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TAKE ME OUT TO THE BALLGAME . . . BUT BRING A HELMET: REFORMING THE “BASEBALL RULE” IN LIGHT OF RECENT FAN INJURIES AT BASEBALL STADIUMS

MATTHEW J. LUDDEN*

I. INTRODUCTION

Baseball is “America’s pastime.”¹ The nostalgia for the game, among other reasons, causes fans from across the country to take their family members to baseball stadiums to enjoy the peanuts, the Cracker Jack, and the old ball game. However, with the way the sport has evolved, fans need to become increasingly aware of the dangers of attending a baseball game. For example, in August 2007, James Falzon took his eleven-year-old son, his nine-year-old nephew, and his father to a baseball game between the New York Mets and the Atlanta Braves at Shea Stadium in New York.² Falzon and his family members sat in the second row along the third base line of the stadium.³ During the seventh inning, Mets’ second baseman Luis Castillo broke his maple bat when he hit a fly ball into play.⁴ Pieces of the broken bat flew into the stands, including the heaviest portion—the barrel of the bat.⁵ Falzon was watching the ball when the bat shattered and he did not see the

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1. William Browning, *Sports History: How Baseball, America’s Pastime, Has British Roots*, YAHOO SPORTS (Aug. 3, 2011), <http://sports.yahoo.com/mlb/news?slug=ycn-8906174>.

2. Dareh Gregorian, *Battered Fan Sues Met Star*, N.Y. POST (Aug. 10, 2010), <http://nypost.com/2010/08/10/battered-fan-sues-met-star/>; Jennifer Peltz, *Mets Bat Lawsuit: Judge Tosses Fan’s Case*, HUFFINGTON POST (Apr. 27, 2011), http://www.huffingtonpost.com/2011/04/28/mets-bat-lawsuit-judge-to_n_854809.html.

3. Gregorian, *supra* note 2.

4. *Id.*

5. Peltz, *supra* note 2.

barrel fly into the stands.⁶ Unfortunately, the barrel struck Falzon in the face and caused extensive injuries, including a broken nose, eye socket, and pallet, which forced Falzon to have metal plates and pins surgically implanted into his skull.⁷

Falzon's incident is certainly tragic. However, the tragedy of the situation is heightened by the fact that he is unlikely to recover any damages for his injuries from either the stadium owner or the team.⁸ This is because courts have traditionally held stadium owners to a limited duty of care known as the "baseball rule."⁹ The specific elements constituting the baseball rule differ across state law, but in general, the baseball rule holds stadium owners to a lower duty of care for the safety of fans compared to the reasonable duty of care owed by most property owners under the common business-invitee rule.¹⁰ Consequently, the rule has allowed baseball owners to avoid liability for fan injuries, even when it has been reasonable for owners to make simple changes to their stadiums to protect fan safety.

To address this issue, the baseball rule needs to be reformed to put the onus on stadium owners to make the necessary changes to make the game safer for fans. To do this, courts should adopt a reasonable duty of care standard for stadium owners similar to the business-invitee rule. By adopting a reasonable duty of care standard, baseball owners would be required to make reasonable changes to their stadiums that parallel the potential dangers that arise as the sport evolves.¹¹ The need for this heightened duty of care is especially pressing given the increased risk of harm to fans associated with: (1) maple bat use by players; and (2) potentially defective railing heights at stadiums.

Part II of this Article illustrates recent implications of the baseball rule through examples of fan injuries at baseball stadiums resulting from broken maple bats and railing falls. Part III explores the history of the baseball rule, its foundations in tort law, some common defenses associated with the rule, and different variations of the rule across state law. Part IV focuses on studies conducted on broken maple bats and railing heights to determine whether the incidents described in Part II potentially increase the inherent risks of the

6. Gregorian, *supra* note 2.

7. *Id.*

8. See Peltz, *supra* note 2 (describing that Falzon's lawsuit against the Mets and Castillo was thrown out by a New York judge).

9. Edward C. v. City of Albuquerque, 2010-NMSC-043, ¶ 23, 148 N.M. 646, 241 P.3d 1086.

10. *Id.* ¶ 25 (citing Wells v. Minn. Baseball & Athletic Ass'n, 142 N.W. 706, 707-08 (Minn. 1913)).

11. David Horton, Comment, *Rethinking Assumption of Risk and Sports Spectators*, 51 UCLA L. REV. 339, 367 (2003).

game under the current baseball rule. While the evidence may point to increased inherent risks—which would trigger a heightened duty of care under the current baseball rule¹²—ultimately, the arguments in favor of increased risks are too speculative to hold stadium owners liable under the current rule. Because of this, the need for a heightened duty of care is explored in Part V with a discussion of case law and statutory law that suggests the potential for adopting a reasonable duty of care. Part VI discusses the benefits of adopting a reasonable duty of care for stadium owners, and how owners can implement reasonable changes to their stadiums to satisfy this standard. Part VII concludes with a summary of the topics and arguments discussed.

