

# The Laws of the Game:

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## What the puck was that?! An analysis of *Browning v. Odyssey*, examining the liability of sports arena owners in negligence for spectator safety

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### Abstract

This paper will look at the reasoning and legal principles applied by the judge in the recent ice hockey spectator case of *Browning v Odyssey* [2014] NIQB 39. This paper will analyse and compare English cases with those from other jurisdictions to show how this area of law has developed. Academic opinion and judicial reasoning will be brought in to support the discussion on whether the current position allows for fair and consistent decisions, and alternatives will be suggested where this does not appear to be so.

In particular, the paper will analyse a number of specific areas including: the standard of care owed to sports spectators by sports arena owners, whether a higher standard of care should be owed to children and the extent to which a risk can be so small that it is justifiable for the reasonable man to ignore it. Finally, different sports will be compared to see what is classed as an inherent risk, whether it is fair to claim that these risks are similar throughout all sports and whether there should be the same expectations in the warm up as in the main event.

Keywords: *Negligence, Occupiers' Liability, Personal Injury, Spectator Safety, Ice Hockey, Inherent risk*

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## INTRODUCTION

This paper will look at the reasoning and legal principles applied by the judge in *Browning v Odyssey*.<sup>1</sup> The facts of the case are that a twelve year old girl went to watch an ice hockey game with her friends. A puck left the ice during the warm up and hit her over the eye causing a laceration, however Mr Justice Gillen held that the arena owners were not guilty of negligence.

This case was decided in Northern Ireland and the possible implications of this on English sports negligence law will be considered. This paper will analyse and compare English cases with those from other jurisdictions to show how this area of law has developed. Academic opinion and judicial reasoning will be brought in to support the discussion on whether the current position allows for fair and consistent decisions, and alternatives will be suggested where this does not appear to be so.

Five specific areas will be analysed. First, the standard of care owed to sports spectators by sports arena owners will be looked at to see whether the current position is appropriate, or whether it is possible to apply higher and/or lower standards. Second, there will be a discussion on whether a higher standard of care should be owed to children. Third, the paper will consider what can reasonably be expected from the arena owner in light of their expertise, industry regulations and general safety expectations. Fourth, cases will be discussed that show the balancing exercise that decides what makes for a risk so small it is justifiable for the reasonable man to ignore it. Finally, different sports will be compared to see what is classed as an inherent risk, whether it is fair to claim that these risks are similar throughout all sports and whether there should be the same expectations in the warm up as in the main event.

## WHAT STANDARD OF CARE IS OWED TO SPORTS SPECTATORS?

Gillen J held that:

“This arena where this match was played was as safe a place as could reasonably be expected”.<sup>2</sup>

This means that the arena owners had fulfilled their duty of care by meeting the standard of the ‘reasonable man’<sup>3</sup> or the ‘man in the Clapham Omnibus’.<sup>4</sup> This test is a question of fact not law, and so although broad principles can be identified,<sup>5</sup> each case has to be considered individually. Therefore, whilst this is an objective test, (as stated in *Bolton*)<sup>6</sup> it is a “question of degree... opinions may differ”.<sup>7</sup> This uncertainty can be shown by comparing *Bolton* with *Hilder*.<sup>8</sup> Whilst negligence was only found in *Hilder*, it is just as likely that the ‘reasonable man’ could have decided the other way, finding a greater risk in *Bolton* due to the nature of the game.<sup>9</sup>

It has been questioned whether the ‘reasonable man’ is the most suitable standard to be applied in this type of case. In particular, higher and lower standards have been suggested or applied in the past. The level of the standard of care owed was discussed extensively in *Hall* where it was suggested that a higher standard could

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<sup>1</sup> *Browning v. Odyssey Trust Company Ltd and another* [2014] NIQB 39

<sup>2</sup> *Browning v. Odyssey Trust Company Ltd and another* [2014] NIQB 39 [30] (Gillen J)

<sup>3</sup> *Blythe v. Birmingham Waterworks* (1856) 11 Ex Ch 781 (Baron Alderson)

<sup>4</sup> *Hall v. Brooklands Auto Racing Club* [1933] 1 KB 205, 224 (Greer LJ)

