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# WHEN IT HITS THE FAN: WILL THERE BE LIABILITY FOR THE BROKEN BAT?

A. DAVID AUSTILL\*

## I. INTRODUCTION

In 1997, a new phenomenon developed in Major League Baseball (MLB)—the maple baseball bat. Sam Holman, founder of the Sam Bat and the Original Maple Bat Corporation in Ottawa, Canada, developed a maple bat out of sugar maple at the urging of an old baseball scout, who complained that baseball bats made of ash wood broke so easily.<sup>1</sup> In a MLB game in 1997, Joe Carter, of the Toronto Blue Jays, was the first to use an unsanctioned maple bat in a game and hit a home run. The maple bat received much more favor when Barry Bonds (San Francisco Giants) used the Sam Bat to hit seventy-three home runs and broke Henry Aaron's career home run record.<sup>2</sup> It is now estimated that maple bats are used by about fifty to sixty percent<sup>3</sup> of MLB players.

Since then, the use of maple baseball bats has become controversial, not just because of allegations that it makes a batted ball go farther and faster, but because the maple bat has a tendency to shatter creating danger of serious injury to other game participants (players, coaches, and umpires) and spectators. Broken bats are common in major league play today; in fact, in one major league game in 2008 a batter broke three bats in one plate

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\* A. David Austill is Professor of Accounting and Business Law at the McAfee School of Business Administration at Union University in Jackson, Tennessee. He holds a J.D. from the University of Tennessee, LL.M. in Taxation from Washington University in St. Louis, an M.B.A. from the University of Arkansas, and a B.B.A. from the University of Memphis. Before practicing law, he was a C.P.A. for a large public accounting firm. During his legal career he practiced law with several large and small firms. He has authored a number of articles in law, taxation, ethics, and accounting, and lectured in Bulgaria as a Fulbright Senior Scholar.

1. *About Sam Bat*, SAM BAT, <http://sambat.com/about-sam-bat/> (last visited Dec. 29, 2013).

2. Barry Adams, *State Researchers Study Broken Baseball Bats for MLB*, LACROSSE TRIBUNE.COM (Dec. 27, 2008), [http://lacrossetribune.com/news/state-researchers-study-broken-baseball-bats-for-mlb/article\\_40a197b3-0bb1-521d-841d-9429ce5f811b.html](http://lacrossetribune.com/news/state-researchers-study-broken-baseball-bats-for-mlb/article_40a197b3-0bb1-521d-841d-9429ce5f811b.html); *Barry Bonds: 73 and 756—Critical Numbers—Historical Achievements in Baseball*, SAM BAT (Apr. 10, 2010), <http://sambat.com/news/barry-bonds-73-and-762/>.

3. See Adams, *supra* note 2 (“Last season, about 60 percent of the bats used in the majors were maple.”); Jeff Passan, *Baseball at Breaking Point Over Maple Bats*, YAHOO SPORTS (May 9, 2008), <http://sports.yahoo.com/mlb/news?slug=jp-maplebats050808&prov=yhoo&type=lgns> [hereinafter Passan, *Baseball at Breaking Point*] (estimates “about 50 percent of players use maple”).

appearance. There have been incidents where game participants and spectators have been injured when sharp wooden projectiles made contact with the person.

Rule 1.10(a) of the official rules of MLB states, “The bat shall be one piece of solid wood.”<sup>4</sup> Whereas a wooden baseball bat is usually taken for granted during the game, at times attention is paid to the bat. For example, it is not uncommon for batters to hurl the bat at the pitcher when he feels the pitcher has intentionally thrown at him. In the fifty years, the author has been watching MLB games on television, the most remarkable incident he has witnessed involving a baseball bat was a near tragic accident on September 6, 1976, on a nationally televised game. During that game Los Angeles Dodgers catcher Steve Yeager was impaled in the neck with a broken bat.<sup>5</sup> With his teammate Bill Russell at bat and Yeager in the on-deck circle, Russell’s wooden bat broke after hitting a ball.<sup>6</sup> The sharp end of the bat’s barrel stuck in Yeager’s neck, piercing his esophagus. He had nine pieces of wood removed from his neck in a ninety-eight-minute surgery to repair the injury.<sup>7</sup>

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4. MLB 2013 OFFICIAL BASEBALL RULES r. 1.10 (2012). The entire Rule 1.10 provides:

(a) The bat shall be a smooth, round stick not more than 2.61 inches in diameter at the thickest part and not more than 42 inches in length. The bat shall be one piece of solid wood.

NOTE: No laminated or experimental bats shall be used in a professional game (either championship season or exhibition games) until the manufacturer has secured approval from the Rules Committee of his design and methods of manufacture.

(b) Cupped Bats. An indentation in the end of the bat up to 1¼ inches in depth is permitted and may be no wider than two inches and no less than one inch in diameter. The indentation must be curved with no foreign substance added.

(c) The bat handle, for not more than 18 inches from its end, may be covered or treated with any material or substance to improve the grip. Any such material or substance, which extends past the 18 inch limitation, shall cause the bat to be removed from the game.

NOTE: If the umpire discovers that the bat does not conform to (c) above until a time during or after which the bat has been used in play, it shall not be grounds for declaring the batter out, or ejected from the game.

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(d) No colored bat may be used in a professional game unless approved by the Rules Committee.

5. *Steve Yeager—Lucky to Be Alive*, GLORY OF BASEBALL (Oct. 30, 2007, 8:22 PM), <http://thegloryofbaseball.blogspot.com/2007/10/steve-yeager-lucky-to-be-alive.html>.

6. *Id.*

7. *Id.* The author with other television viewers witnessed this event on a live broadcast. Yeager completed his career, but after the incident, to protect his neck from further injury, he wore a leather throat protector flap on his catcher’s mask. He pioneered the use of the mask’s throat protector flap, which was commonly used by catchers before the hockey-style catcher’s mask came in vogue. *See id.*

This single event communicated the seriousness of shattered wooden baseball bats.

In the last few years, at least five significant injuries have been caused by broken maple bats in MLB play. They were:

- On September 19, 2010, Tyler Colvin's (Chicago Cubs) upper left side of the chest was punctured by the sharp end of a broken bat while he was running down the third baseline toward home plate after a hit by his teammate. Colvin was hospitalized with a chest tube inserted to prevent his lung from collapsing. The puncture was only a few inches from Colvin's heart.<sup>8</sup>
- On March 17, 2008, Carlos Delgado was speared in the arm by the sharp end of a broken bat. Delgado was on third base when his New York Mets teammate Brady Clark's bat shattered. Delgado threw up his arm to protect his head. His injury required four stitches.<sup>9</sup>
- On April 15, 2008, Don Long, Pittsburg Pirates batting coach was hit in the cheek by a broken bat, while sitting in the dugout. A shard (about two pounds) of Pirate Nate McLouth's bat cut his left cheek and resulted in ten stitches and some nerve damage.<sup>10</sup> McLouth ran to first with about three inches of bat still in his hands, but the remainder hit the ground and "tomahawked 30 feet" striking Long.<sup>11</sup>
- On April 28, 2008, Susan Rhodes, a fifty-nine-year-old spectator sitting four rows behind the visitor's dugout at Dodger Stadium, was hit in the jaw by the barrel of a broken bat. In a MLB game between the Colorado Rockies and the Los Angeles Dodgers, Todd Helton's maple bat broke, the ball going into center field and the bat barrel into the seats. Susan Rhodes saw the ball go to centerfield, but she was not looking at the bat's barrel. Her jaw was fractured in two places and required surgery. The Dodgers refused to cover her medical expenses relying on both express and implied assumption of risk, which is common risk management

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8. *Tyler Colvin Injury: Cubs Player IMPALED by Bat (PHOTO)*, HUFFPOST SPORTS, [http://www.huffingtonpost.com/2010/09/19/tyler-colvin-injury-cubs-\\_n\\_730850.html](http://www.huffingtonpost.com/2010/09/19/tyler-colvin-injury-cubs-_n_730850.html) (last updated May 25, 2011).

9. Joe Zedalis, *Delgado Gashed by Broken Bat*, YAHOO SPORTS (Mar. 17, 2008), <http://sports.yahoo.com/mlb/rumors/post/Delgado-gashed-by-broken-bat?urn=mlb,72040>.

10. Andrew Cohen, *Spectators in Stands on Their Own Where Flying Objects Are Concerned*, ATHLETIC BUS., July 2008.

11. Passan, *Baseball at Breaking Point*, *supra* note 3.

among baseball clubs.<sup>12</sup>

- On June 24, 2008, umpire Brian O’Nora working a MLB game between the Rockies and Kansas City Royals, was hit in the head by a large shard off the broken bat of Miguel Olivo. O’Nora received a mild concussion and significant bleeding from a cut to his forehead. Interestingly in this case, two years earlier Olivo had been hit, without significant injury, by a shard from his teammate Eric Byrnes’ bat after Byrnes got angry and slammed his bat onto the ground. Furthermore, the O’Nora injury occurred on the same day that MLB’s Safety and Health Advisory Committee held a conference call to discuss what to do about injuries caused by broken bats.<sup>13</sup>

More recently, the maple wooden bat has resulted in personal injuries to participants and spectators. With the maple bat being used by most MLB players, the danger of broken bats is more pronounced. Substantially more incidents occur than during the ash bat era. The tendency is for maple bats to break easily, as bats either snap off at the handle or substantial shards are projected from the barrel. The sports television broadcasters, ESPN in particular, show many of these incidents in game highlights. It is not unusual to see a pitcher or infielder nearly get hit two or three times in a game with a flying broken bat. Argument of absence of foreseeability is clearly a *non sequitur*. This problem persists, although in somewhat reduced occurrences since MLB studied the problem in 2008 and instituted some new rules to ameliorate the problem. The MLB study and resulting new bat safety rules and specifications are discussed *infra*.

Thus, there appears to be a growing risk of injury from broken maple baseball bats to participants and spectators sitting close to the playing field. This Article will discuss the liability issues stadium operators, players, teams as employers, and bat manufacturers face and the available defenses as they pertain to the use of maple baseball bats or other wooden bats that have been manufactured or altered making them unsafe for use in a game. Liability issues will address both negligence and strict product liability. The author argues that: (1) courts should find liability for manufacturers who produce maple baseball bats; (2) players should be found negligent if they make the

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12. See Scott Miller, *Weekend Buzz: Broken Bats a Growing Concern for Fans and Officials*, CBSSPORTS.COM (June 1, 2008), <http://www.cbssports.com/print/mlb/story/10850497>; Jeff Passan, *Fan’s Injury Should Force Bat Policy Change*, YAHOO SPORTS (May 30, 2008), <http://sports.yahoo.com/news/fans-injury-force-bat-policy-045000620--mlb.html>.

13. Dick Kaegel, *Ump O’Nora Hit in Head by Broken Bat*, MLB.COM: NEWS (June 25, 2008), [http://mlb.mlb.com/news/article.jsp?ymd=20080624&content\\_id=2995831&vkey=news\\_mlb&fext=jsp&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20080624&content_id=2995831&vkey=news_mlb&fext=jsp&c_id=mlb); Cohen, *supra* note 10.

maple bats dangerous by shaving the bat handle making the handle more brittle and more likely to break; and (3) that teams should be found vicariously liable as well as directly liable for negligent supervision when players shave bat handles causing injury to spectators. Given the danger involved in the use of maple baseball bats, the doctrine of express or implied assumption of risk should not be applied as the risk of a shattered baseball bat caused by negligent design or negligent alteration is not inherent in the game of baseball or the risk has been increased by bat manufacturers and MLB.