II. THE BASEBALL RULE AND RECENT EXAMPLES OF FAN INJURIES AT BASEBALL STADIUMS

While a majority of states uphold the traditional baseball rule,¹³ some recent examples of fan injuries at baseball stadiums raise questions as to the utility of the rule’s limited duty. Consider, for example, Susan Rhodes who attended a Los Angeles Dodgers game in 2008.¹⁴ Rhodes was sitting near the baseline at Dodger Stadium when Todd Helton, a player for the Colorado Rockies, broke his maple bat sending a large spear into the stands.¹⁵ Like the situation with James Falzon,¹⁶ Rhodes focused her attention on the ball batted in play instead of the broken bat.¹⁷ Shards from the bat hit Rhodes in the head causing a concussion and two jaw fractures.¹⁸ She eventually had surgery to insert a titanium plate into the right side of her head.¹⁹ As a result, Rhodes’s medical bills were in excess of \$7000.²⁰ She asked the Dodgers to help pick up some of her expenses, but relying on the baseball rule, the team told her that she assumed the risk of injury; therefore, the Dodgers would not help with the costs.²¹

Rhodes’s injuries are certainly devastating, but even more disastrous

12. See *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992); *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 550–51 (Pa. 1978).

13. *Edward C.*, 2010–NMSC–043, ¶ 23.

14. See Jeff Passan, *Fan’s Injury Should Force Bat Policy Change*, YAHOO SPORTS (May 30, 2008), <http://sports.yahoo.com/mlb/news?slug=jp-bats052908>.

15. *Id.*

16. Gregorian, *supra* note 2.

17. Passan, *supra* note 14.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

events have occurred as a result of inadequate railing protection at baseball stadiums. A recent example occurred in July 2011, when Shannon Stone took his six-year-old son to a Texas Rangers baseball game at Rangers Ballpark in Arlington, Texas.²² Stone and his son were sitting in the first row of the outfield seats when Rangers' outfielder Josh Hamilton picked up a foul ball and tossed it in Stone's direction.²³ The throw was a little short and Stone reached over the guardrail, which fell below his waist, to catch the ball.²⁴ Stone lost his balance, fell over the railing, and plummeted twenty feet to the concrete floor.²⁵ Stone was rushed to the hospital, went into cardiac arrest in the ambulance, and died shortly thereafter.²⁶

A similar event to Stone's occurred at Miller Park in Milwaukee, Wisconsin in April 2010.²⁷ Stuart Springstube was in attendance for a Milwaukee Brewers game and decided to enter the stadium early to watch his favorite team, the Chicago Cubs, take batting practice.²⁸ Springstube was sitting in the front row along the left field wall when he reached over the thirty-inch railing separating him from the field to catch a batted ball.²⁹ Sadly, Springstube lost his momentum, fell fifteen feet onto the field, and suffered broken ribs, a ruptured aorta, and a brain hemorrhage.³⁰ Tragically, Springstube died a few weeks later.³¹

Unfortunately, similar to Rhodes, it would be difficult for Stone's or Springstube's families to recover damages for their lost family member under the baseball rule because of the current limited duty owed by stadium owners to protect fans from injury. A discussion of the legal foundations of the baseball rule will help to explain the duty of care owed by stadium owners and why it is difficult for fans to recover under the current rule.

22. Ben Bolch, *Baseball Fan's Death Raises Concerns About Stadium Safety*, L.A. TIMES (July 8, 2011), <http://articles.latimes.com/2011/jul/08/sports/la-sp-baseball-fall-20110709>.

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Paula Lavigne, *Fans Split on Stadium Safety Changes*, ESPN, http://espn.go.com/espn/otl/story/_/id/6899698/mlb-stadium-deaths-officials-raising-railings-some-fans-disagree-changes (last updated Aug. 27, 2011).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

III. LEGAL FOUNDATIONS OF THE “BASEBALL RULE”

The “baseball rule” is founded on the tort of negligence and the assumption of risk defense.³² As with any negligence action, a plaintiff bringing a negligence claim against a stadium owner under the baseball rule would have to establish that the owner owed a duty of care to the plaintiff, the owner breached that duty, and the breach was the proximate cause of harm sustained by the plaintiff.³³ Particularly for the baseball rule, one of the most contentious issues in bringing a negligence claim involves the duty of care owed to fans and the applicable defenses available to owners.

Courts that have heard cases on the baseball rule have generally held that owners and stadium operators owe a limited duty of care to spectators.³⁴ This duty is “limited” because it is less than the ordinary reasonable duty of care owed by landowners to business-invitees in other settings.³⁵ Unlike the limited duty owed by stadium owners to their fans, the duty owed by landowners to business-invitees has traditionally been “the highest duty owed to any entrant upon land. The landowner is under an affirmative duty to protect a business visitor not only against known dangers, but also against those that might be discovered with reasonable care.”³⁶

The limited duty of care varies with state law, as some states hold a somewhat higher degree of the limited duty than others. For example, a number of courts, including those in Minnesota and New York, have held that the stadium owners’ limited duty is met when they: (1) provide protections from the most dangerous areas of the stadium (which in most cases is directly behind home plate); and (2) provide sufficient seating in those protected areas

32. See generally *Brisson v. Minn. Baseball & Athletic Ass’n*, 240 N.W. 903 (Minn. 1932).

33. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 6 cmt. b (2010).

