

1 STATE OF NEW YORK : FIFTH JUDICIAL DISTRICT
2 SUPREME COURT : COUNTY OF ONEIDA

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3 KEVIN J. VIVYAN and TERRI L. VIVYAN :

4 Plaintiff, :

5 -v- :

6 ILION CENTRAL SCHOOL DISTRICT, THE :

7 BOARD OF EDUCATION OF THE ILION SCHOOL :

8 DISTRICT and THE ILION MEMORIAL POST :

9 #920 AMERICAN LEGION, INC. :

10 Defendants. :

11 -----X

12 TRIAL BY JURY

13 December 9, 2010

14 Herkimer County Office Building

15 301 North Washington Street

16 Herkimer, New York 13350

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BEFORE:

THE HONORABLE MICHAEL E. DALEY,

HERKIMER SUPREME COURT JUDGE

APPEARANCES:

For the Plaintiff:

DOUGLAS G. ROBERTS, ESQ.

134 Walton Street

Syracuse, New York 13202

For the Defendant:

MATTHEW J. KELLY, ESQ.

13 Columbia Circle

Albany, New York 12203

Deborah A. Rose

Senior Court Reporter

1 (Proceedings held outside the presence of the ju

2 THE COURT: The Court has conducted a
3 charge conference in chambers and gone over with
4 counsel the Court's charge specifically in regard to
5 the facts as it pertains to this case.

6 Are there any objections or requests to
7 charge, Mr. Roberts?

8 MR. ROBERTS: No, your Honor.

9 MR. KELLY: On behalf of the defendant,
10 your Honor, we had asked for a request to charge on
11 expressed assumption of risk and I understand the
12 Court's not going to give that charge.

13 In addition, our proposed verdict sheet
14 included the question, "Were the premises reasonably
15 safe?" as the first question, and I cited *Revill*
16 *versus Boston Post Road, 293 AD2d 138*, in support of
17 the proposition that there should be that as the
18 first question as opposed to, "Were the defendants
19 negligent?" and I understand the Court is not going
20 to do that and I just take exception to those two
21 issues.

22 Thank you.

23 THE COURT: Very well. Are we ready to
24 proceed?

25 MR. ROBERTS: Yes, we are, your Honor.

1 MR. KELLY: Yes.

2 (Proceedings held in the presence of the jury)

3 THE COURT: Good morning, ladies and
4 gentlemen. My apologies for the delay in getting
5 started here. That was the responsibility of the
6 Court and I apologize for that. Please do not hold
7 it against either of the attorneys or their parties.

8 We are going to proceed now with the
9 summations and then at the close of the summations,
10 depending upon how long they take, we may take a
11 short break and then you will receive the charge of
12 the Court.

13 Mr. Kelly.

14 MR. KELLY: Thank you, your Honor.

15 May it please the Court. Ladies and
16 gentlemen of the jury. Thanks for agreeing to serve
17 as jurors. It's the only way we have to resolve
18 civil disputes in this state and it's only by your
19 agreement to sit on the jury that we're able to do
20 that, so we thank you for that.

21 The parties here have demonstrated their
22 proof to you now. You have seen all the pictures
23 you want to see and all the sketches you want to
24 see, and the Judge, after I'm finished and
25 Mr. Roberts is finished, will charge you on the law

1 of the case and then, as I indicated to you earlier
2 this week, he'll give you a verdict sheet and the
3 verdict sheet will have questions on it. And those
4 questions will start off with were the defendants
5 negligent, and the Judge will charge you on what the
6 law of negligence is.

7 In that particular circumstance I submit
8 to you that the answer should be that the defendants
9 were not negligent in this case. And why do I say
10 that? Well, we know quite easily that there's an
11 area of fencing that's the backstop and there's an
12 area that people can sit there if they bring a
13 chair. We know also there's bleachers on either
14 side where people can sit if they choose. And, like
15 anything else, you're free to come or not come, as
16 the case may be, and in this particular case the
17 plaintiff, Kevin Vivyan, had been at this field 40
18 times before for games. He was well familiar with
19 the condition of the bleachers and felt that the
20 bleachers were so safe and not a problem that he
21 brought his parents with him and he sat in the
22 bleachers.

