

CANADA / JUDGMENT

Rivers v. North Vancouver (District)

2020 BCSC 1050

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Supreme Court of British Columbia

DECIDED

15 July 2020

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2020 BCSC 1050 Rivers v. North Vancouver (District)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rivers v. North Vancouver (District),

2020 BCSC 1050

Date: 20200715

Docket: S158567

Registry: Vancouver

Between:

Thomas William Rivers

Plaintiff

And

The Corporation of the District of North Vancouver,

B.C. Amateur Baseball Association, Little League for B.C. Kids,

Mount Seymour Little League Association,

West Vancouver Little League Society, Little League Baseball Canada,

John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6,

John Doe 7, John Doe 8, John Doe 9, John Doe 10, John Doe 11, John Doe 12, John Doe 13 and John Doe 14

Defendants

Before: The Honourable Mr. Justice Tammen

Reasons for Judgment

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No other appearances

Place and Date Trial:

Vancouver, B.C.

February 13-14, 2020

Place and Date of Judgment:

Vancouver, B.C.

July 15, 2020

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Introduction and Overview

- [1] On April 18, 2015, the plaintiff, Thomas William Rivers, was watching his teenage son play baseball at Inter River Park in North Vancouver and was struck on the head by a foul ball (the "Incident"). He now sues multiple parties for damages arising from the injuries he suffered as a result. At the time he was struck, the plaintiff was sitting in the first row of the bleachers on the third base side of field D (the "South Bleachers"). The foul ball came from field C, the diamond adjacent to the south of field D. The first base line of field C runs parallel to the third base line of field D. Thus, the plaintiff was sitting with his back to field C and was directing his attention to the game being played on field D.
- [2] The sole issue for determination on these applications is liability on the part of three defendants, or groups of defendants. The action has been discontinued against two defendants, B.C. Amateur Baseball Association and Little League For B.C. Kids. Before me are three applications seeking summary dismissal of the plaintiff's claim, brought on behalf of the following defendants:
- 1) The Corporation of the District of North Vancouver (the "District");
 - 2) Little League Baseball Canada ("Little League Canada"); and
 - 3) Mount Seymour Little League Association, West Vancouver Little League Society, John Doe(s) 1 through 14 (the "League Defendants").
- [3] Those defendants all seek, pursuant to Rule 9-7 of the Supreme Court Civil Rules, that the action against them be dismissed, with costs. The plaintiff opposes the relief sought, but agrees that the question of liability is suitable for determination at a summary trial.

Factual Background

Inter River Park

- [4] Inter River Park is located at 1301 Lillooet Road in North Vancouver, B.C. It is a municipal park consisting of several athletic fields, including soccer pitches and two baseball diamonds, constructed by the District in 2001 on a site that had previously been a landfill.

- [5] The two baseball diamonds, labelled fields C and D, are configured in back to back fashion, with the third base line of field D running parallel to the first base line of field C. This type of diamond configuration is very common for any facility with more than one diamond. At Inter River Park, the spectator bleachers are not covered, and run parallel to the base lines, essentially between home plate and the bases. Next to the bleachers, closer to the outfield, are the player dugouts, which are covered.
- [6] Fencing runs parallel to the base lines, to approximately the bases, which is the end of the dugouts. The height of the fencing is variable. It is tallest at the backstop area behind home plate. There is a winged section with inward facing overhangs that runs to the end of the bleachers. The final section of fencing, which is shorter and has no winged overhang, runs adjacent to the roofed dugouts.
- [7] At field D, the backstop fencing, including overhang, is 39.7 feet high. The winged extension fencing is 34.7 feet high. At field C, the backstop fencing is 40.6 feet high, and the winged extension is 34.8 feet high.
- [8] The distance between the backstop at field C and the backstop at field D is 78.7 feet. The distance between the foul lines at the two fields is 172.45 feet. There is a large grassy area between the two diamonds, which in addition to the bleachers, has two picnic tables.
- [9] The distance between home plate and the backstop at both diamonds at Inter River Park is between 41 and 42 feet. The minimum distance required for hosting championship games at the senior boys' level is 40 feet.