34. *Edward C. v. City of Albuquerque*, 2010–NMSC–043, ¶ 23, 148 N.M. 646, 241 P.3d 1086. (“Courts almost universally adopted some form of what is known as the ‘baseball rule,’ creating on the part of ball park owners and occupants only a limited duty of care toward baseball spectators.”).

35. *Id.* ¶ 25 (citing *Wells v. Minn. Baseball & Athletic Ass’n*, 142 N.W. 706, 707–08 (Minn. 1913)).

36. *Emge v. Hagosky*, 712 A.2d 315, 317 (Pa. Super. Ct. 1998) (citing *Crotty v. Reading Indus. Inc.*, 345 A.2d 259 (1975)). See also RESTATEMENT (SECOND) OF TORTS § 343 (1965), which states:

A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if, he

- (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
- (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
- (c) fails to exercise reasonable care to protect them against the danger.

to accommodate enough fans who wish to sit there.³⁷ Other state courts hold a somewhat higher duty of care, in that the stadium owner's duty is to take precautions to not increase the inherent risks of the sport.³⁸ An inherent risk is one that, if eliminated from the sport: "(1) would chill vigorous participation in the sport; and (2) would alter the fundamental nature of the activity."³⁹ Other states have even codified their own baseball rule by statute, including those that limit liability to injuries that occur as the result of defective screening,⁴⁰ intentional misconduct by the owner or an employee of the owner,⁴¹ or failure to sufficiently warn fans of the potential for flying baseballs and baseball bats into the stands.⁴²

Accompanying the limited duty of care owed by stadium owners, a primary impediment to a successful negligence claim for spectators in baseball rule cases is the assumption of risk defense or the individual state's variation thereof. Assumption of risk is a somewhat fluid defense applied across the states. Some states distinguish between express and implied assumption of risk, and further, between primary and secondary implied assumption.⁴³ Others have done away with the concept altogether in favor of an inherent risk analysis,⁴⁴ or a comparative fault or negligence analysis.⁴⁵ However, even with these different variations, the common denominator among them is that the defense traditionally acts as an affirmative defense to negligence liability.⁴⁶ In its basic form, the defense holds that the defendant will not be liable if the plaintiff knows of a certain risk and voluntarily assumes or confronts that risk.⁴⁷ Applying the defense to baseball cases requires an inquiry into the individual fan's knowledge of the risks of the sport; however, most courts that have heard cases on the baseball rule have held that, as a matter of law, a fan assumes the normal or inherent risks of watching a baseball game, including the danger of being struck by baseballs and bats

37. See *Brisson v. Minn. Baseball & Athletic Ass'n*, 240 N.W. 903, 904 (Minn. 1932); *Akins v. Glens Falls City Sch. Dist.*, 424 N.E.2d 531, 533 (N.Y. 1981).

38. See *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992); *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 550–51 (Pa. 1978).

39. *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529, 536 (Ct. App. 2002).

40. *Baseball Facility Liability Act*, 745 ILL. COMP. STAT. 38/10 (2012).

41. *Id.*

42. N.J. STAT. ANN. § 2A:53A–48 (West 2013).

43. *Lawson v. Salt Lake Trappers, Inc.*, 901 P.2d 1013, 1016 (Utah 1995) (citing *Jacobsen Constr. Co. v. Structo-Lite Eng'g, Inc.*, 619 P.2d 306, 310 (Utah 1980)).

44. *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 881 (Iowa 2009).

45. *Perez v. McConkey*, 872 S.W.2d 897, 905 (Tenn. 1994).

46. See RESTATEMENT (SECOND) OF TORTS § 496C (1965).

47. *Id.*

flying into the stands.⁴⁸

In general, the assumption of risk defense is powerful and difficult for a plaintiff to overcome in most baseball rule cases. For states that have adopted primary implied assumption of risk, courts hold that a fan is automatically barred from recovering from the owner for injuries arising from inherent risks since the owner does not owe a duty of care to the fan for such “common, frequent and expected” risks.⁴⁹ Thus, because these risks are common knowledge, there cannot be a claim regardless of a fan’s subjective knowledge.⁵⁰ Similarly, for states following the secondary implied assumption of risk defense, even though the defense is not expressly a complete defense to liability, courts have held that if fans knowingly and voluntarily assume the inherent risks in watching a baseball game (by sitting in unscreened areas, for example), they are barred from recovering from the owner for injuries arising from such inherent risks even if the owner in some way breached his or her duty—essentially making it a complete defense similar to primary implied assumption of risk.⁵¹

Instead of holding assumption of risk as a complete defense to liability, most states today have adopted a form of comparative fault or negligence, where the purported negligence of the defendant and plaintiff are weighed against each other to determine liability and damages.⁵² Even for states that have adopted comparative negligence, courts have found that fans are not “at fault” or negligent for merely sitting in an unscreened area, and therefore, their prospective fault cannot be compared to anything; instead, this decision is merely the choice of the fan.⁵³ Thus, if the fan is not at fault by sitting in the area, the owner is not at fault if the fan gets injured in that area, unless the owner somehow increased an inherent risk of the game.⁵⁴ However, arguing that an owner increased an inherent risk of the game is difficult to prove in most baseball cases.