23 Now he has indicated that he was seated
24 further down towards right field, but we have
25 testified and Tom Moreau has said this is where he

1 was, right in the middle of the bleachers, up on the
2 fourth row. And if, in fact, this was a situation
3 that was difficult, why was it that he was up on the
4 fourth row? But we can also look at what you've
5 seen and what you've heard here to tell you that
6 these premises were safe.

7 Let's jump, right away, to the second
8 witness in the case. That would have been
9 Mr. Chaney(sic). Now Mr. Chaney is an engineer by
10 profession. Now Mr. Chaney --

11 MR. ROBERTS: Excuse me, your Honor. His
12 name is Cleary.

13 THE COURT: Cleary.

14 MR. KELLY: Cleary. Mr. Cleary was paid
15 by the plaintiff to go to Diss Field and, as an
16 engineer, he brings with him some degree of
17 expertise. And what he did was he took
18 measurements, took measurements of the backstop and
19 he took measurements of the bleachers. And I asked
20 him on cross examination what else did you do,
21 because you and I could take a measuring tape and
22 make those measurements. And if we had a ladder we
23 could make those measurements. But wouldn't you
24 expect, using your own everyday common sense, that
25 if this engineer went to this field and looked at

1 this field, that if there was anything, anything at
2 all, that was unsafe about this, he would have got
3 on that witness stand --

4 MR. ROBERTS: Your Honor, I object to
5 this.

6 MR. KELLY: -- and he would have told you.

7 THE COURT: Sustained.

8 MR. ROBERTS: He was not qualified as a --

9 THE COURT: Sustained.

10 MR. ROBERTS: Thank you, your Honor.

11 MR. KELLY: You bring with you into this
12 jury room all your everyday common sense and your
13 own good judgment, and in this particular case the
14 plaintiff has the burden of proof to show what it
15 was that the school and the American Legion team did
16 wrong. In this particular circumstance there has
17 been no proof presented by anyone, nothing cited by
18 anybody, that what we did was unsafe or
19 unreasonable.

20 What we did was we presented a field that
21 had been constructed originally in 1978, 1979, and
22 at that time the school district had an
23 architectural firm and they put together plans and
24 specs, and those plans and specs were presented to
25 the State of New York, and the State of New York had

1 the opportunity to look at those plans and specs
2 and, in fact, ruled that they were appropriate and
3 that this field was proper.

4 Now -- Oh, here's the picture I was
5 looking for before. This is where the plaintiff was
6 sitting. Closer to the dugout than to the outfield.

7 Now, one of the exhibits you saw here was
8 a letter to Warren Lennox, and you had the
9 opportunity to see Mr. Lennox on the witness stand.
10 You had the opportunity to see that for 25 years he
11 volunteered for the school board. And you heard
12 Mr. Lennox say that what he did was he came to see
13 that this project was not getting moving and he
14 moved it along so that Diss Field could be
15 constructed, Diss Field. And one of the letters
16 that he received 32 years ago talks about how they
17 should think about having bleachers on either side
18 or behind home plate. And you heard that the
19 architects designed it with permanent bleachers on
20 each side, one on first base, one on third base.
21 You heard Mr. Lennox say hey, you know what we did,
22 we put them in cement so they wouldn't tip over, we
23 put them there permanently, we wanted them to be
24 safe. And even in this letter it talks about if and
25 when the state approves the capital construction

1 program, then the matter can move forward. So there
2 was a requirement for not only the architects from
3 the school, but also the architects and the
4 engineers from the state, to look at this project,
5 and they decided that it was safe and they didn't
6 ask for anything different.

