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Beware of Deadly Flying Bats: An Examination of the Legal Implications of Maple Bat Injuries in Major League Baseball

*Javier Diaz**

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INTRODUCTION

On August 8, 2007, James G. Falzon and his son Robert were spending the day watching the New York Mets play their baseball rival, the Atlanta Braves.[1] Falzon was sitting in a box seat in the second row along the third base line.[2] Luis Castillo, a batter for the Mets, approached the plate.[3] Castillo emerged from the dugout with Ramon Castro's maple bat, which he borrowed after shattering his own bat hitting a foul ball.[4] Crack![5] Castillo hits a fly ball.[6] The fans turn, watching the ball to see if it will fall in for a hit.[7] Falzon rose to watch the ball, unaware that Castillo's bat exploded into several sharp pieces, the most significant of which, the barrel portion of the bat, was moving rapidly toward Falzon's face, in a flat spin.[8] The impact knocked Falzon over his seat and into the row behind him.[9] Falzon's son watched the entire scene in horror as field medical personnel attend to his father.[10] The following laundry list of injuries that resulted sounds like those of a horrific car accident:

Multiple facial fractures including bilateral nasal bone fractures, nasal septum fractures, fractures at posterior, medial and anterior maxillary walls, left zygoma fractures, bilateral pterygoid plate fractures; a fractures/split palate necessitating a tracheostomy to complete surgery; open reduction and internal fixation including insertion of synthetic implants in facial bones; right floor orbit fractures; left orbit fracture, left medial orbit wall fractures; lacerations to right upper lip extending into the right nostril, loosening of the front teeth; profuse bleeding of the mouth and face; vomiting of ingested

1 Verified Complaint ¶¶ 24–25, Falzon v. Major League Baseball Enters., Inc., No. 10110508 (N.Y. Sup. Ct. Aug. 5, 2010).

2 *Id.* ¶ 26.

3 Dareh Gregorian, *Mets Fan Sues Team and Bat-Maker After Getting Smacked in the Face*, N.Y. POST (Aug. 9, 2010, 2:26 PM), http://nypost.com/p/news/local/queens/mets_face_sues_team_and_bat_maker_qYAh2JxhXEJ8K3kYDFOF8K.

4 *Id.*; Verified Complaint, *supra* note 1, ¶ 29.

5 Verified Complaint, *supra* note 1, ¶¶ 29–30.

6 *Id.* ¶ 30.

7 *See id.* ¶ 31; Gregorian, *supra* note 3.

8 Verified Complaint, *supra* note 1, ¶ 31; Gregorian, *supra* note 3.

9 Gregorian, *supra* note 3.

10 Verified Complaint, *supra* note 1, ¶ 33.

blood; and [severe] headaches.[11]

Falzon was lucky. It could have been much worse.[12]

He attempted to pursue his case by suing Major League Baseball and the Mets organization, which ran Shea Stadium.[13] On April 26th, 2011, Justice Singh sitting in the Supreme Court of New York County (trial court) dismissed Falzon's complaint against Major League Baseball.[14]

> The court held that the issue was not whether maple bats are more likely to break than traditional ash bats—because the risk of injury to spectators who occupy unprotected areas remains the same. The court expressly declined to extend the limited duty of care or to require the owners and operators of a baseball stadium to protect additional areas of the ballpark with protective screening.15

The trial court erred because it failed to consider the new and heightened danger posed by maple bats.[16] Mr. Falzon has appealed the court's decision.[17]

When fans like Falzon are injured in this manner, their legal options have historically been limited by the assumption of risk doctrine.[18] This doctrine is based on the premise that a fan should be aware of his or her surroundings and the attendant risks when choosing to sit in an unprotected seat.[19] Major League Baseball and stadium owners are shielded from liability for any injuries incurred while occupying unprotected

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11 *Id.* ¶ 32.

12 Ed Storin, *Selig Has Dropped the Ball Yet Again*, ISLAND PACKET (S.C.), Mar. 20, 2010, *available at* Factiva, Doc. No. IPAK000020100320e63k0008j (quoting Joe Maddon, Major League Baseball manager for the Tampa Bay Rays, as stating: "Some day, somebody is going to get killed or impaled"); *see, e.g.*, Paul Sullivan, *Cubs' Colvin in Hospital, Punctured by Broken Bat*, ORLANDO SENTINEL, Sept. 20, 2010, at C7, *available at* Factiva, Doc. No. ORSE000020100920e69k0004t (reporting that "outfielder Tyler Colvin" had to be taken to a local hospital after being "impaled in the left upper chest with a broken [maple] bat").

13 *See* Verified Complaint, *supra* note 1.