## II. THE NATURE OF WOODEN BASEBALL BATS

Baseball bats used by professional players have changed over time. During Babe Ruth's era, bats made of hickory wood were heavier, longer (at least for sluggers), and stronger than today's bats. Decades ago the handles of bats were bigger (in circumference) which added to durability and weight. Northern white ash from Pennsylvania and Upstate New York, a lighter, less dense wood, later became the dominant wood used to manufacture bats used by professionals. Today, players in both major and minor leagues generally use either ash or maple bats. Some other wood bats are used, for example yellow birch and bamboo, but these are not widely used today. Both ash and maple bats have good and bad qualities. They break differently, but they both break. All wood bats break. The wood used in baseball bats is of varying quality with the bats used by major and minor league players of the highest quality. Bats used by amateurs are of a much lower quality with much lower production and retail prices.<sup>14</sup>

Ash baseball bats tend to crack and flake off in small chunks. The nature of ash wood is that it is ring porous. The pores are concentrated in a few areas and appear together in growth rings (growth planes), which create multiple weak spots in the wood. When an ash bat makes contact with a baseball, these cell walls may collapse, causing the barrel to soften and break in multiple areas resulting in physical flaking, exploding, or shattering. The pore structure that makes ash prone to flaking also channels cracks along the length of the bat. The bat generally does not break until the crack (or separation) runs the length of the bat. The batter usually notices a minor crack first, for example by hitting the handle of the bat on the ground or home plate to detect the "crack" sound or vibration. The batter may also notice excessive flaking. In either case the bat would no longer be used before the bat completely breaks in two. This does not mean, however, that a perfectly sound ash bat may not

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14. Andrea Thompson, *The Science Behind Breaking Baseball Bats*, LIVESCI. (July 15, 2008), <http://www.livescience.com/strangeneWS/080715-baseball-bat.html>.

break completely through on one swing. It may, but it is not as prone as a maple bat to do that.<sup>15</sup>

Maple bats, stronger and heavier than ash, tend to fracture in bigger, jagged shards. Maple wood is ring-diffuse. Its pores are more evenly distributed throughout the wood than they are in ash wood. This minimizes the weak spots in maple wood making it more durable and stronger than ash. The maple bat does not tend to flake. The random pore structure means that maple bats may crack in any direction not just the length of the bat as in ash. When a maple bat breaks, the break usually occurs along a single fault line. This allows the crack to grow out toward the edge of the barrel resulting in large chunks of the bat breaking off entirely when striking the ball. Since a maple bat does not flake and crack along the grain like an ash bat, the batter does not have advance warning that the bat has been compromised.<sup>16</sup> MLB players understand this as well. As Lance Berkman of the Houston Astros said, “‘A maple bat can have a crack in it that you don’t know about, and all of a sudden you hit a ball on the barrel and it explodes. An ash bat is true. You can always tell if there’s something wrong with it.’”<sup>17</sup>

Three different factors may be exacerbating the problem with shattering baseball bats. First, with the increased demand for maple wood, perhaps there has been a reduction in the quality of maple wood used in the bats. There are more manufacturers of maple bats today and their sources of maple wood differ. Using a lower quality of wood for the intended use of the bat could be construed to be a design defect for liability purposes. Second, in the manufacturing process how the bat is cut out of the wood can affect the bats’ susceptibility to breakage. The bat is strongest when the grain lines up with the length of the bat. The grain of ash wood is easier to see and straighter than the grain of maple.<sup>18</sup> Last, and possibly most important, is the size of the bat handle.

As noted earlier bat handles used to be much bigger. Since ash wood would be less dense and lighter than maple wood, players desire to reduce the weight of the bat by having a smaller, narrower, handle,<sup>19</sup> this is done by shaving the handle’s circumference, which makes for a lighter but less durable baseball bat. The MLB minimum handle size is currently sixteen-nineteenths

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15. *Id.*

16. *Id.*

17. Lou Dzierzak, *Batter Up: Shattering Sticks Create Peril in MLB Ballparks*, SCI. AM. (July 14, 2008), <http://www.sciam.com/article.cfm?id=baseball-bat-controversy> (citations omitted).

18. Thompson, *supra* note 14.

19. *Id.*

of an inch<sup>20</sup> (or 0.842 of an inch) thick. Sam Holman does not manufacture his Sam Bat with handles less than seven-eighths of an inch (or 0.875 of an inch) thick, but determined players, intent on decreasing bat weight, will shave down the handles further.<sup>21</sup>

Such a thin-handled bat is less sturdy and more prone to breaking. Players may also desire the narrower bat handle because they grew up using aluminum baseball bats with very narrow handles. Players usually use aluminum bats in youth leagues through college because these bats are durable and cheap when compared to wooden bats. The handles on aluminum bats are very thin compared to wooden bats because there is little chance the handle of an aluminum bat will break. Since professional players are comfortable with the feel of the narrow handles on aluminum bats, they like to order wooden bats with similar narrow handles. The result is that they are using maple and ash bats that are more likely to break.<sup>22</sup>

#### A. MLB's Commissioned Study of Broken Bats

As a response to the rash of broken bat injuries and near misses, MLB's Safety and Health Advisory Committee in 2008 commissioned a study of experts in wood science to study why and how ash and maple baseball bats break as they do and to make specific recommendations that would remedy the broken bat situation. Final policy changes would be made collaboratively with the Major League Baseball Players Association (MLBPA), the players' union. The MLBPA had input because equipment usage, i.e., baseball bats are tools of the trade, and bat specifications are terms and conditions of employment, which is a mandatory subject of negotiation under the National Labor Relations Act.<sup>23</sup> In the 2006 MLB-MLBPA contract negotiations, the union was recalcitrant on negotiations over maple baseball bats or specifications on

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20. Jeff Passan, *Maple Presents a Hard Problem*, YAHOO SPORTS (June 24, 2008), [http://sports.yahoo.com/mlb/news;\\_ylt=ApWZK3\\_JOZ58Vr1JP\\_LXP9KHU84F?slug=jp-maplehelton062408&prov=yhoo&type=lgns](http://sports.yahoo.com/mlb/news;_ylt=ApWZK3_JOZ58Vr1JP_LXP9KHU84F?slug=jp-maplehelton062408&prov=yhoo&type=lgns).

21. Jack Curry, *In M.L.B. Study, 257 Broken Bats . . . and Counting*, NYTIMES.COM (July 25, 2008), [http://www.nytimes.com/2008/07/25/sports/baseball/25maple.html?\\_r=1&pagewanted=print](http://www.nytimes.com/2008/07/25/sports/baseball/25maple.html?_r=1&pagewanted=print); Jeff Passan, *Maple-Bat Backlash Bothers Sam Bat Pioneer*, YAHOO SPORTS (June 12, 2008), [http://sports.yahoo.com/mlb/news;\\_ylt=ArxAlQkXvRIcCRA.Z9Kq9SgHU84F?slug=jp-samholmanmaple061208&prov=yhoo&type=lgns](http://sports.yahoo.com/mlb/news;_ylt=ArxAlQkXvRIcCRA.Z9Kq9SgHU84F?slug=jp-samholmanmaple061208&prov=yhoo&type=lgns) [hereinafter Passan, *Maple-Bat Backlash*].

22. See Thompson, *supra* note 14; Dzierzak, *supra* note 17.

23. National Labor Relations Act, 29 U.S.C. § 158(a)(5) (2012); see *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979) (discussing the employer's obligation to negotiate in good faith on terms and conditions of employment); Ronald Blum, *Batty Problem: Baseball Discusses Broken Bats*, USATODAY.COM (June 25, 2008), [http://www.usatoday.com/sports/baseball/2008-06-25-3981318713\\_x.htm](http://www.usatoday.com/sports/baseball/2008-06-25-3981318713_x.htm) (noting MLB Commissioner Bud Selig's reluctance to unilaterally set a specification for the thickness of bat handles or banning maple bats).

their use to lessen the likelihood of breakage.<sup>24</sup> James Sherwood, a University of Massachusetts-Lowell mechanical engineering professor and director of the Baseball Research Center, in 2005 was commissioned by MLB to conduct a study of maple baseball bats and the propensity of wooden bats to break. Sherwood's study tested maple against ash baseball bats and his findings revealed that: (1) the batted ball speeds were essentially the same; (2) maple had no advantage in getting a longer hit over an ash bat; and (3) as the size of the handle increases, the potential for broken bats decreases.<sup>25</sup>

Concerned about bat safety and the significant increase in broken bats and heightened risk of injury from them, MLB conducted another study in 2008.<sup>26</sup> This new study was conducted over about a five-month period by researchers at TECO, a wood certification company, Forest Products Laboratory, a government entity; Harvard statistician Carl Morris; and James Sherwood.<sup>27</sup> No peer review of the research was conducted as MLB relied on the different research professionals to act as their own checks and balances.

The researchers analyzed more than 2232 broken bats, with 756 of them broken into multiple pieces, collected from the major and minor leagues during a nine-week period between July 2, 2008 and September 7, 2008.<sup>28</sup> The researchers found that "maple was three times more likely than ash to break into two or more pieces and that maple was four times more likely to have broken due to a poor-quality slope of grain when compared to the ash bats that broke in the same way."<sup>29</sup> The research revealed that some bat manufacturers were using low-quality wood with large barrels and thin handles causing increased breakage.<sup>30</sup>

During the winter meetings of MLB owners, MLB and the players' union

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24. Passan, *Baseball at Breaking Point*, *supra* note 3.

25. *Id.*; see also Chris Ladd, *With Makeshift Bat Cave, MLB to Scan Broken Wood for Fan Safety*, POPULAR MECHANICS (Dec. 18, 2009), <http://www.popularmechanics.com/outdoors/sports/4281376.html> (discussing Robert Adair's, a Yale University physicist and author of *The Physics of Baseball*, argument that thinner bat handle breaks easier than thicker-handled bats).

26. Adams, *Supra* note 2.

27. *Id.*

28. News Release, MLB, MLBPA Adopt Recommendations of Safety & Health Advisory Comm. (Dec. 9, 2008), available at [http://mlb.mlb.com/pa/pdf/health\\_advisory\\_120908.pdf](http://mlb.mlb.com/pa/pdf/health_advisory_120908.pdf) [hereinafter MLB-MLBPA News Release]; Adams, *supra* note 2.

29. See MLB-MLBPA News Release, *supra* note 28 (explaining the causes of bat breakage into multiple pieces as: "due to poor-quality 'slope of grain' and/or ruptures caused by excessive bending. Slope of grain is a term used in the wood industry to quantify how straight the grain is along the edge (radial) and flat (tangential) faces of a piece of wood. As the straightness of the grain decreases, the durability of the bat decreases."); Adams, *supra* note 2.

