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# From Closers to Closing Submissions: When Baseball and Litigation Intersect

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Litigation and baseball have a lot in common. Both are governed by arcane rules—MLB's run 160 pages—and both have vernaculars that are jargon-laden and sometimes rife with incomprehensible abbreviations. Ballgames, like lawsuits, can be long affairs featuring appeals and reviews subject to amorphous standards of review. And just as in baseball a pitcher's goal can be to strike out a batter, a litigator's goal may be to strike out a pleading. So intertwined are the two that the Chief Justice of the United States, John Roberts, famously quipped at his confirmation hearing, "it's my job to call balls and strikes, and not to pitch or bat."

I am a litigator and lover of the old ball game, so I wanted to see what happens when the action at the stadium makes its way to the courthouse. Get your peanuts and crackerjacks ready. Here's what I found.

The Blue Jays drew roughly 33,000 fans a game last year. In the early '90s, the average attendance hovered closer to 50,000. This put tickets in high demand. And with high demand came a black market for secondary ticket sales at premium prices. In *Toronto Blue Jays Baseball Club v. John Doe*,[2] the Blue Jays sought to address this. The club applied for an order for interim recovery of "an unknown quantity of tickets" from a class of proposed defendants described by the court as "itinerant and anonymous" individuals who "ply their trade in person on game day in the immediate vicinity of Skydome" and "tend to disappear at the first sign of the presence of authority." The motion turned, in part, on some "very fine print" on the back of the tickets that prohibited resale above face value.

Obtaining an injunction, like hitting a nasty breaking ball, is hard though. Here, the Blue Jays swung and missed.

The court declined to recognize the validity of the fine print, finding no evidence before it that the would-be defendants knew of—let alone agreed to—the terms it contained. "As a factual matter", the motion judge observed, "I doubt if one ticket buyer in ten thousand would be prepared for the avalanche of technicality" in the fine print. Unsurprisingly, then, the court also refused to take judicial notice of any "notoriety or custom" in relation to the fine print, such that knowledge and acceptance might be inferred. The fine print had none of the notoriety of other matters the court expressed a willingness to take notice judicial notice of, e.g., "that

[1] This article was inspired by (a) "The Stanley Cup: The Unintended Legal Impacts of Hockey's Greatest Prize" by Stephen N. Libin published in this journal last summer and (b) the columns of David Pannick collected in *I Have to Move my Car: Tales of Unpersuasive Advocates and Injudicious Judges*.
[2] 9 O.R. (3d) 622 (Ont. Ct. Gen. Div.).

fans for generations have been warned that baseball clubs are not liable for injury caused by balls projected into the stands; that admission could be refused or the patron evicted for misconduct upon refund of the purchase price; [and] that if a legal game was not played a 'rain check' would be provided". None of this was of any assistance to the Jays.

Though the motion was dismissed, the Jays weren't left licking their wounds for long. Months later, they won their second straight World Series championship.

Minute Made Park (née Enron Field) is home to the Houston Astros, who cheated their way to a World Series title in 2017. For years its playing field uniquely featured a small hill in dead-centre field that included a flagpole. A far cry from this was diamond number 4 at Globe Park in Hamilton, which at one point in time included a less dignified feature. I speak, of course, of goose excrement, which found itself at the centre of a personal injury suit in *St. Anne (Litigation Guardian of) v. Hamilton (City)*.[3]

The plaintiff had been playing second base in a slow-pitch game in the city employee league. The batter hit a blooper to shallow right-centre field. The plaintiff raced for it, lost his balance, and "and the next thing he knew he was flying through the air". He landed awkwardly, breaking two vertebrae and tearing his rotator cuff in the process. He then sued the city, claiming that he slipped on goose excrement and that the city breached its duty to provide a safe playing area.

There was little dispute in the case that "there were quantities of goose excrement ... in the outfield area of diamond number four." As the court dryly noted, "It is a fact of life that Canada Geese are found in certain open areas in the City of Hamilton and a further fact of life that they deposit their excrement in those areas", including Globe Park.

Still, the court dismissed the plaintiff's claim. The court disagreed with the plaintiff that the city ought to have "posted warning signs about goose droppings in the outfield", finding no reason to think the plaintiff, a "keen and competitive baseball player" would have acted any differently had a warning sign been in place. The plaintiff's own testimony did him in: "[I] give everything, my all, when I'm playing sports." One of his teammates was even more compelling: "It is second nature when the ball is hit, to go after it".

"It is as likely as not", the court concluded, "that the unfortunate injury sustained by the plaintiff was the result of a sporting accident not caused or contributed to by the defendants." Unfortunate indeed, but there's a moral to this: Watch your footing during gameplay, especially in fowl territory.

[3] 2001 CarswellOnt 1599 (ON SC).

The average length of a baseball game in the 2022 MLB season was just over three hours. According to *Cheek v. R.*,[4] though, "there are only 16 to 18 minutes when there is actual 'motion' on the field such as (i) a pitcher delivering a pitch from the mound; (ii) a base runner attempting to steal a base; or (iii) a batter hitting a particular pitch thereby causing the ball, the batter, any base runner and all fielders to be in motion." For many, the game's leisurely pace is the perfect antidote for our hyperactive era. For broadcasters, it means a lot of dead airtime to fill.

