

## Readings for the Week of Aug 24-26

[CB = Witt & Tani casebook; Supp. = supplementary reading;  
all Supp. and Restatement readings are available on Canvas]

### Introduction: What Is Tort Law? What Are Its Goals?

Monday, August 24

Principles and Institutions (CB 1-4)

“Danger at the Ballpark” (Supp.)

*Vosburg v. Putney* (CB 4-6)

The Anatomy of a Torts Case (CB 6-8)

The Pervasiveness of Settlement (CB 8-10)

The Size of the Torts System (CB 10-13)

Accident Rates and the Deterrence Goal (CB 14-18)

Expressing Moral Judgments and Correcting Injustice (CB 18-19)

### (New Unit: Liability for Intentionally Inflicted Harm)

Tuesday, August 25

#### Battery

Review *Vosburg*

Restatement (3d.) (Liability for Physical and Emotional Harm) § 1: Intent

Restatement (2d.) § 13 Battery: Harmful Contact

*Garratt v. Dailey* and Notes 1, 4, 5 (CB 19-22, 24-28)

Battery for the Era of #MeToo (CB 29-30)

Wednesday, August 26

#### Offensive Battery

Restatement (2d.) § 18 Battery: Offensive Contact

*Fisher v. Carousel Motor Hotel* & notes, (CB 47-49)

#### Assault

*I. de S. and Wife v. W. de S.* & notes (CB 50-52)

Restatement (2d.) § 21 Assault

Restatement (2d.) § 24 What Constitutes Apprehension

**SPORTS BUSINESS**

# Danger at the Ballpark, and in a Baseball Ticket's Fine Print

**By Joe Nocera**

Nov. 20, 2015

Umbrellas.

We're going to spend some time today talking about umbrellas. While that may seem like an odd subject for a sports column, it turns out to be surprisingly important, and a topic that ties directly into a larger discussion that is beginning to get a public airing about the number and severity of fan injuries that occur at baseball games. Not to spoil the punch line, but the days when major league teams could avoid liability for fan injuries by inserting some legalistic fine print on the back of the ticket could soon be coming to a close.

But back to umbrellas. Specifically to the umbrellas fans were using during the third inning of a game between the Yankees and the Oakland Athletics at Yankee Stadium on Thursday, Aug. 25, 2011.

A 50-year-old Manhattan real estate executive named Andy Zlotnick had gotten his hands on some great seats for that game: he was sitting in the third row, about 50 feet or so past first base, with his 13-year-old son and two of his son's friends. It was a rainy day, and there had been a 90-minute rain delay. Although it continued to rain intermittently in the early innings, there was no question that Zlotnick was going to stick it out. What parent bails when he's taken three excited teenagers to a ballgame, no matter how miserable the weather?

In truth, the weather was bad enough that the game might have been postponed earlier in the season. But by late August, the Yankees, a veteran team in the playoff hunt, had only two days off remaining on their schedule. Hurricane Irene was roaring up the East Coast; there was concern that other games might have to be postponed over the weekend. "If this game gets rained out it's gonna cause many, many logistical problems," an announcer said during the rain delay. "This is a game both teams desperately wanted to play."

By the top of the third inning, the rain was coming down hard again. As he stepped into the batter's box, Hideki Matsui, then playing for the A's, wiped the bill of his batting helmet with his sleeve to remove the accumulated water. Zlotnick, surrounded by open umbrellas, couldn't see Matsui or Phil Hughes, the Yankees' pitcher. Thus when Matsui pulled a scorching foul ball down the first-base side, Zlotnick never had a chance. A second — literally — after he heard the crack of the bat, he was on the ground, howling in agony, blood streaming from his eye and the left side of his face.

Matsui's line drive foul completely destroyed the bones around Zlotnick's left eye socket, fractured his sinus and upper jaw, and did extensive damage to the left side of his face. Zlotnick now believes that his titanium glasses, which crumpled but didn't break, may have saved his life. His plastic surgeon, Henry Spinelli, who operated on him six days later, told me that his injuries were akin to someone being punched in the eye with brass knuckles. After Matsui hit the ball, one of the announcers, noticing a leopard-print umbrella down the first-base line, said, "I think that leopard one has an extra big spot on it."

Zlotnick took a selfie while waiting to see a doctor at Lincoln Hospital in the Bronx.