30. Jeff Passan, *New MLB Rules Cause Maple Bat Flap*, YAHOO SPORTS (Jan. 19, 2009), <http://sports.yahoo.com/news/mlb-rules-cause-maple-bat-051500525--mlb.html> [hereinafter Passan, *New MLB Rules*]

agreed on some bat safety measures to become effective for the 2009 season with the study continuing for the 2010 season. The agreed upon recommendations included the following:

1. All bats [had to] conform to slope of grain wood grading requirements which apply to the  $\frac{2}{3}$  length of the billet that [would] constitute the handle and taper regions of the bat. All manufacturers [had to] identify and grade the handle end prior to production of the bat to ensure that its slope of grain satisfie[d] the grading requirement.
2. All manufacturers [had to] place an ink dot on the tangential face of the handle of sugar maple and yellow birch bats before finishing. Placing an ink dot enable[d] a person to easily view the slope of grain of the wood.
3. The orientation of the hitting surface on sugar maple and maple bats should be rotated 90 [degrees] (one quarter turn of the bat). The edge grain in maple that [had been] currently used as the hitting surface [was] the weaker of the two choices. To facilitate such a change in the hitting surface, manufacturers [had to] rotate the logos they place[d] on these bats by 90 [degrees].
4. Handles of sugar maple and yellow birch bats [had to] be natural or clear finish to allow for inspection of the slope of grain in the handles.
5. Manufacturers [had to] implement a method of tracking each bat they suppl[ied] (e.g., serial number) so that each [could be] linked back to the manufacturer's production records.
6. Representatives of each authorized manufacturer [were] required to participate in an MLB-sponsored workshop on the engineering properties and grading practices of wood as they relate[d] to the manufacture of solid-wood baseball bats.
7. Manufacturers would be visited on a regular basis by MLB or its designated representatives to audit each company's manufacturing processes and recordkeeping with respect to bat traceability.
8. Audits would be randomly conducted of bats by MLB or its designated representatives at the ball parks to ensure that the new bat requirements were being followed.
9. A formalized third-party bat certification and quality

control program would be established to certify new suppliers, approve new species of wood, provide training and education to bat manufacturers, and address issues of non-compliance.<sup>31</sup>

Significant in this bat safety negotiation was the absence of any recommendation for the specification of the thickness of the bat handle. This absence reflected an apparent lack of seriousness by MLB and the players' union in dealing with the bat safety issue given that bat manufacturers believed bat handle thickness was a significant factor in bats breaking and Spencer noted in his 2005 study that the handle thickness affected bat breakage. Most bat manufacturers generally theorize the problem as basic bat geometry: use of large-barreled, thin-handled bats, and length-to-weight ratio exceeding a differential of three between a bat's length in inches and weight in ounces (i.e., thirty-three-inches, thirty-ounce bats).<sup>32</sup> Additionally, the research group rejected conventional wisdom that discouraged face-grain contact. Some bat manufacturers were concerned with the new mandate to place the manufacturer's stamp on the bat's edge grain instead of the face grain. This is contrary to the practice in the bat industry that encouraged players to hold the bat with the label facing toward them in order to strike the ball ninety degrees from the label.<sup>33</sup> The recommendations focused on the bat manufacturing process causing several bat manufacturers to be unhappy with the study and MLB's new policies. Finally, it appeared that MLB wanted to reduce the number of bat manufactures. The annual administrative fee of bat suppliers was increased from \$5,000 to \$10,000 per year and the liability insurance minimum requirements were increased from \$5 million to \$10 million.<sup>34</sup> The increase in liability insurance limits is curious given the dogmatic reliance on the assumption of risk doctrine when baseball bat injuries lead to lawsuits against teams and stadium operators. Could MLB's insistence on doubling liability limits for baseball bat manufacturers reflect recognition of a *potential* change in the application of assumption of risk? This conclusion would appear to be reasonable.

### III. LIABILITY FOR SPECTATOR INJURY CAUSED BY BROKEN BAT

Liability for injuries to spectators when they are hit with shrapnel from broken baseball bats may arise, at least in theory, under several arguments of

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31. See MLB-MLBPA News Release, *supra* note 28; Adams, *supra* note 2.

32. Passan, *Maple-Bat Backlash*, *supra* note 21.

33. Passan, *New MLB Rules*, *supra* note 30.

34. MLB-MLBPA News Release, *supra* note 28.

law applied to manufacturers, baseball teams, stadium operators, and players. Liability may be based on negligence, vicarious liability, and product liability under claims of negligence or strict liability design or manufacture of defective baseball bats.<sup>35</sup> Thus far, however, the doctrine of assumption of risk has been effective for teams, operators, and players. There have been no court decisions as of yet definitively shielding these three defendant groups from liability for shrapnel from maple bats. Legislatures are beginning to give statutory immunity to stadium operators from plaintiffs who claim injuries from balls and bats. Each of these theories and defenses will be discussed hereafter.

#### A. *Negligence of Stadium Operator*

The stadium operator, which may also be the baseball club, may be the least likely party to be held liable. Although owners or operators of the baseball stadium generally do have a duty to their business invitees, the spectators, to provide a reasonably safe place to watch the game free from any known or reasonably discoverable hazards, there is a long-standing defense for baseball teams and stadium operators that usually shields against liability. Generally, spectators will not recover from injuries received from ordinary and foreseeable risks inherent to the sport. The spectator implicitly assumes the risk of injury incident to attendance at the sporting event.

The policy behind the general rule was articulated in 1929 by Chief Justice Cardozo of the Court of Appeals of New York:

[A participant], accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. . . . The timorous may stay

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35. See generally Matthew R. Wilmot, *Baseball Bats in the High Tech Era: A Products Liability Look at New Technology, Aluminum Bats, and Manufacturer Liability*, 16 MARQ. SPORTS L. REV. 353 (2006) (explaining liability of a manufacturer of an aluminum bat); Joe Novosel, Comment, *Baseball Bats Out of Hell: Potential Theories of Liability Arising from Maple Bat Injuries*, 8 DEPAUL J. SPORTS L. & CONTEMP. PROBS. 95 (2012) (explaining the potential liability from maple bat injuries); Jessica J. Penkal, Comment, *When Legislative Regulation Strikes Out: Proving a Products Liability Case Against Metal Baseball Bat Manufacturers*, 67 MONT. L. REV. 315 (2006) (explaining how there a strict products liability case should work against metal baseball bat manufacturers); Matthew A. Westover, Comment, *The Breaking Point: Examining the Potential Liability of Maple Baseball Bat Manufacturers for Injuries Caused by Broken Maple Baseball Bats*, 115 PENN ST. L. REV. 517 (2010) (explaining how different types of liability arises); Amanda M. Winfree, Casenote, *Increasing the Inherent Risks of Baseball: Liability for Injuries Associated with High-Performance Non-Wood Bats in Sanchez v. Hillerich & Bradsby Co.*, 11 VILL. SPORTS & ENT. L.J. 77 (2004) (describing previous cases involving non-wood bats).

at home.<sup>36</sup>

More spectators are injured at baseball and softball games than probably any other type of sporting events.<sup>37</sup> Historically, baseball and softball spectators assumed the risk of injury from flying balls and bats and being run over by players. Paying baseball spectators have been suing for injuries from being hit by baseballs since about 1913. In 1913, in *Crane v. Kansas City Baseball & Exhibition Co.*,<sup>38</sup> a baseball fan sued the stadium owner for injury he incurred when he was hit by a batted foul ball. After the fan paid for his ticket, he had a choice of sitting in an area that was partially protected from batted balls by a wire netting or sitting in an unprotected area. He chose not to sit in the protected area and was hit by a batted foul ball. In his lawsuit he argued that the stadium owner was negligent in not screening the whole sitting area. The court found for the defendants stating:

Defendants were not insurers of the safety of spectators; but, being engaged in the business of providing a public entertainment for profit, they were bound to exercise reasonable care, i.e., care commensurate to the circumstances of the situation, to protect their patrons against injury. In view of the facts that the general public is invited to attend these games, that hard balls are thrown and batted with great force and swiftness, and that such balls often go in the direction of the spectators, we think the duty of defendants towards their patrons included that of providing seats protected by screening from widely thrown or foul balls for the use of patrons who desired such protection.

Defendants fully performed that duty when they provided screened seats in the grand stand, and gave plaintiff the opportunity of occupying one of those seats. . . .

So in the present case plaintiff, doubtless for the purpose of avoiding the annoyance of the slight obstruction to vision offered by the netting, voluntarily chose an unprotected seat, and thereby assumed the ordinary risks of such position. And if it could not be said that he assumed the risk, still he should

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36. *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929).

37. *But see* Brett Celedonia, *Flying Objects: Arena Liability for Fan Injuries in Hockey and Other Sports*, 15 SPORTS LAW. J. 115, 117 (2008) (discussing how more National Hockey League spectators were injured from flying pucks entering the stands than at MLB games before NHL arenas were required to put Plexiglass around the entire arena at least five feet in height and netting behind the goals for the 2002–03 season).

38. 153 S.W. 1076 (Mo. Ct. App. 1913).

not be allowed to recover, since his own contributory negligence is apparent and indisputable. One invited to a place, who is offered a choice of two positions, one of which is less safe than the other, cannot be said to be in the exercise of reasonable care if, with full knowledge of the risks and dangers, he chooses the more dangerous place.<sup>39</sup>

The owner or operator of the baseball stadium has a duty to the spectators to screen the most dangerous section of the field, which is usually the area behind home plate. Further, the screening that is provided must be sufficient for those spectators who reasonably anticipated to desire protected seats on an ordinary occasion. Beyond the requirement to provide a reasonable number of screened seats, the no-duty rule or the limited-duty rule applies.

There have been two reported cases found during the last ten years involving a plaintiff-spectator's injury from a broken baseball bat at a game.<sup>40</sup> The Michigan court of appeals in *Benejam v. Detroit Tigers, Inc.*<sup>41</sup> considered whether Michigan should adopt the "limited duty" rule. In this case the Benejam was a young girl seated "quite close to the playing field along the third base line." Although she was seated behind the screen (very near its end down the third base line), she was injured "when a player's bat broke and a fragment of it curved around the net." She suffered crushed fingers as a result of the accident. There was no evidence that the bat fragment tore through the screen or that there was a hole in the screen. Benejam sued the Detroit Tigers as the stadium proprietor for negligence in failing to have a net (screen) "sufficiently long" and that "warnings about the possibility of projectiles leaving the field were inadequate." The plaintiff effectively argued that the case should be governed by the usual invitor-invitee principles of ordinary care to provide reasonably safe premises, which a special baseball rule should not govern.

Most jurisdictions follow the limited duty rule rather than the no-duty rule. The *Benejam* court here adopted the limited duty rule in concluding:

[A] baseball stadium owner that provides screening behind home plate sufficient to meet ordinary demand for protected seating has fulfilled its duty with respect to screening and cannot be subjected to liability for injuries resulting to a spectator by an object leaving the playing field. We do not today hold that a baseball stadium operator that does not

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39. *Id.* at 1077–78 (citation omitted).

40. *James v. Hillerich & Bradsby Co.* was the first reported case involving a lawsuit from an injury received by a broken wooden baseball bat. 299 S.W.2d 92 (Ky. 1956).

41. 635 N.W.2d 219 (Mich. Ct. App. 2001).

provide this level of protection can be held liable. For reasons previously noted, there may be an argument that would prevent the imposition of liability in that situation as well.<sup>42</sup>

The *Benejam* court also held that the stadium proprietor had no duty to warn spectators that some object (broken bat) might leave the playing field and cause injury because the risk of such an occurrence was “well-known.”<sup>43</sup>

In the second broken-baseball-bat case, *Rees v. Cleveland Indians Baseball Co.*,<sup>44</sup> the Court of Appeals of Ohio affirmed the summary judgment awarded to the Cleveland Indians. The plaintiff Rees was knowledgeable about the game of baseball, watched it on television and went to a couple of Indians games a year. She and her husband were seated in the second row near third base at Jacobs Field in Cleveland. During the game she was hit in the face by a broken bat. She sued the baseball team and the MLB Commissioner for negligence and willful and wanton reckless failure to protect spectators from objects such as baseball bats and baseballs from flying into unprotected and uncovered stands and failure to warn spectators of these risks. The trial court held that Rees’ case was barred by the affirmative defense of primary assumption of risk as the risk of being struck by a broken bat was an ordinary risk of the game assumed by spectators and the defendants had no duty to warn or to provide protective screening throughout the entire park.<sup>45</sup>

Stating that the case of a spectator injury from a broken baseball bat was a case of first impression in Ohio and relying on the reasoning in *Benejam*, the *Rees* court affirmed the summary judgment. The court noted that Rees was familiar with the stadium, the game of baseball, and the specific location of her seat and she knew she was unprotected from objects that might enter the stands. Based on those facts the defense of primary assumption of risk was appropriate and barred her claim. The *Rees* court also held the defendants owed no duty to Rees. Finally, the *Rees* court concluded that Rees had adequate warning of the risk on multiple occasions—the ticket stub, the posted signs on the scoreboard, and the announcements on the loudspeaker about the risk.<sup>46</sup> The disclaimer on the ticket stub included “specifically (but not exclusively) the danger of being injured by thrown bats, or fragments thereof, and thrown or batted balls.”<sup>47</sup> The *Rees* court rejected the plaintiff’s argument

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42. *Id.* at 225.