14 Carla Varriale, *Baseball Spectator's Lawsuit Alleging Enhanced Dangers of Maple Bats Dismissed*, LEGAL INSIGHTS, Summer 2011, at 2, 6, *available at* http://hrrvlaw.com/resources/HRRV_Insight_2011_summer.pdf.

15 *Id.*

16 *Id.*

17 *Id.*

18 James Winslow & Adam O. Goldstein, *Spectator Risks at Sporting Events*, INTERNET SCI. PUBLICATIONS (2007), http://ispub.com/journal/the-internet-journal-of-law-healthcare-and-ethics/volume-4-number-2/spectator-risks-at-sporting-events.html.

19 *Id.*

seats.[20] This limitation to the stadium owners' duty and in turn, their liability is reinforced by warnings and disclaimers on the back of tickets, announced during the games and in modern stadiums, and memorialized on the back of seats.[21]

The doctrine centers on an assumption of risk that is necessary to observe the game in the intended manner.[22] Essentially, a spectator who attends a game should expect that there is a possibility that objects inherent to the game such as flying balls or broken bats could injure the spectator in the natural course of the game.[23]

Primary assumption of risk by the spectator entitles the stadium owners to significant protections from liability were an injury to occur to the spectator.[24] However, this protection from liability is not absolute as the specific risk causing the injury must be known to and appreciated by the spectator in order to absolve the stadium owners of liability.[25] Much legal debate centers on what a spectator should and should not "reasonably expect" when attending a game.[26]

A second and less constrictive doctrine, *secondary assumption of risk*, posits that a stadium owner who does owe a *duty of care* to the spectator and neglected that duty is only partially responsible for injuries occurring when a spectator encountered a risk that was known to the spectator and caused by the defendant's breach of the duty of care.[27] States differ on how far that duty of care extends and where it is limited.[28] In states, like New York,[29] that have adopted a comparative

20 *Id.*
21 *Id.*; *see infra* Figure 1.
22 W. PAGE KEETON ET AL., PROSSER & KEATON ON TORTS 497 (5th ed. 1984).
23 *Id.* at 465.
24 *Id.*
25 Winslow & Goldstein, *supra* note 19.
26 W. PAGE KEETON ET AL., *supra* note 23, at 497.
27 Knight v. Jewett, 834 P.2d 696, 707–08 (Cal. 1992).
28 *Compare* KAN. STAT. ANN. § 60-258a(a) (2009) ("[C]ontributory negligence . . . does not bar that party . . . from recovering damages . . . if that party's negligence was *less than* the causal negligence of the party or parties against whom a claim is made . . . ." (emphasis added)), *with* OR. REV. STAT. § 31.600(1) (2009) ("Contributory negligence shall not bar recovery in an action by any person or the legal representative of the person to recover damages for death or injury to person or property if the fault attributable to the claimant was *not greater than* the combined fault of all persons . . . ." (emphasis added)).
29 *See* N.Y. C.P.L.R. 1411 (MCKINNEY 2010) ("In any action to recover damages for personal injury . . . the culpable conduct attributable to the claimant . . . shall not

fault regime,[30] any liability under a secondary assumption of risk becomes merged into the comparative fault scheme, whereby the trier of fact apportions responsibility to parties for their respective conduct when an injury occurs.[31]

In order to inform the spectator and lessen the risk, stadium owners seek to protect themselves from liability by posting signs in dangerous areas,[32] warning fans of the dangers on tickets and over the loudspeakers, and installing netting in the most dangerous area, the backstop.[33] In some jurisdictions, including New York,[34] as long as the stadium owner has taken these measures to protect spectators in areas where risks are most apparent, the backstop and adjacent seating areas, courts will find a stadium owner has *discharged the duty* to use "reasonable care" in protecting the spectator as long as a spectator had an opportunity to occupy a protected seat or is given the opportunity to switch to a protected seat, upon request, if his seat is not in a protected area.[35] Once a stadi-

bar recovery, but the amount of damages otherwise recoverable shall be diminished in . . . proportion . . . to the [claimant's] culpable conduct . . . .").

30 *See, e.g.*, *id.*; ARIZ. REV. STAT. ANN. § 12-2505(A) (2004) ("The defense of contributory negligence or of assumption of risk is in all cases a question of fact . . . . [T]he claimant's action is not barred, but . . . shall be reduced in proportion to the relative degree of the claimant's fault . . . ."); LA. CODE CIV. PROC. ANN. art. 2323(A) (2011) ("If a person suffers injury . . . as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree . . . of negligence attributable to the person suffering the injury . . . .").

31 *Jewett*, 834 P.2d at 703 (holding that "cases involving 'secondary assumption of risk' . . . are merged into the comprehensive comparative fault system").

32 *See infra* Figure 1.

