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Report From The Spring Meetings

ASTM F08 Progress On The Headgear Front

By: Mark S. Granger, Partner, MM, Boston

The American Society for Testing and Materials recently held the Spring meetings for its F08 Sports Equipment and Facilities Committee in Salt Lake City, Utah. These meetings presented an opportunity for company officials, engineers, designers, and consumers to gather to look at standards applicable for sports facilities and sports equipment and to make important changes to those standards.

The most striking progress was achieved in the nearly record time promulgation of standards for martial arts helmets. The comprehensive standard, which is substantially different than most other headgear standards, was produced and approved after much work from a task group which was charged with bringing this matter to the forefront as quickly as possible.

Efforts at creating standards for soccer headgear again bounced down a rough road and sufficient negatives were presented in opposition to the proposed standard that it could not be promulgated. The subcommittee involved with these standards is confident, that with a great deal of hard work, it will have an acceptable standard ready for ballot in the Fall of 2004.

Also struggling are attempts to promulgate standards for pole vault and rodeo helmets. Both standards' efforts had suffered from a lack of narrow scope to their efforts. With respect to pole vault helmets, the type of injury sought to be reduced is not from someone falling from a full pole vault height to the ground. Instead, the helmets are being considered to reduce the risk of injury if either the following occurs: (1) somehow the jump is missed and the vaulter does not even get up to the rail and falls back into the "launch site" on the approach side of the pole; or (2) situations where the vaulter clears the pole and drops to the pit only to bounce out of the pit and strike hard on the hard surfaces surrounding the pit. Now that they have focused their scope, it is to be hoped that committee can come up with standards at the November meetings in Washington, D.C.

Rodeo helmets also have suffered from too broad a scope of risk reduction. The Task Group has basically determined that there are really only two kinds of injuries that a helmet may provide some protection from: falling from a horse or bull and coming in contact with the head of a horse or a bull when the animal rears its head back. Now that there is a reduced scope, it is hoped that more will be able to be achieved on helmet standards for that sport. Interestingly, rodeo is one of the fastest growing sports in the United States and thousands of young people, particularly in high school and college, regularly participate in rodeo competition.

Existing football helmet standards were re-approved as required by ASTM without any substantive changes.

A Task Force Group was designated to look at labeling standards with respect to helmets and headgear in an attempt to harmonize existing standards and to make certain that the consumers' current needs are being met by helmet labeling standards. Reports of groups on roll off protection and the use of new energy absorbing foams were also presented.

The F-08 Committee is gearing up for its 35th Anniversary to take place in Washington, D.C. November 9-12, 2004. A gala event is being planned and all are urged to attend. Celebrating 35 years of reducing the risk of injury to persons participating in sports and sporting events has been an active goal of the F-08 Committee since its inception.

The F-08 Committee also plans to hold symposia on injuries to disabled athletes and on expert and engineering testimony in depositions. More details on these up coming programs will appear in later editions of *Sports Law Journal*

Concussions in Athletes: A Team Doctor View

*By: Dr. J. Scott Delaney, Research Director,
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To give you a little insight into my background, I am a physician who practices both sports medicine and emergency medicine at McGill University in Montreal, Canada. I am the team physician for the local professional football and soccer teams, as well as the McGill University football and soccer teams. I also function as the physician in charge of several world champion

¹ *Morrison, Mahoney & Miller, LLP regularly publishes articles in Sports Law Journal from guest authors. These articles are solely the opinion of their authors and not necessarily of Morrison Mahoney LLP or its clients.*

professional boxers and artists from Cirque du Soleil. Most of my research focuses on concussions in athletes.

In this initial article, I will try to highlight just a few findings from our research which might not be intuitive or well known to those not involved in concussion research.

1. Concussions are very much underreported.

The vast majority of concussions are mild in severity. Most concussions do not involve a loss of consciousness or post-traumatic amnesia. The initial symptoms of a concussion may include a headache, feelings of mild disorientation (getting “dinged”), blurred vision, nausea, balance problems, and decreased memory. In simple terms, these are not symptoms which are detectable to an observer. As such, unless an athlete volunteers his or her symptoms to someone, a concussion will go undiagnosed. In recent years, we have developed very sophisticated tests to detect and quantify the severity and recovery from a concussion. Despite this sometimes impressive technology, we are almost always dependent on athletes to volunteer their symptoms as the first step in the diagnosis of a concussion. That has not always proven reliable. Why not?