The Parties

- [10] The plaintiff, Thomas Rivers, was 58 years old at the time of the Incident and the father of two teenage sons. His younger son was 16 years old, and playing senior boys baseball with the Mount Seymour Little League on a team called the Athletics.
- [11] The defendant District owns Inter River Park, constructed the baseball diamonds, and is responsible for all maintenance of the facilities and structures at Inter River Park. The District is clearly an "occupier" pursuant to the Occupiers Liability Act, R.S.B.C. 1996, c.337 [Act].
- [12] The League Defendants are two societies and an unincorporated association whose little league baseball teams play games at Inter River Park. The League Defendants concede, for purposes of this summary trial, that they are "occupiers" pursuant to the Act.
- [13] Little League Canada is a non-profit organization with headquarters in Ottawa. Apart from two full-time employees, it is wholly administered by volunteers throughout the country.

- [14] Little League Canada is divided into five administrative divisions, with British Columbia designated Division 1. All little leagues that operate on the North Shore are part of District 5, one of several districts falling under the umbrella of Division 1. Each district has a district administrator, who acts as a liaison between the district and Little League Canada, but is not supervised or controlled by Little League Canada.
- [15] Little League Canada denies that it is an "occupier" of Inter River Park pursuant to the Act.

The Incident

- [16] On April 18, 2015, the Athletics played their second game of the season. The plaintiff believes it was the first game he attended that year, certainly the first home game. The previous season, when his son played for a different team, the plaintiff assisted with pre-game field preparation for home games. Those games were all played on field C. The Athletics played home games on field D.
- [17] The plaintiff arrived at the ball park early on April 18, 2015, and assisted with preparing the field for the game. He then sat in the first row of the designated bleachers for home team supporters, which was on the third base side of field D.
- [18] There was another game being played on field C at the time. The plaintiff knew that there was either a practice or game occurring there, although he could not say which.
- [19] The Incident occurred in one of the early innings of the game. The plaintiff's son was batting at the time, and the plaintiff was paying full attention to the home plate area of field D.
- [20] The plaintiff was struck by a foul ball on the back of his head. The ball came from field C. The plaintiff did not hear any warning shout prior to being struck. There is affidavit evidence from the volunteer coaching first base on field C at the time that he yelled such a warning. I accept that he did so, but I also accept that the plaintiff did not hear the warning.
- [21] The plaintiff suffered a head injury as a result of being struck by the baseball.

Evidence of foul balls leaving the field of play at Inter River Park

- [22] There was broad ranging evidence from individuals concerning frequency of foul balls leaving the field of play at Inter River Park. In particular, estimates of frequency of balls leaving field C and landing in the South Bleachers along the third base line of field D varied greatly.
- [23] The plaintiff filed affidavits from four parents, who were regular spectators at games played at field D. All said that foul balls frequently cleared the backstops at fields C and D, and less frequently landed in the South Bleachers. One such witness said she sat with an umbrella open while watching games from the South Bleachers, specifically to guard against being struck by a foul ball.

- [24] The League Defendants filed several affidavits from coaches and assistant coaches, all of whom said that foul balls clearing backstops is common in senior boys' baseball, and occurs at virtually all baseball diamonds. They were unaware of any unique risk factors specific to Inter River Park.
- [25] The plaintiff deposed that he felt completely safe sitting in the South Bleachers, since he assumed foul balls would not land there. He said that he had seen balls clear the backstop from field C in the past, but could not see where they landed because he was seated in the bleachers along the third base line and his view was obstructed. He assumed those balls landed in the grassy area between the diamonds. I note that the South Bleachers are situated within that grassy area.
- [26] All the witnesses agreed that there was an informal warning system among the parents and coaches, specifically shouted warnings of "heads up" whenever a foul ball left the field of play. None of the witnesses had seen anybody struck by a foul ball in the past. Some of the parent witnesses said there had been near misses in the South Bleachers, but nobody was actually struck prior to the Incident.
- [27] The District had no record of ever receiving a report of anybody being struck by a ball at Inter River Park, nor any complaints concerning safety at the baseball diamonds.