33 "The baseball rule states that [a] stadium owner must (1) screen the most dangerous area of the ballpark, usually behind home plate; and (2) provide that such screening adequately protects those spectators who may reasonably be anticipated to desire protected seats in the course of an ordinary game." Robert J. Thorpe, Comment, *Way Out in Left Field:* Crespin v. Albuquerque Baseball Club *Rejects Nearly One Hundred Years of American Jurisprudence by Declining To Adopt the Baseball Rule in New Mexico*, 17 SPORTS LAW. J. 267, 296 (2010) (citing Akins v. Glens Falls City School Dist., 424 N.E.2d 531, 533 (N.Y. 1981); Maytnier v. Rush, 225 N.E.2d 83, 87 (Ill. App. Ct. 1967); Benejam v. Detroit Tigers, Inc., 635 N.W.2d 219, 221 (Mich. Ct. App. 2001)).

34 *See Akins*, 424 N.E.2d at 533.

35 "Cases where the courts have adopted the baseball rule . . . support the proposition that owners and occupiers of baseball stadiums are immune from liability, regardless of how the injury occurs, as long as they adequately screen a baseball stadium behind home plate and provide a sufficient number of protected seats." Thorpe, *supra* note 34, at 278 (citing Crespin v. Albuquerque Baseball Club, LLC, 216 P.3d 827, 832–33 (N.M. Ct. App. 2009), *rev'd*, Edward C. v. City of Albuquerque, 241 P.3d 1086 (N.M.

um owner has discharged this *limited duty of care*, the owner is absolved from liability for any injury occurring in an area and a manner that the spectator, who chooses to assume the risk of occupying an unprotected seat, should be reasonably aware of.[36]

This Comment posits that *assumption of risk* doctrine should not shield Major League Baseball or the owners of Shea Stadium from liability in *Falzon* or any other case involving injury resulting from a cracked or shattered maple bat.[37] Part I of this Comment begins with the background information on maple bat injuries, the rise of maple bat use in Major League Baseball[38] and injuries suffered by players, coaches and spectators alike since the introduction of the maple bat.[39] The discussion continues with an analysis of what steps Major League Baseball has taken to evaluate the safety, utility and practicality of maple bat usage.[40]

Part II of this Comment focuses on the impact of the legal theories of assumption of risk in *Falzon v. Major League Baseball*.[41] This section will discuss the duties of Major League Baseball and the stadium owners.[42] This section will also discuss the risk the spectator assumes when entering a ballpark or arena.[43] Much of this section is devoted to the fundamental differences between being hit by a "foul ball" or

2010); *Akins*, 424 N.E.2d at 535; *Benejam*, 635 N.W.2d at 221–25; McNiel v. Ft. Worth Baseball Club, 268 S.W.2d 244, 246 (Tex. Civ. App. 1954)). *See Akins*, 424 N.E.2d at 533 ("in the exercise of reasonable care, the proprietor of a ball park need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest").

36 Thorpe, *supra* note 33, at 278.

37 In *Falzon v. Major League Baseball*, the trial court held that "the issue was not whether maple bats are more likely to break than ash bats, because the risk of injury to spectators who occupy unprotected areas remains the same." Carla Varriale, *Blog: Court in Bat Case Refused to Extend the Duty of Care*, ATHLETIC BUS. (Apr. 29, 2011, 10:47 AM), http://athleticbusiness.com/editors/blog/default.aspx?id=504. As a result, "[t]he court declined to extend the limited duty of care," noting "that to hold otherwise would essentially render them insurers of a spectator's safety—a standard the court expressly declined to adopt." *Id.*

38 *See* discussion *infra* Part I.A.

39 *See* discussion *infra* Part I.B.

40 *See* discussion *infra* Part I.C.

41 Falzon v. Major League Baseball, No. 10110508 (N.Y. Sup. Ct.).

42 *See* discussion *infra* Part II.A.

43 *See* discussion *infra* Part II.B.

an intact released bat versus an exploded maple bat.[44] It will also highlight the legal consequences of these fundamental differences.[45] The Conclusion draws together both the present and future implications of continued maple bat use.

I. THE CONTROVERSY

A. The Rise of the Maple Bat

Sam Holman, founder of SamBats, Inc., the company widely considered the pioneer in maple bat technology for Major League Baseball, believes Joe Carter, in 1997, was the first well-known Major League Baseball player to use a maple bat.[46] Use spread, and, in 2001, Barry Bonds significantly affected maple bat use in his historic run to break the Major League Baseball single season home run record with his distinct black maple bat.[47] By 2008, sixty-five percent of the bats Louisville Slugger shipped to major and minor league players were maple.[48]

Players and experts alike have speculated as to why so many players prefer maple.[49] They point to everything from the water content (twelve percent for maple Louisville Sluggers, five percent for Sam Bats) to durability (maple bats tend to last longer than ash bats) to the "feel" of maple on impact.[50]

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44 *See* discussion *infra* Parts II.B–C.