Zlotnick is a thoughtful, methodical — and very persistent — man. During his slow recovery, he began to research the umbrella policies for the 30 major league teams. He discovered that while eight teams forbade the use of umbrellas except during rain delays — two didn't even allow them in the ballpark — many other teams had policies like the Yankees', which simply said that umbrellas were permitted, "so long as they do not interfere with other Guests' enjoyment of the game or event." No mention of safety, you'll notice. More broadly, Zlotnick began investigating the numerous — and they are indeed numerous — injuries sustained by fans at major league ballparks because of hard-hit foul balls or broken bats.

He also reached out to Randy Levine, the Yankees' president. They met in November 2011. Zlotnick showed him pictures of his injury, including a gruesome selfie he took in the emergency room. He explained to Levine that some teams didn't allow open umbrellas during play because of the danger they posed. "I said, 'I would like the Yankees to do the right thing,'" Zlotnick recalled. "Please ask your owners to prohibit umbrellas so no one will suffer the way I have."

(The Yankees declined to offer their version of Zlotnick's conversations with Levine.)

He also told Levine that of the \$100,000-plus he had racked up in medical bills, he'd had to pay about \$25,000 out of pocket. He asked that the Yankees reimburse him. Levine said: "No problem. I'll take care of it."

By early 2012, not having heard anything, Zlotnick called Levine. This time, Levine told him he had to check with "the insurance folks" about the reimbursement. A week after that, Levine told Zlotnick — again according to Zlotnick — "We can't do anything for you, and my lawyers have told me not to speak to you."

Near the end of 2012, feeling he had been left with no choice, Zlotnick filed a personal-injury lawsuit against the Yankees and Major League Baseball. It was not about the \$25,000, which Zlotnick had the means to cover. His main goal, he told me, was to force the Yankees to change their umbrella policy — and for M.L.B. to start taking fan injuries seriously.

Thanks largely to that fine print I mentioned earlier, it is nearly impossible for an injured fan to win a lawsuit against the Yankees or the Mets.

“The bearer of the ticket assumes all risk and danger incidental to the sport of baseball,” the Yankees declare on the back on their tickets. The legal boilerplate then goes on to disclaim all liability if a fan is injured at Yankee Stadium. Zlotnick’s lawyer, Edward Steinberg, told me that New York courts had been “tough” in enforcing what’s known as the “assumption of risk” doctrine. (Some people call it the “baseball rule.”) Indeed, Steinberg, who is a personal-injury lawyer, said that he routinely turns away badly injured fans who want to sue, because the suits have so little chance of succeeding.



Fans with umbrellas at Yankee Stadium during a game between the Yankees and the Athletics on Aug. 25, 2011. Barton Silverman/The New York Times

But he viewed Zlotnick’s case differently. In allowing open umbrellas during the game, the Yankees, in his legal opinion, negligently increased the danger posed by the game of baseball.

In July 2013, Lizbeth Gonzalez, a State Supreme Court judge in the Bronx, set a deposition schedule, allowing each side to question witnesses under oath. Four months after taking Zlotnick’s deposition in February 2014 — but before Steinberg could depose any Yankees witnesses — the Yankees’ lawyers raced to court and filed for summary judgment.

Arguing that the assumption of risk doctrine was legally binding in this case — all those open umbrellas notwithstanding — the Yankees and M.L.B. argued that the court should throw out the case.

Today, nearly a year and a half later, the two sides are still awaiting Gonzalez's ruling. (As The New York Times noted in 2013, the courts are a little backed up in the Bronx.)

### **A Common Occurrence**

In September 2014, a Bloomberg News reporter named David Glovin wrote an article about the extent of the injuries sustained by fans during baseball games. What made the story especially noteworthy was that it was based on a statistical analysis done by Bloomberg — the first ever, according to Glovin — of the number of people who get hurt during games, primarily from foul balls and broken bats. The number Bloomberg came up with, confirmed by five mathematicians and statisticians who reviewed the analysis, was astounding: about 1,750 a year. As Glovin noted, "That's more often than a batter is hit by a pitch, which happened 1,536 times last season."

Not every fan gets hurt as badly as Zlotnick, of course, but there are plenty who do. Glovin noted the 6-year-old girl who "underwent surgery in 2010 after the ball shattered her skull" during an Atlanta Braves game, and the 7-year-old in Chicago who "sustained severe brain swelling from a foul liner in 2008."