48. *Thurmond v. Prince William Prof'l Baseball Club, Inc.*, 574 S.E.2d 246, 250–51 (Va. 2003).

49. *Jones v. Three Rivers Mgmt. Corp.*, 394 A.2d 546, 551 (Pa. 1978) (quoting *Goade v. Benevolent & Protective of Elks*, 28 Cal. Rptr. 669, 672 (Ct. App. 1963)); *see also* Daniel E. Wanat, *Torts and Sporting Events: Spectator and Participant Injuries—Using Defendant’s Duty to Limit Liability as an Alternative to the Defense of Primary Implied Assumption of the Risk*, 31 U. MEM. L. REV. 237, 238, 249 (2001).

50. *Jones*, 394 A.2d at 551.

51. *See Thurmond*, 574 S.E.2d at 251; *Brown v. S.F. Ball Club, Inc.*, 222 P.2d 19, 20–21 (Cal. Dist. Ct. App. 1950); *see also* Horton, *supra* note 11, at 346–48, 354.

52. *Perez v. McConkey*, 872 S.W.2d 897, 905 (Tenn. 1994).

53. *Neinstein v. L.A. Dodgers, Inc.*, 229 Cal. Rptr. 612, 616 (Ct. App. 1986).

54. *Id.*

IV. FAN INJURIES AND INCREASING THE INHERENT RISKS OF THE GAME?

While recent fan injuries at baseball stadiums, such as Rhodes's, Stone's, and Springstube's incidents, appear to fall under the limited duty of care as inherent risks of being a fan at a baseball game, the circumstances surrounding these tragedies may show that their assumed risks were not inherent to the game.

A. *Broken Maple Baseball Bats*

Courts have traditionally held that baseball bats that fly into the stands are inherent risks of the game covered under the limited duty of care rule.⁵⁵ A recent trend among many Major League Baseball (MLB) players has been to switch from using the traditional ash wood bat to a maple bat (largely because of the staggering number of home runs hit by maple bat pioneer, Barry Bonds),⁵⁶ which has caused a dramatic increase over the past four seasons in the number of broken bats per game.⁵⁷

For example, there were 2232 broken bats during three months of the 2008 season, which represented the highest number of bat breakages for any season.⁵⁸ Of those, 756 were multi-piece breaks⁵⁹—similar to the breaks that injured Susan Rhodes⁶⁰ and James Falzon.⁶¹ The problem with maple bats is that, because of the consistency of the wood, they are three times more likely to result in a multi-piece break than the traditional ash bat.⁶² MLB has attempted to reduce the number of breaks by conducting studies into the science behind bat breaks and imposing certain regulations on the structure of bats, which has resulted in a decrease in the total number of breaks since the 2008 season.⁶³ However, bats were still breaking into multiple pieces at a rate

55. See generally *Ratcliff v. San Diego Baseball Club*, 81 P.2d 625 (Cal. Dist. Ct. App. 1938).

56. See Paul Basken, *University Scientists Go Extra Innings to Help Baseball Solve Breaking Bats*, CHRON. HIGHER EDUC. (Nov. 1, 2010), <http://chronicle.com/article/University-Scientists-Go-Extra/125223/>.

57. *Id.*

58. Patrick Drane et al., *A Study of Wood Baseball Bat Breakage*, 34 *PROCEDIA ENGINEERING* 616, 617 (2012); see also Basken, *supra* note 56; Quinn Roberts, *Huge Strides Being Made in Reducing Broken Bats*, MLB.COM (Aug. 3, 2012), http://mlb.mlb.com/news/article.jsp?ymd=20120803&content_id=36046676&c_id=mlb.

59. Drane et al., *supra* note 58, at 617.

60. Passan, *supra* note 14.

61. Gregorian, *supra* note 2.

62. Drane et al., *supra* note 58, at 619.

63. *Id.* at 618.

of .53 bats per game as of the 2012 season,⁶⁴ representing a very high number.