7 And then Mr. Boyd came in the other day
8 and he testified, yeah, every year we have a safety
9 office inspection, somebody comes from BOCES and
10 they look and see if our facilities are adequate,
11 and part of the work that they do is they walk the
12 property with me. And we walk by the baseball field
13 and, in fact, you'll see in here that the inspector
14 even went into the press box and said you know what,
15 you need another fire extinguisher in here. The
16 safety inspection went over that whole property and
17 you'll see in here there's nothing that suggests
18 that these bleachers are not safe, nothing at all.

19 So what we have is we have the State of
20 New York, back in 1978, saying the premises are
21 safe, we have the architect, back in 1978, saying
22 they're safe, we have the BOCES officer saying
23 they're safe, and then what we have is we have a
24 witness stand in which no witness ever came in on
25 behalf of the plaintiff and said this particular

1 configuration and the way that this is set up, none
2 of this violates any law or any regulations or any
3 principles whatsoever, no expert came in to suggest
4 that to you.

5 On the other hand, we had Mr. Long testify
6 to you about how the school district has to follow
7 regulations of the state education department and
8 any project they do that cost over a certain amount
9 of money has to get approval. You heard from
10 Mr. Fusco that, of course we built the press box
11 here because here is where it makes sense. And also
12 in the bottom there's some room for supplies to be
13 put in there, bases and whatever. Lawn mowers don't
14 fit in there, it's not that big a building.

15 And you know from hearing the testimony
16 yesterday that there's space on each side of the
17 backstop for people to sit and gather. And the
18 plaintiff, Kevin Vivyan, admitted it to you. He
19 said I don't like to sit back there because there's
20 an obstructed view and I don't like to be back there
21 because sometimes it gets congested. So if there's
22 people back there, they're watching the game, this
23 is an area that's available for people to sit at.
24 And is it so unusual to think that people will bring
25 their own lawn chairs and sit back there if they

1 choose to?

2 Now this is a field that the American
3 Legion was running that night. The American Legion,
4 a volunteer organization, everybody contributes
5 their own time freely to help people, help young
6 people have something to do. This is the area where
7 they play. Now, you heard Mr. Moreau say well, you
8 know I get out there and I get the chains to drag
9 the field out of the storage shed press box and I go
10 to the field and I drag the field and I line the
11 field, and he does this all voluntarily. He's the
12 kind of guy that makes a community better, and
13 Warren Lenox was the same kind of guy. They made a
14 community better by their voluntary efforts.

15 Now, in this particular circumstance
16 there's no doubt about it, Mr. Vivyan was hurt at
17 the field, and that's unfortunate, we're sorry that
18 happened. But the law of the case has to be decided
19 by you, which was what, if anything, did the school
20 district --

21 MR. ROBERTS: Objection, your Honor.

22 THE COURT: Ladies and gentlemen, you
23 don't decide the law, the Court instructs you on the
24 law, you decide what the facts are.

25 MR. KELLY: You'll decide this case based

1 upon your questions on the verdict sheet and those
2 questions will point out the burden of proof that
3 this plaintiff has, something that the school
4 district did or didn't do that was negligent.

5 The premises here, we submit, are
6 reasonably safe. Nothing can be made absolutely
7 safe, especially when there's a baseball game going
8 on. And everybody knows and brings with you into
9 this jury room your common sense, your everyday good
10 judgment, and you know that in athletic activity
11 things are going to happen outside the boundaries
12 and so you have to be prepared for that eventuality,
13 and if you voluntarily come to the game -- because
14 the American Legion doesn't even charge an admission
15 fee -- if you voluntarily come to this game, there's
16 a risk involved in that activity. And the Court
17 will charge you on the area of assumption of risk
18 and we submit to you that, in this particular
19 circumstance, Kevin Vivyan, who had been to this
20 field so many times before, voluntarily undertook
21 the risk of having a foul ball come out from behind
22 home plate and come into that area.

