

DEATH TO THE CRAZY HOT DOG VENDOR?: THE CONTINUED EROSION OF THE BASEBALL RULE AFTER *COOMER* v. *KANSAS CITY ROYALS*

GARRETT R. BROSHUIS*

INTRODUCTION

The Reading Fightin Phils, a minor league baseball team, have one of the most popular between-innings mascot performances in all of baseball: the Crazy Hot Dog Vendor. A man “rides” a fake ostrich, spins in circles erratically, and launches a constant barrage of wrapped hotdogs at flinching and laughing fans.¹ The spectacle has become such a fan favorite that the Fightin Phils have even crafted their new logo after it.² Yet due to a recent court decision, the activity—and countless others like it—might soon come to an end.

In 1913, the Missouri Court of Appeals in Kansas City provided the genesis for the doctrine now known as the baseball rule, which shields promoters of baseball games from liability for injuries stemming from errant foul balls.³ While the rule retains a high level of acceptance, the exact same Missouri court—almost exactly 100 years later—recently issued a ruling that could severely curtail this assumption of risk doctrine: a team can be held liable when a mascot throws a hotdog into the stands and an injury results.⁴

* J.D. candidate, 2013, Saint Louis University School of Law. The author would like to thank his wife for her enduring support, and to thank all the hitters who pummeled his offerings during six years of professional baseball for teaching him the virtue of humility.

¹ For a relatively tame video of this spectacle, see *Crazy Hot Dog Vendor at Reading Phillies*, YOUTUBE (Aug. 2, 2011), <https://www.youtube.com/watch?v=a2wLbIaE5Sw>.

² See Andrew Kulp, *Reading Phillies Are Now the Reading Fightin Phils, Mascot Is an Ostrich for Some Reason*, THE700LEVELCLUB.COM (Nov. 17, 2012, 2:30 PM), <http://www.the700level.com/baseball-philadelphia-phillies/news/The-Reading-Phillies-Are-Now-the-Reading?blockID=803147>.

³ *Crane v. Kansas City Baseball & Exhibition Co.*, 153 S.W. 1076 (Mo. Ct. App. 1913); see also *infra* Part I.

⁴ *Coomer v. Kansas City Royals Baseball Corp.*, Nos. WD 73984, WD 74040, 2013 WL 150838, at *1 (Mo. Ct. App. Jan. 15, 2013); see also *infra* Part II.A.

Given that almost all sporting events today launch souvenirs into the stands during breaks from game action, this decision could have far-reaching consequences. Until recently, a team's liability for these prevalent practices remained relatively unknown.⁵ Despite providing some clarity, however, this decision is just one in a line of recent decisions further refining—and sometimes rejecting⁶—the baseball rule in favor of a general trend towards comparative fault.⁷ Nevertheless, assumption of risk principles should still govern, as the souvenir launch during game breaks has become common to the overall event.

This article begins by briefly discussing the baseball rule's development. Next, the article discusses the recent court decision carving an exception for souvenir launches and examines how this ruling fits within related erosion to the rule. Lastly, an argument will be made that other courts should not adopt this ruling.

I. THE BASEBALL RULE AND ASSUMPTION OF RISK

The origins of what has become known as the baseball rule can be traced to 1913, when the Kansas City division of the Missouri Court of Appeals decided *Crane v. Kansas City Baseball & Exhibition Co.*⁸ In what quickly became accepted doctrine, the court found the plaintiff assumed the risk of being hit by a foul ball by choosing to sit in an area without protective netting since the team also offered protected seating.⁹

⁵ See Scott b. Kitei, *Is the T-Shirt Cannon "Incidental to the Game" in Professional Athletics?*, 11 SPORTS LAW. J. 37, 53 (2004) ("If a spectator is injured by one of these items, it is not clear whether a court will rule that the spectator assumed the risk of the injury . . .").

⁶ See *Rountree v. Boise Baseball, LLC*, No. 38966, 2013 WL 646277, at *5 (Idaho, Feb. 22, 2013).

⁷ See *infra* notes 30–35 and accompanying text.

⁸ 153 S.W. 1076 (Mo. Ct. App. 1913); see also J. Gordon Hylton, *A Foul Ball in the Courtroom: The Baseball Spectator Injury as a Case of First Impression*, 38 TULSA L. REV. 485, 486 (2003) ("[T]he first appellate court opinion dealing with a spectator injured by a foul ball . . . was *Crane v. Kansas City Baseball & Exhibition Co.*").

⁹ *Crane*, 153 S.W. at 1077–78 ("[P]laintiff . . . voluntarily chose an unprotected seat, and thereby assumed the ordinary risks . . .").

