear that failure to apprise students of those incidents, to trim the foliage, or to take other protective measures closely connects the defendants' conduct with plaintiff's injury."¹²⁹ Similarly, given the obvious foreseeability of baseballs entering the stands and injuring spectators, failure to take protective measures forms the necessary connection. The fourth factor is the "moral blame attached to the defendant's conduct."¹³⁰ Under *Peterson*, this factor is established once the first three factors are met.¹³¹

The final three factors are interrelated: "[T]he 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."¹³² First, of course, there is a general social policy of preventing harm which should be encouraged whenever economically feasible. The analysis of these remaining factors may differ, resulting in different standards of care for the major league commercial baseball stadium or the smaller, municipal diamond used for school and Little League games.

The reason the analysis may differ is rooted in the economics of each enterprise. If the duty of the major league commercial stadium is increased (e.g., requiring the stadium to increase the extent of its screening, warn spectators of the danger, or inform spectators of the availability of seats in the screened area and hold a reasonable number of seats open for each game), the costs of compliance could be spread throughout a large consumer base. Alternatively, the cost of liability insurance could be met by a small surcharge on tickets. Unlike its major league counterpart, the

a line-drive foul which fractured his skull and caused an intracerebral hemorrhage. *Id.* at 624-26, 128 Cal. Rptr. at 811-12. The facts in *Fish* were particularly ironic. The boy was hit by the ball, treated at the stadium's emergency first aid station, and released to watch the rest of the game, during which he chased a foul ball. After the game, his condition worsened, and he died a few days later. The family's wrongful death action against the stadium was successful; however, it was based on the emergency physician's negligence in releasing the boy without conducting a proper examination, rather than on the ballpark's failure to protect the fan. *Id.* at 623, 128 Cal. Rptr. at 810.

128. See *supra* text accompanying note 58.

129. 36 Cal. 3d at 814, 685 P.2d at 1202, 205 Cal. Rptr. at 851.

130. See *supra* text accompanying note 58.

131. 36 Cal. 3d at 814, 685 P.2d at 1202, 205 Cal. Rptr. at 851.

132. See *supra* text accompanying note 58.

smaller baseball diamond may not have the economic resources or spectator volume to carry liability insurance to compensate those injured by fast-moving baseballs. This does not mean, however, that the duty of the smaller ballpark should not be reevaluated.

The smaller ballpark has a number of low-cost options available that would reduce the risk of injury to the baseball spectator. First, the ballpark could post prominent signs informing patrons of the risk of injury. These signs could emphasize that the screen was in place for the patrons' safety. Additionally, these signs could warn the baseball fan that if he is injured while outside of the screened area, the ballpark is not liable for his injuries. Alternatively, the ballpark might increase the extent of its screening to cover the areas of higher risk (generally, the areas along the first and third base lines). There may be other options available. These kinds of protective measures might lead the trier of fact to find that the ballpark had satisfied its duty toward the spectators resulting in a finding of no negligence.

Whether the ballpark acted reasonably in protecting spectators from harm should be a question for the jury. If the ballpark takes actions making the game safer for the spectator, the jury may find that the ballpark acted reasonably, under the policies of *Rowland* and guidelines in *Peterson*.¹³³ The jury could appropriately tailor the standard of care to both the smaller ballpark and the major league stadium by considering the community expectations involved, the economics of the enterprise, and the knowledge and actions of the particular plaintiff.

B. Assumption of Risk Revisited

As discussed earlier, the spectator's agreement to assume the risk of injury inherent in watching a ball game from an unscreened seat is implied by the baseball spectator's reasonable conduct in taking an unscreened seat.¹³⁴ This reasonable implied assumption of risk may be primary, relieving the ballpark of a duty to protect the spectator from a baseball coming at high speed off a foul tip or a wild throw. Alternatively, this reasonable implied assumption of risk may be secondary, where the spectator impliedly covenants not to hold the ballpark liable for its *negligence* in failing to protect the spectator from these flying

133. In addition, as in *Peterson*, there may be an issue of governmental immunity when the ballpark is owned and operated by a municipality. See generally *Peterson v. San Francisco Community College Dist.*, 36 Cal. 3d 799, 809-13, 685 P.2d 1193, 1198-202, 205 Cal. Rptr. 842, 847-51 (1984); the California Tort Claims Act, CAL. GOV'T CODE §§ 815-835.4 (West 1980).