Evidence concerning design of baseball facilities

- [28] The District filed a report prepared by Doug Wournell, an architect who designs sports and recreational facilities (the "Wournell Report"). The Wournell Report addressed the following matters:
- 1) Standard practices for baseball diamond design;
 - 2) A comparative analysis of Inter River Park and a cross-section of other multiplex diamond facilities from British Columbia and elsewhere in Canada; and,
 - 3) A brief statement of opinion on the adequacy of Inter River Park from an industry safety perspective.
- [29] The Wournell Report noted that there is no clearly defined standard for designing baseball diamonds that ensure both player and spectator safety. There are numerous reference materials available to those who design such facilities. One such reference recommends a minimum distance between foul lines of back to back diamonds of 120 to 140 feet. At Inter River Park, the distance is 172.45 feet.

- [30] Several references recommend minimum heights for backstops of 20-25 feet, with the added recommendation of an overhang. Both diamonds at Inter River have overhangs, and the minimum height is 34.7 feet. The minimum height of vertical fencing, excluding overhang, is approximately 30 feet. The Wournell Report noted that the general direction in baseball diamond design has been toward backstops of 30 feet, with an additional 6 feet of overhang, at an angle of 45 degrees. That is what was constructed at Inter River Park.
- [31] The Wournell Report also did a comparison of various safety features between Inter River Park and a sampling of other multiplex diamond facilities: five from the Lower Mainland, one from Kamloops, and four from other Canadian provinces. The body of the report utilizes that data, in addition to the other reference material regarding standards, to answer six questions, which form the opinion, related to the adequacy of the design of Inter River Park from a safety perspective.
- [32] Appendix B of the Wournell Report expresses an opinion of the degree of safety afforded to spectators at Inter River Park versus each of the other ten diamonds. The main variables at play in that comparison are: backstop height, distance between diamonds, and distance between home plate and backstop. A greater distance between the home plate and backstop is less safe than a shorter distance, because of the necessary trajectory angle to clear the backstop.
- [33] Some of the other ballparks provided greater spectator safety than Inter River Park, some about the same, and some less. The Wournell Report notes that none of the facilities, at least as of 2015, had any warning signs posted.
- [34] Appendix B is silent as to roofs or protective netting covering the spectator seating. However, the report notes that most baseball diamonds use standard aluminum bleachers, and it is common that they remain uncovered.
- [35] The Wournell Report commented on the potential use of netting affixed to the backstop behind home plate to prevent foul balls from going over the backstop. It notes that such netting is not commonly used for two reasons: first, it takes an important part of the game out of play, namely the potential for the catcher to make an out by catching the foul ball, and; second, it increases risk to players and umpires, because netting causes the foul ball to fall back into the field very quickly.
- [36] The final opinion in the Wournell Report is that Inter River Park diamonds are consistent with industry standards for player and spectator safety, and meet or exceed the standard of baseball diamond design in the Lower Mainland and across Canada.
- [37] The plaintiff filed an affidavit from Mark Wilson, president of Netex Canada Netting Inc. ("Netex"), a company which designs and installs sports netting systems meant to enhance spectator safety at various sporting facilities. The majority of the affidavit concerned a netting system Netex installed at Ambleside Park, to address a particular problem created by the proximity of a soccer field to the first base line of the baseball diamond. The final

paragraph of the affidavit is an assertion that Netex could have designed and installed netting for the South Bleachers at field D at Inter River Park at a cost of \$15,000.00.

[38] The plaintiff's material also includes several photographs of the baseball facility at Minoru Park in Richmond, which has warning signs posted around the diamonds.

Issues

[39] The issues I must decide are these:

- 1) Is the question of liability suitable for determination by summary trial; and
- 2) If so, should the claim against each of the defendants be dismissed?

Suitability for Summary Trial

[40] The parties agree that the question of liability is suitable for resolution at summary trial, and that I should decide that issue separately from the issue of quantum of damages. I am advised that a ten day trial is scheduled for June 2021, on the question of damages.