23 Now, Mrs. Vivyan testified yesterday, she
24 didn't remember that she had seen foul balls come
25 five or six times here. She didn't recall how many

1 times she was there, but she didn't go as often as
2 her husband, and he said 15 times he'd seen foul
3 balls hit people. Well that's knowledge that they
4 had. But, in terms of what the school district and
5 American Legion's responsibility was, they were to
6 make the premises reasonably safe, and through their
7 efforts and the school district's effort in allowing
8 young men to play on that field, they did provide an
9 opportunity. In this particular circumstance we've
10 demonstrated to you that there was plenty of area
11 for the plaintiffs to sit if they wanted to bring
12 their own seat, there was plenty of area for them to
13 stand if they wanted to stand, and if they wanted to
14 sit, we gave them bleachers to sit at, but they're
15 not fenced, they're not screened, and they're
16 reasonably safe. And in this particular
17 circumstance, if there was any witness who could say
18 anything different, any expert witness that the
19 plaintiff wanted to bring in of any kind to say this
20 wasn't safe, he had the opportunity to do it.

21 Now, as I said before, you bring with you
22 your everyday good judgment. We had Mr. Boyd as a
23 witness, Mr. Long as a witness, Mr. Fusco as a
24 witness. All of these gentlemen testified in front
25 of you and told you why it was that this situation

1 was as it is and it's an opportunity for people to **300**
2 come to a game and see a game, unobstructed view, to
3 sit in the bleachers or sit on the hillside and
4 watch. I submit to you that these premises were
5 reasonably safe, and at the end of your
6 deliberations you should find that and find in favor
7 of the defendants.

8 Thank you.

9 THE COURT: Thank you, Mr. Kelly.

10 Mr. Roberts.

11 MR. ROBERTS: Thank you, Judge. Your
12 Honor, may I take a second to --

13 THE COURT: Yes.

14 MR. ROBERTS: Yes. Good morning, ladies
15 and gentlemen.

16 We have now reached the last portion of
17 the attorneys' participation in this case. I am now
18 going to give you my closing statement and then the
19 Judge will then take over from this point. But
20 ultimately it will be you who will be taking over
21 and you who will be deciding all of the issues and
22 put it in prospective of what the Judge is going to
23 charge you is the law in the case.

24 Now, before I begin my summation, I just
25 wanted to briefly touch some of the things that

1 Mr. Kelly said in his closing.

2 He indicated to you that anybody can bring
3 seats. Now there's no question anybody can bring
4 seats. But he left out one very important fact. He
5 left out that the defendant, the defendant school
6 district, who owns this field, and the American
7 Legion, who operated the field that night, that they
8 did not make available or provide not even one seat
9 for use of people or spectators who wish to avail
10 themselves of the protection that the backstop
11 offered. If that person did not bring a seat, for
12 whatever reason, and we all have reasons in our
13 daily life for not bringing a seat to a baseball
14 game, we've gone over them before; You're from
15 another town, you're not familiar with Diss Field,
16 you've come from work, you just go to the game, you
17 just plain forget a seat. That means at Diss Field,
18 that you are out of luck. You cannot choose to have
19 protection when you watch the game and all that is
20 left for you are those bleachers, if you want to
21 sit, and those bleachers, as we all know, and it was
22 all seen in the photos, clearly indicated absolutely
23 no protection.

24 Now, he also talked about architectural
25 stamps and approvals. I didn't see it. I didn't

1 see, any time in this case, I didn't see any
2 architectural stamps or approvals. I didn't see any
3 letters from the State of New York Education
4 Department. I saw nothing of that sort. We're
5 talking about as if the State of New York was the
6 ultimate determiner of the safety of this field;
7 that was not brought out, that was not -- there was
8 no substance, there was no evidence to support that
9 proposition, and, to me, that is just a white
10 elephant that's designed to make you think that
11 someone beyond the people who constructed Diss Field
12 and who owned Diss Field and operated Diss Field
13 were ultimately responsible for the safety of this
14 field, and especially the safety afforded to
15 spectators.

16 Now, he also referred to this red folder,
17 that something magical is inside this folder that
18 relates to the safety of the bleacher seating and
19 all of the -- and any seating behind home plate or
20 behind the backstop. This is here, it's thick and
21 it is worthless. It's worthless to the issues in
22 this case. You can bring it into your jury room and
23 deliberate and look through it. There is not one
24 iota of reference to the backstop for the seating or
25 to protection. A waste of time.