Given the increase in broken bats from maple bat use, it is unclear whether an owner’s failure to make adequate changes to his or her ballpark to account for this increasing danger counts as increasing an inherent risk of the game. There are a few reasons why this failure might increase the inherent risks. First, knowing that: (1) ash bats are available as a viable alternative to maple; and (2) MLB allows the use of maple bats that are more likely to result in multi-piece breaks than ash bats, a stadium owner’s failure to not make arrangements to protect fans from potential maple bat breakage may increase the inherent risk of being injured by a broken bat.⁶⁵ Secondly, being struck specifically by a maple baseball bat may not be inherent to the sport at all⁶⁶ and may give rise to a reasonable duty of care. Given the fact that “the game was played for nearly 150 years without maple bats[,]”⁶⁷ eliminating its risk through reasonable means would not “chill vigorous participation in the sport” nor “alter the fundamental nature of the sport.”⁶⁸ However, while these arguments present some valid points, they may be unpersuasive given that a court could hold that the increasing number of bats breaking makes the incident more “inherent” to baseball and, as a result, fans should have increasing knowledge of the possibility of broken bats injuring them.

B. Railing Heights

The current height of railings at many baseball stadiums could also be seen as increasing an inherent risk of the game. To illustrate, Rangers Ballpark, the site of Stone’s tragic death,⁶⁹ has encountered a number of problems with fans falling over the stadium’s railings. In 1994, a fan fell from a thirty-inch railing at the stadium, sued the Rangers for damages, and settled with the team for an undisclosed amount.⁷⁰ Following the incident, the team raised the railing to forty-six inches, but only for the section that the fan was injured in.⁷¹ Consequently, in 2010, a fan fell over thirty-feet while trying to

64. Roberts, *supra* note 58.

65. See 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, 104 (2011).

66. 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, 525 (2010).

67. *Id.*

68. Sanchez v. Hillerich & Bradsby Co., 128 Cal. Rptr. 2d 529, 536 (Ct. App. 2002).

69. Bolch, *supra* note 22.

70. Lavigne, *supra* note 27.

71. *Id.*

catch a foul ball while reaching over a thirty-inch railing in a different section,⁷² followed by the Stone incident in 2011, where the railing height in Stone's section was thirty-three inches at the time of his death.⁷³ The Rangers apparently failed to learn their lesson from either the 1994 or 2010 incident since the team increased the railing height to forty-two inches following Stone's death, but again only in the section of the accident.⁷⁴

Fan injuries or deaths have occurred at a number of different ballparks with similar, or even shorter, railing heights. Stuart Springstube's death at Miller Park in 2010 occurred in a section where the railing height was thirty inches tall.⁷⁵ Two separate injuries occurred at Busch Stadium in St. Louis in 2009.⁷⁶ In one incident, a fan fell eighteen feet from the stadium's Casino Queen Party Porch onto a bystander below; the area was covered by thirty-inch railings.⁷⁷ Almost two months later, a fan fainted and fell twelve feet over the first row railing of the fourth deck to the concourse below; again, this section was covered by thirty inch railings.⁷⁸ Currently, railing heights at baseball stadiums may be as low as twenty-six inches, the minimum required height under the International Building Code.⁷⁹ However, the Code was written in 1929 and was adopted for stadiums built at that time.⁸⁰

Overall, the risk of injury from attempting to catch a ball by reaching over a railing is probably an inherent risk to the sport given the frequency of foul balls hit into the stands at every baseball game played. Whether current railing heights increase this risk is a different issue, especially given that a number of stadiums have adhered to similar standards since the 1920s. While stadium owners may escape liability by adhering to these archaic standards, adopting changes to railing heights to prevent these injuries would certainly not "chill vigorous participation in the sport" nor "alter the fundamental nature of the activity."⁸¹ However, because of the almost uniform standards followed by stadium owners, it may be difficult to prove that current railing heights increase the inherent risks of the game.

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529, 536 (Ct. App. 2002).

C. Uncertainty with Increasing the Inherent Risks of the Game Argument

While arguments supporting the idea that the inherent risks of the game are increased by the stadium owners’ failure to take proper precautions to protect fans from the risk of injury from maple bats and inadequate railing heights seem plausible, they still may not be strong enough to overcome the entrenched limited duty rule held by most state courts, especially given the plausible counterarguments as to why maple bats and railing heights do not increase inherent risks. Therefore, in order to ensure that adequate measures will be made to protect fan safety at stadiums, there needs to be an increased duty of care owed by stadium owners to fans under the baseball rule; specifically, one that expands on the duty to not increase the traditional inherent risks of the game—a reasonable standard of care that would increase the duty of owners to take precautions to prevent reasonable harm to spectators.

V. CASE LAW AND STATUTORY LAW EXPRESSING THE POTENTIAL FOR AN INCREASED DUTY OF CARE

Even with a majority of states adopting the limited duty baseball rule, a few courts have left open the possibility of establishing an increased duty of care on stadium owners. For example, in *Maisonave v. Newark Bears Professional Baseball Club, Inc.*, where the plaintiff was injured by a foul ball that landed in the open walking area of a baseball stadium,⁸² the New Jersey Supreme Court stated:

We simply apply traditional tort principles and conclude that the proper standard of care for all other areas of the stadium is the business invitee rule, which provides that a landowner “owe[s] a duty of reasonable care to guard against any dangerous conditions on his or her property that the owner either knows about or should have discovered.”⁸³

While the case was eventually superseded by state statute,⁸⁴ the idea of an increased duty of care being owed by stadium owners in some fashion reverberated with the New Mexico Supreme Court in *Edward C. v. City of Albuquerque*.⁸⁵

In *Edward C.*, the court addressed the issue of the baseball rule in a case

82. *Maisonave v. Newark Bears Prof'l Baseball Club, Inc.*, 881 A.2d 700, 702 (N.J. 2005).