45 *See* discussion *infra* Parts II.C–D.

46 Amy K. Nelson, *Q&A About Maple Bats*, ESPN (Aug. 18, 2008, 2:01 PM), http://espn.com/mlb/news/story?id=3540538 (interviewing Sam Holman, owner of The Original Maple Bat Corporation, and Chuck Schapp, Louisville Slugger's Director of Professional Baseball, about their opinions on the ash versus maple bat debate). Traditionally, Major League Baseball players used ash bats. *Id.*

47 John Donovan, *Bonds Slugs No. 756 To Pass Aaron as Home Run King*, SI.COM, http://si.com/2007/baseball/mlb/08/07/bonds.record (last updated Aug. 8, 2007, 1:10 PM). In a bit of irony, one day prior to Falzon being injured, Bonds hit his record-breaking 756th career home run. *Id.*

48 Nelson, supra note 48.

49 *See id. Compare Our Manufacturing Process*, DOVE TAIL BAT COMPANY, http://dovetailbat.com/productcart/pc/dtb_woodbatsfaqs.asp (last visited Feb. 16, 2012) (noting that "[p]hysics professors who've studied the properties of ash and maple say there's no real difference in how one performs over the other when made into baseball bats."), *with* LOUIS E. BOONE & DAVID L. KURTZ, CONTEMPORARY MARKETING 173 (14th ed. 2010) (recognizing that "[m]any players prefer the performance of maple bats over ash, believing the ball travels farther.").

50 Nelson, supra note 48.

In 2005, Major League Baseball commissioned a study by the Director of the Baseball Research Center at the University of Massachusetts-Lowell, James Sherwood.[51] His conclusions went contrary to what many players believed to be a significant performance upgrade provided by using maple instead of ash.[52] He found that "[m]aple has no advantage in getting a longer hit over an ash bat."[53] However, for players, distance is not the sole consideration.

A quick physics lesson illustrates one significant potential advantage.[54] Hal Incandenza, a frequent contributor for Sportsfilter, summarizes the point:

> It's not about bats hitting the balls *further* overall, it's about having a wider sweet spot- which is one of the other advantages of aluminum bats besides hitting it further, and which is why maple became popular: it's a wood bat with a larger, and thus more forgiving, sweet spot. You lose less speed on the batted ball when hitting just off the sweet spot with maple than with ash. . . . Mis-hit balls go furthest with aluminum bats, then a little less far with maple, then less far with ash. . . . . """What's odd, however, is that the same physics that says maple bats have an advantage of ash bats also notes that stiffer bats have wider sweet spots, and wider handles means stiffer bats- without any real cost to bat speed, since weight in the handle is at or near the pivot point and thus shouldn't slow down the player's swing via heaviness. It may be that players prefer thin handled bats because they are easier to hold in the finger tips when producing a quicker, more whip-like swing.[55]

It is this whip-like motion that also produces the danger: a thin handle with a heavy bat head moving at great speed[56]

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51 *Maple Bat Man Strikes Back!*, RUMORS ON INTERNETS (Jan. 21, 2009), http://rumorsontheinternets.org/2009/01/21/roti-exclusive-maple-bat-man-strikes-back. "MLB chose not to release the 50-page report, citing the breadth of proprietary information gathered on its trips to the manufacturing plants." Jeff Passan, *New MLB Rules Cause Maple Bat Flap*, YAHOO! SPORTS (Jan. 19, 2009), http://yahoo.com/mlb/news?slug=jp-maplecontroversy011809.

52 The study "found that . . . batted-ball speeds were essentially the same for the two woods." Jeff Passan, *Baseball at Breaking Point over Maple Bats*, YAHOO! SPORTS (May 9, 2008), http://yahoo.com/mlb/news?slug=jp-maplebats050808.

53 *Id.*

54 Hal Incandenza, Comment to *Maple Bats: One of Baseball's Most Dangerous Weapons*, SPORTSFILTER (May 11, 2008, 2:33 AM), http://sportsfilter.com/news/9854/maple- bats-one-baseballs-most-dangerous.