[41] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), Chief Justice McEachern urged chambers judges to decide cases summarily unless it would be "unjust to do so" (p. 211). By way of further explication, the Chief Justice said this at p. 215:

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

[42] I have no hesitation in concluding that the issue of liability should be determined at this summary trial. Likewise, I find that the question of liability should be severed from that of damages.

[43] I am greatly aided by the parties' agreement on this question. Moreover, as noted in the various submissions, irrespective of my findings on liability, there will likely be considerable savings and overall litigation efficiency achieved by proceeding in that fashion.

[44] The record filed by the parties is adequate to permit a full consideration of the relevant facts. There is nothing to be gained by hearing any viva voce evidence. I can find all the facts necessary for a determination of liability of the various defendants. I intend to do so.

Should the plaintiff's claim be dismissed against the defendants?

[45] The claim against all remaining defendants is based on the provisions of the Act, and on common law principles of negligence, specifically duty of care. However, the basis for liability against the various defendants differs somewhat, in particular as between the

District and the League Defendants. The claim against the District is primarily based on an alleged failure to keep and maintain the premises in a manner that ensured the safety of spectators to the baseball games being played there. Against the League Defendants, the claim is largely based on a failure to warn spectators of the risk of foul balls leaving the field of play, or to bring the risk of injury from foul balls to the attention of the District.

[46] I will address the claim against the District first, and then turn to the claim against the League Defendants, to the extent it is different than that against the District.

[47] However, prior to doing so, I will address the claim against Little League Canada. That claim should be dismissed because the plaintiff has not proved on a balance of probabilities that Little League Canada was an "occupier" of the premises pursuant to the provisions of the Act.

[48] In the Act, "occupier" is defined in section 1 as a person who:

- (a) is in physical possession of premises, or
- (b) has responsibility for, and control over, the condition of premises, the activities conducted on those premises and the persons allowed to enter those premises,

and, for this Act, there may be more than one occupier of the same premises.

[49] Little League Canada has headquarters in Ottawa, and at no time was in physical possession of Inter River Park. If it was an "occupier" it must be pursuant to the second definition under section 1(b) of the Act.

[50] That definition requires both responsibility for and control over the condition of the premises, the activities occurring there, and the persons allowed entry to the premises. As noted in *Chamberlain v. Jodoin*, 2012 BCCA 108, at para. 30, the components of the second definition are conjunctive.

[51] I cannot find that Little League Canada had either responsibility for the premises, or the requisite degree of control over them to be considered an "occupier". The plaintiff's claim in this regard is that Wayne Hobson, a representative of Little League Canada, obtained the required permit to use the field, and did so on behalf of Little League Canada. I disagree.

[52] Mr. Hobson was a director at large on the Board of Little League Canada in 2015. He was also the District Administrator for District 5 of Division 1, a position he held from 2001 through 2018. He deposed that his practice, as District Administrator, was to obtain the required permit from the North Vancouver Recreation & Culture Commission to allow all District 5 teams to have games and practices on the field each year. The permit for the 2015 season is appended to his affidavit.

- [53] Mr. Hobson said that he obtained the permit for the District 5 teams as a matter of convenience, so that each team did not need to obtain a permit. He did so, he deposed, "with the authorization of the presidents of all the teams that are members of District 5." Mr. Hobson's evidence was clear that he did not obtain the permit on behalf of Little League Canada, nor acting on instructions from, or pursuant to policy of, Little League Canada.
- [54] The permit was issued to "District 5 Baseball .represented by Wayne Hobson." Mr. Hobson signed the permit on a signature line that references District 5 Baseball, and contains. Mr. Hobson's home address. Little League Canada is not mentioned at all in the permit documentation.
- [55] I accept Mr. Hobson's assertion that he obtained and signed the permit in his capacity as District Administrator for District 5, the North Shore little league teams, and not as a representative or board member of Little League Canada.
- [56] Little League Canada was not an "occupier" of the premises. As expressly contemplated by the definition, there were multiple occupiers of Inter River Park during the 2015 season, but Little League Canada was not one of them. The entities that would be considered occupiers were the various North Shore little league teams, collectively District 5, and the District.
- [57] The claim against Little League Canada is dismissed.