83. *Id.* at 709 (quoting *Hopkins v. Fox & Lazo Realtors*, 625 A.2d 1110 (N.J. 1993)).

84. See N.J. STAT. ANN. § 2A:53A-48 (West 2013).

85. 2010-NMSC-043, 148 N.M. 646, 241 P.3d 1086.

where a child was injured during a minor league baseball game when he was hit in the head by a fly ball while seated in a picnic area behind the outfield fence.⁸⁶ The court rejected the traditional baseball rule, but also rejected the court of appeals' ruling that, because the State did not recognize the traditional baseball rule, stadium owners owe a duty of ordinary care.⁸⁷ Instead, the court adopted a duty to be used for comparative negligence analysis and held that a stadium owner "owes a duty that is symmetrical to the duty of the spectator."⁸⁸

What this "symmetrical" duty requires is unclear, but the court notes that spectators owe an "ordinary" duty to protect themselves from being hit by a projectile.⁸⁹ Since the court does not describe what an "ordinary" duty is, it is likely akin to that of the reasonable person standard, which holds that a fan must act as a reasonably prudent person would under similar circumstances.⁹⁰ Thus, this "reasonably prudent spectator standard"⁹¹ imposes a higher duty on the spectator than the limited duty owed by stadium owners, and since this duty is to be "symmetrically" owed by the stadium owner, it may call for an increased duty of care on stadium owners.

While New Jersey and New Mexico have at least broached the idea of establishing an increased duty of care on stadium owners, Colorado has codified an increased duty of care owed by stadium owners to fans. The Colorado Baseball Spectator Safety Act of 1993 describes that assumption of risk is not a complete defense to stadium owners' liability if the owners "[f]ail[] to make a reasonable and prudent effort to design, alter, and maintain the premises of the stadium in reasonably safe condition relative to the nature of the game of baseball."⁹²

Like the Colorado Baseball Spectator Safety Act of 1993 and the courts' discussions of the baseball rule in *Maisonave* and *Edward C.*, the baseball rule can be changed to implement an increased duty of care on stadium owners. While the traditionalism of holding a limited duty of care appears entrenched in most jurisdictions, a discussion of the practicality of changing the rule will help explain the benefits of changing the rule, the disadvantages of changing the rule, and why the benefits ultimately outweigh the disadvantages.

86. *Id.* ¶ 6.

87. *Id.* ¶¶ 20, 41.

88. *Id.* ¶ 41.

89. *Id.* ¶ 41.

90. Christopher McNair, Comment, *Edward C. v. City of Albuquerque: The New Mexico Supreme Court Balks on the Baseball Rule*, 41 N.M. L. REV. 539, 563 (2011).

91. *Id.*

92. COLO. REV. STAT. § 13-21-120(5)(a) (2012).

VI. IMPLEMENTING A REASONABLE DUTY OF CARE STANDARD FOR THE BASEBALL RULE

In response to the framework of the case law and statutory law discussed in Part V, the baseball rule needs to adopt a reasonable duty of care, similar to the business-invitee standard, on stadium owners to their fans. This is especially pressing with the heightened risk of fan injury due to the increase in broken bats and inadequate railing heights and the corresponding uncertainty as to whether these incidents qualify as increasing the inherent risks of the game to make stadium owners potentially liable under the current baseball rule.

A. *Benefits of Establishing a Reasonable Duty of Care Standard*

There are numerous benefits to establishing a reasonable duty of care standard for the baseball rule. First, holding stadium owners to the duty of care owed by property owners under the business-invitee rule would bring certainty to the baseball rule. Instead of having different variations of the limited duty rule by state, a business-invitee baseball rule would allow states to apply a more concrete standard that is familiar to the courts both in that state and across different states as well. Second, in the fans’ interest, an increased duty would force stadium owners to make the necessary changes to protect fan safety as the sport evolves over time,⁹³ such as protecting fans from injury resulting from the increase in broken bats and injuries from railing falls with height standards dating back to 1929.⁹⁴ Additionally, increasing the duty would not force stadium owners to make excessive and costly changes to their stadiums, as is commonly argued.⁹⁵ Instead, the duty would only require reasonable changes to make the stadium safe to the extent the benefit of making the change outweighs the burdens of doing so.⁹⁶

Establishing a reasonable duty of care standard would not automatically result in an increased risk of stadium owners’ personal liability for fan injuries compared to the current limited duty rule. Instead, establishing a reasonable standard of care would allow the comparative fault or negligence analysis to naturally take place, which would allow the fact-finder to balance the degree of responsibility for the injury between the fan and stadium owner and reduce any potential spectator recovery by the amount he or she acted unreasonably in

93. Horton, *supra* note 11, at 367.

94. *See generally* Drane et al., *supra* note 58; Lavigne, *supra* note 27.