<sup>5</sup> K Horsey & E Rackley, *Tort Law* (2<sup>nd</sup> edn, Oxford University Press 2011) 197

<sup>6</sup> *Bolton and others v. Stone* [1951]

<sup>7</sup> *Bolton and others v. Stone* [1951] 1 All ER 1078, 1086 (Lord Reid)

<sup>8</sup> *Hilder v. Associated Portland Cement Manufacturers Ltd* [1961] 3 All ER 709, 712 (Ashworth J)

<sup>9</sup> S Gardiner & others, *Sports Law* (3<sup>rd</sup> edn, Cavendish 2007) 676

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be owed entitling the spectator to “reasonable safety as an absolute promise”.<sup>10</sup> It was also stated that a higher duty is owed from contract than tort.<sup>11</sup> However, as seen in *Murray*,<sup>12</sup> this still does not require absolute protection from every known risk. A high standard has also been applied<sup>13</sup> in American sport, as spectators are classed as business invitees.

A feminist critique<sup>14</sup> of the ‘reasonable man’ suggests that this is not just a word choice, but does indeed only consider the views of the judiciary - a predominantly male group. It could therefore be possible that a higher standard could be expected if the reasoning took into account traditional female perspectives. It is further suggested that viewing objectively is a male ability. However, a subjective test would only further increase uncertainty into the law<sup>15</sup> as arena owners would have no guidance on which spectator’s standards they were to cater for.

Lower standards were also considered in *Hall*,<sup>16</sup> such as the duty only to warn of traps, and it has been stated that “the standard of care will be generously interpreted”<sup>17</sup> in regards to sports arenas. This is due to the fact that spectators are aware of the risks of the game, although to what risks this applies and who should be aware are questioned below.

A much lower standard of care, baseball’s “limited duty” rule,<sup>18</sup> is used in some American jurisdictions.<sup>19</sup> This requires baseball stadium owners to screen only the most dangerous areas of the field and sections where people can choose to sit if they want more protection. This ensures that protection is given but that no unreasonable steps have to be taken. It also sets clear limits to the liability of the stadium owners and ensures consistency. In some states, this rule has been extended to ice hockey, both in the common law<sup>20</sup> and by statute.<sup>21</sup> However, the rule is based on the public policy reason that these sports are a part of American culture and history and their value needs protection. Therefore, whilst this would not stretch to ice hockey in Northern Ireland,<sup>22</sup> it could potentially be applied to traditional English sports such as football.<sup>23</sup>

## SHOULD A DIFFERENT STANDARD BE OWED TO CHILDREN?

In his summing up of *Browning*, Gillen J uses both the phrases:

<sup>10</sup> See: *Hall v. Brooklands* (n4), 213 (Scrutton LJ)

<sup>11</sup> *Ibid*, 227-228 (Slesser LJ)

<sup>12</sup> *Murray and another v. Harringay Arena* LD [1951] 2 KB 529, 536 (Singleton LJ)

<sup>13</sup> H James & JD Moss, ‘Proof of negligence requires more than an accident and injuries’ *Recreation Law* (14 July 2014) (online) [<http://www.recreation-law.com/2014/07/14/proof-of-negligence-requires-more-than-an-accident-and-injuries-a-spectator-at-a-rodeo-needed-proof-of-an-improperly-maintained-gate>]

<sup>14</sup> K Horsey & E Rackley, *Tort Law* (2<sup>nd</sup> edn, Oxford University Press 2011) 199

<sup>15</sup> S Gardiner & others, *Sports Law* (3<sup>rd</sup> edn, Cavendish 2007) 634

<sup>16</sup> See: *Hall v. Brooklands* (n4), 213 (Scrutton LJ)

<sup>17</sup> William Norris, ‘The duty of care to prevent personal injury’ (2009) 2 JPI Law 114, 117

<sup>18</sup> *Teixiera v. New Britain Baseball Club Inc* (2006) 41 Conn L Rptr 777 (Shaban J)

<sup>19</sup> P Thornton, *Sports Law* (Jones and Bartlett Publishers 2011) 327

<sup>20</sup> *Nemarnik v. Los Angeles Kings Hockey Club LP* 127 Cal Rptr 2d 10 (Cal Ct App 2002) Ortega J

