The Ump Is Blind—And So Is Justice

by Jack Betts

This regular Insight *feature examines policymaking in the judicial branch of state government. Now, with winter approaching an end and with the beginning of a new season,* Insight *looks at a little-known, quarter-century old N.C. Supreme Court decision that, had it gone the other way, could have changed the way we play and watch the national pastime and altered the course of western civilization—at least between the foul lines.*

Nearly 3,500 howling, baying fans were packed into Devereux Meadow that hot June night in 1960 when the Raleigh Caps entertained the Greensboro Yankees in a battle for the lead in the Carolina League. The G-Yanks, scourge of the league, were leading by one full game, and a win by the Caps, a Boston Red Sox farm club, could have forced a tie. But the outcome of the game was of little consequence compared to the outcome of a lawsuit sparked by a fracas at the end of the game between an irate fan and the field umpire, one John H. Toone of Daytona Beach, Fla. The ump sued the home club after the fan socked the ump on his way out of the park, but the Supreme Court ruled Toone out by a mile.

Had the North Carolina Supreme Court held for Toone—and had that decision been upheld in the federal courts—the right of a manager to vigorously protest an umpire's decision would have been curtailed sharply.[1] No more Tommy Lasordas masticating on the tip of an umpire's nose. No more Cal Ripken Sr.s blistering the air of Baltimore with a choice selection of Anglo-Saxon adjectives and nouns. No more ripping of second base out of its foundation and tossing it into centerfield, or emptying a bat bag onto the playing field to protest an adverse decision. In short, no more childish behavior—and not nearly so much fun for the serious student of The Game.

Would it really have gone so far as to limit the antics of managers and coaches? "Absolutely," says Raleigh attorney J. Harold Tharrington, who as a law clerk did part of the research on the Supreme Court opinion in 1964. In fact, argued Raleigh attorney James K. Dorsett Jr. in the winter of 1964, "It would establish a very novel and far-reaching precedent and would dangerously affect organized sports contests, whether high school, collegiate, or professional."[2] That precedent, as sought by umpire Toone, would have held both players and coaches liable if their protests and arguments to an umpire or referee incited spectators to take violent action against the referee. Had Toone's claim been upheld, players and managers would have had to make sure they did not

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argue so loudly or demonstrably that the fans would become excited to the point of fisticuffs or other violent behavior. In law, this foresight—to perceive the ultimate consequences of an action—is called the rule of foreseeability. But applied in the Toone case, argued Dorsett, it "would truly 'stretch foreseeability into omniscience.'"

Raleigh Caps Manager Kenneth Deal didn't have that kind of omniscience on the night of June 16, 1960, when the two teams played at Devereux Meadow—now the site of a city vehicle maintenance center. As the game proceeded that night, Umpire Toone and Manager Deal tangled three times—once in the second when Toone ruled that the Cap rightfielder had trapped a ball in his glove and not caught it cleanly; once in the third when Toone ruled a Cap runner out at first base; and once more in the ninth when all hell broke loose. During the second argument, Deal had threatened that if Toone made one more adverse decision, Deal would misbehave, Toone would have to throw Deal out of the game, and the already unruly fans would be incensed to hostility. Sure enough, in the top half of the ninth, with Greensboro at bat, Toone called a runner safe at first on a close play with two men already aboard. As Deal rushed the field to complain, the Raleigh players also charged Toone. Unnoticed, the two Greensboro runners went on to score and the runner at first advanced to second. Deal blew his stack, cursed the umpire, dared Toone to run him out of the game, and taunted Toone that he would receive no help from Deal or his players in getting off the field when the game was over.

Toone would need that help. When the game ended with Greensboro winning and extending its lead to two games instead of winding up in a tie, the spectators poured over the right field fence onto the field, reviling Toone and spoiling for a fight. But Toone and the other umpire walked off the field to the players' gate, where they were met by two uniformed policemen who were to escort Toone to the dressing room. That's where Baxter Adams got into the game. Adams, one of the 3,452 fans who sat in the stands and wailed for Toone's neck, ignored the policemen and struck Toone a blow to the ear and jaw with the heel of his hand. Toone developed an earache, a headache, and a lawsuit. He claimed actual damages of $1,500 and punitive damages of $10,000, charging that it was Deal's responsibility to conduct himself in a reasonable manner and guarantee the ump's safety. Instead, Toone argued, Deal had "wilfully set out to force the umpire to rule favorably to him [Deal and the Raleigh Caps] or suffer the consequences." Those consequences, Toone went on, included inciting the Raleigh fans to violence—and for that the manager should be held responsible. Toone's injuries had been caused by the "wilful, wanton, and malicious negligence of the defendants"—including Deal, Adams, and the baseball club itself.