95. Horton, *supra* note 11, at 368–69.

96. Mohit Khare, Note, *Foul Ball! The Need to Alter Current Liability Standards for Spectator Injuries at Sporting Events*, 12 TEX. REV. ENT. & SPORTS L. 91, 105–06 (2010).

causing his or her injury.⁹⁷ For example, if a fan is hit by a projectile that is almost impossible to avoid, such as the barrel of a broken maple bat, a court is unlikely to conclude that the fan was responsible for his or her injury (or the owner if he or she has established sufficient protections), but a drunk fan trying to catch a foul ball by reaching over a railing that is of sufficient height and that has adequate warning signs may be viewed differently.⁹⁸

Lastly, adopting a uniform reasonable duty of care standard would allow MLB to establish minimum guidelines to be applied to stadiums across the league. Currently, as shown by the differences in railing heights across baseball stadiums,⁹⁹ safety requirements are determined by the individual team and stadium owner.¹⁰⁰ Since custom is usually a factor considered under the reasonable duty standard,¹⁰¹ establishing uniform safety guidelines would significantly reduce questions of reasonableness in the comparative negligence analysis for stadium owners who meet such guidelines, which reduces the owner's potential liability.¹⁰²

B. Potential Disadvantages of Establishing a Reasonable Duty of Care Standard

While there are numerous advantages to establishing a reasonable duty of care standard under the baseball rule, there are a few potential disadvantages that should be mentioned as well. First, adopting the business-invitee standard may result in an increase in litigation and subsequently more flooding of the court system than under the traditional baseball rule.¹⁰³ While the potential for increased litigation may raise some apprehension among stadium owners regarding the potential for an increased duty of care, because of the comparative negligence analysis adopted by a majority of courts, an increase in litigation would not necessarily result in an increase in liability for stadium owners.¹⁰⁴ Instead, owners would be protected from liability so long as reasonable measures were taken to protect fan safety.¹⁰⁵

Second, the increased duty would likely require stadium owners across the country to make preemptive changes to their stadiums, which would cost

97. Horton, *supra* note 11, at 368.

98. Horton, *supra* note 11, at 370–71; Khare, *supra* note 96, at 105–06.

99. Lavigne, *supra* note 27.

100. Horton, *supra* note 11, at 373.

101. *Id.*

102. *Id.*; Khare, *supra* note 96, at 107.

103. Horton, *supra* note 11, at 374.

104. *Id.*

105. Horton, *supra* note 11, at 368–71; Khare, *supra* note 96, at 105.

owners in terms of time, finances, and resources. However, these preemptive costs are likely to benefit stadium owners in the long run from the potentially larger costs associated with: (1) negative publicity that accompanies both fan injuries at the owner’s stadium and the fan’s subsequent inability to recover damages for such injuries;¹⁰⁶ or (2) potential damages settlements paid for by teams and stadium owners for these injuries.¹⁰⁷

Accordingly, while there are a few potential disadvantages to establishing an increased duty of care standard under the baseball rule, the disadvantages are outweighed by the advantages of doing so. Implementing the necessary changes to take advantage of these benefits would prove practical for stadium owners as well.

C. Satisfying the Increased Duty of Care Standard for Stadium Owners

The necessary changes that would need to be made to baseball stadiums to satisfy the increased duty of care would be practical and relatively easy for stadium owners to implement, as evidenced by a few stadiums that have begun to make these changes. First, to address the risk of injury from the increase in broken bats, stadium owners could increase netting to cover the areas most frequently affected by broken bats—such as extending the backstop netting to cover the end of the dugout area or even farther to cover the area on the first and third base lines that cover the majority of the infield (which would also help protect against injuries resulting from line-drive foul balls). For uniformity, and to set minimum guidelines, stadium owners could adhere to the standard heights for netting, screening, and fences as determined by the American Society for Testing and Materials (ASTM),¹⁰⁸ which is currently adhered to by only a few stadiums.¹⁰⁹ Adopting such standards would help set a precedent that is currently lacking among stadium owners. For example, some baseball stadiums have screening of around only forty-seven to fifty feet in length surrounding the backstop area, whereas others have taken a more preemptive approach and have extended the screening area to 250 feet.¹¹⁰ Even college baseball teams have decided to extend screening to limit liability, as Florida State University has extended 275 feet of screening around its

106. See Passan, *supra* note 14; Peltz, *supra* note 2.

107. See Lavigne, *supra* note 27.

108. See AM. SOC’Y FOR TESTING AND MATERIALS, *Standard Guide for Fences for Baseball and Softball Fields*, F2000–10 (2010), available at http://enterprise.astm.org/filtrexx40.cgi?+REDLINE_PAGES/F2000.htm.

109. Gil Fried & Robin Ammon Jr., *Baseball Spectators’ Assumption of Risk: Is It “Fair” or “Foul”?*, 13 MARQ. SPORTS L. REV. 39, 60 (2002).