The claim against the District of North Vancouver

- [58] The relevant portions of sections 2 and 3 of the Act are:

Application of Act

2 (1) Subject to section 3 (4), and sections 4 and 9 and subsection (2) of this section, this Act determines the care that an occupier is required to show toward persons entering on the premises in respect of dangers to them, or to their property on the premises, or to the property on the premises of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done on the premises, and for which the occupier is responsible by law.

Occupiers' duty of care

3 (1) An occupier of premises owes a duty to take that care that in all the circumstances of the case is reasonable to see that a person, and the person's property, on the premises, and property on the premises of a person, whether or not that person personally enters on the premises, will be reasonably safe in using the premises.

- (2) The duty of care referred to in subsection (1) applies in relation to the
- (a) condition of the premises,
 - (b) activities on the premises, or

- (c) conduct of third parties on the premises.
- (3) Despite subsection (1), an occupier has no duty of care to a person in respect of risks willingly assumed by that person other than a duty not to
 - (a) create a danger with intent to do harm to the person or damage to the person's property, or
 - (b) act with reckless disregard to the safety of the person or the integrity of the person's property.

- [59] Thus, the Act codifies the common law duty of care owed by occupiers of premises to all those who enter onto or use those premises. As noted by Justice Wood in *Bauman v. Stein*, [1991] B.C.J. No. 548 (C.A.), section 3 of the Act does not create a presumption of negligence against an occupier whenever someone is injured on their premises. Rather, the burden still rests with the injured plaintiff to point to some act or omission on the part of the occupier that caused the injury before liability is established.
- [60] Also of note in section 3 are the two references to reasonableness. An occupier is required to take reasonable steps in all the circumstances to ensure that persons are reasonably safe on the premises. In short, an occupier is not required to take all conceivable steps to guard against risk of injury. Nor is an occupier required to take steps to guard against risk of injury that is not reasonably foreseeable. Put another way, an occupier is not expected to safeguard those entering premises from every conceivable risk of injury, no matter how remote.
- [61] The general standard of care in negligence was described this way in *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 [Ryan]:
- [28] Conduct is negligent if it creates an objectively unreasonable risk of harm. To avoid liability, a person must exercise the standard of care that would be expected of an ordinary, reasonable and prudent person in the same circumstances. The measure of what is reasonable depends on the facts of each case, including the likelihood of a known or foreseeable harm, the gravity of the harm, and the burden or cost which would be incurred to prevent the injury. In addition, one may look to external indicators of reasonable conduct, such as custom, industry practice, and statutory or regulatory standards.
- [62] In the context of spectator safety at sporting events, in particular baseball, the standard has generally been held to include the erection of protective fencing in appropriate areas to minimize the danger posed by foul balls leaving the field of play: *Dyke v. British Columbia Amateur Softball Association*, 2005 BCSC 1422 at para. 13, aff'd 2008 BCCA 8. That was done in this case by the District.
- [63] The plaintiff alleges that the fencing was inadequate, and also claims that the District should have taken other steps to ensure his safety. Those include such things as: posting signs warning of foul balls; either moving the bleachers to a safer location or putting a roof or protective netting over the bleachers; moving home plate closer to the backstop, and; having protective netting extending from the backstop fencing over home plate.

- [64] There is a degree of inherent risk in the activity of baseball viewing. Balls routinely leave the field of play. Spectators must be alive to that possibility, and alert enough to take evasive action if necessary.
- [65] The particular difficulty in the present circumstances is the configuration of the two baseball diamonds at Inter River Park. The "back to back" layout effectively ensures that spectators sitting in one set of bleachers while watching a game on one diamond will have their backs completely turned to the action on the other diamond. The Wournell Report points out that such a configuration is the most popular design, principally because it most efficiently uses available space. Indeed, many facilities have three or four diamonds arranged in that way, in essence in a cloverleaf pattern.
- [66] Industry standard or custom is one factor to be considered in determining whether there was a reasonable standard of protection for spectators. Likewise, evidence of prior injuries at the premises is relevant. In *Hagerman v. City of Niagara Falls et al.* (1980), 29 O.R. (2d) 609 (H.C.J.), a spectator at a hockey game was injured when struck by a puck that left the playing area of the rink. In an oft-quoted passage, Justice Labrosse said this about the standard of care:

As to what constitutes reasonable protection, Courts have looked to the protection customarily provided in facilities designed for the viewing of a particular sport: see *Klyne v. Town of Indian Head et al.* (1979), 107 D.L.R. (3d) 692, [1980] 2 W.W.R. 474, 1 Sask. R. 347; *Murray et al. v. Harringay Arena Ltd.*, [1951] 2 K.B. 529, and *Elliott v. Amphitheatre*, *supra*.