“Athletes are lying to you or they have no idea what a concussion is!”: I often use this slide to describe most athletes’ understanding and behavior towards concussions.

Let me deal with each of these problems in turn.

Athletes have reasons, valid or not, for “lying”. Remember, we are almost always dependent on the athlete reporting their symptoms as the first step in the diagnosis of a concussion. When deciding disposition after a concussion, we are also dependent on them telling us about past concussions, as the number and severity of past concussions often affects how long we keep an athlete from competition after suffering a concussion. Thus, while full disclosure of past and present symptoms is vitally important to an athlete’s health, it can directly result in an athlete being kept out of competition. I first became aware of the “lying” or concealment of symptoms and past history when I conducted a

study of all professional football players reporting to training in the Canadian Football League (CFL). This study was done in conjunction with the CFL Players' Association (CFLPA), and the responses from each individual were kept confidential. I asked the players about past concussions and concussion symptoms they may have experienced in the previous season. When I received the completed questionnaires, I discovered that almost none of the athletes reported that they had suffered a past concussion or had experienced any symptoms from a concussion in the previous year. Based on personal experience and other similar research, this was not what I had expected. Wanting to know why the athletes seemed reticent about their symptoms, I discussed the findings with representatives of the CFLPA. They informed me that, despite assurances of confidentiality, the players felt that the information might somehow make its way to general managers who could use it to determine who to sign and who to let go. With the approval of the CFLPA, we conducted the same study the following year; but, this time, we used anonymous questionnaires and discovered that 44.8 % of the players who played in the CFL during the previous year had likely suffered a concussion.

A second example of the "lying" or concealment of symptoms was evident when one of my colleagues at McGill University (Dr. Suzanne Leclerc) conducted a study of our ice hockey players. This study involved prospectively diagnosing concussions in our university ice hockey players over several seasons (i.e., the study was dependent on an athlete coming forward right after the concussive episode and volunteering his or her symptoms to someone on the medical staff). This study revealed that almost 75% of all diagnosed concussions occurred in first-year hockey players. While this might make sense if one were to argue that first year players may be younger, less physically developed, less experienced and less skilled, all of which might make someone more at risk for a concussion, the past evidence suggests something different. The majority of concussions occur during games (not practices) and first-year players play in games much less

often than their more experienced teammates. Knowing this, we postulate that an athlete learns, either through personal experience or from more experienced teammates, that volunteering symptoms of concussion may result in a physician preventing them from returning to play for a period of time. Once they have learned this, the athletes stop volunteering their symptoms for fear of being kept out of competition by the medical staff.

Now, let me address the idea that athletes do not understand what constitutes a concussion. In our study of CFL players, 81.2 % of those players who suffered a concussion did not recognize they had suffered a concussion. We determined this by first asking the athletes how often they had suffered a concussion after being hit in the head playing football during the previous season. Most athletes answered that they had not suffered any concussions. We then asked them how often they had suffered each of the common concussion symptoms – loss of consciousness, headache, memory problems, confusion, visual problems, etc., – after being hit in the head during the previous football season. If a player answered "no" to the first question about suffering a concussion, but also answered "yes" to any of the questions concerning concussion symptoms, we considered that this was indicative of a player who had suffered a concussion without recognizing it.

This poor understanding of concussions is not only limited to professional athletes. In a study using a near identical questionnaire to the CFL study, we studied university football and soccer players from all across Canada and discovered that 80.2% of soccer and 76.6% of football players who had suffered a concussion while participating in their respective sports did not recognize they had suffered a concussion. It seems that most athletes still believe a concussion must include a loss of consciousness and prolonged, significant confusion.

Because of what we have learned from our research, we continue to use anonymous questionnaires when attempting to determine the true incidence and rates of concussions in a

given sport. While this makes it impossible to confirm or gather further data from a specific athlete, we believe that individuals are less inhibited when answering an anonymous questionnaire. It gives us the chance to learn about those athletes who may have suffered a concussion, but who may not have been identified prospectively. This may occur if the athlete was unaware that his or her symptoms were secondary to a concussion or if the athlete was afraid to mention his or her symptoms to a trainer or physician, for fear of being prevented from returning to play

2. Certain athletes are more at risk for concussion.

We know that certain groups or individuals, either because of intrinsic or extrinsic factors, are more at risk for concussions. The first group that is more at risk for concussions comprises those athletes who have suffered a previous concussion. Our studies and others have shown that athletes who have suffered at least one diagnosed concussion in the past are 4- 6 times more likely to suffer another concussion than those athletes who have never suffered a past concussion. This is one of the reasons that physicians inquire about an athlete's past concussions. An athlete who has suffered past concussion will traditionally be kept from returning to competition longer in an effort to ensure there has been complete and full recovery.