1 Now, he also mentioned about experts.
2 Mr. Kelly didn't bring any experts in, nor did I. I
3 submit to you, ladies and gentlemen, that in this
4 case there is only one expert and it's the
5 collective expert of you. You will decide what was
6 right and what was wrong and who was negligent and
7 who was not. Or you will decide any gradients of
8 negligence, as the Judge will charge you. You will
9 decide whether the defendant was negligent and at
10 the same time whether Kevin Vivyan assumed some
11 risk, some risk in being at that stadium and that
12 place when this accident occurred. The Judge is
13 going to read you that charge and you are going to
14 be the experts ultimately. There's no need for any
15 experts here, we all have our ears and our eyes and
16 our senses. We are the experts, but you are the
17 ultimate experts.

18 Now Mr. Kelly also indicated that there
19 was space, other space behind the backstop. He
20 points out that -- but he conveniently left out a
21 very important portion of that statement. People's
22 Exhibit 2. We had uncontroverted testimony that
23 this area here, as you're facing it it's the area to
24 the right, if you're behind the backstop, of course,
25 it's the area to the left, but we'll call it the

1 right. That that area there was taken up by a
2 concession table.

3 You heard the testimony of Lori Smith.
4 Lori Smith, who actually operated the concession
5 table. And Lori Smith will tell you that the
6 concession table was set up just feet away from the
7 fence, and that the customers -- here's the fence.
8 The customers would be, when they got their food and
9 their refreshments, that's where they would stand,
10 and then the table and then her on the other side
11 with a propane stove and et cetera, et cetera, et
12 cetera, and that area was not available for your
13 seating. And there was no other proof to controvert
14 that. You also have an electrical transformer that
15 also is behind that area, making that area -- that's
16 just not an area for people to watch a game.

17 Now, it gets us to this area here, this
18 area of evidence about a building, this building
19 that you've heard so much about. This building that
20 was not part of the original plans, but was
21 constructed, was designed and constructed and
22 actually put in this position by the defendant after
23 those architectural plans, after anything that
24 occurred in -- to 1980, this occurred later. This
25 was placed consciously and knowingly by the

1 defendant in the area, the most important area in
2 this whole baseball field for somebody who would
3 want protection. Right behind home plate where you
4 can see the game.

5 All they gave, all that he could give,
6 Mr. Kelly, was five feet seven inches. As you
7 recall Brady Boyd, when he stood up, five feet seven
8 inches was all that there was. And what could you
9 do, you could put some seats in there, some folded
10 seats, some -- and I might add, some posed folded
11 seats, which is the evidence that Mr. Kelly gave
12 you. Not seats that were present at the baseball
13 game. No photos there, no photos showing that
14 people were actually sitting there.

15 But wait one second. Was that area really
16 even, that small limited area where he posed two
17 seats, even those two seats, could those two seats
18 have been there? Well Lori Smith also, and other
19 witnesses, even his own witnesses said that that was
20 an area that people used as a pathway to go from the
21 home stand to the concession table. They walked by.
22 And that photograph in this exhibit here, how
23 clearly does this show. Grass all around, no grass.
24 Worn path. Totally and completely corroborating
25 what Lori Smith said, that people use this as a

1 pathway, this wasn't a seating area. And if it was
2 a seating area, the umpires would tell you you can't
3 sit there. You can't sit there because you're right
4 up against it, right up against the fence where the
5 game is going on, the pitcher and the catcher.

6 Now, Mr. Kelly said well, then that means
7 you couldn't put bleachers there. We're not saying
8 that, we're saying if this building wasn't there,
9 you had all the space in the world behind the
10 backstop to put bleachers, or even, and I submit to
11 you, even a bench or two. That's all you would have
12 needed. We wouldn't be here today if they had only
13 put some benches there or provided some seats to
14 those who came there without chairs, for whatever
15 reason they came without chairs, and there were many
16 reasons why someone would not come with chairs. If
17 they had only provided seating, and Brady Boyd
18 specifically, specifically, specifically stated they
19 did not provide seats, they had no seats, not
20 anywhere, and certainly not in that storage
21 station -- excuse me, that storage shed.