55 Incandenza, *supra* note 56 (emphasis in original).

56 Placing weight on the end of a bat alters the bat's center of gravity. DEREK

composed of a material prone to shatter impacts another object (the ball) moving at a similar rate of speed.[57] The collision of the two causes the bat to shatter at the point of impact,[58] tomahawking the portion furthest from the anchor point (the barrel) away from the anchor point (the hands) at the point of impact.[59] This results in a dangerous flying shard(s).[60]

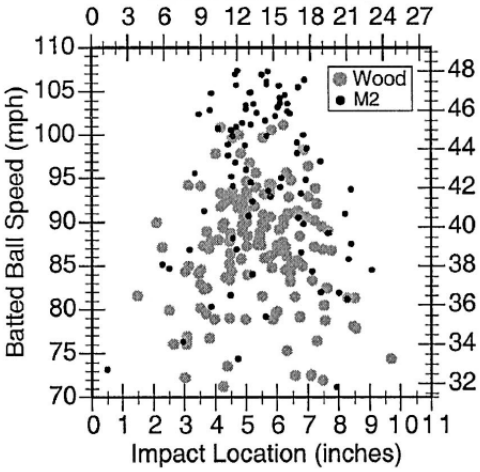

Figure 3.Crisco Study on Batted Ball Speeds[61]

ZUMSTEG, THE CHEATER'S GUIDE TO BASEBALL 118 (2007).
Now, why that results in a faster swing requires a fairly long and quite confusing discussion on angular momentum. The short version is that it's true, and you can test it for yourself if you want. Swing a sledgehammer with, say an 8-pound head, as you would when destroying a wall. Then turn it around and swing it holding the weight in your hand. It is much easier. Trust me . . . .
Id.

57 *See generally* ROBERT K. ADAIR, THE PHYSICS OF BASEBALL 79–86 (3rd ed.2002) (discussing the physics behind the collision of a bat hitting a ball).

58 "From a physics point of view, it is interesting to note that a broken bat often signals a well struck ball rather than a weak hit." ROD CROSS, PHYSICS OF BASEBALL & SOFTBALL 21 (2011).

59 *Id.* at 236 ("When a bat collides with a ball, the force of the ball on the bat does not act on the handle, nor does it act on the batter's hands. It acts on the bat at the point of impact on the barrel.").

60 "It is like a heavy truck slamming into a basketball. The truck will slow down a fraction, but it won't come to a stop or reverse direction. It's the same with the barrel of a bat." *Id.*

61 Joseph J. Crisco et al., *Batting Performance of Wood and Metal Baseball Bats*,

B. Other Maple Bat Injuries

The first maple bat injury to receive significant media coverage was to Don Long in April of 2008.[62] Long was a Pittsburgh Pirates hitting coach and was in the visitors' dugout at the L.A. Coliseum when Nate McClouth crisply struck an Esteban Loaiza pitch into right field.[63] Long, a veteran coach and former player with the Pirates, tracked the ball down the right-field line.[64] Without warning, Long was struck by a maple bat shard from McClouth's bat.[65] Unbeknownst to Long, the bat had shattered and the shard had flown over thirty feet at devastating velocity.[66] He was hit in the left cheek and was immediately tended to by field personnel.[67] He required ten stitches and suffered nerve damage to the left side of his face.[68] The shard struck with such ferocity that pieces of it needed to be excised from his face prior to stitches being put in.[69]

Ten days after Long's injury, in the same stadium, Susan Rhodes was seated in Row 4 behind the visitor's dugout, roughly 15 feet behind where Long was hit.[70] Rhodes, a novice spectator, was invited by friends to take in the game.[71] In the seventh inning, Todd Helton, a Colorado Rockies batter known for his power, struck a ball into center-field.[72] Rhodes watched the ball fall in for a single when she was upended by

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34 MED. & SCI. SPORTS & EXERCISE 1675, 1681 fig.5 (2002). This chart demonstrates the power aluminum bats generate as opposed to wooden bats, here with an aluminum bat, designated by M2. The M2 material, like maple, allows a faster swing resulting in a higher batted ball speed at the point of impact when hit cleanly. Like aluminum, maple generates more batted ball speed and will thus result in a further travel of the broken barrel of the bat creating a larger danger area when a maple bat breaks, that area extends outward from the point of impact, toward the field and the stands.

62 Passan, *supra* note 54.

63 *Id.*

64 Don Long Biography, MLB.COM, http://mlb.com/team/coach_staff_bio.jsp?coachorstaffid=534229 (last visited Jan. 16, 2012); Passan, *supra* note54.

65 Passan, *supra* note 54.

66 *Id.*

67 *Id.*

68 *Id.*

69 *Id.*

70 Jeff Passan, *Fan's Injury Should Force Bat Policy Change*, YAHOO! SPORTS (May 30, 2008), http://yahoo.com/mlb/news?slug=jp-bats052908.