43. *Id.* at 226–27.

44. No. 84183, 2004 WL 2610531 (Ohio Ct. App. Nov. 18, 2004).

45. *Id.* ¶ 5.

46. *Id.* ¶¶ 31–33.

47. *Id.* ¶ 32.

that a broken bat was not a common occurrence of the game of baseball.

The no-duty rule, which appears almost sacrosanct in Pennsylvania and very similar to the limited duty rule, provides that ballpark owners and managers have no duty to protect spectators from risks inherent to the game of baseball. Inherent to the game means risks that are common, frequent, and expected.<sup>48</sup> Foul balls, errant throws, and, usually, broken bats are inherent to the game of baseball. Only when the plaintiff can show that the defendant “deviated in some relevant respect from established custom will it be proper for an ‘inherent-risk’ case to go to the jury.”<sup>49</sup> In *Loughran v. Phillies*, summary judgment was awarded to the Philadelphia Phillies MLB club when a spectator in the outfield was hit in the face with a baseball tossed into the stands by a Phillies outfielder after the inning was over. The trial court applied the no-duty rule and held that, since players commonly threw baseballs into the stands at MLB games, the act fell into the risk-inherent in the game as a “‘customary’ part of the game.”<sup>50</sup> In affirming the trial court’s summary judgment, the Pennsylvania Superior Court reasoned that it did not matter that the rules of MLB did not allow for players to throw baseballs. It said,

When determining what is “customary” part of the game, it is our opinion that we cannot be limited to the rigid standards of the Major League Baseball rule book; we must instead consider the actual everyday goings on that occur both on and off the baseball diamond; we must consider as “customary” those activities that although not specifically sanctioned by baseball authorities, have become as integral a part of attending a game as hot dogs, cracker jack, and seventh inning stretches.<sup>51</sup>

Justice Bender’s dissenting opinion would have restricted the no-duty rule in situations where players purposefully throw baseballs and other items into the stands injuring spectators. In his dissent he said,

In my view, since the act of tossing a ball to fans as a souvenir is extraneous to the game and not necessary to the playing of the game, a spectator does not “assume the risk” of being struck by a ball entering the stands for this purpose, nor

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48. *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 551 (Pa. 1978); *Loughran v. Phillies*, 2005 PA Super 396, ¶ 8, 888 A.2d 872, 875.

49. *Jones*, 394 A.2d at 550.

50. *Loughran*, 2005 PA Super 396, ¶ 10.

51. *Id.*

is there any valid reason in law or policy to extend the immunity of the “no duty” rule to this practice. Rather, if a baseball player wants to go beyond the confines of the game and provide a gratuitous souvenir to a fan, he should be charged with the obligation of doing it in a reasonably safe and prudent manner.<sup>52</sup>

The owner or operator of a ballpark fully discharges any obligation he has to protect the spectator from thrown or hit balls by providing seating in a fully protected area. Where the spectator at a ballpark rejects the protected seating and opts for seating that is not, or less protected, the owner or operator of the ballpark is not liable for the spectator’s injuries. Courts have rejected any requirement of the stadium operator to provide screening or netting in other parts of the baseball stadium, for example down the base lines.<sup>53</sup> Finally, there is no duty to warn of risks and dangers that are open and obvious,<sup>54</sup> including danger of a fragment of a broken bat leaving the field of play.<sup>55</sup> Chief Justice Torbert of the Supreme Court of Alabama noted in a special concurrence opinion, in *Vines v. Birmingham Baseball Club, Inc.*,<sup>56</sup> that assuming the defendant-team had a duty to warn the plaintiff-spectator of the risks posed by foul balls, the defendant-team had discharged this duty with warning signs posted at the field and warning on the ticket stub. These rules are consistent for both professional and amateur baseball.

Why do so many fans choose not to sit in the safe, screened area behind home plate and to assume the risk of injury by sitting elsewhere? There are several reasons. Obviously, the higher ticket price to sit behind home plate and the somewhat obstructed view are prime considerations. Fans also want to get close to the action. Finally, as the California Court of Appeals stated as dicta in *Rudnick v. Golden West Broadcasters*,<sup>57</sup> “[T]he chance to apprehend a misdirected baseball is as much a part of the game as the seventh inning

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52. *Id.* ¶ 16.

53. *See, e.g.*, *Wade-Keszey v. Town of Niskayuna*, 772 N.Y.S.2d 401, 403 (App. Div. 2004).

54. *See, e.g.*, *Bellezzo v. Arizona*, 851 P.2d 847, 851 (Ariz. Ct. App. 1993) (holding the danger of being struck by a foul ball at a baseball stadium was open and obvious to the plaintiff-spectator and defendants did not owe the plaintiff, a business invitee, a duty to warn of such danger) (“The underpinnings of that general principle are self-evident: when a danger is open and obvious, the risk of harm generally is slight because the condition is easily perceived and therefore does not pose an unreasonable risk against which the landowner must protect invitees.”); *Wade-Keszey*, 772 N.Y.S.2d at 403–04.

55. *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 220 (Mich. Ct. App. 2001).

56. 450 So. 2d 455 (Ala. 1984).

57. 202 Cal. Rptr. 900 (Ct. App. 1984).

stretch or peanuts and Cracker Jack.”<sup>58</sup> When Cal Ripkin hit his 400th home run, the home run ball broke a fan’s nose but that did not stop the mad rush of the fans to grab the ball.

If the doctrine of assumption of risk inherent in the game applies, which presupposes knowledge of the game of baseball, can a novice of the game, who has no prior knowledge of the risk of injury resulting from foul balls, errant throws, or a broken bat, assume the risk and not be able to recover? Put another way, can a novice to baseball successfully recover for his or her injury from a foul ball, errant throw, or broken bat? Furthermore, for those novices of the game of baseball, does the stadium operator owe them a duty to inform them of the risk of foul balls and errant throws? Finally, does a state’s adoption of the comparative negligence doctrine abolish the assumption of risk of being struck by a foul ball or errant throw? The court in *Friedman v. Houston Sports Association*<sup>59</sup> rejected these arguments holding firm to the no-duty rule.

The assumption of risk defense has had a long history in tort law involving sports. The general principle of assumption of risk is that “[a] plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm.”<sup>60</sup> Most jurisdictions allow the assumption of risk defense, which works as a complete bar to liability in negligence cases.

Assumption of risk can be either express or implied. Generally, express assumption of risk is simple. The plaintiff expressly consents in advance to relieve the defendant of an obligation to exercise care for the plaintiff’s protection.<sup>61</sup> This type of assumption of risk is usually manifest in the form of a waiver or release of liability, such as the waiver printed on a ticket to a baseball game containing language similar to the following:

[DISCLAIMER –] The holder of this ticket assumes all the risks and danger incidental to the game of baseball including specifically (but not limited to) the danger of being injured by thrown bats and thrown or batted balls, and agrees that the participating clubs, their agents and players are not liable for injuries resulting from such causes.<sup>62</sup>

Sometimes waivers or releases of liability may be voided on public policy

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58. *Id.* at 905.

59. 731 S.W.2d 572 (Tex. App. 1987).

60. RESTATEMENT (SECOND) OF TORTS § 496A (1965).

61. *Id.* § 496A cmt. c.

62. *Teixiera v. New Britain Baseball Club, Inc.*, No. HHBCVO54004214S, 2006 WL 2413839, at \*5 (Conn. Super. Ct. 2006).

grounds.

Implied assumption of risk may be either primary or secondary. Implied primary assumption of risk exists where the plaintiff has assumed known risks inherent in a particular activity or situation. The assumed risks are not those assumed by the defendant's negligence, but rather by the nature of the activity itself, such as spectators attending baseball games and being subjected to thrown or batted baseballs.<sup>63</sup> In this situation, no legal duty is owed by the defendant to the plaintiff to protect plaintiff from those inherent risks in the activity.<sup>64</sup>

Implied secondary reasonable assumption of risk exists where the plaintiff is aware of a risk created by the negligence of the defendant, and the plaintiff proceeds or continues voluntarily to encounter it. In addition, the plaintiff's conduct in proceeding is entirely reasonable since the risk is small or the plaintiff proceeds with all due caution.<sup>65</sup> Finally, implied secondary unreasonable assumption of risk exists when the plaintiff's conduct in encountering a known risk may in itself be unreasonable, because of the danger is out of all proportion to the advantage that the plaintiff is seeking to obtain. In such a case, the plaintiff's continuance in this activity amounts to contributory negligence.<sup>66</sup> An example of this is thoroughbred horse racing where the risk of serious injury from uncontrollable large animals is substantial.

Assumption of risk may be confusing, and it has been made more confusing since the adoption of doctrine of comparative fault. Some courts have abrogated the assumption of risk defense because it was incompatible with comparative fault, which abrogated the contributory negligence defense. For example, in *Rini v. Oaklawn Jockey Club*,<sup>67</sup> the U.S. Court of Appeals for the Eighth Circuit held that in cases involving the implied secondary reasonable and unreasonable assumption of risk, the assumption of risk doctrine was abrogated. Instead, the plaintiff's activity was considered as a factor in the court's comparative fault analysis. Plaintiff Rini was an experienced horse jockey racing at defendant Oaklawn's racetrack in Hot Springs, Arkansas. During a morning practice Rini was preparing a horse for its first race on the track. Rini's horse left the starting gate, became spooked, and attempted to duck or turn and run the wrong way around the track. Rini's saddle turned sideways, Rini struck the inside rail of the track, and fell to the

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63. RESTATEMENT (SECOND) OF TORTS § 496A cmt. c.2.

64. See *Mastro v. Petrick*, 112 Cal. Rptr. 2d 185, 188-89 (Ct. App. 2001).

65. See RESTATEMENT (SECOND) OF TORTS § 496A cmt. c.3.

66. W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 68 (5th ed. 1984).

67. 861 F.2d 502 (8th Cir. 1988).

ground. He was injured. Rini sued the owner of the racetrack claiming negligence in design and operation of the track. Since the trial court had issued a jury instruction applying assumption of risk, the decision was reversed and remanded.<sup>68</sup>

This approach is not inconsistent with the Louisiana approach applied in *Picou v. Hartford Insurance Co.*,<sup>69</sup> with courts going through a “duty risk” analysis to determine whether a defendant’s conduct was the legal cause of the plaintiff’s injury. The Louisiana Court of Appeals stated:

Under a duty risk analysis, there are the following inquiries: (1) What, if any, duty was owed by the defendant to the plaintiff? (2) Was there a breach of the duty? (3) Was that breach a substantial cause in the fact of the injury? (4) Was the risk and harm within the scope of the protection afforded by the duty breached? Whether a defendant owes a plaintiff a legal duty is a question of law. Whether a defendant has breached a duty owed is a question of fact.