22 Now if they are going to make a claim that
23 this area was available for your seating and not
24 provide any seats for those who didn't have it, what
25 good is it? It can't be, it can't be a basis for

1 them to say they have fulfilled their duty to the
2 spectator.

3 Now, the question of what the school
4 district could have done. Twenty-six years elapsed
5 between the time of the final -- excuse me, the
6 opening of Diss Field in 1980 and Kevin Vivyan's
7 injury in 2006. That's over a quarter, one year
8 past a quarter of a century. And in that time they
9 put up, between 1980 and 2006, not before, but
10 after, they put up a building right there where we
11 have talked about so many times. And what happened?
12 Did they take any steps whatsoever to assess the
13 effect of that building being there or where that
14 building could have been? And Mr. Fusco said, I
15 asked him, could you have put it somewhere else, he
16 says well, I said how about along the third base
17 line, behind the third base line, he said well, that
18 would be difficult for the announcer and that would
19 be difficult for the people who are doing the lining
20 of the field, and then he said 90 feet, 90 feet
21 away. For 90 feet they couldn't have, the people
22 couldn't have walked 90 feet and gotten the things
23 out and did what they had to do, the announcers
24 couldn't see the game from the third base line?
25 That's where you see announcers in, not in every

1 stadium or every park, but you see them there too.
2 There's not any reason to say they had to be behind
3 home plate. There was no reason why that building
4 had to have been put there, but once it was put
5 there, there's no reason why it had to stay there.

6 Now we talk about risk. This case has
7 risk involved in here. You heard the testimony of
8 Kevin who said about 15 times, and his wife, okay,
9 his wife up here said she couldn't remember, but
10 said three years before five times. Well, let's
11 take it that her recollection was better three years
12 before. Five times she saw it. But most important
13 of all were the testimony of Mr. Kelly's witnesses.
14 Every one of them, every single one of them said
15 that they had witnessed foul balls going into the
16 stands, going into the bleachers, both sides, every
17 which way. Now, they were aware of the risks. They
18 had the power, they had the power to do something
19 about it. They had the duty to do something about
20 it. They knew that sooner or later, it was only
21 fate that nothing had happened in 26 years to bring
22 somebody into a courtroom like this. But they knew
23 that they had the power to do -- to either move that
24 backstop -- excuse me -- move that shed, or, even if
25 they're going to keep that shed, I mean give them at

1 least three or four or five seats, give them a
2 bench, give them something.

3 But what do you do? You have a stadium, a
4 field with the -- Diss Field decided that 300 people
5 was the capacity that would need and want seats, 300
6 people, 150 in each. They couldn't have even given
7 them a bench, three or four or five. Those people
8 who wanted to be protected, sorry, you go sit there
9 because we decided that we have these bleachers and
10 you're going to sit there if you want to sit. And
11 we all know that those bleachers were unprotected.

12 Now, do you recall Mr. Moreau? Very
13 laudable man, a man who spent his time in youth
14 baseball and loves the sport. And let me tell you
15 something about this case: This isn't about finding
16 that somebody's a villain. Nobody is a villain
17 here. Nobody set out to do this. This is a case of
18 strict negligence and negligence is different from
19 intent. Nobody intended for Kevin Vivyan to get hit
20 that day or anybody else to ever get hit before,
21 during or after. So when we talk about Tom Moreau,
22 believe me, I think highly of him.

23 However, Tom Moreau, one of the things
24 that came out in Tom Moreau's testimony, he was at
25 that game that night. He was there, he was present.

1 He was a coach. And where did Tom -- where was Tom
2 Moreau that night? Half the time he was at the
3 third base, coaching, because, you know, you're out
4 in the field when that happens. The other half in
5 this dugout. In this dugout, six feet seven inches
6 away from the bleachers. Beautifully protected by
7 fencing from top to bottom and on the sides. And
8 guess what else they had? They had a seat in there
9 where the people could sit. So Tom Moreau had the
10 opportunity to be protected and to sit, as did his
11 young players. And also the players on the other
12 team, they all had the opportunity to be protected.
13 But not the people who wanted protection behind the
14 backstop. There was no seats, there were no seats
15 provided.