134. See generally *supra* notes 36-41 and accompanying text.

baseballs.¹³⁵

It is probable that secondary assumption of risk has not been used to relieve the ballpark from liability since the California Supreme Court's decision in *Quinn v. Recreation Park Association*. According to the *Restatement (Second) of Torts*, the essential elements of secondary assumption of risk, as a complete defense, are "(1) full knowledge and appreciation of the risk; (2) voluntary exposure to the risk; and (3) circumstances that manifest plaintiff's willingness to accept the risk."¹³⁶ These elements are to be determined by a subjective inquiry into the particular plaintiff's actual knowledge.¹³⁷ The plaintiff in *Quinn* satisfied these three elements. She "frankly admitted knowing at the time she took the unscreened seat she would be in danger of being struck by a batted ball."¹³⁸ She chose to take this unscreened seat after being told that screened seats in the area she preferred were not available.¹³⁹ After the court of appeal's decision in *Brown v. San Francisco Ball Club*, however, the plaintiff's knowledge of the risk is imputed and this subjective inquiry required by secondary assumption of risk is no longer followed.¹⁴⁰

If secondary assumption of risk remains available as a defense to negligence in the spectator injury actions, it may be included in the comparative fault scheme established by *Li v. Yellow Cab Co.*¹⁴¹ Judge Crosby, in *Rudnick v. Golden West Broadcasters*, argued that this form of assumption of risk does not affect the spectator injury case because the ballpark is not negligent as a matter of law. Without negligence, assumption of risk and comparative fault are meaningless.¹⁴² On the other hand, Judge Trotter may have been arguing that even if this form of assumption of risk exists as a defense to negligence—and assuming the ballpark is found negligent—the injured spectator's recovery will *not* be reduced under principles of comparative fault.¹⁴³ Authority for Judge Trotter's

135. See generally *supra* notes 34-43 and accompanying text.

136. RESTATEMENT (SECOND) OF TORTS § 496 (C)(1) (1965).

137. *Id.*

138. *Quinn v. Recreation Park Ass'n*, 3 Cal. 2d 725, 731, 46 P.2d 144, 146-47 (1935).

139. *Id.* at 730, 46 P.2d at 146.

140. See *supra* notes 49-52 and accompanying text.

141. See *supra* notes 60-68 and accompanying text.

142. See *supra* notes 95-97 and accompanying text.

143. It is not entirely clear from Judge Trotter's opinion whether the baseball spectator's reasonable assumption of risk is to be considered in comparing the fault of the parties or whether a "reasonable" plaintiff recovers in full.

Li . . . held the doctrine of contributory negligence is superseded by a system of comparative negligence which assesses liability in direct proportion to fault. In so holding, the defense of assumption of the risk was abolished to the extent it is merely a variant of the contributory negligence doctrine. Thus, under *Li*, unlike *Quinn*,

position is found in the California Court of Appeal's decision in *Segoviano v. Housing Authority*.¹⁴⁴

In *Segoviano*, a young man separated his left shoulder while playing in a flag football game organized by the Stanislaus County Housing Authority. At trial, the jury was instructed on contributory negligence and comparative fault, but not on assumption of risk. The jury returned a verdict for the young man, reducing his recovery by thirty percent, after finding him contributorily negligent. The court of appeal reversed and awarded the plaintiff *full* recovery, holding that contributory negligence and any reduction it would have on plaintiff's recovery does not apply when the plaintiff acted reasonably.¹⁴⁵

The court of appeal held that comparative negligence is only to be considered when the plaintiff acts unreasonably. Here, the plaintiff acted reasonably and the court decided that California's comparative fault law does not apply to cases in which the plaintiff's actions are termed reasonable implied assumption of risk. Specifically, *Segoviano* held that *Li v. Yellow Cab Co.* completely abolished secondary reasonable implied assumption of risk and primary reasonable implied assumption of risk in most circumstances.