<sup>21</sup> (745 ILCS 52/1) Hockey Facility Liability Act Illinois, 78B-4-508 Limitation on liability of hockey facilities (Utah)

<sup>22</sup> The team was only created in 2000: [<http://www.belfastgiants.com/history/>]

<sup>23</sup> Football was brought to England by the Romans and the Football Association was created in 1863: [<http://www.fifa.com/classicfootball/history/the-game/origins.html>]

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“No spectator could have been unaware”<sup>24</sup> and “she must be taken to have accepted”.<sup>25</sup>

The issue here is that whilst the injured spectator is only twelve years old, the judge makes clear that no adjustment of the required standard is made in allowance for her age, and that instead she is treated as a ‘reasonable spectator’.<sup>26</sup> This follows the principle in the case of *Murray*<sup>27</sup> where Lord Justice Singleton stated that:

“In considering liability... it would not be right to introduce a wider term because one of the parties is a youth”.<sup>28</sup>

As this case was based in contact, its application in *Browning*<sup>29</sup> does not seem to fit. Firstly, *Browning* also concerned the Occupiers Liability Act.<sup>30</sup> This specifically states in 2(3)(a) that: “an occupier must be prepared for children to be less careful than adults”, which appears to be directly contradicted by Singleton LJ’s statement. Owing a higher standard to children also fits with other negligence decisions. If, as the decision in *Mullins*<sup>31</sup> suggests, a lower standard is expected from children as they will not foresee the risk of causing injury, then why shouldn’t a higher standard be owed to children, as they surely will not foresee the risk of injury occurring to themselves?

Indeed, it was questioned in *Hall*<sup>32</sup> whether it was necessary to take the specific spectator’s knowledge of the risks into account or just the knowledge of the ‘reasonable spectator’. It has of course been stated that as it is an objective test the individual’s knowledge is irrelevant. If a subjective test was used, it would be especially difficult to ascertain the knowledge of a small child,<sup>33</sup> giving rise to policy reasons regarding the use of Court time and the uncertainty of what is expected from arena owners. Cases have however been decided with knowledge of the risk taken into account. In *Morris*,<sup>34</sup> negligence was found as the spectator was attending an unfamiliar game for the first time and was unaware of the risks. Accordingly, in *Gilchrist*<sup>35</sup> no negligence was found as the spectator had attended games before and was aware of the risks. However, as well as being only persuasive, it could be argued that the principle in these cases is not applicable to modern English law due to the fact that viewing sports events on television and the internet is now common practice and it would be hard to show having no knowledge of game risks.

On the other hand, *Browning*<sup>36</sup> is distinguishable from both *Murray*<sup>37</sup> and *Gilchrist*<sup>38</sup> due to the child spectator’s lack of adult supervision. If the arena owners were found to be acting *in loco parentis*, perhaps through their knowledge of the purchase of a lone child’s ticket, they would potentially owe a higher standard of care.<sup>39</sup> Practically however, this is very unlikely to become a part of English sports negligence law for policy reasons as the cost to the arenas to check and supervise everybody purchasing children’s tickets would significantly increase prices or mean that children would no longer be allowed into sporting arenas.

<sup>24</sup> See: *Browning v. Odyssey* (n1), [31] (Gillen J)

<sup>25</sup> *Ibid*, [30] (Gillen J)

<sup>26</sup> *Ibid*, [18/19] (Gillen J)

<sup>27</sup> See: *Murray v. Harringay Arena* (n12)

<sup>28</sup> *ibid*, 536 (Singleton LJ)

<sup>29</sup> See: *Browning v. Odyssey* (n1), [19] (Gillen J)

<sup>30</sup> Occupiers Liability Act (Northern Ireland) 1957

<sup>31</sup> *Mullins v. Richards* [1998] 1 All ER 920, 924 (Hutchinson LJ)

<sup>32</sup> See: *Hall v. Brooklands* (n4), 213 (Scrutton LJ)

<sup>33</sup> Stephen Todd, ‘The reasonable incompetent driver’ (1989) 105 LQR 24, 26