16 You know when it is all -- excuse me.
17 When it is all said and done, after all the
18 testimony and the exhibits and the Court rulings and
19 things that Mr. Kelly and I have said and are going
20 to be saying, this case is really about our numbers.
21 And I'm going to read you some numbers and these are
22 the numbers that are involved in this case.
23 1,000,000, 750, 300, 125, 90. 26, 20, 7, 2 and 0.

24 Now testimony came out from Mr. Fusco that
25 this complex, Diss Field Complex, cost in the

1 neighborhood of one million dollars. This wasn't
2 just some little sand lot down the street where your
3 kids go and they play these little games of scrub or
4 baseball tag or all those little games that kids
5 play down the street and there's a fence and there's
6 nothing else. It's not that. This was a place
7 where upwards of 30 games a year were played. Games
8 between -- established games, with umpires, where
9 they had umpires, of course, they had everything
10 about a baseball game that even a professional field
11 would have. The fields were lined, the lights were
12 on and they had opportunity for people to eat and
13 drink. I don't mean alcohol, but they could have
14 soda or water or anything they wanted, and to watch
15 a baseball game. This was not some rinky dink,
16 podunk type of park. This, as Mr. Fusco said, this
17 was the state of the art.

18 And at this park, as the Judge had asked a
19 question of one of the witnesses and did some quick
20 math, and I would not argue with his math at all,
21 and he said -- he came to the conclusion there were
22 about 750 games played over there in the 26-year
23 period.

24 Now there are 300 -- there was 300
25 bleacher seats made available. 300. That meant

1 that they anticipated the possibility of 300 people
2 wanting to sit at a game. 300.

3 Now, 125. That was the number that Kevin
4 Vivyan estimated were at that game that night. 125
5 people.

6 90. 90 feet. That was the distance that
7 Mr. Fusco used to justify not moving -- or either,
8 in the first instance, placing the shed 90 feet
9 away, or in not moving it 90 feet away, to open up
10 that area so that we could have sufficient seating
11 for those who wanted it, for those that wanted to be
12 protected.

13 Now, 20. That was the number, and this is
14 my calculations but I think it's pretty right, there
15 are nine players on a baseball team. There is
16 reserves, but we'll just assume there were no
17 reserves that night. There's a coach. And in this
18 case there was another coach, Mr. Vivyan's son,
19 Wesley. That's 11 in one dugout. And there is at
20 least ten in the other dugout, the nine players and
21 the coach. There were seats, protected seats that
22 were provided by the people at Diss Field, there
23 were, we now know, they had the ability to provide
24 for at least 20 protected seats, 20 protected seats
25 to the players, and well they should have, they

1 needed it. We all needed it. Anybody needed it in
2 a baseball field, you need some protection where you
3 can make the decision whether you will seek it or
4 not.

5 See, that's another thing here, they
6 didn't give him the chance to make a decision. They
7 did not give him the opportunity with his group of
8 seven to make that choice to sit in protected
9 seating, all they gave him was the opportunity to
10 sit in those bleachers, the unprotected bleachers.

11 And the number two, well, I have already
12 gone over that, two dugouts.

13 But the key number in this whole case is
14 zero. Z-E-R-O, zero. There were zero seats
15 provided by the people at Diss Field. It was easy
16 for them to take those folding chairs after, well
17 after Kevin's injury and after notice of a lawsuit,
18 it was easy for them to come up with those folding
19 seats so that they could use them to pose them, not
20 at an actual game, but just to pose them. Where
21 were those seats at the time that Kevin was there?
22 If Kevin had had that opportunity and not taken
23 them, we wouldn't be here because he wouldn't
24 deserve to be here. But they were not made
25 available to Kevin or to anybody else. Anybody