We hold that [reasonable implied assumption of risk] plays no part in the comparative negligence system of California; it is neither a bar to plaintiff's recovery on the theory that it forecloses the existence of a duty of care by the defendant toward the plaintiff nor is it a partial defense justifying allocation of a portion of the fault for the accident to the plaintiff on the theory that he or she was contributorily negligent in confronting the risk. It is only when the defendant proves that the plaintiff's decision to participate in the activity was *unreasonable* that a jury may allocate damages between the plaintiff and the defendant. Such an allocation is permissible because the defendant has proved that the plaintiff was negligent. Whether the plaintiff's decision to expose himself . . . to the risk of injury was unreasonable under all of the circumstances will be a question for the jury unless it can be held as a matter of law that the decision was reasonable.¹⁴⁶

neither contributory negligence nor assumption of the risk will absolutely bar Rudnick from recovery.

Rudnick, 156 Cal. App. 3d at 804, 202 Cal. Rptr. at 907 (Trotter, P.J., concurring) (citations omitted).

144. 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983).

145. *Id.* at 176, 191 Cal. Rptr. at 588.

146. *Id.* at 164, 191 Cal. Rptr. at 579-80 (emphasis in original).

Under *Segoviano*, the plaintiff who acts reasonably in exposing himself to some risk may recover *in full* for any resulting injuries.¹⁴⁷ The inquiry focuses on the defendant's actions; if the defendant is negligent,¹⁴⁸ the plaintiff may recover.¹⁴⁹

Applying *Segoviano* to the baseball spectator injury case, the defendant ballpark must first be found negligent. Once it is found negligent, the spectator will recover in full, regardless of what he knew about the risk of injury inherent in sitting in the unscreened area. The only requirement is that the plaintiff's conduct must be termed reasonable. Under *Segoviano*, this requirement is easy to meet and may be determined by law.¹⁵⁰

Even if *Segoviano* is not followed, it may be unfair to apply any form of assumption of risk to the ballpark spectator. The regular baseball fan, attending a baseball game, certainly knows that balls enter the stands. The occasional spectator, even if the only games that he has watched were on television, also knows that balls enter the stands and are considered valuable souvenirs. However, as demonstrated by the facts in *Brown* and *Rudnick*, many spectators do not realize that by simply sitting in an unscreened seat, they assume the risk of incurring a serious injury.¹⁵¹ In addition to assuming the risk of injury, the spectator may unknowingly assume all responsibility for the costs resulting from the injury.¹⁵²

It is unfair for the baseball spectator to be held to assume the risk of such costs in the absence of reasonable notice and clearer evidence of actual consent, as required under the traditional affirmative defense of assumption of risk.¹⁵³ If the ballpark may continue to shelter under the

147. *Id.* at 174-75, 191 Cal. Rptr. at 587.

148. *Id.* at 175, 191 Cal. Rptr. at 587-88.

149. This result is contrary to the California Supreme Court's intent in adopting comparative fault. The court stated, "[t]he fundamental purpose . . . shall be to assign responsibility and liability for damage in direct proportion to the amount of negligence of *each* of the parties." *Li v. Yellow Cab Co.*, 13 Cal. 3d 804, 829, 532 P.2d 1226, 1243, 119 Cal. Rptr. 858, 875 (1975) (emphasis added).

150. 143 Cal. App. 3d at 175-76, 191 Cal. Rptr. at 588.

151. See *Rudnick*, 156 Cal. App. 3d at 796, 202 Cal. Rptr. at 901; *Brown*, 99 Cal. App. 2d at 488-89, 222 P.2d at 21.

152. In fact, most spectators are unfamiliar with baseball tort law and, when surveyed, responded that they expected compensation for any baseball-caused injury incurred at a major league game. In 1984, the author conducted a survey of 100 persons between the ages of 18 and 65 who attended baseball games in the Southern California area. None of the people had any legal training. Only 13 of those surveyed did not expect compensation. Survey taken in September and October (1984).