<sup>34</sup> *Morris v. Cleveland Hockey Club Inc* (1952) 105 NE2d 419, 426

<sup>35</sup> *Gilchrist v. City of Troy* (1985) 113 AD2d 271

<sup>36</sup> See: *Browning v. Odyssey* (n1), [4] (Gillen J)

<sup>37</sup> See: *Murray v. Harringay Arena* (n12), 530 (Ormerod J)

<sup>38</sup> See: *Gilchrist v. City of Troy* (n36)

<sup>39</sup> *Chittock v. Woodbridge School* [2002] EWCA Civ 915; [2002] ELR 735, 743 (Auld LJ)

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## WHAT CAN REASONABLY BE EXPECTED FROM THE STADIUM OWNERS?

What is to be expected from the arena owners<sup>40</sup> depends on their expertise, what regulations they are to comply with and any other steps it is possible for them to take. Gillen J states that the arenas compliance “with the International Hockey Federation Rules and Regulations”<sup>41</sup> in *Browning* helps guide his finding of no negligence. This follows the previous precedents in *Wattleworth*<sup>42</sup> and *Hinchcliffe*<sup>43</sup> where a duty will be found to be discharged if there is compliance with industry standards or expert advice. It is however worth noting that the boxing case of *Watson*<sup>44</sup> shows that compliance with industry high standards may not be sufficient to fulfil a duty of care.<sup>45</sup> Instead, as confirmed in both *Phee*<sup>46</sup> and *Uren*,<sup>47</sup> sports facility owners should not need to possess knowledge of an accident to know that their premises are unsafe.<sup>48</sup> Similarly in order to fulfil their duty of care, owners and operators will need to undertake a thorough risk assessment and make adjustments to the premises where risks are identified<sup>49</sup>.

As both the manager and consultant engineer in *Browning*<sup>50</sup> are experts in arena safety, the tests in *Bolam*<sup>51</sup> and *Bolitho*<sup>52</sup> are applied. The judge is therefore entitled to favour the manager’s evidence, due to the fact that he shows consideration of the risks and benefits of further safety precautions as shown below.<sup>53</sup> Indeed, Gillen J noted how:

“in addition to the physical safety precautions, there were a plethora of warning signs... a warning on every ticket and... regular announcements”<sup>54</sup>

These warnings helped the arena owners fulfil their duty of care as they allowed a visitor to remain reasonably safe<sup>55</sup> without impairing the spectator’s ability to enjoy the action.<sup>56</sup> Although the spectator in *Browning*<sup>57</sup> didn’t read the signs, unfortunately the test is objective so it was held to be enough that the *reasonable* spectator would have seen and complied with the warnings.

## WHAT RISK OF INJURY IS SO SMALL IT IS JUSTIFIABLE TO IGNORE IT?

In *Browning* it was stated that “the risk of this injury was so small that it was unnecessary to take any further precautions.”<sup>58</sup> However, even when a risk has been deemed to be small, Lord Reid held that:

<sup>40</sup> See: *Browning v. Odyssey* (n1), [30] (Gillen J)

<sup>41</sup> *Ibid*, [33] (Gillen J)

<sup>42</sup> *Wattleworth v. Goodwood Road Racing Company Limited* [2004] EWHC 140,164 (Davis J)

<sup>43</sup> *Hinchcliffe v. British Schoolboys Motorcycle Association* (12 April 2000, unreported QBD, Smith J)

<sup>44</sup> *Watson v. British Boxing Board of Control Ltd (BBC) and another* [2001] QB 1134

<sup>45</sup> *Watson v. British Boxing Board of Control Ltd (BBC) and another* [2001] QB 1134, [111] (Lord Phillips of Worth Matravers MR)

<sup>46</sup> *Phee v. Gordon* [2013] CSIH 18; SC 379 at [18]

<sup>47</sup> *Uren v. Corporate Leisure Ltd and Ministry of Defence* [2013] EWHC 353

<sup>48</sup> See: *Watson v. BBC* (n44), [121] (Lord Phillips of Worth Matravers MR)

<sup>49</sup> See: *Uren v. Corporate Leisure Ltd*, (n47), [211] (Foskett J)