Zlotnick pointed me to the case of Laura Turek, a single mother who sustained a concussion, multiple fractures and extensive eye damage after being hit by a foul ball last season during a game between the Milwaukee Brewers and the Braves — and whose medical bills have topped \$200,000.

And then there's Tonya Carpenter, who in June had her head bashed in by the shattered remains of a broken bat during a game at Fenway Park and sustained injuries originally thought to be life-threatening. Carpenter's injury received national publicity.

Although the sheer number of injuries may be surprising to fans, it is not surprising to those who make their living coaching or playing baseball.

"Sometimes we cringe: Somebody just got smoked," Braves Manager Fredi Gonzalez told Glovin.

The former outfielder Matt Stairs once told The Chicago Tribune that he won't allow his daughters to sit near the dugout.

Many other players have the same rule: Because they see it every game, they know how dangerous those seats are.

Indeed, during the last several contract negotiations, the Major League Players Association has tried to negotiate for fan safety, arguing that baseball teams should extend the netting behind home plate down the two foul lines. That argument went nowhere.

What has been baseball's big objection to extending protective netting? Mainly, that it would detract from the fans' enjoyment of the game by erecting a barrier between the fans in those valuable, up-close seats. Baseball has long denied that there is a problem that needs to be dealt with. "There is no epidemic of foul ball damage yet that would warrant some sort of edict or action by the commissioner's office," John McHale told Glovin. McHale is a top Major League Baseball executive.

### **Class-Action Suit Filed**

Bob Gorman, the author of the book “Death At the Ballpark” who blogs about fan injuries, said, “It seems like it is going to take someone to die before they do anything about it.” He pointed out that in March 2002, a young girl died after being hit by a puck during an N.H.L. game in Columbus, Ohio. It took all of three months for the N.H.L. to mandate the installation of “high-quality protective netting at the ends and corners of their rinks.”

Zlotnick shortly after having surgery.

In mid-July, two prominent plaintiffs’ firms filed a class-action lawsuit on behalf of all season-ticket holders against Major League Baseball and Commissioner Rob Manfred. According to a news release issued by the plaintiffs, Manfred is alleged to have “failed to uphold his duties to enact safety measures against the danger of foul balls and broken bats through a pattern of negligence, misrepresentation,” etc.

Bob Hilliard, one of the lawyers bringing the suit, told me that he believes that the assumption of risk doctrine should no longer protect baseball. The players are bigger and stronger; the seats in newer ballparks are often closer to the foul lines; and the distractions, many of them instigated by teams to keep fans engaged, are plentiful. Even fans who are paying attention can’t necessarily get out of the way of a hard-hit foul ball. “You can’t assume risk that you can’t protect against,” Hilliard said.

Perhaps it is just a coincidence, but on Thursday, Manfred’s office said that it would “announce shortly a recommendation regarding netting for the 2016 season”— details of which will be revealed after the January owners’ meeting, according to a spokesman.

As for Zlotnick, although he looks fine today, he’s not. He feels pain whenever anyone touches the left side of his face, has blurry vision and has numbness in his mouth. His wife, Jeanne Lutfy, told me that she can’t even kiss him on the left side without inflicting some pain. The injury has changed him, too, she said. “He lost a certain lightness to his personality, as if the ball knocked it out of him,” she said.

And the Yankees? The team’s position is that it goes out of its way to warn fans about the potential dangers and the importance of paying attention to what’s happening on the field. It also notes that fans who fear for their safety are welcome to request a different seat. The Yankees believe, despite the open umbrellas on Aug. 25, 2011, they have no legal liability for Zlotnick’s injuries.

After the 2011 season, however, the Yankees did change their umbrella policy. Although fans can still bring umbrellas into the ballpark — and can still use them while a game is in progress — the Yankees no longer permit oversized umbrellas, nor do they want open umbrellas to “compromise other Guests’ ability to view the game.” According to the current policy, fans “may be asked to close their umbrellas if it is obstructing the view of other Guests.”

Baseball likes to say that it puts fan safety first. When baseball mandates netting down the foul lines, and a leaguewide policy that bans open umbrellas while a game is being played, I’ll believe it. Not until then.