The next day's newspaper missed the prize fight when it reported the game story. In a piece written by Joe Tiede, *The News and Observer* took note of only one argument in "a wild ninth inning."[3] Raleigh players, wrote Tiede, "doubted the accuracy of the decision at first" in the ninth that led to the go-ahead run by Greensboro, but there was no reference to Toone, Adams, or the punchout—let alone intimations of a lawsuit. Who could know that the very foundations of baseball were in danger of crumbling?

Toone filed the suit in August 1960, but the case didn't reach first base until January 1964, when Judge Hal H. Walker found no cause for action. Walker said that both Deal and the baseball club "are as a matter of law not held to foresee the mere possibility that one spectator, out of a total of 3,452 spectators, will voluntarily decide to assault the plaintiff umpire after the conclusion of a baseball game."[4]

Toone disagreed and appealed to a higher court. At the time, there was no Court of Appeals in North Carolina, and the job fell to the N.C. Supreme Court and a jurist who would become known for many achievements—including her decision on baseball, a topic about which she previously had little knowledge. Associate Justice Susie Sharp, who eight years later would become the nation's first elected female chief justice, would write the opinion, but first there were arguments to be considered.

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Toone saw it this way: The rules of the National Association of Professional Baseball Leagues require, among other things, that the home team furnish police protection to preserve order, that umpires remove players, managers, or even spectators for violating rules or for unsportsmanlike conduct, and that umpires' decisions involving judgment calls were final and could not be argued by players or managers. Deal and the Raleigh Caps violated those rules by arguing judgment calls, Toone argued, thus inciting the fans. Toone's lawyer, Wright Dixon, contended that "... the actions of Kenneth E. Deal were not merely negligent, but wilful, wanton and malicious in that Deal knew or intended that his actions should produce a resulting injury of some type to [Toone]."[5]

Deal, of course, saw it another way. His lawyer, Dorsett, contended it is common knowledge that sports contests arouse intense feelings among spectators. "It is equally well known that in the heat and excitement of close games, players and managers are prone to protest decisions by umpires and to argue with them in loud and colorful terms. This may expose a player or manager to a fine or even suspension, but it has been for many decades an accepted and expected part of baseball."[6]

Dorsett went on to point out that games often attract huge crowds—12,000 for basketball games in Raleigh and as many as 50,000 spectators at Tar Heel football games [at least until two recent 1-10 seasons]. "Such spectators are of diverse backgrounds, personality, and tempers, and some of them undoubtedly have neurotic and psychotic disorders. The participating teams and players have no control over the type of spectators who are admitted to the game and no possible knowledge as to the emotional temperament and stability of the different individuals."

Dorsett noted that Adams was the only fan to be so incensed as to punch out the ump, and added, "The fact that 3,451 other spectators did not assault the umpire indicates that such an assault was not likely or within the realm of reasonable foreseeability."

Thus the opinion came before an umpire of a different sort. In fact, umpires and judges are distantly related, each having the responsibility to decide cases—the one based on an instant's consideration, the other based on months of careful deliberations. The term *umpire* comes to us from folks who know nothing about baseball. The word derives from the French *noumpere*, which in turn comes from the Latin *non par*, meaning "not equal." A noumpere was that elevated individual whose job it was to decide a dispute. In *Toone v. Adams*, the noumpere was a jurist who had never before seen a professional baseball game, and as part of her research, she and her law clerks spent an evening at the old ballyard in Devereux Meadow. The resulting opinion, issued on July 10, 1964, was "one of the finest analyses of professional baseball ever written," recalls former Supreme Court Associate Justice J. Phil Carlton, himself a devoted baseball fan.

For Tharrington, who was clerking for Justice Sharp during the 1963-64 term and another clerk, Wade Smith (now a partner of Tharrington's in a prominent Raleigh firm), that night remains a vivid memory. "We were doing some research on the case and knew she had never been to a baseball game before," recalls Tharrington. "Wade suggested taking Judge Sharp to see a game. And we did. Wade sat on one side of her and I sat on the other, and the players got into the darndest shouting match about the seventh inning. The manager was butting the umpire and they were yelling at one another and carrying on, and Judge Sharp just took it all in."