Some doctrinal refinement has since taken place,¹⁰ but the basic rule has remained the same: so long as the injury does not result from faulty netting¹¹ or from incidents uncommon to the game,¹² the defendant will not be found negligent. As one treatise states:

Given the Plaintiff's awareness of danger and choice of seat, the sports operator's only duty is to provide some reasonably safe accommodations. That is often defined as an obligation to provide screening in the most dangerous areas These rules do not mean that the sports enterprise never owes a duty of care For instance, the enterprise might provide a defective screen behind home plate, or bleachers that collapse.¹³

Despite this rule, courts have struggled with defining the outer edges of what activities should be deemed common to the game (and non-compensable) versus those uncommon to the game (and compensable).¹⁴ For instance, a court imposed liability on a team when a mascot distracted a spectator who was then hit by a foul ball,¹⁵ but another did not impose liability for an injury sustained by a fan attempting to catch fly balls during a promotional contest.¹⁶ While such cases provide rough guidelines for sports promoters, liability questions related to souvenir launches have remained unanswered.

¹⁰ Most states have now adopted comparative negligence principles instead of contributory negligence principles. See 3 STEIN ON PERSONAL INJURY DAMAGES TREATISE § 14:6 (3d ed.) (updated Oct. 2012) (stating that “[p]resently only a few states continue not to apply comparative fault principles” and listing only four states and the District of Columbia); see generally Christopher J. Robinette & Paul G. Sherland, *Contributory or Comparative: Which Is the Optimal Negligence Rule?*, 24 N. ILL. U. L. REV. 41 (2003).

¹¹ See *Edling v. Kansas City Baseball & Exhibition Co.*, 168 S.W. 908 (Mo. Ct. App. 1914).

¹² See, e.g., *Jones v. Three Rivers Mgm't Corp.*, 394 A.2d 546 (Pa. 1978) (imposing liability when a woman was struck by a batted ball during pre-game batting practice since it was not part of the game); *Cincinnati Baseball Club v. Eno*, 147 N.E. 86 (Ohio 1925).

¹³ DAN B. DOBBS, PAUL T. HAYDEN, & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 239 (2nd ed.) [hereinafter “DOBBS’ LAW OF TORTS”]; see also RESTATEMENT (SECOND) OF TORTS §§ 341A–343A (1965) (providing general assumption of risk principles).

¹⁴ See *Kitei*, *supra* note 5, at 47–51.

¹⁵ *Lowe v. Cal. League of Prof'l Baseball*, 65 Cal. Rptr. 2d 105, 105–06 (Cal. App. Ct. 1997).

¹⁶ *Hawley v. Binghamton Mets Baseball*, 262 A.D.2d 729, 730 (N.Y. App. Div. 1999).

II. HOTDOGS, MASCOTS, AND THE CONTINUED EROSION OF THE BASEBALL RULE

Sporting events today offer more promotional activities than ever; in turn, this creates more opportunities for spectator injuries.¹⁷ This proves particularly true for souvenir launches during game breaks, and courts must decide whether these promotions should be deemed a common part of the game, and thus covered by the baseball rule, or uncommon to the game.¹⁸

A. *The “Hotdog Launch”*: *Coomer v. Kansas City Royals Baseball Corp.*

Almost exactly 100 years after the Kansas City Court of Appeals issued its seminal opinion in *Crane*, the same court recently carved an exception. In *Coomer v. Kansas City Royals Baseball Corp.*, Mr. Coomer sued the Kansas City Royals after allegedly sustaining eye injuries from a hotdog thrown by their mascot, “Sluggerrr.”¹⁹ Sluggerrr had regularly launched hotdogs into the stands during Royals’ games since around 2000; some were bubble-wrapped and launched by air guns, while others were foil-wrapped and thrown by hand.²⁰

Prior to the incident, Mr. Coomer saw Sluggerrr throwing hotdogs between innings but briefly looked away.²¹ Next, a hotdog hit him in the face.²² Two days later, he began experiencing vision problems and underwent surgery for a detached retina.²³ Following the development of a cataract, Mr. Coomer endured another surgery, but he still suffers from vision problems today.²⁴

¹⁷ See Kitei, *supra* note 5, at 52.

¹⁸ *Id.* at 53 (“If a spectator is injured by one of these items, it is not clear whether a court will rule that the spectator assumed the risk of the injury, or that a team or facility owner violated a duty . . .”).

¹⁹ Nos. WD 73984, WD 74040, 2013 WL 150838, at *1 (Mo. Ct. App. Jan. 15, 2013).

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ *Id.*

²⁴ *Id.*

After a trial, a jury imposed no liability on the Royals based on assumption of the risk.²⁵ On appeal, the court disagreed, finding that “the risk of being hit in the face by a hot dog is not a well-known incidental risk of attending a baseball game.”²⁶ Consequently, it made no difference that the Royals regularly engaged in the promotional activity, that Mr. Coomer had previously attended games, that Mr. Coomer knew promotional items were thrown into the stands, and that Mr. Coomer had seen the “Hotdog Launch” begin on the night of the injury.²⁷ The launch was a “customary activity,” but Mr. Coomer did not “consent to the risks of being hit by a promotional item” since “[i]nherent risks are those that inure in the nature of the sport itself.”²⁸ Thus, the jury should not have been instructed on assumption of risk.²⁹

B. The Continued Erosion of the Baseball Rule

Coomer represents just one in a line of cases eroding the baseball rule. Mere weeks after *Coomer*, the Supreme Court of Idaho rejected the baseball rule completely, finding “no compelling policy reason” for its adoption.³⁰ Somewhat similarly, the New Mexico Supreme Court recently rejected the baseball rule in favor of a modified rule imposing “a duty that is symmetrical to the duty of the spectator.”³¹ Several courts have

²⁵ *Id.* at *2.