The second higher risk group is made up of athletes who participate in specific activities. While it is well known that activities and sports such as boxing, football, ice hockey and rugby are sports at high risk for concussion, it might not be as well known that sports such as soccer, downhill skiing, snowboarding, gymnastics and cheerleading are high risk sports for concussion. While the majority of sports-related concussions in the United States occur in football, this is in large part because of the large number of high school football players. Proportionally, many of the less-popular sports actually have an equal or higher risk of concussion for an individual as compared to football. Because of the relatively small number of athletes who participate in some of these activities in relation to football,

there are less total concussions occurring on a yearly basis, and thus less attention is directed at preventing concussions in these sports. While the choice of sport or activity may predispose an athlete to a higher risk of concussion, the position a player plays in a specific sport may also put the player at higher risk for concussion. For example, in football, quarterbacks and defensive backs are believed to be the positions at highest risk, whereas in soccer, goalies and possibly players who consider themselves "headers" are thought to be most at risk.

The third group which is considered to be at higher risk for concussion is children. From the trauma literature, it is well known that children are generally more susceptible to head injuries than adults. Compared to an adult, a child has a proportionately larger head, but a thinner skull to protect the brain. Young athletes also have weaker neck muscles, which, when developed, help to absorb and dissipate the forces applied to the head, thus lessening the chances for a concussion. Children are less adept at skills such as heading the soccer ball, and may not yet have mastered the proper techniques of lessening the forces applied to the skull during heading

3. Soccer players are just as at risk for concussions as football players.

I first became involved in concussion research because I did not expect this fact to be true. In my first few years of providing medical coverage for the university football and soccer teams, it occurred to me that we had lost more soccer players to concussions than football players. This did not intuitively make sense to me, as football is undeniably a more violent game than soccer. I explored the literature on concussions in soccer and found that, indeed, soccer had been proven to have high concussion rates. Because most of the initial literature was conducted in Europe, the results were less well known here in North America. In an effort to directly compare the two sports, I used the model of anonymous concussion questionnaires that I had used in the previous CFL study. In a pilot study on McGill University athletes after their fall season, we learned that 34.1 % of football players had likely suffered a concussion

while 46.2% of soccer players had likely suffered a concussion, while participating in their respective sports. In an attempt to study a larger group of athletes, the following year we approached universities in Canada with both football and soccer teams. Because most Canadian university soccer players play soccer for the fall outdoor, winter indoor and summer outdoor seasons, we also decided to question athletes on the entire preceding 12 months in an attempt to get a better understanding of concussions occurring on an annual basis. Similarly, football players play during the fall season; but they also participate in spring camps at the universities. These spring camps are full contact, and therefore, a very high risk period for concussions. We discovered that over the preceding 12 month period, 70.4% of football and 62.7% of soccer players likely suffered a concussion while participating in their respective sports. In a recent study of patients presenting to emergency departments with sports-related head injuries and concussions in the United States from 1990-1999, we showed that the concussion rates are similar amongst people from the general population participating in either football or soccer.

Realizing that soccer is a high risk sport for concussion, that soccer is perhaps the only sport where the purposeful use of the head to strike a moving ball is allowed, and that soccer is the most popular sport in the world (with at least 120-150 million people playing soccer worldwide and over 13-17 million participants in Canada and the United States), it should come as no surprise to learn that several companies have designed and are producing protective headgear for soccer. These products range in design from small plastic straps covering only the front of the head to large foam helmets covering the entire skull. In an attempt to regulate these products and ensure adequate safety standards, the American Society for Testing and Materials (ASTM) is developing a safety standard for soccer headgear. The standard is near completion and is meant to ensure that any headgear which meets or exceeds this standard will provide an athlete with protection against concussive impacts, while not being a hazard or threat to other

players who may come in contact with the product. Because of these design parameters, the products will have to be soft, without a hard outer shell. As such, the product may actually protect other players who come into contact with it. The international governing body of soccer (Federation Internationale de Football or FIFA) and the National Federation of High Schools in the United States have already agreed to allow the use of these products, so you will likely be seeing these products used extensively in the near future.