. . . In this softball game defendant owed plaintiff the duty to act reasonably, that is, to play fairly according to the rules of the game and to refrain from any wanton, reckless conduct likely to result in harm or injury to another.

Under a duty risk analysis, plaintiff bears the burden of proving by a preponderance of the evidence that the defendant violated an imposed duty and acted unreasonably causing injury.<sup>70</sup>

In two other cases involving injuries to horse jockeys, New York and California courts held that reasonable implied assumption of risk as a complete defense survives adoption of the comparative negligence doctrine.<sup>71</sup> The plaintiff jockeys assumed the risk of injury as a result of negligence of other jockeys even though rules were violated (though not recklessly or intentionally) by defendant jockeys. In assuming the risks the plaintiffs consented to those risks and the defendants performed their duty, with the actual consent to the risks being implied from the plaintiffs’ act of electing to participate in the activity.<sup>72</sup>

Thus, whether the jurisdiction allows the assumption of risk defense or

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68. *Id.* at 510.

69. 558 So. 2d 787 (La. Ct. App. 1990).

70. *Id.* at 790 (citing *Ginsberg v. Hontas*, 545 So. 2d 1154, 1155 (La. Ct. App. 1989)).

71. *Turcotte v. Fell*, 502 N.E.2d 964, 968 (N.Y. 1986); *Ordway v. Casella*, 243 Cal. Rptr. 536, 538 (Ct. App. 1988).

72. *Turcotte*, 502 N.E.2d at 968; *Ordway*, 243 Cal. Rptr. at 541

simply considers the qualities or nuanced aspects of assumption of risk while applying them under a comparative fault analysis, the effect is to reduce liability exposure to sports employers, stadium operators, and sports participants.

There are times in which spectators are injured even though they are attempting to keep their eyes on the ball. At baseball and softball games, sometimes before the game or during the game, events are happening on the field in which more than one ball is being used. For instance, a relief pitcher may be warming up in the bullpen next to the grandstand, players are playing “pepper,” or the defense is taking some in-field practice. The Illinois Court of Appeals recognized in *Maytnier v. Rush*<sup>73</sup> that a spectator does not assume the risk of injury from being hit by a baseball when more than one baseball is in the air at one time in the ball park. In that case, the plaintiff was a knowledgeable spectator sitting in the first row about ten to fifteen seats down the outfield side (left field) of the Chicago Cubs dugout. The Cubs bullpen was also on the left field side of the field. During the sixth inning of the second game of a doubleheader, the plaintiff was struck on the left side of his head by a ball thrown from the bullpen by a Cub pitcher, who was warming up. The spectator did not see the ball that hit him from the left because he was watching the ball actually in play in the game to his right. The court found for the plaintiff.

The *Maytnier* court considered the above facts against the following legal policy as argued by Dean Prosser:

Knowledge of the risk is the watchword of assumption of risk. Under ordinary circumstances the plaintiff will not be taken to assume any risk of either activities or conditions of which he is ignorant. Furthermore, he must not only know of the facts which create the danger, but he must comprehend and appreciate the danger itself.

. . .

Even where there is knowledge and appreciation of a risk, the plaintiff may not be barred from recovery where the situation changes to introduce a new element, such as several balls in the air at one time in a baseball park.<sup>74</sup>

The court also considered the Ohio Supreme Court’s prior decision in

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73. 225 N.E.2d 83 (Ill. App. Ct. 1967).

74. WILLIAM PROSSER, HANDBOOK OF THE LAW OF TORTS 462, 464 (3d ed. 1964) (footnotes omitted) (internal quotation marks omitted).

*Cincinnati Baseball Club Comany v. Eno*,<sup>75</sup> which held that a plaintiff, hit by a stray-batted ball during a practice session in between games of a doubleheader, could recover for his injuries when several balls were simultaneously in play upon the field. Its rationale was that it is impossible for the spectator to protect himself by watching the ball when more than one ball is being batted or thrown at once. The analysis is similar for a broken baseball bat. How can one keep his or her eye on a batted ball and also keep an eye on a broken bat? Even though one is aware of the risk of a broken bat, the first instinct of a game participant or spectator is to catch the flight of the batted ball.

The Illinois Court of Appeals in two cases in 1992 followed its precedent in *Maymier*. In *Coronel v. Chicago White Sox, Ltd.*,<sup>76</sup> the Illinois Court of Appeals considered whether the sports facility adequately screened the most dangerous area is a question of fact for the jury. In the case the plaintiff sat three seats away from the protective screen at Comiskey Park in Chicago. She was distracted only for a brief moment when she was struck by a foul ball. She alleged that the White Sox failed to adequately protect her and to warn her of foul balls, which they knew would be hit in the unprotected area. The White Sox defended that they had met their only duty to provide a screened area behind home plate, the most dangerous area in the stadium, and that they had no duty to warn the plaintiff of an “open and obvious” danger of being hit by a foul ball. The Court reversed summary judgment for the White Sox holding the following: (1) there was a duty to give an adequate warning to enable the visitors to avoid the harm, or otherwise to protect them against it; (2) whether or not the warning on the back of the plaintiff’s ticket to the game, announcements on the public address system, and on the scoreboard to watch for foul balls were adequate warnings for plaintiff was a question of fact for the jury; and (3) whether there was sufficient screened area for spectators was a question of fact for the jury.

In *Yates v. Chicago National League Ball Club, Inc.*,<sup>77</sup> the same Illinois Court of Appeals considered whether the Chicago Cubs had a duty to a minor child who was hit in the face with a foul ball while he was sitting on the edge of the screened area. The trial court granted judgment for the plaintiff. On appeal the Court of Appeals upheld the verdict holding the following: (1) there was sufficient evidence to support a finding that the owner’s failure to screen the area behind home plate farther down the first and third base lines was a breach of the defendant’s duty of reasonable care; (2) consideration could be

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75. 147 N.E. 86 (Ohio 1925).

76. 595 N.E.2d 45 (Ill. App. Ct. 1992).

77. 595 N.E.2d 570 (Ill. App. Ct. 1992).

given to the number of persons hit by foul balls in the stadium during the previous season; and (3) the Cubs had a duty to warn about risk of being hit by batted balls in unprotected seats in the area behind home plate.

*B. Statutory Protections to Stadium Operators*

The *Coronel* and *Yates* decisions no longer have precedential value as they have effectively been abrogated by the Illinois Baseball Facility Liability Act,<sup>78</sup> which states the following:

The owner or operator of a baseball facility shall not be liable for any injury to the person or property of any person as a result of that person being hit by a ball or bat unless: (1) the person is situated behind a screen, backstop, or similar device at a baseball facility and the screen, backstop, or similar device is defective (in a manner other than in width or height) because of the negligence of the owner or operator of the baseball facility; or (2) the injury is caused by willful and wanton conduct, in connection with the game of baseball, of the owner or operator or any baseball player, coach or manager employed by the owner or operator.<sup>79</sup>

The owner may also own the team or the team may own the baseball facility. The statute covers baseball facilities that are used for professional, amateur, or educational baseball purposes. The Illinois statute gives no protection to the players or coaching staff. An interesting situation could possibly arise as to the level of immunity offered to an owner or operator of a baseball facility. If a player is negligent in altering a wooden bat causing injury to a spectator or another player or coach, could the team be vicariously liable? It is clear that the statute shields the team from direct liability, but it appears the language “for any injury to the person or property” reflects the legislative intent to be read broadly. Furthermore, in Illinois plaintiffs are foreclosed from asserting that the protective screen behind home plate is too small to provide adequate protection.

Two other states, Arizona and Colorado, have passed similar legislation to provide limited immunity to owners and operators of baseball stadiums used for professional, amateur or educational baseball purposes. Arizona’s statute<sup>80</sup> does not appear to be as broadly written and arguments may be made of

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78. 745 ILL. COMP. STAT. 38 (1993). The Act was held to be constitutional under the Illinois Constitution in *Jasper v. Chi. Nat’l League Ball Club, Inc.* 722 N.E.2d 731 (Ill. App. Ct. 1999).

79. 745 ILL. COMP. STAT 38/10.

80. ARIZ. REV. STAT. ANN. § 12-554 (2013).

negligence in design or adequacy of the protective screening behind home plate and elsewhere in the stadium, like in a picnic pavilion area. The statute does not protect the baseball team (unless it also owns the baseball stadium), coaches, or players. The statute states the following:

- A. An owner is not liable for injuries to spectators who are struck by baseballs, baseball bats or other equipment used by players during a baseball game unless the owner either:
  - 1. Does not provide protective seating that is reasonably sufficient to satisfy expected requests.
  - 2. Intentionally injures a spectator.
- B. This section does not prevent or limit the liability of an owner who fails to maintain the premises of the baseball stadium in a reasonably safe condition.<sup>81</sup>

The Colorado Baseball Spectator Safety Act of 1993<sup>82</sup> provides for limited immunity from liability only for owners of professional baseball teams or owners of baseball stadia. The Act clearly states the intention of the Arizona legislature to protect the owners of professional baseball stadiums from lawsuits for spectator injuries from balls or bats, by stating the following:

(4)(a) Spectators of professional baseball games are presumed to have knowledge of and to assume the inherent risks of observing professional baseball games, insofar as those risks are obvious and necessary. These risks include, but are not limited to, injuries which result from being struck by a baseball or a baseball bat.

(4)(b) Except as provided in subsection (5) of this section, the assumption of risk set forth in this subsection (4) shall be a complete bar to suit and shall serve as a complete defense to a suit against an owner by a spectator for injuries resulting from the assumed risks. . . . Except as provided in subsection (5) of this section, an owner shall not be liable for an injury to a spectator resulting from the inherent risks of attending a professional baseball game, and, except as provided in subsection (5) of this section, no spectator nor spectator's representative shall make any claim against, maintain an action against, or recover from an owner for injury, loss, or damage to the spectator resulting from any of the inherent

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81. *Id.* §§ 12-554 (A)–(B).

82. COLO. REV. STAT. § 13-21-120 (2013).

risks of attending a professional baseball game.<sup>83</sup>

Colorado's statute leaves open liability for failing "to make a reasonable and prudent effort to design, alter, and maintain the premises of the stadium in a reasonably safe condition relative to the nature of the game" or for failing to post and maintain specific warning signs for spectators.<sup>84</sup>

### C. *Negligence of Players, Coaching Staff, and Team*

With the legal impediments and overwhelming case law opposing injured spectators, compensation for injuries from broken baseball bats, regardless of the wood used to manufacture the bat, is only remotely a possibility. It would appear that plaintiffs need to take another approach to litigation. Although it is not clear that they would be effective, reasonable arguments may be made that: (1) wooden bats with thin handles, principally those made of maple, are badly designed for play in professional baseball; and (2) the players who shave down the handles of baseball bats to make them thinner create a potentially dangerous situation for which the players and their team employers should be liable. Serious injury in both cases is reasonably foreseeable.

Given the long history of professional baseball and the nature of the baseball bat, have the changes in the baseball bat's form and material usage been necessary to the game? As discussed above, experts in physics and engineering and baseball bat manufacturers seem to agree that thin bat handles weaken the bat and make them break more easily than would thicker-handled bats. This is not a strange phenomenon; it seems intuitive that a thin-handled bat is more likely to break under 5000 pounds of pressure, which occurs when the fastball meets a strong batter's swinging bat that. Recall that Sam Holman will not manufacture a maple bat with a handle thickness of less than 0.875 of an inch even though the MLB minimum is 0.842 of an inch.<sup>85</sup>

Why should baseball spectators and other participants in the game have to accept the risk of being hit with bat fragments because the player chooses to use a bat that is weak? If the "Golden Rule of Business" is "he, who has the gold, makes the rule," then why should the ballplayer dictate the legal rules? In practically, no other industry or profession is the customer (spectator) treated with such legal disdain by courts. Whole bodies of law have developed or expanded around the objective of the deep pocket theory—it is better that the injured, innocent person receives compensation from a business or professional who can spread the risk through insurance and price adjustments.