110. *Id.* at 61.

field.¹¹¹

Second, in addition to extending screening lengths, stadium owners should raise the height of railings to protect fans from injury. As shown by the incidents described in Part II,¹¹² the current minimum height of twenty-six inches is insufficient to protect fans from injury.¹¹³ Stadium owners should follow the lead of the Texas Rangers—who increased the railing height to forty-six inches in the wake of a settlement with an injured fan¹¹⁴—and increase their railing heights to at least forty-six inches. However, unlike the Rangers who only raised the heights of railings in the areas where the injuries occurred,¹¹⁵ this height should be installed throughout the stadium in order to ensure adequate protection in all sections. A forty-six-inch railing would be sufficient to protect most fans, and would certainly be considered reasonable under the increased duty, since forty-six inches rests well above the hips of a person who is six-feet, three-inches tall and would cover above the sternum for someone who is five-feet, four-inches tall.¹¹⁶

While these changes can be easily implemented, the traditional argument impeding owners from making these changes is that such changes would hinder the fan's viewing experience, and perhaps reduce fan attendance. This argument is flawed for a few reasons. First, regarding screening, the netting used by baseball stadiums today is thinner and less visible than ever before¹¹⁷ to help prevent any distraction from the viewing experience. Viewing impediments behind screened areas, if any, are minimal, as evidenced by the fact that some of the most expensive seats at a baseball game—behind home plate—are covered by netting, which has not stopped fans from paying top dollar for tickets in these areas on a daily basis. Second, regarding railing heights, while forty-two inches is approximately the line where vision is hampered for a person sitting in the front row,¹¹⁸ owners could move the traditional metal railing up to where vision is blocked and implement a transparent material, such as Plexiglas (which is used to protect fans from injury at hockey stadiums)¹¹⁹ or a thinner metal wire, such as pipe railing,¹²⁰

111. *Id.*

112. *See* Bolch, *supra* note 22; Lavigne, *supra* note 27.

113. Lavigne, *supra* note 27.

114. *Id.*

115. *Id.*

116. *Id.*

117. Fried & Ammon, *supra* note 109, at 59; Horton, *supra* note 11, at 368–69.

118. Lavigne, *supra* note 27.

119. PLEXIGLAS® Applications, EVONIK INDUSTRIES, http://www.plexiglas.de/product/plexiglas/en/about/faq/Pages/applications.aspx#faq_0_3 (last visited Nov. 11, 2013).

120. Lavigne, *supra* note 27.

for the remaining height to help prevent vision impairment.

To summarize, the changes discussed can be implemented by stadium owners in a practical manner that would not detract from the fan’s viewing experience nor reduce stadium attendance. Instead, such changes would protect fans from injury and thus protect stadium owners from potential future liability associated with such injuries.

VII. CONCLUSION

The baseball rule has limited the liability of stadium owners for fan injuries for almost as long as baseball has been played in the stadium setting.¹²¹ However, the rule does not adequately account for the increased risk of fan injury resulting from maple bat use and inadequate railing heights based on standards developed in the 1920s that are still used to “protect” fans in today’s stadiums.¹²² Due to these increased risks, and the improbability of fan recovery under the current liability standard, the baseball rule needs to be changed to increase the duty of care owed by stadium owners to fans to mirror the reasonable duty that business owners owe to invitees in other settings. While each state would be responsible for adopting such a standard through either common¹²³ or statutory law,¹²⁴ doing so would not place undue burdens on stadium owners to make drastic changes to their stadiums. Instead, the reasonable duty of care standard would require reasonable changes to be made to stadiums similar to the changes already implemented by a number of stadium owners,¹²⁵ which may include raising the minimum height of railings, adding transparent barriers, and adding additional netting. Additionally, the reasonable duty of care would follow a comparative negligence analysis in most states, which would continue to limit the overall liability of owners by taking into account the degree of reasonableness shown by the injured fan’s behavior.

Overall, adopting a reasonable duty of care standard under the baseball rule would require preemptive precautions by owners to help decrease fan injury—which would likely decrease the number of fan injuries and thus the number of potential personal injury claims—and would put more responsibility on fans to act reasonably in order to have any chance of

121. *See Wells v. Minn. Baseball & Athletic Ass’n*, 142 N.W. 706 (Minn. 1913).

122. *See generally* Drane et al., *supra* note 58; Lavigne, *supra* note 27.

123. *See Edward C. v. City of Albuquerque*, 2010–NMSC–043, ¶ 41, 148 N.M. 646, 241 P.3d 1086.

124. *See Colorado Baseball Spectator Safety Act of 1993*, COLO. REV. STAT. § 13–21–120(5)(a) (2012).

125. *See Fried & Ammon*, *supra* note 109, at 60–61; Lavigne, *supra* note 27.

recovery for an injury. It is an issue that can be easily fixed in a practical manner so long as the necessary steps to implement the duty are taken, which includes the support from baseball's most influential organization, MLB. It is time for both MLB and the individual states to step up to the plate.