<sup>50</sup> See: *Browning v. Odyssey* (n1), [13-14, 33] (Gillen J)

<sup>51</sup> *Bolam v. Friern Hospital Management Committee* [1957] 2 All ER 118, 121 (McNair J)

<sup>52</sup> *Bolitho v. City & Hackney Health Authority* [1997] 4 All ER 771, 778 (Lord Browne-Wilkinson)

<sup>53</sup> See: *Browning v. Odyssey* (n1), 11 (Gillen J)

<sup>54</sup> *Ibid*, [31] (Gillen J)

<sup>55</sup> John McQuater, ‘Case Comment, Phee v. Gordon’ (2012) 2 JPI Law C67, C60/70

<sup>56</sup> Aaron Wakamatsu, ‘Spectator Injuries: Examining Owner Negligence and the Assumption of Risk Defence’ (2009) 6 Willamette Sports Law Journal 1, 14

<sup>57</sup> See: *Browning v. Odyssey* (n1), [6-7] (Gillen J)

<sup>58</sup> See: *Browning v. Odyssey* (n1), [32] (Gillen J)

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“But it does not follow that, no matter what the circumstances may be, it is justifiable to neglect a risk of such a small magnitude. A reasonable man would only neglect such a risk if he had some valid reason for doing so, eg, that it would involve considerable expense to eliminate the risk. He would weigh the risk against the difficulty of eliminating it.”<sup>59</sup>

The courts consider several factors when evaluating what risk can be taken.<sup>60</sup> For example, the likelihood of the activity causing injury and the seriousness of that potential injury are looked at, although as seen above with both *Bolton*<sup>61</sup> and *Hilder*,<sup>62</sup> each case is decided on its own facts. Ultimately, whilst the formula provides guidelines it will be left to judicial judgment to determine the outcome.<sup>63</sup> Importantly, the expense and (in)convenience of taking precautions must also be taken into account. This was particularly decisive in this case as the cost of £50-60,000<sup>64</sup> to provide netting in the Odyssey arena does not seem unreasonable, especially as the judge assessed the value of the injury at £30,000.<sup>65</sup>

The safety of both the players and spectators is therefore a matter of balance<sup>66</sup> and the expense of the Perspex boards does have to be considered alongside the social utility argument that the nets would interfere with the view of the game.<sup>67</sup> This importance of safeguarding the value of sports is epitomised by the *Compensation Act 2006*.<sup>68</sup> The Act states that when a court considers a negligence claim it should take into account whether the steps the defendant would have to take to prevent the injury would affect the way the sport was played, a view echoed by cases such as the *Scout Association v. Barnes*:

“It is not the function of the law of tort to eliminate every iota of risk or to stamp out socially desirable activities”.<sup>69</sup>

Although it has been questioned whether the statute was introduced to protect against an “overprotective nanny state”<sup>70</sup> and a compensation culture that was more imaginary than real,<sup>71</sup> it is worth reminding ourselves that *Watson*<sup>72</sup> was the first case of its kind in the whole world, and this has led to the adoption of new standards that can help protect from serious injury. It is also important to point out that there is not a licence to cause injury simply because a game has a social value.<sup>73</sup> Indeed, while there may be a justifiable fear of the ‘floodgates’ opening, it was mentioned that not only have there have been no previous successful cases against hockey arenas,<sup>74</sup> but that the manager noted in a news statement how a successful claim “could have opened the door for a lot of claims for other teams”.<sup>75</sup>

<sup>59</sup> *Overseas Tankship (UK) Ltd v. Miller Steamship Co Pty Ltd (The Wagon Mound) (No 2)* [1967] 1 AC 617, 642 (Lord Reid)

<sup>60</sup> *Tomlinson v. Congleton Borough Council* [2003] UKHL 47 [34] (Lord Hoffman)

<sup>61</sup> *Bolton and others v. Stone* [1951] 1 All ER 1078

<sup>62</sup> *Hilder v. Associated Portland Cement Manufacturers Ltd* [1961] 1 WLR 1434

<sup>63</sup> *South Pacific Manufacturing Co Ltd v. New Zealand Security Consultants & Investigations Ltd* [1992] 2 NZLR 282, 294 (Cooke P)