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83. *Id.* §§ 13-21-120 (4)(a)–(b).

84. *Id.* § 13-21-120 (5).

85. Jeff Passan, *Maple-Bat Backlash*, *supra* note 21.

Persons subject to liability under such legal reasoning adjust over time and improvements to products or services grow out of necessity. Professional baseball should be no different.

Should a spectator accept the risk of the negligent or reckless creation of a dangerous situation by a player who desires to maintain higher offensive statistics necessary to improve his compensation? Given the frequency of broken maple bats and the risk of serious injury, it would appear that creation of dangerous situations would exist in using a maple bat with a thin handle at the MLB minimum size or by shaving the bat handle down once the player gets it from the manufacturer. Since the game of baseball does not require either maple bats with their propensity to shatter into fragments or excessively thin bat handles, use of these types of bats is not a customary element of the game of baseball born out of tradition such that the risk of injury from their use would be an inherent risk in participating in the game or attending the game as a spectator. The use of maple bats and thin handled bats may have become customary over the last fifteen years, a relatively short period given the 150-year history of baseball, but these types of bats are not necessary for the game. Spectators should not have to assume the risk of dangerous situations created by another based on desires for economic wealth or vanity. If the stadium owner or operator cannot be liable because play of the game is beyond its control, then the rules of negligence should be applied absent a “baseball rule” of primary implied assumption of risk.

The author does not propose abolishing the doctrine of primary implied assumption of risk as it applies to baseball spectators with regard to foul balls; errant throws in practice or during a game; or even a thrown or broken bat, as long as the bat, when used, is not unreasonably dangerous. The basic nature of the game is still unchanged from the days of the early application of the assumption of risk doctrine. The game is still hitting, running, catching, and throwing with some baseball strategy mixed in. Promotional activities or overzealous behavior like throwing baseballs into the stands or selecting baseball bats that are, either factually or perceptively, superior performers but unsafe for other participants or spectators are only ancillary to the game. If the maple baseball bat with a very thin handle is so important that players and owners believe they cannot be successful without it, even to protect ticket-buying customers who pay extra to sit close to the field, then it seems unreasonable to ban steroids that also create much more offense but cause health problems to the players who use them.

As has been argued, players choose maple bats and some players shave down the handles to make the bats lighter. Assuming that a player uses a bat that breaks more frequently than other bats and that one of the broken bats hits a spectator in the stands, should that player be liable for the injured spectator's

injury? If the doctrine of implied primary assumption of risk were abolished with regard to broken bat injuries, then there would be a question of fact as to whether the player was negligent in selecting the bat for use or modifying the bat making it less safe. A jury would then decide if the player knew or should have known that the bat he was using was defective in its design or manufacture or he might have been using it wrong and against MLB's new bat specifications and policies. Certainly if the batch of bats were excessively brittle, such that a reasonable ballplayer would or should have known this, then there would be negligence. Also, if the player shaved down the handle on the bat to below MLB bat specification, this would be a negligent act. With duty and breach of duty proven, the injured spectator would then have to prove that the player's negligence was the proximate cause of the spectator's injury.

What effect might the 2009 MLB bat specifications and cautions for player use in hitting have on liability? It will be interesting to see if in the future bat manufacturers, as a precautionary measure, place a warning label on wooden bats about the risk of hitting a ball on the wrong side of the bat. By instituting a policy aimed at both manufacturers and player use of the bats to make the bats safer, could MLB not be creating a legal duty to spectators and game participants to comply with that new safety policy? Courts have held that golf course operators who instituted warnings of inclement weather, such as lightning in the area, could be liable for negligence for failure to fulfill their obligations under such policies.<sup>86</sup> Could a court find that a player, who would have actual or implied knowledge of these safety guidelines, liable for not turning his bat the right way before he attempted to hit a ball? Could MLB be liable for not monitoring its bat policies? This is only a remote likelihood, but it could create another argument that MLB has heightened the risk to spectators and game participants.

A possible defense would be implied secondary assumption of risk. Was the spectator paying attention to the game while the ball was in play? Did the spectator try to avoid the broken bat, if he could? Applying the comparative fault doctrine, which is consistent with implied secondary assumption of risk, the law of negligent injury to spectators for broken bats would now be consistent with general tort law. Ballplayers would be more prudent in their selection of bat manufacturers and bat specifications; they could purchase liability insurance; and they would be reluctant to shave down the bat handles. Ballplayers would have the option of continuing to use maple bats with thin handles, but they would have to perform an economic cost-benefit analysis. Spectators and society would not have to shoulder the economic burden if one

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86. See, e.g., *Maussner v. Atlantic City Country Club, Inc.*, 691 A.2d 826, 835 (N.J. Super. Ct. App. Div. 1997). *But cf. Hames v. Tennessee*, 808 S.W.2d 41, 42 (Tenn. 1991).

of the players' bats broke during a game and caused injury. As many states do not have workers' compensation coverage for professional athletes, players, and coaches would also have the same legal rights to sue the negligent ballplayer. Such a legal policy would not affect the statutory or common law defenses afforded stadia owners or operators.

Teams as employers under such a legal policy shift could be vicariously liable under the doctrine of *respondeat superior* for injuries suffered as a result of the player's negligence. Of course, if the player was instructed by a coach or manager to use a maple bat that was unsafe or instructed to shave down the handle even though either course of action was reasonably foreseeable to result in an injury to a spectator, then the coach or manager could be directly liable for negligent supervision or training. Furthermore, if the team management knew, or should have known, that a player's bat handle was too thin, the team would be directly liable for negligent supervision. What the team's equipment manager knows or does with regard to making sure the team members' equipment is safe could be relevant in determining liability for the team.

#### D. Doctrine of Vicarious Liability

When a player or coach commits a tortious act, plaintiffs usually seek to have the team (employer) held liable as well. The corporate team or employer is not the culprit of the bad act. However, under the doctrine of *respondeat superior* the employer is vicariously liable for a tortious act, negligent or intentional, of an employee if the act was committed within the scope of the employee's employment with the employer.<sup>87</sup> This notion is based on an agency relationship existing between the employer or principal (team) and the employee or agent (player or coach). If the act was not within the employee's scope of employment, the employee is liable but not the employer.

The Restatement (Second) of Agency provides a very broad series of factors and tests for defining when employee conduct is within the scope of employment. Conduct of a servant is within the scope of employment if, but only if:

1. It is of the kind he is employed to perform;
2. It occurs substantially within the authorized time and space limits;
3. It is actuated, at least in part, by a purpose to serve the

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87. RESTATEMENT (THIRD) OF AGENCY § 2.04 (2006). See generally Steven I. Rubin, *The Vicarious Liability of Professional Sports Teams for On-the-Field Assaults Committed by Their Players*, 1 VA. J. SPORTS & L. 266 (1999).

master; and

4. If force is intentionally used by the servant against another, the use of force is not unexpected by the master.<sup>88</sup>

Conduct of a servant is not within the scope of employment if it is different in kind from that authorized, far beyond the authorized time or space limits, or too little actuated by a purpose to serve the master.<sup>89</sup>

To determine whether an employee's act is within the employee's scope of employment, courts use the "purpose" or "intent" test (also called the "motivation to serve" test) or the "outrageousness" test.<sup>90</sup> Under the purpose test, the employer is vicariously liable where the employee's act was committed with a purpose to serve the master.<sup>91</sup> This is not usually the case when intentional torts are involved, and this rule effectively reduces the employer's likely chance of liability, especially in the sports industry. However, the employee does not have to base his intent or motivation solely for the purpose of serving the employer. The intent or motivation may be mixed.<sup>92</sup> Furthermore, the act may not have been authorized, but if the act was "not unexpected in the view of the duties of the servant," then courts will deem the act to be within the scope of employment.<sup>93</sup> Courts consider whether the act of the employee can be reasonably expected or anticipated. The nature of the industry or activity, customs of the enterprise, and nature of the persons usually employed are relevant factors.<sup>94</sup> If the employee's conduct is considered outrageous, the employer will not be held liable. The rationale under this test is that, if the act is outrageous, the employee can be viewed as departing from the scope of his employment.<sup>95</sup>

Based on the foregoing law of agency, when a player modifies a baseball bat to improve his offensive performance or uses a bat that he knows or should know is excessively dangerous, and this results in injury to a spectator or game participant, then he is negligent or reckless and liability would ensue. If the team's manager or coach does not stop the player and discipline him when he

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88. RESTATEMENT (SECOND) OF AGENCY § 228 (1957).

89. *Id.* § 228.

90. *See* Rubin, *supra* note 87, at 282. California follows the "arising out of employment" test rather than the "scope of employment" test. *See id.* at 282 n.84. California's test is similar to the usual test for workers' compensation liability and has a more inclusive effect. *Id.* at 282.

91. *Id.* at 280.

92. RESTATEMENT (SECOND) OF AGENCY §228(1)(c) (1957).

93. *Id.* §245.

94. *Id.* §245 cmt. a; Rubin, *supra* note 87, at 283.

95. *Bates v. Doria*, 502 N.E.2d 454, 457 (Ill. App. Ct. 1986); *see also* RESTATEMENT (SECOND) OF AGENCY § 235 cmt. c.

is negligent in modifying his bat to make it less safe, vicarious liability attaches to the player's team as he would be furthering the team's business or the player's action would be construed to be a tacitly ratified by the team.

If a coach or manager directs or encourages a player to use a dangerous bat, the team is also vicariously liable for the use of that bat should it break and injure a spectator. Such direction by a player or manager could be construed as negligent supervision as well for which the team could be directly liable. One might question whether any team or umpire periodically or systematically determines if players' bats meet the specified minimum handle thickness. This might be relevant because failing to take this precaution could be deemed a tacit ratification of a player's negligence in shaving a bat handle down to excessive thinness. Furthermore, it could be held to be negligent supervision of the player.

#### *E. Product Liability for Defective Design*

Perhaps given the strength of the assumption of risk doctrine and courts' reluctance to modify its reach in broken wooden baseball bat situations, the best alternative may be for courts to recognize liability based on design defect. Simply put, the wooden baseball bat as it is designed for professional players, and in accordance with some MLB standards, vis-à-vis thinness of the handle relative to barrel size and bat length and allowance of construction from maple wood, constitutes a design defect, which, when resulting in injury to a spectator or game participant, would create liability for the manufacturer. If this argument were to be accepted by the courts, MLB could also be liable under a negligence theory for specifying the design of the bat, especially given the wooden bat manufacturers' collective opinion that MLB's allowable barrel size—bat length-handle thickness relationship results in a bat that could too easily break.<sup>96</sup> Furthermore, a number of well-respected baseball experts share the opinion that maple bats with thin handles are dangerous.<sup>97</sup>

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96. See generally Passan, *New MLB Rules*, *supra* note 30 (describing the response by bat manufacturers to MLB's 2008 bat study and new bat guidelines.) Passan describes how the MLB 2008 study was flawed and important conclusions were rejected by some bat manufacturers, for example the new "slope of grain" findings requiring players to hit using the face grain, but not enforcing the requirement, that went contrary to wood bat manufacturers' and players' preference. See *id.*

97. See, e.g., Westover, *supra* note 35, at 523 n.53 (Tampa Bay Rays manager Joe Maddon called maple bats "dangerous" and Scott Rolen of the Cincinnati Reds said he would not want his family to sit anywhere in stands except behind the screen because of the hazard of maple bats.); Al Yellon, *MLB Had a Solution to Shattered Bats and Refused to Institute It*, SB NATION CHI. (Sept. 20, 2010, 1:53 PM), <http://chicago.sbnation.com/2010/9/20/1700071/mlb-tyler-colvin-maple-bat-shattered-bat-batglove> (statement of Joe Maddon) ("If we're going to wait for somebody to actually get killed or impaled, we're going to wait way too long.").