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Recreational Vehicles and Children

By: Brian Heermance, Partner and Justin Fabella, Associate, MM, New York

If you allow your child to ride a recreational vehicle, then be ready to accept the liability that goes along with it. Despite what some parents may think, motorized scooters (“go-peds”), dirt bikes, mini-bikes and go-carts are not allowed on any street, highway, parking lot, sidewalk or other area that allows public motor vehicle traffic.² According to the New York Vehicle Traffic & Safety Laws, these recreational vehicles fall within the definition of “motor vehicles” and, therefore, must be registered and carry the requisite liability insurance.³ The New York legislature has enumerated exceptions to the definition of motor vehicle, such as all-

² Department of Motor Vehicles, <http://www.nydmv.state.ny.us/dmvfaqs.htm#motor>

³ A motor vehicle is defined as “[E]very vehicle operated or driven upon a public highway which is propelled by any power other than muscular power”. N.Y. VEH. & TRAF. § 125

terrain vehicles (“ATV”) and snowmobiles; however, go-peds, dirt bikes, mini-bikes and go-carts do not fall within the statutory exceptions.⁴

To make matters worse for parents, the Department of Motor Vehicles has ruled that none of these recreational vehicles can be registered in New York State because each lacks the proper equipment and/or design for operation on roadways.⁵ Despite the inability to register a go-ped, dirt bike, mini-bike or go-cart, a parent can be found in violation of the Vehicle and Traffic Laws if a child is caught operating any of these vehicles.⁶ For example, if a child is stopped by the police while operating a go-ped on a public roadway, then that child’s parent is susceptible to one or more summonses, namely, operating a vehicle without a license, unregistered vehicle, uninsured vehicle, safety violations such as failure to wear a helmet and endangering the welfare of a child. Not only should that parent expect hundreds of dollars in civil fines, he/she may be arrested and charged with a misdemeanor.⁷ The only legal means for a child to ride one of these recreational vehicles is if the operation is restricted to property owned or leased by the parent.

As previously indicated, the New York legislature has carved out a few recreational vehicles from the definition of a motor vehicle, including ATVs and snowmobiles.⁸ With

regard to ATVs, in 1985 the legislature passed Article 48-B of the Vehicle and Traffic Law. Article 48-B requires that all ATVs operated within the state must be registered despite the fact that they may only be used on private property.⁹ Additionally, a parent must obtain liability insurance unless the ATV is operated solely on private property.¹⁰

The law restricts the use of ATVs by children under sixteen to property owned or leased by his or her parent unless supervised by a person eighteen or older or sixteen or older with an ATV safety certificate.¹¹ Parents who own or possess an ATV should be aware that Section 2288 of Article 48-B places upon them responsibility for the violations of their children under the age of sixteen. Therefore, not only can parents be liable for failure to register or insure the ATV, they can also be issued summonses for their child’s traffic infractions and equipment violations, such as failure to wear a helmet.¹²

The use of a snowmobile is governed, generally, by Article 25 of the Parks, Recreation and Historic Preservation Laws.¹³ A snowmobile must be registered and insured in New York State unless it is only operated on property of the owner or property that the owner has a contractual right to use.¹⁴ The law prohibits a child under the age of ten from operating a snowmobile unless either on property owned or

⁴ N.Y. VEH. & TRAF. § 125.

⁵ Department of Motor Vehicles, <http://www.nydmv.state.ny.us/dmvfaqs.htm#motor>

⁶ The Appellate Division in the First department held that a go-ped fit squarely into the definition of “motor vehicle.” *Reilley v. DMV*, 658 N.Y.S.2d 316 (N.Y. App. Div.1997).

⁷ Endangering the Welfare of a child is a Class A Misdemeanor. PENAL LAW § 260.10. Moreover, a traffic court can impose a fine up to \$1,500 for operating a motor vehicle without a liability insurance and can also revoke the parents driver’s license. N.Y. VEH. & TRAF. §§ 312, 319.

⁸ Section 125 excluded the following four devices from the definition of “motor vehicles” (a) electrically-driven mobility assistance devices operated or driven by a person with a disability, (b) vehicles which run only upon rails or tracks, (c) snowmobiles as defined in article forty-seven of this

chapter, and (d) all terrain vehicles as defined in article forty-eight-B of this chapter. N.Y. VEH. & TRAF. § 125.

⁹ An ATV that is only used for agricultural purposes or not-for-hire snow removal on private property does not require a registration. N.Y. VEH. & TRAF. § 2281.

¹⁰ N.Y. VEH. & TRAF. § 2281. The amount of liability insurance required for an ATV is governed by NY CLS Veh & Tr § 311 4(a).