It follows from the proposition that only reasonable protection must be provided, that there is no obligation to provide protected seating for all spectators. The protection does not have to be absolute; it need only be reasonable protection. Furthermore, if a spectator chooses to occupy an unscreened seat because he prefers the unimpeded view which it offers, or if he is unable to procure a screened seat but nonetheless chooses to remain and view the game, no duty of care extends to him and he bears the risk of injury resulting from a danger inherent to the game. See *Brown v. San Francisco Ball Club, Inc.* (1950), 222 P. (2d) 19 at p. 21.

In deciding whether reasonable protection has been provided, Courts have also considered evidence of prior injuries or the absence thereof: see *Hall v. Brooklands*, *supra*.

- [67] I cannot conclude, on the evidence before me, that there is unreasonable risk created by the layout or design of the two diamonds at Inter River Park. As noted, the basic layout is consistent with industry standard.
- [68] I must then consider if the other variables at play in the design at Inter River Park created a risk of injury that fell short of the required standard of protection for spectators. Those variables include: height of protective fencing; distance from home plate to backstop; distance between the two diamonds; and, location of the bleachers.

- [69] I accept that the Wournell Report contains only a small sampling of comparable facilities. Nonetheless, it does permit basic comparison between the degree of protection provided to spectators at Inter River Park and that at various other multi-diamond parks. The Wournell Report also notes that there is no standard guideline or regulation for such things as backstop height or minimum distance between diamonds. However, the report does refer to certain readily available and reputable reference documents, which have some recommendations in that regard.
- [70] The minimum recommended distance between foul lines in one such reference is 120 to 140 feet. The distance at Inter River Park is 172.45 feet.
- [71] The Wournell Report cited various recommended minimum backstop heights, the most common being 25 feet, with a further recommendation of an angled overhang. Inter River Park, with its angled overhang, has a backstop height of 34.7 feet or greater.
- [72] There is nothing unusual about the configuration or location of the bleachers at Inter River Park. The Wournell Report notes that covered bleachers are rare.
- [73] The distance between home plate and the backstop at Inter River Park is greater than that at many facilities, including all the comparison facilities referred to in the Wournell Report. The distance at Inter River Park is between 41 and 42 feet. A distance of 40 feet apparently permits the hosting of championship play up to the 14-15 year old age division.
- [74] The Wournell Report contains analysis for degree of angle required for a ball to clear the backstop behind home plate for Inter River Park and the other facilities referred to in the report. The other significant variable in the calculation, in addition to distance between home plate and backstop, is backstop height. There is considerable variation among the diamonds studied, but nothing that makes Inter River Park markedly different.
- [75] Using all of the variables, the Wournell Report attempts to compare the degree of protection provided to spectators at the various facilities. Some offer greater protection than Inter River Park, some about the same, and some less. Although Inter River Park has the greatest distance between home plate and backstop, it also has taller backstops and greater distance between diamonds than almost all the comparison facilities.
- [76] In summary, the conclusion of the Wournell Report is that Inter River Park offers a degree of spectator safety that is consistent with the industry standard, to the extent one exists, and also consistent with that offered at a small sample of other similar facilities. There is no evidence of any deviation from industry standard or custom in the essential design and construction of Inter River Park.
- [77] I must also consider whether the District should have taken any steps post-construction to make the premises safer for spectators, such as posting warning signs, covering the bleachers or moving home plate closer to the backstop. In my view, none of those steps was required. To require the District to have undertaken any or all of those things would be to hold the District to a standard of near perfection. The District was not required to take all

conceivable measures to make the premises as safe as possible for spectators. Rather, it was required to take reasonable steps to render the premises reasonably safe.