²⁶ *Id.* at *3.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* The court did, however, find that the trial judge properly submitted a comparative negligence instruction to the jury due to Mr. Coomer’s choice of seat, awareness of the event, and choice to look away from the event. *Id.* at 4.

³⁰ *Rountree v. Boise Baseball, LLC*, No. 38966, 2013 WL 646277, at *5 (Idaho, Feb. 22, 2013). The rarity of spectator injuries and deference to the legislature led to this conclusion. *Id.*

³¹ *Edward C. v. City of Albuquerque*, 241 P.3d 1086, 1097 (N.M. 2010).

also rejected the baseball rule for non-seating areas, such as concessionaries or concourses.³²

These decisions parallel a broader movement within tort law away from complete bars of recovery and towards comparative negligence doctrine.³³ Some jurisdictions have not only cast aside contributory negligence but have also disposed of the assumption of risk defense.³⁴ Although comparative negligence certainly better meets many of tort law's goals than contributory negligence,³⁵ the baseball rule still has much to offer.³⁶

The rule's underlying rationale and utility has not changed, contrary to the stance of some commentators.³⁷ First, today's spectator possesses the exact same awareness of errant foul balls as the spectator of 100 years ago. Second, many spectators actually *want* foul balls to enter the stands, as they desire to capture a foul ball as a souvenir.³⁸ Third, the age and widespread adoption of the rule has led to predictability, and promoters of baseball games rely on the rule when constructing stadiums.³⁹

Similar rationale can be found for applying the rule to souvenirs thrown into the stands during game breaks. Such activities have become common to an overall sporting

³² See *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, 881 A.2d 700, 708–09 (N.J. 2005); *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 552 (Pa. 1978).

³³ See, e.g., *Edward C.*, 241 P.3d at 1093 (noting the shift towards “comparative fault tort systems”); Robinette & Sherland, *supra* note 10, at 41–43 (describing the evolution of contributory and comparative negligence and noting that “[c]urrently forty-six jurisdictions apply comparative negligence”).

³⁴ See, e.g., *Rountree*, 2013 WL 646277, at *8; DOBBS' LAW OF TORTS §§ 235–37.

³⁵ See Robinette & Sherland, *supra* note 10, at 60 (“Comparative negligence is the rule that best achieves the goals of tort law.”).

³⁶ *C.f.* David F. Tavella, *Duty of Care to Spectators at Sporting Events: A Unified Theory*, 5 FLA. A&M U. L. REV. 181, 190 (2010) (“The fact that the limited duty rule has its origins in the earliest days of baseball does not mean it's anachronistic or unfair. The limited duty rule seeks to balance an operators' duty to ensure the safety of the public with that of the public's ability to enjoy a sporting event, including all the elements that go with sporting events, such as the potential for souvenirs . . .”).

³⁷ See generally David Horton, comment, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. REV. 339 (2003).

³⁸ See Tavella, *supra* note 36, at 192 (“[F]ew people would want to go to sporting events where the field are completely surrounded by protective netting . . . it would prevent the possibility of obtaining a souvenir and restrict interaction with players.”).

³⁹ See *id.* (noting the cost that would be associated with abandoning the rule).

event. When viewed narrowly, of course a hotdog toss is not a common *game* activity. But courts should not take this narrow view found in *Coomer*, as, more generally, such launches are certainly common *event* activities desired by the spectator: they provide entertainment during otherwise dull moments, and they provide the prospect of catching a free souvenir (or snack). So long as adequate care is taken in the selection of such souvenirs for tossing, these two attributes—spectator awareness and spectator desirability—dictate that the baseball rule should extend to souvenirs thrown into the stands.

CONCLUSION

Previous decisions already found that the baseball rule does not apply to areas such as concession areas and walkways. Further, the baseball rule has been rejected when a mascot distracts a spectator during the game's action. These decisions carved out important and necessary exceptions to an otherwise complete bar to liability. However, further erosion of the rule is neither necessary nor desirable for either the spectator or the promoter, especially when it comes to entertainment provided during breaks in game action. Today's spectator both desires and expects souvenir launches during game breaks. So long as the promoter does nothing to increase the danger to fans during souvenir launches (by not launching hard or sharp objects, or not launching with unreasonable velocity), assumption of risk principles should apply. If not, a less desirable, watered down game experience might be coming to a ballpark near your soon. It might even mean the death of the Fightin Phils' "Crazy Hot Dog Vendor."