¹¹ N.Y. VEH. & TRAF. § 2410.

¹² *Id.*; N.Y. VEH. & TRAF. § 2406.

¹³ N.Y. PARKS REC. & HIST. PRESERV. §§ 25 et seq.

¹⁴ N.Y. VEH. & TRAF. § 2222; *see also* Department of Motor Vehicles, <http://www.nydmv.state.ny.us/dmvfaqs.htm#Snowmobiles>

lease by his/her parent or accompanied by a person over eighteen years of age or a person over fourteen years of age who holds a snowmobile safety certificate.¹⁵ Youths between the ages of ten and eighteen years old may operate a snowmobile without adult or other supervision if they have completed a snowmobile safety training course recognized by the State of New York.¹⁶ However, parents must ensure that the snowmobile has a working muffler, head light, tail light and requisite reflector material and that the child is wearing a helmet.¹⁷

The laws governing the operation of snowmobiles on public trails are quirky and particular and, therefore, parents must educate their children or face the consequences. Specifically, it is unlawful to operate a snowmobile on railroad tracks, in any tree nursery or while towing a sleigh or toboggan except with a rigid tow bar.¹⁸ Further, snowmobilers must be aware that it is illegal to drive on a frozen body of water within one hundred feet of a skater, ice fisherman, ice fishing house, or other person not on a snowmobile and one hundred feet of a dwelling between 12 midnight and 6 AM except at the minimum speed required to maintain forward motion.¹⁹ Please note that Article 25 has many more operational restrictions that children must know and follow.²⁰

Traffic and equipment violations pale in comparison to a parent's civil responsibility for the injuries of third-parties caused by their minor child's operation of an ATV or snowmobile. Specifically, a parent owes a duty to protect third-parties from harm that is clearly foreseeable from the child's improvident use or

¹⁵ N.Y. PARKS REC. & HIST. PRESERV. §§ 25.19(a). Further, a child under ten years old may operate a snowmobile when accompanied by a person specified in paragraph (a) on unplowed highways designated for snowmobile use pursuant to section 25.05. *Id.* at 25.19(b).

¹⁶ *Id.*

¹⁷ N.Y. PARKS REC. & HIST. PRESERV. §§ 25.17.

¹⁸ N.Y. PARKS REC. & HIST. PRESERV. §§ 25.05.

¹⁹ *Id.*

²⁰ *Id.*

operation of a dangerous instrument, such as an ATV, where such use is found to be subject to the parent's control.²¹ However, the Court of Appeals' recent decision in *Rios v. Smith*, expanded parental liability for the use of ATVs by minors.²² In this case, the court affirmed a \$3,000,000 judgment against a father who owned the ATV that caused the plaintiff's injuries but was being operated by his son's friend.²³ The Court held that "the evidence was legally sufficient for the jury to determine that [the father] created an unreasonable risk of harm to plaintiff by *negligently entrusting* the ATVs to his son, whose use of the vehicles involved lending one of the ATVs to Smith, another minor."²⁴

Without a doubt, recreational vehicles offer hours of entertainment to youngsters. Parents must carefully weigh, however, the value of entertaining their children with recreational vehicles against the risk of liability and its attendant costs.

Spectator Cries "Foul" In Fenway Park Ruling

By: Michael F. Aylward, Partner, MM, Boston

Red Sox fans learned long ago that pain and suffering were the price of loyalty to their team. According to the Appeals Court of Massachusetts, however, pain and suffering don't necessarily also allow you to sue the Red Sox.

²¹ *Rios v. Smith*, 95 N.Y.2d 647, 653; 744 N.E.2d 1156; 722 N.Y.S.2d 220 (2001); *Nolechek v Gesuale*, 46 N.Y.2d 332,340, 385 N.E.2d 1268; 413 N.Y.S.2d 340 (1978); *LaTorre v Genesee Mgt.*, 90 N.Y.2d 576, 584; 687 N.E.2d 1284; 665 N.Y.S.2d 1 (1997).

²² *Rios v. Smith*, 95 N.Y.2d 647, 653; 744 N.E.2d 1156; 722 N.Y.S.2d 220 (2001).

²³ *Id.* The Jury originally awarded \$ 6,800,000 for her past pain and suffering and \$ 2,250,000 for her future pain and suffering but the Court threatened to order a new trial unless the plaintiff accepted \$2,000,00 for past and suffering and \$1,000,000 for \$1,000,000 for future pain and suffering. *Id.*

²⁴ *Id.* (emphasis added).