There have been lawsuits against metal baseball bat manufacturers in which courts have found liability for defective design and failure to warn.<sup>98</sup> However, there have been no decided cases of liability based on defect in design or bat warnings against manufacturers of wooden bats used in professional baseball. Still, the cases against the metal bat manufacturers are instructive.

In *Sanchez v. Hillerich & Bradsby Co.*,<sup>99</sup> a college pitcher was seriously injured when he was struck in the head by a line drive hit by an opposing batter's Air Attack 2 aluminum bat. The bat used by the batter was manufactured by defendant Hillerich & Bradsby (H & B) and met the safety specifications by the NCAA. Sanchez sued the manufacturer under a claim of strict product liability and under a claim of negligence sued the NCAA, the batter's university and collegiate athletic conference. Sanchez argued that the use of the Air Attack 2 bat increased the risk above that inherent in the sport of baseball.

Evidence showed that the defendants had actual knowledge that the bat generated a ball exit speed too fast for use. In fact, the designer of the bat had informed H & B that the bat allowed a batter to hit a ball at speeds in excess of that which would give a pitcher time to avoid being hit. The designer opined to H & B that the Air Attack 2 substantially increased the risk of a pitcher being hit by what he termed a "come backer." H & B instructed the bat designer to refrain from publicly discussing issues of the bat's safety. At the time of the Sanchez's injury, the NCAA had concluded the new aluminum bats were a safety risk to pitchers and infielders; the use of such bats had changed the way the college game of baseball was being played; and the new aluminum bats substantially outperformed traditional wood bats. The trial

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98. See, e.g., *Yeamon v. Hillerich & Bradsby Co.*, No. CIV-10-1097-F (W.D. Okla. Dec. 4, 2011) (jury's verdict of \$951,000 against defendant aluminum bat manufacturer was reversed on appeal because the court concluded that there was no reasonable basis for finding the bat was defective given that it's batted ball speed only exceeded the safety standard by a very small margin); *Cockrell v. Hillerich & Bradsby Co.*, 611 S.E.2d 505 (S.C. 2005) (order of settlement for \$1.7 million, dated Mar. 12, 2007); *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529 (Ct. App. 2002) (liability established but the damages were not specified); *Domalewski v. Hillerich & Bradsby Co.*, No. 08-2975 (D. N.J. filed June 13, 2008) (twelve-year-old Little League pitcher struck in the chest from a batted ball from defendant manufacturer's metal baseball bat, case settled for \$14.5 million on Aug. 22, 2012); *Patch v. Hillerich & Bradsby Co.*, 2011 MT 175, 361 Mont. 241257 P.3d 383 (aluminum bat manufacturer liable for approximately \$800,000 based on the failure to warn in the death of an eighteen-year-old American Legion baseball pitcher struck by batted ball); see also Maria Chutchian, *Baseball Bat Maker Gets Judgment in Jury Suit Reversed*, LAW360 (Sept. 6, 2012) (on file with author); John Petrick & Richard Cowen, *\$14.5M Settlement Reached in Wayne Family's Louisville Slugger Lawsuit*, NORTHJERSEY.COM (Aug. 22, 2012), [http://www.northjersey.com/sports/145\\_million\\_settlement\\_reached\\_in\\_Louisville\\_slugger\\_case.html](http://www.northjersey.com/sports/145_million_settlement_reached_in_Louisville_slugger_case.html).

99. *Sanchez*, 128 Cal. Rptr. 2d 529.

court granted summary judgment to the defendants on the ground that Sanchez would not be able to prove causation.

The California court of appeals reversed and reached several interesting conclusions. In discussing Sanchez's primary assumption of risk of getting injured by the batted ball, the court noted,

A defendant owes no duty of care to protect a plaintiff against risks inherent in a particular sport voluntarily played by the plaintiff. But the defendant owes a duty to participants not to increase the risk of harm over and above that inherent in the sport. . . . If it is determined that the actions of a defendant did increase the risk of harm above that inherent in the sport, primary assumption of risk is not available and the issue becomes one of secondary assumption of risk.

A risk is inherent in a sport if its elimination (1) would chill vigorous participation in the sport; and (2) would alter the fundamental nature of the activity.<sup>100</sup>

The court held, based on the evidence as described in preceding paragraph, that there was a triable issue of material fact:

[W]hether the design and use of the Air Attack substantially increased the inherent risk appellant faced. The evidence also raises at least a triable issue whether defendants knew of and appreciated the nature of the increased risk. . . .

If it is ultimately determined primary assumption of risk does not apply here, the issue then becomes one of secondary assumption of the risk. Comparing the relative fault of plaintiff and defendants is a question of fact that must be resolved by a trier of fact and cannot be resolved by way of a summary judgment.<sup>101</sup>

## 1. Consumer Expectation and Prudent Manufacturer Tests

Product liability cases or statutes usually provide that a manufacturer or seller may be liable for injuries caused by a product that is determined to be in a defective condition or unreasonably dangerous at the time it left the control of the manufacturer or seller. Generally, an unreasonably dangerous product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases the product, or a product that, because of its dangerous condition, would not be put on the market by a

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100. *Id.* at 535–36 (citations omitted).

101. *Id.* at 538 (citations omitted).

reasonably prudent manufacturer or seller assuming that the manufacturer or seller knew of its dangerous condition.<sup>102</sup>

Most states rely on the Consumer Expectation Test and some states allow for an alternative test, the Prudent Manufacturer Test.<sup>103</sup> Some states apply the Consumer Expectation Test exclusively, and some states conclude that the two tests are, in essence, the same approach. The Consumer Expectation Test for determining whether a product is unreasonably dangerous asks whether the product's condition poses a danger beyond that expected by an ordinary consumer with reasonable knowledge. This test requires consideration of what both game participants and bystanders (i.e., spectators, umpires, coaches, etc.) require in terms of safety of the wooden baseball bat. Under this test, a product would not be unreasonably dangerous if the ordinary consumer would appreciate the condition of the product and the risk of injury. The test can only be applied to products about which an ordinary consumer would have knowledge—to those products in which everyday experience of the product's users permits a conclusion. Consumer expectation may be proven by either direct or circumstantial evidence or by focusing on how the product is marketed.<sup>104</sup> Considering consumer expectations may involve examining “evidence of actual industry practices, knowledge at the time of other injuries, knowledge of dangers, the existence of published literature, and from direct evidence of what reasonable purchasers considered defective.”<sup>105</sup>

In applying the Consumer Expectation Test, there are two potential users or interested parties. The professional baseball player has an interest in obtaining the lightest-weighted bat as possible but the strongest in its impact on the baseball. The player would thus request a maple bat with a thin handle, a big barrel, and a stylish, sleek appearance. Note that there is still a perception that maple bats provide more “jump off the bat” than do ash bats. Such expectations from the player's perspective would be reasonable given their interest in offensive effectiveness of the bat and their potential financial gain. This is consistent with the marketing of maple baseball bats to major league ballplayers. Bats are custom made for these players by about twenty manufacturers.

The bystander, however, has another interest; it is one of safety. Clearly, the bystander would like to see the players perform well and see more offense

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102. TENN. CODE ANN. §§ 29-28-101-108 (2012).

103. *See Ray v. BIC Corp.*, 925 S.W.2d 527, 528 (Tenn. 1996) (stating that Tennessee allows both the Consumer Expectation Test and the Prudent Manufacturer Test).

104. *See Wilmot*, *supra* note 35, at 364–71.

105. *Id.* at 364 (quoting *Sexton ex rel. Sexton v. Bell Helmets, Inc.*, 926 F.2d 331, 337 (4th Cir. 1991)).

in the game, but, for those persons in close proximity to a flying bat fragment, this is, in the zone of danger, safety is a more reasonable concern.

The Prudent Manufacturer Test (referred to as the risk-utility hindsight analysis) considers the question: “Had the manufacturer been aware of the risk created by the product, would a reasonable manufacturer still have sold the product?”<sup>106</sup> In *Ray v. BIC Corp.*,<sup>107</sup> the Tennessee Supreme Court applied the Prudent Manufacturer Test as an alternative to the Consumer Expectation Test. The court stated the following:

[T]he prudent manufacturer test requires proof about the reasonableness of the manufacturer or seller’s decision to market a product assuming knowledge of its dangerous condition. What the buyer expects is irrelevant under this test. In contrast to the consumer expectation test, the prudent manufacturer test is more applicable to those circumstances in which an ordinary consumer would have no reasonable basis for expectations. Accordingly, expert testimony about the prudence of the decision to market would be essential.<sup>108</sup>

In *Ray*, the court had to determine whether or not a BIC disposable lighter was defective in its design when an unattended, small child accidentally started a fire in his mother’s home. The fire caused the child to suffer severe burns. In applying the Consumer Expectation Test the court noted, “An ordinary consumer would expect that a cigarette lighter, left in the hands of a young child, could cause danger and injury concomitant to that occurring in this case.”<sup>109</sup> Similarly, a reasonable baseball player would expect a maple bat with a barrel too large for its thin handle, causing greater likelihood of breaking into large fragments, to injure another player, coach, umpire, or spectator. Batter awareness would be unavoidable given the frequency within ball games of broken bats and near misses to game participants.

## 2. Risk-Utility Analysis

In determining whether a product’s design is dangerous, it may be necessary to apply a risk-utility analysis, which is necessary when the Prudent Manufacturer Test is applied. This analysis may be conducted under either the

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106. Wilmot, *supra* note 35, at 367; *Ray*, 925 S.W.2d at 530 (“[The Prudent Manufacturer Test clause] provides that a product is unreasonably dangerous if a reasonably Prudent Manufacturer Test or seller, aware of the product’s dangerous condition, would not put the product on the market.”).

107. *Ray*, 925 S.W.2d 527.

108. *Id.* at 531.

109. *Id.* at 530.

Consumer Expectation Test or the Prudent Manufacturer Test. This form of analysis requires the balancing of factors in determining usefulness as compared to the dangerousness of the risk of the product. The Wade-Keeton factors<sup>110</sup> consider seven issues to assist in the balancing of utility against the dangerousness of the risk. Each factor is discussed below as applied to wooden baseball bats used in professional baseball.

*i. The Usefulness and Desirability of the Product—Its Utility to the User and to the Public as a Whole.*

Maple bats are desirable in that they are perceived by players, teams, and fans as adding more offense to the game of baseball. Even though MLB's 2005 bat study concluded that there was no difference in bat performance between maple and ash wood, players and managers do not share that opinion. The game of baseball is as popular as ever in terms of ticket sales, but one cannot logically conclude that the increased offense generated by today's higher performance bats is the cause. One could more reasonably argue that the drastic increase in offensive stats and run production is owed more to the running of the steroids era, new ball parks with shorter fences, or just bad pitching. If maple bats were banned and/or bats made sturdier in their construction by having a safer proportional relationship between the handle, barrel, and length, all batters would be playing on a level playing field. The game would remain the same. The public would probably see little difference, and many would believe the game was more honest in staying with tradition. Generally speaking, there is no substantial benefit to any constituent group or to the public that would warrant not changing the design.