Neither Tharrington nor Smith thought that there would be such an oral altercation between the manager and the umpire, but they thought Judge Sharp enjoyed the game, even as noisy and uncultured as it evidently was. "She had a great time," says Tharrington. "You know, here is this delicate and refined lady, but she thoroughly enjoyed the game even when exposed to the violence that occurred on the field that night."

Justice Sharp immediately grasped that it was

an important part of the spectacle of baseball to be able to call the umpire a succession of uncomplimentary names and to heap calumny upon his every decision. "For present-day fans," wrote Justice Sharp in her opinion for a unanimous court, "a goodly part of the sport in a baseball game is goading and denouncing the umpire when they do not concur in his decisions, and most feel that, without one or more rhubarbs, they have not received their money's worth. Ordinarily, however, an umpire garners only vituperation—not fisticuffs. Fortified by the knowledge of his infallibility in all judgment decisions, he is able to shed billingsgate like water on the proverbial duck's back."[7]

Sharp pointed to the ability of the umpire to decide what is and what is not in the old baseball story of the three noumperes:

> "Balls and strikes," said one, "I call them as I see them."
> "Balls and strikes," said the second, "I call them as they are."
> "They are not balls and strikes until I call them," decreed the third.

Then Sharp pointed out that Toone's contention that a baseball club had to furnish protection to an umpire was undermined by the fact that two policemen did escort Toone from the game. Sharp's opinion noted that Deal's arguments with Toone and Adams' blow were not contemporaneous. Adams was not on the field when Deal was busy questioning Toone's ancestry, nor was Deal around when Adams later smote Toone. Thus, "To say that Deal's conduct was a proximate cause of the attack on [Toone] would be pure speculation. No one can say whether Adams' assault on [Toone] was his own reaction to the umpire's ruling, to the 'rhubarb' created by Deal, or whether he was merely venting pent-up emotions and propensities which had been triggered by the epithets, dares, or challenges of one or more of the 3,451 other fans attending the game." Adams, Justice Sharp went on, was acting on his own and was legally and morally responsible for his own actions. "The mere fact that both Adams and Deal may have become simultaneously enraged with the plaintiff for the same cause does not establish a concert of action. It would be an intolerable burden upon managers of baseball teams to saddle them with the responsibility for the actions of every emotionally unstable person who might arrive at the game spoiling for a fight and become enraged over an umpire's call which the manager had protested."[8]

Though he lost the case, the ensuing 25 years have not altered Wright Dixon's view of the principle—"despite the fact that in the interim years as a coach for a Little League team, I found myself harassing umpires for blindness and stupidity." But, says Dixon, the point of Toone's suit "was not to limit the tumult and shouting on the field during the game," because Toone was "unperturbed by a manager's antics and threats." But it was the home club's responsibility to provide more protection for the umpire's post-game walk to the showers, and the Raleigh club failed to provide enough to protect the ump, Dixon says today. He adds, "I'm just glad Mr. Adams didn't have a knife."

Sharp's decision became well-known in the Sixties for more than one reason. The first, of course, was the novelty of it, and the second, for baseball fans, was its high regard for the ways of the game and the way it was written. "It was an important decision," says Wade Smith, "and it was a beautifully written decision." The Sharp opinion in *Toone v. Adams* had national implications, and partly for that reason, it was selected as a lead case in the 1966 edition of American Law Reports, a compendium of landmark cases that cites a ground-breaking case and publishes annotations of related cases.[9] Since it was published more than 25 years ago, the *Toone* case has ensured that while much else about the *business* of baseball may have changed, the *game* of baseball remains the prototypical American pastime—loud, boisterous, argumentative and colorful, and not easily altered by the threat of litigation.

FOOTNOTES

[1] *Toone v. Adams*, 262 N.C. 403 (1964), 136 SE 2d 132.

[2] Defendant Appellee's Brief, p. 6.

[3] Joe Tiede, "Greensboro Tops Caps, 6-4, With 3-Run Rally In Ninth," *The News and Observer*, June 17, 1960, p. 35.

[4] As reported in *Records and Briefs*, N.C. Supreme Court, Spring Term 1964, Vol. 3, *Toone v. Adams*, p. 12.

[5] Plaintiff Appellant's Brief, p. 11.

[6] Defendant Appellee's Brief, p. 7.

[7] *Toone v. Adams* at 408.

[8] *Ibid.* at 412.

[9] 10 ALR 3d 435. The office of the Commissioner of Baseball, which reviewed a draft of this article, suggested that readers who liked this opinion might also enjoy "Common law origins of the infield fly rule," 123 Pennsylvania Law Review 1474, June 1975.