71 *Id.*

72 *Id.*

a chunk of the bat's barrel.[73] The bat Helton used had exploded, leaving him with a three-inch piece in his hand, with the remainder tomahawking into the stands.[74] Rhodes sustained significant injury despite being hit by the blunt end of the bat.[75] Her jaw was broken in two places and she required a titanium plate and four screws to repair it.[76] She also suffered from severe headaches and light sensitivity.[77]

Once Rhodes' medical bills started arriving she hired an attorney, Alan Ghaleb, to contact the stadium's insurer.[78] Ghaleb received a call from American Specialty Insurance and Risk Services, an Indiana Company that offers insurance to sports teams.[79] The company refused the claim, informing Ghaleb that the stadium was protected because Rhodes had assumed the risk by attending the game and sitting in an unprotected area of the stadium.[80] Rhodes and Ghaleb have not pursued a claim.[81]

In April of 2010, Michael Arthur, a forty-seven-year-old spectator was struck while sitting in Section 112, Row R (seventeen rows back from the closest field-level seats) at Tropicana Field in Tampa Bay, Florida.[82] Arthur was watching the game when Robinson Cano, a New York Yankee batter, struck a pitch for a single.[83] Arthur and his wife watched the single drop in and when they glanced back to home plate, a shard from Cano's bat had struck them.[84] Arthur's wife Sasha deflected the shard but it struck Arthur squarely in the face.[85] Arthur required 7 stitches and the chunk of wood missed a vi-

73 *Id.*
74 *Id.*
75 *Id.*
76 Passan, *supra* note73.
77 *Id.*
78 *Id.*
79 *Id.*
80 *Id.*
81 *Id.*
82 Tony Fabrizio, *Rays Fan Hit by Bat Still Recovering*, TAMPA BAY ONLINE, http://tbo.com/content/2010/jul/30/312353/fan-struck-bat-fridays-game/news-breaking (last updated July 31, 2010, 11:53 PM); *Tropicana Field Seating Chart*, OFFICIAL SITE TAMPA BAY RAYS, http://mlb.com/tb/ticketing/seating_pricing.jsp (last visited Jan. 16, 2012).
83 Fabrizio, *supra* note 85.
84 *Id.*
85 *Id.*

tal artery by less than one half inch.[86] Had the bat remnant rotated that extra half-inch, Arthur might have lost sight in his right eye permanently.[87]

While 25 players have died in the course of a game during the last century of baseball, no players or spectators have died from being struck by a shard or piece of an ash bat striking them.[88] It appears, however, that the danger level to both spectators and players has changed. Brad Ziegler, a relief pitcher for the Oakland A's, who was struck with a large portion of an opponent's maple bat during a game, recently commented:

> That's one of the things we've been talking about with maple bats for a long time, the inherent danger. . .It didn't seem like bats broke like that—with the barrel end flying all the time—10, 15 years ago. Now that's happening a lot, almost every game or every other game. It was just a matter of time before someone got hit with one, I just wish it wasn't me.[89]

This growing concern among players about their safety coupled with the increase in bat breakage prompted MLB to conduct a study ("Sherwood Study") on maple bats in 2005 and again in 2008.

C. The Maple Bat Study & MLB Reaction

The Sherwood Study essentially found no significant difference in batted ball distance between ash to maple.[90] Yet the study also showed that while ash bats tend to break innocuously,[91] maple bats tend to "explode" on impact creating several projectiles, the most dangerous being portions of the barrel, the heaviest part of the bat.[92] Based on surveys of breaks in the ash and maple bats,[93] the study pointed to fea-

86 *Id.*
87 *Id.*
88 ROBERT M. GORMAN & DAVID WEEKS, DEATH AT THE BALLPARK: A COMPREHENSIVE STUDY OF GAME RELATED FATALITIES, 1862–2007 (2010).
89 Alex Espinosa, *Ziegler's Injury Revives Maple Bat Debate*, MLB.COM (Sept. 4, 2010, 5:35 PM), http://mlb.com/news/article.jsp?ymd=20100904&content_id=14277718.
90 Jim Morrison, *Baseball's Bat Man*, SMITHSONIAN.COM (Oct. 5, 2010), http://www.smithsonianmag.com/history-archaeology/Baseballs-Bat-Man.html.
91 Passan, *supra* note 54.
92 *Id.*
93 Passan, *supra* note 53.

tures such as slope of the grain, direction of grain on impact, and overall wood quality as possible catalysts for the explosive quality of maple.[94] Thus, it concluded that maple bats were no more advantageous to players, but posed a significantly greater risk of breakage.[95]

Major League Baseball took no action following the study, likely due to the increased popularity of the bats among players.[96] After issue was re-introduced in the 2006 collective bargaining negotiations, Major League Baseball convened a Safety and Health Advisory Committee in order to further research the issue.[97] At the urging of the Committee, in 2008, Major League Baseball commissioned the Forest Products Laboratory, Harvard statistician Carl Morris, Sherwood, and wood-certification company TECO to analyze over 2,200 maple bats broken between July 2nd and Sept. 7th of 2008.[98] Spurred on by some of the injuries previously discussed, Major League Baseball asked the committee to analyze and make recommendations to promote players and spectator safety.[99] "In the study, Morris ran regression analyses on the characteristics of the bats that broke, Forest Product Laboratory's Dave Kretschmann tested the actual wood and Sherwood used his lab to try different bats to see which held up best."[100]