In *Costa v. The Boston Red Sox Baseball Club*, 02-P-1433 (Mass. App. Ct. June 9, 2004), the Appeals Court considered the issue of whether a spectator was entitled to sue for severe personal injuries that she was struck by a foul ball during a game in 1998. Jane Costa had arrived late for a September game between the Red Sox and the Detroit Tigers. She was seated in an unscreened area in the upper box section along the first base line behind the Red Sox dugout. In the bottom of the fifth inning, facing a count of one ball and two strikes, Darren Lewis hit a line drive that struck Costa in the face. Costa sued the Red Sox, arguing that they had negligently failed to warn her of the danger of being hit by a foul ball.

The evidence presented to the court was that foul ball injuries do occur with considerable regularity at Fenway Park. A spreadsheet produced by the Red Sox, collating five years of data from the 1990's showed that there are an average of 36 to 53 foul ball injuries per year, several of which require medical attention.

Additionally, the plaintiff presented evidence it is virtually impossible to get out of the way of a line drive foul ball. The plaintiff's expert witness, a professor of engineering from Northeastern University, testified that the Lewis foul tip was traveling at a speed of 90 miles per hour and traveled from home plate to her seat in no more than 1.07 seconds before it struck her.

Costa herself testified that she was utterly ignorant of the rules of baseball and had not been to a ball game since she was eight years old when her father sat with her in the bleachers. As the Appeals Court drolly noted, "As atypical as this may seem in Red Sox nation, we accept for present purposes (as we must) that the plaintiff had no subjective understanding of the risks posed by an errant foul ball."

In contrast to the plaintiff's evidence, the Red Sox established that they did warn patrons of certain risks inherent in the sport. For instance, the tiny print on the back of admissions tickets to the ball park contains the following disclaimer:

The holder assumes all risk and danger incidental to the game of baseball including specifically (but not exclusively) the danger of being injured by thrown bats and thrown or batted balls and agrees that the participating clubs, their agents and players are not liable for injuries resulting from such causes.

Additionally, there are certain signs installed along the first base line reading "be alert, foul balls and bats hurt." The plaintiff denied being aware of these warnings and contended that had she received an adequate warning of the danger of foul balls, she would never have sat in that seat.

This is not the first time that a case of this sort has been presented to the courts of Massachusetts. In *Shaw v. American League Baseball Co.*, 325 Mass. 419 (1950), the Supreme Judicial Court of Massachusetts had ruled that a baseball club was not liable to a spectator who was struck by a foul ball. The holding in *Shaw* rested on the assumption of the risk and therefore required evidence that the plaintiff had subjective knowledge of the risks posed by certain conduct and had nonetheless voluntarily exposed herself to those risks. In *Shaw*, the plaintiff was an acknowledged fan who had attended many baseball games and knew that fast moving foul balls often landed in the stands. 325 Mass. at 421.

In view of Costa's professed ignorance of the dangers inherent in the sport of baseball, however, the Appeals Court acknowledged that Costa's case was factually dissimilar to *Shaw*. Furthermore, the defense of doctrine of assumption of the risk was not available to the Red Sox, as it had been abolished as an affirmative defense by the Massachusetts legislature in 1973.

Nevertheless, the Appeals Court concluded that some of the logic underlying the "assumption of the risk" doctrine was still valid as regards the plaintiff's "failure to warn" theory and that, in particular, "the duty to warn does not extend to

dangers that would be obvious to persons of average intelligence.” The court ruled that the abolition of assumption of the risk as an affirmative defense did not alter the fact that a plaintiff in a negligence action must prove that the defendant had a duty of care in the circumstances. The court refused to impose liability on the Red Sox, finding that:

The potential for a foul ball to enter the stands and injure a spectator who is seated in an unscreened area is, as a matter of law, sufficiently obvious that the defendant reasonably could conclude that a person of ordinary intelligence would perceive the risk and need no additional warning. Even someone of limited personal experience with the sport of baseball reasonably may be assumed to know that a central feature of the game is that batters will forcefully hit balls that may go astray from their intended direction. We therefore hold that the defendant had no duty to warn the plaintiff of the obvious danger of a foul ball being hit into the stands.

In an aside, the Appeals Court chided Major League Baseball, whose Commissioner had submitted an *amicus* brief cutely suggesting that, “The timorous may always chose to stay at home.” The Appeals Court suggested that Major League Baseball might more graciously internalize the costs of such claims, presumably by raising ticket prices to create a fund to compensate victims of such accidents.

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