153. The issue of notice was addressed by the court in *Brown*, 99 Cal. App. 2d at 491, 222 P.2d at 23. The court stated, "[i]t would have been absurd, and no doubt would have been resented by many patrons, if the ticket seller, or other employees, had warned each person entering the park that he or she would be imperiled by vagrant baseballs in unscreened areas." *Id.* (quoting *Keys v. Alamo City Baseball Co.*, 150 S.W.2d 368, 371 (Tex. Civ. App.

defense of assumption of risk as a defense to negligence or as a reason for limiting the ballpark's duty, the jury should be called upon to verify that the requisite knowledge and consent were present.¹⁵⁴

VI. A PROPOSAL FOR STRICT LIABILITY

An alternative method of analyzing ballpark liability for spectator injuries may be found by looking to the cases on strict liability for product design defects. Under the California Supreme Court's decisions in *Barker v. Lull Engineering*,¹⁵⁵ *Daly v. General Motors Corp.*,¹⁵⁶ and most recently *Campbell v. General Motors Corp.*,¹⁵⁷ applying strict liability to a major league baseball stadium may now be appropriate to fulfill considerations of public policy and economic efficiency.

Strict liability could be imposed on a major league baseball stadium under the guidelines of *Barker*.¹⁵⁸ While it may at first appear that products liability cases have no bearing on a ballpark liability analysis, there are some compelling similarities. First, the court in *Barker* emphasized that the focus of the inquiry is on the product, not the reasonableness or unreasonableness of the defendant's conduct.¹⁵⁹ The product in a spectator injury suit could be a major league baseball game held in a modern baseball stadium. As a product, it may be held defective. *Barker* sets out a two-part inquiry; fulfilling either part establishes a prima facie case

1941)). While this may have been the case in 1940, it appears less absurd now when everything from children's toys to toasters carry extensive warnings. Again, the expectations of the public have changed.

154. The court of appeals in Michigan recently addressed the duty to warn in *Falkner v. John E. Fetzer, Inc.*, 113 Mich. App. 500, 317 N.W.2d 337 (1982). In *Falkner*, the plaintiff was hit by a ball at Tiger Stadium. Her case was presented to the jury on the theory that the ballpark breached its duty to warn. The appellate court stated that "generally . . . there is no duty to warn of the risk of being hit by batted balls when attending a baseball game because the risk is obvious." *Id.* at 502, 317 N.W.2d at 339 (citation omitted). However, the court recognized that the plaintiff had "presented an apparently unique record in an attempt to demonstrate that the magnitude of the risk involved is much greater than commonly believed." *Id.* at 502-03, 317 N.W.2d at 339. The court held that "it was proper to submit to the jury the question of whether it would be reasonable to require defendant to warn spectators of the unexpectedly high degree of risk." *Id.* at 503, 317 N.W.2d at 339. The jury had returned a verdict for the plaintiff, reducing her recovery by five percent under Michigan's comparative fault law.

The court of appeals reversed the jury verdict holding that although the plaintiff had successfully proved negligence, she failed to prove proximate cause. "[P]laintiffs failed to present any evidence to show that if a proper warning had been given, plaintiff . . . would have taken precautions to prevent the injury." *Id.* at 503, 317 N.W.2d at 339.

155. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

156. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

157. 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).

158. 20 Cal. 3d 413, 573 P.2d 443, 143 Cal. Rptr. 225 (1978).

159. *Id.* at 434, 573 P.2d at 457, 143 Cal. Rptr. at 239.

of defective design. First, a product's design may be defective if it fails to meet ordinary consumer expectations when used as intended or in a reasonably foreseeable manner. Second, the design may be found defective if the plaintiff demonstrates that the design proximately caused his injury. If the plaintiff proves proximate cause, the burden of proof shifts to the defendant, requiring the defendant to justify that the design's benefits outweigh its risks.¹⁶⁰

Under the *Barker* test, one confronts an immediate problem: What degree of safety does the ordinary baseball spectator expect when watching the game? Current case law assumes that the spectator accepts the possibility of injury if he is sitting in an unscreened seat. Even if the spectator *does* expect or know he may be injured, he may *not* expect that, if injured, he will not be compensated.¹⁶¹