Though heavily criticized by some maple bat manufacturers, the Sherwood Study showed that the major catalyst in bat breakage was the slope of grain, a characteristic of wood directly related to the strength and durability.[101] It found that the more even the slope of grain, the less breakage occurs.[102] The committee produced a list of 9 safety recommendations, all implemented by MLB:

1. All bats must conform to specific slope-of-grain wood-grading re-

94 Barry M. Bloom, *Safety Tests for Maple Bats Mandated*, MLB.COM (Dec. 9, 2008 6:47 PM), http://mlb.com/news/article.jsp?ymd=20081209&content_id=3708319.
95 *Id.*
96 Bob Nightengale, *Colvin's Injury Stirs Debate over Maple Bats but Ban Unlikely*, USA TODAY (Sept. 21, 2010, 8:29 PM), http://usatoday.com/sports/baseball/2010-09-20-maple-bat-debate-colvin_N.htm.
97 Bloom, *supra* note 97.
98 Passan, *supra* note 53.
99 Bloom, *supra* note 97.
100 *Id.*
101 Passan, *supra* note 53.
102 *Id.*

> quirements which apply to the two-thirds length of the bat that constitutes the handle and taper regions of it. All manufacturers must identify and grade the handle end prior to production of the bat to ensure that its slope of grain satisfies the grading requirement.
>
> 2. All manufacturers must place an ink dot on the face of the handle of sugar maple and yellow birch bats before finishing. Placing an ink dot enables 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 is currently used as the hitting surface is the weaker of the two choices. To facilitate such a change in the hitting surface, manufacturers must rotate the logos they place on these bats by 90 degrees.
>
> 4. Handles of sugar maple and yellow birch bats must be natural or clear finish to allow for inspection of the slope of grain in the handles.
>
> 5. Manufacturers must implement a method of tracking each bat they supply—like a serial number—so that each can be linked back to the manufacturer's production records.
>
> 6. Representatives of each authorized manufacturer should be required to participate in an MLB-sponsored workshop on the engineering properties and grading practices of wood as they relate to the manufacture of solid-wood baseball bats.
>
> 7. Manufacturers should 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 should be randomly conducted of bats by MLB or its designated representatives at the ballparks to ensure that the new bat requirements are being followed.
>
> 9. A formalized third-party bat certification and quality control program should be established to certify new suppliers, approve new species of wood, provide training and education to bat manufactures and address issues of non-compliance.[103]

Additionally, the liability insurance requirement on maple bat manufacturers, to cover possible injuries caused by shattered bats, was increased from $5 million to $10 million per

103 Bloom, *supra* note 97.

incident.[104]

The newly imposed testing requirements were designed to ensure that companies were using wood with sufficient durability to reduce the number of catastrophic breaks.[105] Since the implementation of these measures, MLB has reported annual reductions in the number of broken maple bats bringing down the number of catastrophic breaks (those which produce multiple flying shards) by roughly forty percent.[106]

II. THE LEGAL RAMIFICATIONS

A. *The Duties of Major League Baseball and Stadium Owners*

As a general rule, for those states, like New York,[107] that have adopted a comparative negligence (also known as comparative fault) regime,[108] there is a duty of reasonable care that holds baseball stadium owners to a particular standard in protecting their fans.[109] Often, owners are able to discharge the duty by providing netting or fencing of the "most dangerous portions" of the field, which courts have generally found to be the backstop and some area from the backstop toward the baselines.[110] The advent of maple bats has fundamentally altered the measure of protection that needs to be afforded to spectators in order to discharge this duty, yet courts have refused to recognize this fundamental change to the danger inherent in maple bat use.[111] This is problematic because the spectator must grasp the potential gravity of danger from an

104 *Id.*

105 Paul Basken, *University Scientists Go Extra Innings To Help Baseball Solve Breaking Bats*, CHRON. HIGHER EDUC. (Nov. 1, 2010), http://www.chronicle.com/article/University-Scientists-Go-Extra/125223.

106 *Id.*

107 *See* N.Y. C.P.L.R. 1411 (MCKINNEY 2010).

108 *See, e.g.*, *id.*; ARIZ. REV. STAT. ANN. § 12-2505(A) (2004); LA. CODE CIV. PROC. ANN. art. 2323(A) (2011).