- [78] I note that signage warning of the danger of foul balls is uncommon, not the norm. Likewise, as noted above, most spectator seating is uncovered.
- [79] I consider as well the absence of any documented incident in the past, indeed a complete absence of any report or complaint made to the District concerning spectator safety at Inter River Park. Had there been prior instances of people being struck by foul balls, there might have been a duty to post signs, or close or cover the bleachers. In the absence of such incidents or even complaints of near misses to the District, I cannot impose that duty on the District.
- [80] I do not find the evidence of Mr. Wilson to be helpful. He is a businessman, and was not tendered as an expert. He has no relevant expertise. His business is designing and selling protective netting systems. His experience in that regard at Ambleside Park is interesting, but of no practical evidentiary use in this trial. The evidence of the cost of protective netting for bleachers is marginally relevant to the issues I must decide.
- [81] Cost of taking preventive steps is one item for consideration, in addition to likelihood of harm, gravity of harm and overall ease with which risk of harm could be avoided, in an assessment of the reasonableness of a defendant's conduct: Ryan at para. 28.
- [82] In this case, the more important of those factors are likelihood and gravity of harm. Absent a sufficiently high degree of likelihood of potentially serious harm, an occupier might not be required to turn their mind to cost of remediation. In that context, I will assess the evidence of foul balls leaving the field of play and landing in the area of the South Bleachers.
- [83] With respect to the gravity of harm, I begin with an observation, derived from common sense as opposed to the specific evidence before me. It seems obvious that the potential for serious injury from being struck with a foul ball in these circumstances is comparatively low. Such foul balls are frequently caught with bare hands by spectators at Major League games. They have exhausted all momentum caused by the swing of the bat and are simply obeying the law of gravity in their downward trajectory. Such falling projectiles are far different than hockey pucks that leave a rink from an errant slap shot. Likewise, they are different, and less dangerous, than line drive foul balls that travel with great velocity into, for instance, a player dugout.
- [84] In my view, the likelihood of a spectator being struck while seated in the South Bleachers was small. I agree with the submission of the District that the affidavit evidence provides a small sample size from which to draw concrete conclusions about the frequency with which foul balls landed in those bleachers. I find that such occurred occasionally, but certainly infrequently. The practice, imperfect as it was, of people who saw the foul ball shouting a warning to alert those who may not have seen it, seems to have been relatively effective in preventing anybody from actually being struck, at least until the unfortunate incident at

issue here.

- [85] I do not accept that foul balls were raining down on the South Bleachers with such frequency that some spectators felt compelled to shield themselves with open umbrellas, no matter what the weather conditions. To be blunt, that evidence seems somewhat exaggerated. Nor do I accept the plaintiff's evidence that he was not aware that foul balls from field C could reach the South Bleachers. His evidence was that he had seen foul balls leave field C while seated in the third base bleachers there, but did not see where they landed. He assumed it was in the grassy area between the diamonds. The South Bleachers are situated within that grassy area, albeit at the northernmost edge.
- [86] I find that there was a generally known, but minimal risk of foul balls from one diamond landing in the bleachers for the other diamond. The spectators who sat in those bleachers relied on warning calls to alert them of errant baseballs, and such warnings were generally effective. In this instance, there was a warning call, but the plaintiff did not hear it.
- [87] In conclusion, I am not satisfied that the plaintiff has proved on a balance of probabilities that the District failed to meet the standard of care required by the Act or at common law. The claim against the District is dismissed.

The claim against the League Defendants

- [88] Many of the foregoing conclusions apply to the League Defendants. However, the plaintiff's claim against those defendants is also that:
- 1) Foul balls from field C landing in the South Bleachers were an exceptional risk, known to the League Defendants, which the League Defendants had a duty to bring to the attention of the District. If the District refused to take steps to remove the risk, the League Defendants should have stopped playing baseball on both diamonds at the same time;
 - 2) The League Defendants had a duty to warn the plaintiff of the risk of foul balls from field C landing in the South Bleachers, by posting signs warning of the danger.
- [89] The risk of foul balls landing in the South Bleachers was not an unusual or exceptional risk that gave rise to a duty by the League Defendants to either take steps to ameliorate or warn of its presence.
- [90] In order to constitute such a risk, the danger would need to be one which was known, or could reasonably be expected to be known, to the defendant, but which would not be perceived or appreciated by an ordinary person exercising common sense.