In *Rudnick v. Golden West Broadcasters*, Ms. Rudnick expected that she would be protected from baseballs, despite the absence of a screen.¹⁶² This may have been a reasonable assumption because the partial screening may give the spectator the impression that foul balls only enter the screened area and that the areas outside the screen are safe. In addition, in the ordinary major league baseball game, the spectator is barraged with distractions: fellow spectators, vendors, light posts for night games, electronic scoreboards and now, large television screens allowing the spectator to watch the game without ever seeing the actual ball in play. The modern spectator, having paid for his seat and occupying it in the proper manner, most likely expects safety from the all-American pastime, just as he does from his automobile when out on a Sunday drive.

The second test in *Barker* requires only that the plaintiff show that a defective design proximately caused his injury.¹⁶³ Under the California Supreme Court's recent decision in *Campbell v. General Motors Corp.*,¹⁶⁴ if the plaintiff alleges that the lack of a safety device proximately caused the injury, the case should be submitted to the jury to determine whether this second prong of *Barker* is met.¹⁶⁵ In *Rudnick*, had Ms. Rudnick alleged that the lack of a screen caused her injury under *Campbell*, she might have had her case submitted to the jury.

In *Campbell*, the plaintiff claimed that her injury was caused by the absence of a safety bar in front of her seat on a city bus.¹⁶⁶ The bus

160. *Id.* at 432, 573 P.2d at 455-56, 143 Cal. Rptr. at 237-38.

161. *See supra* note 152.

162. 156 Cal. App. 3d 793, 796, 202 Cal. Rptr. 900, 901 (1984).

163. *See supra* note 160 and accompanying text.

164. 32 Cal. 3d 112, 649 P.2d 224, 184 Cal. Rptr. 891 (1982).

165. *Id.* at 120-21, 649 P.2d at 228-29, 184 Cal. Rptr. at 895-96.

166. *Id.* at 116, 649 P.2d at 226, 184 Cal. Rptr. at 893.

rounded a sharp corner and she was injured when she fell out of her seat.¹⁶⁷ A modern baseball spectator might claim he was injured because the stadium lacked a screen in front of his seat. In *Campbell*, the facts made it clear that the woman was a frequent bus rider who was familiar with the route and who actually knew the bus was about to make the sharp turn that led to her fall onto the floor. However, because she was injured the court held that she stated a cause of action under *Barker*.¹⁶⁸

A modern baseball fan may see the ball coming and be unable to protect himself¹⁶⁹ despite his familiarity with the game, the stadium and the risks involved. Nonetheless, the baseball fan hit by a foul ball is summarily dismissed from court even though the injured baseball fan and the injured bus passenger are similarly situated and should both be entitled to a hearing on the merits. Both the bus and the stadium are designed to meet certain safety requirements, certain consumer expectations and requirements of functionality.¹⁷⁰ Both plaintiffs pay for a service. In addition, both the bus rider and baseball spectator are exposed to constant distractions, preventing either from exercising the vigilance needed to protect himself from an unlikely, but foreseeable accident.¹⁷¹

The basic policy reasons behind strict liability support applying the doctrine to the major league baseball stadium. The primary policy un-

167. *Id.* at 116-17, 649 P.2d at 226, 184 Cal. Rptr. at 893.

168. *Id.* at 119-20, 649 P.2d at 228, 184 Cal. Rptr. at 895.

169. A ball coming off the bat and going into the stands along the first or third base line may be traveling at speeds of up to 100 miles per hour. See *infra* note 124. One of the earliest baseball cases recognized this:

[The plaintiff's] explanation that he was watching the game but failed to see the course the ball had taken from bat is reasonable and natural. The uncertainty in the direction, speed and force of a batted ball is one of the interesting and often exciting features of the game and frequently it is difficult for even the trained eye to follow the course of the ball.