*Cheek* turned on whether, in filling that airtime, the long-time "voice of the Blue Jays", Tom Cheek, was an "entertainer" and, as such, responsible for certain taxes.

The case offers a detailed analysis at the broadcaster's challenge 162 days a year: "hold[ing] the attention and interest of the radio audience during the down time when there is no motion on the field." To do so, broadcasters share "their knowledge of the game and its rules, their experience, their knowledge of current and historical statistics, biographical information on players, team managers, coaches, and other prominent persons connected with the game, and historical information on each team." In short, they share "stories, anecdotes, statistics and strategy."

Yet, for all this, the court held that Cheek was not an "entertainer", but a "reporter"—one "reporting what the players are doing as they do it". The players, the court reasoned, are the real entertainers. "Fans purchase tickets and attend games to see" the players. They watch games on TV for the same reason. And they tune into the game on the radio "to know how the performance of those same highly skilled players affects a game play-by-play." The players perform; the broadcasters merely describe their performance.

While the lawyer in me may agree with the court's reasoning, the fan in me isn't so sure. What distinguishes the great broadcasters, Cheek included, is their skill at storytelling. And Cheek told a pretty good story to the court to convince it he was not an entertainer.

Hitting the ball out of the park usually results in a home run. In *Legacy et al. v. Thunder Bay (Corporation) et al.*,[5] it resulted in a negligence suit.

The minor league Duluth Huskies had been taking batting practice at Port Arthur Stadium in Thunder Bay before a game there against the hometown Border Cats. Just as the plaintiff was driving along the street running next to the stadium, one of the Huskies smashed a pitch over the left-field wall, through or above some protective netting, and right into the driver-side window of the plaintiff's car.

[4] 2002 CarswellNat 247 (TCC).
[5] 2018 ONSC 0758

After the unlucky driver sued, the Huskies moved for summary judgment. As its lawyer put it, "it is not negligent for a baseball player to hit a homerun". In support of their motion, the Huskies relied on a House of Lords decision involving similar facts, albeit in a cricket match. There, Lord Porter dismissed the claim, reasoning, in part, that "the object of every batsman to hit the ball over the boundary if he can". Briefly put, there's no tort in sport.

The court, however, found the Huskies' submissions to be a bit of a wild pitch. In dismissing the motion, the court largely relied on "photographs showing large holes in the netting" separating the ballpark from the city street and evidence from the Huskies' hitting coach that "a number [of] baseballs were hit out of the stadium during batting practice by different players, which is normal". Noting that negligence hinges on foreseeability, the court concluded that the Huskies' players could be liable if they knew they were hitting baseballs "onto a busy city street" because of the defective netting. The motion, in the circumstances, was premature.

After the incident, the Border Cats' manager remarked that, till then, a batted ball had never travelled towards the road like that. With hitters like those, the Huskies were probably winning on the field, at least, even if not in court.

The field of play, as its name suggests, is reserved for those playing on it. One could say Joe [Fan] balked at this convention during a game early in the Jays' 2013 campaign when, according to a Toronto Police Services synopsis, he "ran into the field 'interrupting' the game" and "giving Jays fans a brief respite from their season long agony." He was, the synopsis continued, "subsequently placed under arrest to applause" and then charged with mischief to property under s. 430 of the *Criminal Code*, which prohibits "obstruct[ion], interrupt[ion] or interfere[nce] with the lawful use, enjoyment or operation of property".

Joe retained a slugger of the criminal defence bar, my colleague Matt Gourlay, who then delivered a curveball.[6]

Gourlay wrote to the Crown Attorney arguing that Joe's "vigorous jog from the first base to third base side of the diamond" hardly interfered with anyone's enjoyment of the property when, in the TPS's own synopsis, Joe actions gave the Jays' faithful "a brief respite from their season long agony". As Gourlay put it, the Jays "were off to a horrendous start, languishing in the AL East cellar", and their fans "were beginning to transition from worried concern to full-blown distress."

Nor, the letter continued, was there any real interruption. Here, Gourlay cited as authority former Jays' star Jose Bautista, who was known to comment that the fans are what the game

[6] The happy client has posted all about this misadventure on his website, Running the Field, available at https://www.runningthefield.com/.

is all about. Needless to say, the fans most certainly approved of Joe's performance, as indicated by their heartfelt applause on its conclusion.

Joe, the letter concluded, had already "suffered enough" as a Jays fan. In light of this, Gourlay asked for the charge to be withdrawn; in exchange Joe would agree to stay away from home games for the rest of the season. But, Gourlay wrote, if a guilty plea was necessary, "I think an appropriate sentence to achieve the proper degree of denunciation and deterrence would be to make Joe buy Blue Jays' seasons tickets."

Perhaps sensing that requiring Joe to buy season tickets for the Jays (who finished in last place that year) might veer a tad cruel and an unusual, the Crown had a better idea: It suggested a donation to a charitable cause. Joe, aptly, contributed to the Jays Care Foundation, and the charges were withdrawn. A nice double play.

Fans are cautioned at ballgames and told to stay alert and be aware of their surroundings because bats and baseballs may be thrown or hit into the stands. For lawyers, as all this may show, there's another reason still: You might just find your next client.