*ii. The Safety Aspects of the Product—The Likelihood That It Will Cause Injury, and the Probable Seriousness of the Injury.*

As discussed throughout this paper, there is a significant threat to game participants and spectators sitting in the first twenty rows along the first or third base lines. As spectators tend to follow the flight of the ball, a broken bat barrel or large shard of a bat might be unexpected or unseen. Furthermore, a spectator may move away from a foul ball more easily than a portion of a bat flying toward him or her. When a maple bat breaks, it may snap off at the handle or a large shard of it may break, the later generally not being a feature of an ash bat. The pieces of broken bat contain sharp ends that can penetrate the body like a spear. The barrel end of the bat as a projectile would have the

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110. See *id.* at 533 n.10 (citing Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 837–38 (1973)).

effect of a blunt weapon. Injuries to game participants are more likely. Defensive players on the infield, especially pitchers, are the persons facing the highest risk, but risk of getting struck by a broken bat extends to base coaches, base umpires, and even to all players coaches and staff sitting on the bench. As evidenced by the injury to Tyler Colvin (discussed *supra*), base runners are also vulnerable and the injury can be very severe. To date there have been no fatalities.

*iii. The Availability of a Substitute Product Which Would Meet the Same Need and Not Be as Unsafe.*

The use of maple wood for bats is a fairly recent phenomenon—about fifteen years. The use of maple really grew in about 2001 with Barry Bonds' home run record year. Before maple, ash was the principal source of wood for bats at the professional level. Thus, there is already a substitute wood, which is still today the second most popular wood bat used by MLB players today. Furthermore, bat manufacturers could design wood bats with thicker handles, or, where thinner handles were desired above other bat features, bat barrels could be smaller or bat lengths shorter to put less stress on the handle. The substitute for a maple bat and/or thin handle bat would meet the same needs for players, other game participants, and spectators. There has been speculation that MLB needed to retain the use of maple bats because there is a limited supply of ash wood and the source of ash wood is principally owned or controlled by the major bat manufacturers. To the extent that the large bat manufacturers own or control the supply of ash wood, they would have to guard against acting as monopolists for which the manufacturers could face prosecution under the Sherman Act of 1890. Others have proposed fixes to the problem, for example, other wood substitutes<sup>111</sup> and the bat glove.<sup>112</sup>

*iv. The Manufacturer's Ability to Eliminate the Unsafe Character of the Product Without Impairing Its Usefulness or Making It Too Expensive to Maintain Its Utility.*

This factor poses no problem. As discussed under the third factor above, manufacturers could readily fix the design problem through substituting a different type of wood that has a different cracking and breaking tendency and

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111. E.g., Austin Merrill, *Shatterproof Bats from Africa*, VANITY FAIR (June 24, 2008), <http://www.vanityfair.com/online/daily/2008/06/shatterproof-bats-from-africa>.

112. See *Invention Fixes Broken Baseball Bat Problem*, CNN iREP. (Oct. 28, 2008), <http://www.iereport.com/docs/DOC-126711>. This invention encases the lower part of the bat extending no greater than seventeen inches from the bottom of the handle. *Id.* It does not stop the bat from breaking but it effectively contains the fragments that would normally fly into the air causing serious injury. *Id.*

re-design custom bats for their player customers. A change would probably not occur mid-season as this would be too disruptive for players. If the change were prospective, ample time would be available for manufacturers to find sources of wood materials and custom fit the players. Players would need to have their new bats before the start of spring training, if they did, in fact, change bat designs. A more difficult task would be, for example, re-designing the bat to incorporate the bat glove or a similar device or material. This would certainly be doable, but as any add-on device or incorporated material like the bat glove would most likely be patented, this would complicate the manufacturing process, requiring more lead time and requiring MLB to assure small bat manufacturers that it would not assist in the creation of a monopoly for the large bat manufacturers who sought to obtain exclusive licensure for the use of the patent on the bat glove (or similar device). Finally, the team could protect spectators by extending the screen or install a Plexiglas screen down the first and third baselines.<sup>113</sup> This type of fix would not protect game participants, however, and would damage the relationship that spectators, who prefer to sit closer to the field or players' dugout, have with the team. It would also reduce the value of those tickets and interfere with the fans' enjoyment of the game. It is an option; however, should the players remain abstinent against changing the bat design once a court finds liability for a broken bat.

v. *The User's Ability to Avoid Danger by the Exercise of Care in the Use of the Product.*

Because no one knows when, or if, a bat will break, how it will break, or where the pieces will land, no one can actually avoid the danger of a broken bat. This is especially the case for game participants. Spectators on the other hand have two options to avoid danger. First, spectators could choose to sit in the screened area behind home plate. Second, they could sit farther away from home plate such that a broken bat could not hit them.

vi. *The User's Anticipated Awareness of the Dangers Inherent in the Product and Their Avoidability, Because of General Public Knowledge of the Obvious Condition of the Product, or of the Existence of Suitable Warnings or Instructions.*

All game participants should be aware of the dangers of broken baseball bats. Warnings would do them no good. Some precautions have been taken by some base coaches; many wear batting helmets now. The players cannot

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113. See generally Celedonia, *supra* note 37 (explaining this was the approach that the NHL took when it tried to reduce spectator injuries resulting from flying pucks entering the stands).

be tentative; they must play the game without fear of being struck by a broken bat. Most spectators understand the risk they face. Stadium operators post warning signs within the stadiums about the risk of foul balls and bats thrown into the seats. Each ticket contains a warning. It is unsure whether most spectators actually know about the risk of a sharp end of a broken bat striking them. If a spectator is sitting within an area reachable by a broken bat, all the spectator can do is watch carefully for a broken bat. The spectators also have to watch the flight of the ball and many times deal with the sun blocking their vision. Even if the spectator is diligent, there is no assurance that the spectator will not get injured anyway. Warnings on baseball bats, as opposed to usual product warnings, would be of no benefit in professional baseball.<sup>114</sup> The batter, who is the user, is the least likely to get injured because of a broken bat. The user cannot control the bat. One may argue that the player should be diligent in holding the bat exactly as MLB has instructed him to do to reduce the likelihood of large shards of the bat breaking off, but this is unlikely as much of what a batter does is instinctive.

*vii. The Feasibility, on the Part of the Manufacturer, of Spreading the Loss by Setting the Price of the Product or Carrying Liability Insurance.*

This can be done easily enough. As noted earlier, in order to be a licensee to manufacture bats for MLB, the bat manufacturer must procure a \$10 million liability insurance policy. Furthermore, bats for MLB players are usually custom-made to fit the needs of the individual player. Players from time-to-time change bat companies. These manufacturers can negotiate prices from players who are paid well. The average salary in the major leagues in 2012 was \$3,440,000.<sup>115</sup> The market may weed out some suppliers, but, given the number of suppliers of wooden bats for MLB and the ease of getting into the

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114. See *Patch v. Hillerich & Bradsby Co.*, 2011 MT 175, ¶ 17, 361 Mont. 241, 257 P.3d 383. In *Patch*, the Montana Supreme Court based liability of the aluminum bat manufacturer on the failure to warn the user and bystanders of the danger in using the bat, the assumption by the court was that proper warning labels and advertising of the bat's qualities (i.e., that it was a "hot bat" with batted ball speeds exceeding safety standards) would provide adequate warning to the pitcher. *Id.* If a manufacturer of a hot bat provided warnings on the bat and advertised warnings as the court required of a "hot bat," the effect would simply be to shift any responsibility to players, coaches and umpires to self-police the use of the manufacturer's unsafe product. This assumption would be unreasonable with regard to spectators in professional baseball because spectators would probably not read any marketing or trade literature on bats used by professional ball players. Furthermore, applying the *Patch* court's holding in professional baseball would place a legal duty on MLB (through umpires and team management) to inspect all bats available for use in a game to make sure only safe bats were used. See *id.*

115. *MLB Salaries*, CBSSPORTS.COM, <http://www.cbssports.com/mlb/salaries/avgsalaries> (last visited Dec. 28, 2013).

market, it appears that extending liability based on design defect would not have any significant effect on the game or supply of the bats.

### 3. When the Defendant Heightens the Risk to the Plaintiff through A Defective Product

One can make the case that MLB has significantly increased the risk inherent in the sport, in particular, the risk inherent in watching the sport as a spectator. For the sake of higher batting statistics and more offense in the game, MLB allows the use of a bat made of maple, which breaks more easily than ash bats, breaks many times with large shards acting as projectiles, and allows bats to be used with an unsafe design in the handle, barrel, and length ratio. Similar to *Sanchez*, MLB and the bat manufacturers know of the heightened risk; MLB and the bat manufacturers have ample evidence from the 2005 and 2008 bat studies that maple bats have breaking tendencies different from ash bats and that the thinner the bat handle the more prone the bat is to break. Furthermore, there have been public comments made by experts, like Bobby Cox and Joe Madden, within MLB recognizing that maple bats are dangerous. Some players refuse to use maple bats because of their concern for the safety of others. Finally, the responses by some bat manufacturers following the 2008 bat study and the proposed fix by MLB indicate the MLB baseball bat specifications and production and design guidelines are flawed. The risk of being a spectator has not changed except for the added risk of broken bats, which risks could be reduced by MLB and the bat manufacturers. By introducing this heightened risk of injury by being struck by a broken bat flying into the stands, MLB has breached its duty to spectators to not increase the risk of harm to those spectators above that inherent in the game of baseball.

Continuing with the *Sanchez* court's reasoning, banning the use of maple bats and thin-handled bats, whether constructed of maple or some other wood, would not chill vigorous participation in the sport nor would it alter the fundamental nature of professional baseball. The nature of professional baseball was not established fifteen years ago with the maple bat or in the re-designing of the handle and barrel to create a lighter bat with a larger barrel; rather, it was more of a progression over the first hundred years or so, with the most recent substantive rule change being in 1969 with the lowering of the pitcher's mound.

Arguments are plausible, some being very good, that MLB, with regard to selecting bat specifications, bat manufacturers to the extent they produce the bats within those specifications at the direction of players (some producers even against their professional judgments), and players to the extent they

modify the bats by shaving down the handle excessively have increased the risk of harm to spectators above that inherent in the game of baseball; hence, the doctrine of primary assumption of risk should not be available to defendants in a lawsuit for an injury to a spectator from a broken baseball bat.

#### IV. CONCLUSION

Injuries are going to occur to spectators and baseball participants. Broken bats are part of the game. A wood bat is going to break eventually. Technological advancements in bat design, which may result in a better offensive tool, should not outweigh the need to protect a person who also has an interest in the game from injury. The author concludes that the long-standing doctrine of implied primary assumption of risk, as it is particularly applied to baseball, and unlike other sports such as hockey, should be reined in by appellate courts. The “no duty” and the “limited duty” rules have produced the inequitable result of allowing professional baseball owners and players to knowingly act selfishly and imprudently toward other players, coaches, umpires, and spectators. Spectators injured by broken bats flying into the stands should not assume the risk of a growing danger that could be lessened. A spectator, like a base coach or opposing fielder, cannot follow the flight of a baseball and a broken bat at the same time. The author does not argue either for abolition of the baseball rule completely or for a protective screen around the stadium to protect spectators. The MLB Commissioner has indicated his preference not to do that. But, someday, a spectator will be killed by a bat fragment, and there will probably be a very unpleasant outcry from the public toward MLB. Change will come, *when it hits the fan*.