Edling v. Kansas City Baseball & Exhibition Co., 181 Mo. App. 327, 168 S.W. 908 (1914). According to the report of the case printed in the *Southwestern Reporter*, plaintiff's counsel pointed out that "[i]f the Kansas City Blues had kept their eyes on the ball with the accuracy defendant says plaintiff should have displayed, they would have attained a higher place in the race for the pennant." 168 S.W. at 910. In *Edling*, the plaintiff ultimately recovered because he was seated in the screened area and the ball went through a hole in the screen. 181 Mo. App. at 330, 168 S.W. at 910.

170. Both the bus rider and the baseball spectator expect to be safe while in the "custody" of the bus or the ballpark. Both expect that the seats they occupy are designed for their intended purpose—whether it be to travel over roads or to watch a major league baseball game at a large stadium.

171. The baseball spectator is in a worse position than the bus passenger because of the increased number of distractions present at the major league game. Electronic scoreboards and large television screens are particularly hazardous because they enable the fan to follow the game without ever watching the actual ball in play. In addition, many fans bring a radio or a small screen television to the game to take advantage of the instant replays, the provision of statistics on each player and the ability to follow other games taking place at the same time.

derlying this doctrine, is "to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves."¹⁷² This doctrine is based on the theory of allocation of resources.¹⁷³ Under this theory, the price a consumer pays for a product should reflect the societal costs of the product as well as its production costs. For example, the price one pays for traveling by airplane should include not only the costs of fuel, maintenance and personnel, but also the costs of the insurance the airline must carry to cover large air disasters.¹⁷⁴ When a product's price reflects all of its costs, the purchaser's decision to pay that price and keep the product on the market is an informed decision.¹⁷⁵ Thus, resource-allocation theory results in an enterprise bearing the true costs of doing business, including the costs incurred by the purchaser who is accidentally injured by the product.¹⁷⁶

Resource-allocation theory also requires that the party in the better position to allocate the costs of loss bear the burden of the loss.¹⁷⁷ This requirement theoretically results in achieving two related societal goals: accident reduction and risk distribution.¹⁷⁸ Imposing the costs of accidents on the enterprise reduces accidents by providing incentives for

172. *Greenman v. Yuba Power Prods. Inc.*, 59 Cal. 3d 57, 63, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963).

173. Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 500 (1961).

174. *Id.* at 502-03.

175. *Id.* at 502.

176. *Id.* at 505.

177. *Id.* at 517.

178. *See Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 150 P.2d 436 (1944). Justice Traynor, in his famous concurrence addressing the rationale behind strict liability stated:

Even if there is no negligence . . . public policy demands that responsibility be fixed wherever it will most effectively reduce the hazards to life and health inherent in defective products that reach the market. It is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer from injury from defective products are unprepared to meet its consequences. The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business. It is to the public interest to discourage the marketing of products having defects that are a menace to the public. If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market. However intermittently such injuries may occur and however haphazardly they may strike, the risk of their occurrence is a constant risk and a general one. Against such a risk there should be general and constant protection and the manufacturer is best situated to afford such protection.

Id. at 462, 150 P.2d at 440-41 (Traynor, J., concurring).

making products as safe as economically practicable. The risk of high medical expenses resulting from a defective product does not fall solely on the plaintiff but is assumed by the manufacturer—the party most able to spread the costs incrementally among the consumers benefiting from and choosing to purchase his product.

These economic principles apply as surely to a major league baseball stadium owner as to a manufacturer. First, the goal of reducing accidents is more easily achieved by the stadium than by the fan. The ballpark possesses (or can easily compile) statistics on the safety of the stadium. It can correlate the number of injuries to the area of the stadium. It can then extend the screening to cover areas with a high risk of injury.¹⁷⁹ The costs of such improvements could easily be recovered through the addition of a small ticket surcharge.

The costs of spectator injuries could also be easily assumed by the ballpark. Major league baseball as an enterprise could insure against the costs of these injuries. Although many individuals have some medical insurance, many do not and the costs of their injuries are passed directly on to society in general in the form of higher taxes when society is forced to pay for their medical expenses through government-subsidized health care programs and through higher private insurance rates for those with private insurance. The injuries suffered by baseball spectators hit by fast-moving baseballs can be severe and permanent.¹⁸⁰ If the costs of injuries are imposed and spread throughout the major league system, the costs imposed on each spectator would also be very small. Moreover, imposing the costs of spectator injuries upon the enterprise itself would provide an incentive for improving the design of the stadium so that the game is safer for all spectators. Once the costs of updating the ballpark's safety features and the costs of insuring against the statistically inevitable accidents are imposed on the stadium, the ticket prices will accurately reflect the cost of baseball to society, resulting in a better allocation of resources.