<sup>64</sup> See: *Browning v. Odyssey* (n1), [14] (Gillen J)

<sup>65</sup> See: *Browning v. Odyssey* (n1), [3] (Gillen J)

<sup>66</sup> *Gillon v. Chief Constable of Strathclyde* [1997] SLT 1218, 1220 (Lord Johnston)

<sup>67</sup> Tavella DF, ‘Duty of care to spectators at sporting events’ (2009) Selected Works 18 [[http://works.bepress.com/david\\_tavella/6](http://works.bepress.com/david_tavella/6)]

<sup>68</sup> Bruce Gardiner, ‘Liability for sporting injuries’ (2008) 1 JPI Law 16, 19

<sup>69</sup> *Scout Association v. Barnes* [2010] All ER (D) 284 [34] (Jackson LJ)

<sup>70</sup> *Ibid*, [50] (Ward LJ)

<sup>71</sup> William Norris, ‘The duty of care to prevent personal injury’ (2009) 2 JPI Law 114, 133

<sup>72</sup> *Watson v. British Boxing Board of Control Ltd and another* [2001] QB 1134

<sup>73</sup> John McQuater, ‘Case Comment, Phee v Gordon’ (2012) 2 JPI Law C67, C71

<sup>74</sup> See: *Browning v. Odyssey* (n1), [14] (Gillen J)

<sup>75</sup> Belfast Giants General Manager Todd Kelman, ‘Girl hit by ice hockey puck during Belfast Giant’s match loses damages claim’ *BBC* (1 April 2014) (online) [<http://www.bbc.co.uk/news/uk-northern-ireland-26830921>] <last accessed 2 April 2015>

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## IS THE RISK OF INJURY THE SAME IN ALL SPORTING ARENAS?

Gillen J held that the spectator was injured “as the result of a danger inherent in the sport itself”.<sup>76</sup> However, whilst there are cases that hold flying pucks to be an inherent risk of ice hockey,<sup>77</sup> there are also cases that find otherwise. This is based on the facts that players receive penalties for hitting out the puck<sup>78</sup> and that hockey pucks are supposed to slide on the ice, not fly through the air as a ball.<sup>79</sup>

It has been suggested that the finding of the inherent risk will also depend on the popularity of the sport in the area, and so supposedly the spectator’s knowledge of risks.<sup>80</sup> Applying this principle to English sports negligence law would require a subjective test taking the defendants knowledge into account, or an objective test based on either the statistical evidence of a sports popularity or the populations’ knowledge. Whilst this is unlikely to affect any well-established sports, it could be taken into account for new sports such as parkour.

Gillen J also stated that:

“There was a compelling logic in Mr Kelman’s assertion that the risk was even smaller during the warm up than in the actual game itself because players are not moving at speed or with the intensity that would occur in the game itself”.<sup>81</sup>

However, there are several arguments that the warm up is more dangerous. In the persuasive *Cincinatti Baseball Club*,<sup>82</sup> there was found to be a greater duty to spectators during the warm up due to the difficulty of concentrating on several projectiles, as echoed by the engineer in *Browning*.<sup>83</sup> Similarly, in *Hall*<sup>84</sup> it was noted that no one expected nets to protect football spectators. However, as stated by Gillen J himself, what is reasonable may change with time<sup>85</sup> and many English football clubs now put up nets during warm ups<sup>86</sup> despite these claims of impracticality.<sup>87</sup> The standard expected from sports participants is also higher during the warm up than the game as they do not have the excuse of being caught up in the “heat of the moment”<sup>88</sup> or “exercising every endeavour to win”.<sup>89</sup> Therefore, it appears that Gillen J’s reasoning is incorrect, and sports arenas owners owe a higher duty of care to spectators during the warm up than the main event.