- [91] I reiterate my earlier findings on likelihood of harm. All users of the diamonds at Inter River Park, including parent spectators such as the plaintiff, knew that balls occasionally left the field of play. Even more infrequently, balls landed in or near the South Bleachers. Collectively, the users of the facilities relied on the system of calling a warning when a foul ball was in the air. Prior to the Incident, there is no evidence of anybody ever being struck and injured by such a foul ball.
- [92] The League Defendants knew of those risks, and also were unaware of any past incident causing personal injury to a spectator. Similarly, the parent spectators who swore affidavits were aware of the risk of foul balls generally, and more specifically, the occasional ball landing in the South Bleachers. Thomas Murphy, a past president of Mount Seymour Little League, and at the time a volunteer coach, deposed to, among other things, his knowledge of the risks posed by foul balls at Inter River Park and similar facilities. He said that spectators at any park with adjacent diamonds must be reasonably alert to the possibility of foul balls leaving either diamond. That, in my view, is a matter of simple common sense.
- [93] The test for appreciation of risk is an objective one. An ordinary person in the shoes of the plaintiff, using common sense, would have been aware of the risk of foul balls leaving the adjacent diamond and landing in the South Bleachers in these circumstances. I also find, although it is not necessary to do so, that the plaintiff was aware of that risk. He knew there was baseball activity occurring on field C, although he said he was unsure if it was a practice or game. I have difficulty with that stated uncertainty. If he was paying any attention at all, he would have known it was in fact a game being played on that diamond. I find that he did know that fact.
- [94] Finally, on this issue, I consider the absence of any concern being raised by parent spectators with the League Defendants. I might be inclined to impose a duty on the League Defendants to have raised concerns with the District if there was evidence, for instance, of parents alerting a representative of the League Defendants to a "near miss" that might have caused injury. There is no such evidence.
- [95] The evidence is that parents of the home team continued to sit in the South Bleachers to watch the games, despite what some witnesses said were frightening near mishaps caused by foul balls. None of those witnesses said that they voiced a concern to any representative of the League Defendants.
- [96] Nor would I impose a duty on the League Defendants to post warning signs cautioning of the danger of balls leaving the field of play. As noted, such a risk is well known to all who watch baseball. Absent evidence of any unique hazard at Inter River Park, there was no obligation on the League Defendants to post signs. There is no such evidence.
- [97] I would also find, were it necessary, that such signs would not have prevented the injury to the plaintiff. Put another way, had I found a breach of the duty of care by the failure to post signs, I would not find that the "but for" test for causation was met in this case. There is considerable evidence that the parents of the home team playing on field D sat in the South

Bleachers despite the occasional foul balls that landed there. The plaintiff's own evidence is that he took his customary spot in the first row of the bleachers designated for the home team.

[98] At most, the presence of warning signs would have potentially increased the plaintiff's awareness of warning calls. In this case, there was such a warning, but it was not heard by the plaintiff, nor by some other nearby spectators. That fact, while unfortunate, was unlikely to have changed merely by the presence of signage.

[99] For the foregoing reasons, the claim against the League Defendants is dismissed.

Conclusion

[100] The facts before me disclose an extremely unfortunate accident, one which I am told caused significant injury to the plaintiff. Nonetheless, what occurred here was an accident, something that happened unexpectedly and unintentionally. Not all such incidents occur as a consequence of a breach of a duty of care, or indeed any actionable negligence, on the part of anybody. This, in my view, is such a case, and no legal liability for the injuries suffered by the plaintiff should be visited on any of the defendants.

[101] The defendants are entitled to costs at scale B.

"Tammen J."

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Prepared on 28 October 2026 · Esheria