Imposing strict liability on the ballpark would not be the same as absolute liability. First, the ballpark would have to be found "defective." Second, if Ms. Rudnick or some other spectator were able to prove a defect and have a strict liability cause of action recognized, his or her

179. Prof. Dan Schechter queries: "Given the L.A. Dodgers infield, are fans seated along the first base line subjected to a higher risk of injury?"

The Dodgers committed 166 errors during the 1985 season, more errors than any other team in the National League. Player Steve Sax was responsible for 22 of them. Prof. Schechter adds: "To err is human, three err is Steve Sax." Interview with Dan Schechter, Assoc. Prof. of Law, Loyola Law School, Los Angeles, California (October 28, 1985).

180. See *supra* note 127.

own actions would still be examined. In *Daly v. General Motors Corp.*,¹⁸¹ the California Supreme Court held that actions in strict liability are still subject to principles of comparative fault.¹⁸²

After *Daly*, strict liability is effectively limited by comparative fault. This interaction, along with the requirement of a "defect," guards against absolute liability being imposed on baseball stadiums, and may protect the stadium from becoming an insurer for all spectator injuries.¹⁸³ Imposing strict liability on major league ballparks for spectator injuries may be the most equitable means of balancing the demands of fans for safe entertainment with the economic well-being of major league stadiums.

VII. CONCLUSION

This Note proposed an updated approach to the liability of baseball stadiums for spectator injuries. Generally, the duty of the ballpark should be submitted to a jury and liability imposed under the analysis of *Rowland v. Christian* and principles of comparative fault. In the case of major league commercial baseball stadiums, strict liability should be the rule in order to protect spectators from the costs of severe injuries caused by high-speed baseballs and to provide the stadium with an incentive to

181. 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978).

In *Daly*, the family of the decedent sued an automobile manufacturer on a theory of strict liability for a defectively designed automobile. *Daly* was killed when he was thrown from his car after hitting a metal freeway divider at over 50 miles per hour. There was evidence that *Daly* had been intoxicated at the time of his death. There was also evidence that *Daly's* death could have been avoided if the car door had remained shut and *Daly* had not been thrown out of the car. The plaintiffs presented evidence on the defective design of the door latch. The defendants countered with evidence that *Daly's* death could have been avoided if he had locked the car door or had been wearing the shoulder harness and seatbelt. 20 Cal. 3d at 731, 575 P.2d at 1165, 144 Cal. Rptr. at 383.

The court held that *Daly's* nonuse of the available door lock and seatbelt could constitute contributory negligence. Since contributory negligence was merged into a scheme of comparative fault in *Li v. Yellow Cab Co.*, see *supra* notes 60-68 and accompanying text, the court reasoned that it should apply in situations such as that in *Daly*. The fact that a strict liability action was involved was not dispositive, as the economic and proof considerations addressed by strict liability would not be harmed by applying principles of comparative fault.

182. The court in *Daly* considered the issue and held:

Having examined the principal objections and finding them not insurmountable, and persuaded by logic, justice, and fundamental fairness, we conclude that a system of comparative fault should be and it is hereby extended to actions founded on strict products liability. . . . [T]he term "equitable apportionment of loss" is more accurately descriptive of the process, nonetheless, the term "comparative fault" has gained such wide acceptance by courts and in the literature that we adopt its use herein.

Id. at 742, 575 P.2d at 1172, 144 Cal. Rptr. at 390.

183. Thus, this result may be more preferable to the stadiums than the result suggested by Judge Crosby in *Rudnick*. See *supra* note 93 and accompanying text.

update the safety of the stadiums. This solution would reconcile the conflicts evident in the California Court of Appeal's opinion in *Rudnick v. Golden West Broadcasters*.

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