Gillen J claimed that:

“In short the risks were no different from those which exist in a number of other sporting arenas including field hockey, football, cricket, rugby or golf”<sup>90</sup>

<sup>76</sup> See: *Browning v. Odyssey* (n1), [30] (Gillen J)

<sup>77</sup> *Elliot v. Amphitheatre Ltd* (1934) CarswellMan 69 (Man KB); *Hagerman v. Niagra Falls (City)* (1980) CarswellOnt 843 (Ont SC); *Nemarnik v. Los Angeles Kings Hockey Club LP* 127 Cal Rptr 2d 10 (Cal Ct App 2002) (Ortega J)

<sup>78</sup> *Murray and another v. Harringay Arena* LD [1951] 2 KB 529, 532 (Singleton LJ)

<sup>79</sup> *Morris v. Cleveland Hockey Club Inc* (1952) 105 NE2d 419, 426

<sup>80</sup> Aaron Wakamatsu, ‘Spectator Injuries: Examining Owner Negligence and the Assumption of Risk Defence’ (2009) 6 Willamette Sports Law Journal 1, 14

<sup>81</sup> See: *Browning v. Odyssey* (n1), [31] (Gillen J)

<sup>82</sup> *Cincinatti Baseball Club v. Eno* 112 Ohio St 175; 147 NE 86 (1925)

<sup>83</sup> See: *Browning v. Odyssey* (n1), [13] (Gillen J)

<sup>84</sup> *Hall v. Brooklands Auto Racing Club* [1933] 1 KB 205, 214-215 (Scrutton LJ)

<sup>85</sup> See: *Browning v. Odyssey* (n1), [23] (Gillen J)

<sup>86</sup> Hull City FC Goal Posts: [<http://www.edsports.co.uk/news/hullcityafcstadiumgoals/>]

<sup>87</sup> P Thornton, *Sports Law* (Jones and Bartlett Publishers 2011) 328

<sup>88</sup> *Caldwell v. Maguire* [2001] EWCA Civ 1054

<sup>89</sup> *Wooldridge v. Sumner and another* [1962] 2 All ER 978, 981 (Sellers LJ)

<sup>90</sup> See: *Browning v. Odyssey* (n1), [32] (Gillen J)

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Standard of care decisions are always fact sensitive,<sup>91</sup> and rules, aims and physical setup vary widely between sports.<sup>92</sup> For example, whilst the lack of netting allows spectators to catch balls hit out in baseball,<sup>93</sup> this is not part of the hockey experience. Indeed, it is the very *raison d'être* of baseball<sup>94</sup> and cricket<sup>95</sup> to hit the ball out of the field, whilst the purpose of hockey is to get the ball in the goal. It is fine to note that each sport has its own risks, as long as these are not confused and classed as an inherent part of an unconnected game.

## CONCLUSION

The current standard of care owed to sports spectators, determined by the supposedly objective 'reasonable man' test, still leaves uncertainty in the law. By contrast, the *limited duty* rule would provide further certainty but less protection, while a '*reasonable wo/man*' test could provide a higher (or at least more just) standard, however this is not possible without a gender-balanced judiciary. The inherent paradox underpinning *Browning* is that the requirement for a higher standard of care to be owed to children would introduce further uncertainty into the law, yet simultaneously ensure the safety of those who cannot judge the risks for themselves. It should not be enough for arena owners to rely on prescribed standards. To discharge their duty of care it should be necessary for them to undertake risk assessments and put appropriate precautions into place. For example, extra protection around certain seats, as seen in baseball, would allow parents and children to decide their own safety level.

Finally, and more generically, it is important that the courts ensure the *social value* criteria is not over-emphasised in an attempt to stop a claims culture, making it difficult for the genuinely injured to bring a case. All sports come with their own specific risks, but whether or not these are 'inherent' should be decided based on the circumstances of the game and real public knowledge. Arenas should owe a higher duty of care when it is more difficult for spectators to protect themselves, especially during a warm up.

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<sup>91</sup> William Norris, 'The duty of care to prevent personal injury' (2009) 2 JPI Law 114, 126; *Phee v. Gordon* [2013] CSIH 18; SC 379 [23] (Lord Hodge)

<sup>92</sup> *Morris v. Cleveland Hockey Club Inc* (1952) 105 NE2d 419, 426

<sup>93</sup> See: DF Tavella, 'Duty of care to spectators at sporting events' (n67), 11

<sup>94</sup> *Ibid*, 19

<sup>95</sup> S Gardiner & others, *Sports Law* (3<sup>rd</sup> edn, Cavendish 2007) 676

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