109 Thorpe, *supra* note 33, at 296.

110 Knight v. Jewett, 834 P.2d 696, 708 (Cal. 1992).

111 *Varriale*, supra note 38. Courts have, in the past, recognized exceptions to this general rule. Thorpe, *supra* note 34, at 280–81. For example, at one time, the Supreme Court of New Jersey held that "multi-purpose areas, such as concourses and playground areas, are outside the scope of the rule." Maisonave v. Newark Bears Prof'l Baseball Club, Inc., 881 A.2d 700, 707 (N.J. 2005), *superseded by statute*, New Jersey Baseball Spectator Safety Act of 2006, N.J. STAT. ANN. §§ 2A:53A-43 to -48 (West 2010), *as recognized in* Sciarrotta v. Global Spectrum, 944 A.2d 630, 636 n.6 (N.J. 2008).

instrumentality in order for assumption of risk to apply.[112] The risk of maple bats is transformative: it is a new type of risk, one of shattered maple bat shards, that fundamentally changes the danger of the instrumentality, posing risk that never existed or been contemplated by the average fan prior to the advent of maple bat use.[113] Where a fan previously expected the innocuous break of an ash bat, today he must be prepared for the flying maple bat shard, a new and dangerous threat to the average fan.

Stadium owners (and arena owners generally) are under an affirmative, but limited duty to maintain a safe environment for spectators from these new and more dangerous bats.[114] This premise springs from tort and property law.[115] A person who comes onto a landowner's property by means of a general invitation open to the general public or in order to conduct business dealings with the landowner, is considered an invitee.[116] The landowner's duties owed to an invitee are the broadest available under the duty of care analysis.[117] The classification as an invitee, as opposed to a trespasser or a licensee, defines the bundle of legal rights for an invitee injured by some act of negligence.[118] Spectators are not considered licensees[119] because the purchase of a ticket is a commercial

112 Maddox v. City of New York, 487 N.E.2d 553, 557 (N.Y. 1985) ("It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results."). *Compare* Fatirian v Monti's Holding, Inc., 65 A.D.3d 1280 (N.Y. App. Div. 2009) (finding assumption of the risk principles inapplicable where, in an attempt to cross a dance floor covered in flower petals at a wedding ceremony, a plaintiff slipped), *with* Delaney v. MGI Land Dev., LLC, 72 A.D.3d 1254 (N.Y. App. Div. 2010) (recognizing the relevance of the assumption of the risk doctrine where participant at golf tournament was struck by an errant ball).

113 "A new danger . . . comes from maple bats." *Maple vs. Ash*, DON'T BREAK YOUR BAT.COM, http://dontbreakyourbat.com/maple.htm (last visited Jan. 16, 2012).

114 *See* Harrington v. Syufy Enters., 931 P.2d 1378, 1380 (Nev. 1997).

115 James G. Gaspard, II, Note, *Spectator Liability in Baseball: Nobody Told Me: I Assumed the Risk!!!*, 15 REV. LITIG. 229, 231–33 (1996) (discussing legal theories underlying liability of baseball stadium owners).

116 AARON D. TWERSKI & JAMES A. HENDERSON, JR., TORTS: CASES AND MATERIALS 401 (2nd ed. 2008).

117 *Id.*

118 *Id.*

119 A licensee is owed only the duty to make the premises safe from dangers which the owner is aware. MARC A. FRANKLIN, ROBERT L. RABIN, & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 196 (8th ed. 2006).

transaction which imputes the status of invitee.[120] Once affirmed as an invitee, the landowner assumes certain duties, which include the duty to make the property safe by means of a reasonable property inspection in order to uncover dangers that may threaten the invitee's safety.[121]

Spectators to a baseball game are indisputably invitees because they attend the game at the invitation of MLB and the individual stadium owners.[122] This invitation is held open to the general public who purchase tickets affirming their position as invitees to the landowners' facility, the stadium.[123] Thus, the stadium owners are under an affirmative duty to protect the spectator from hidden dangers.[124]

In addition to the duty to use reasonable care available to licensees, the landowner owes an additional duty to invitees to warn the invitee of non-obvious dangerous conditions known to the landowner.[125] Stadium owners attempt to discharge this duty in baseball through varied methods, some of which include signage intended to warn spectators of the dangers of flying bats and balls.[126] For example, modern stadiums often have placards on the back of many seats warning of the dangers of foul balls.[127] Also, many tickets issued to spectators contain warnings on the back discussing the duties of the stadium owners and explanations about the dangers inherent to baseball.[128] Finally, public address announcers at many stadiums announce a general warning regarding the danger of foul balls prior to the start of the game, often in both English and Spanish.[129] However, if the danger is so obvious that the invitee should have reasonably foreseen the danger, there is generally no duty to warn of the danger.[130]

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120 *Id.*
121 *Id.*
122 TWERSKI & HENDERSON, supra note 119, at 401.
123 *Id.* at 463.
124 *Id.* at 465.
125 *Id.* at 401.
126 *See supra* Figure 1.
127 *See supra* Figure 1.
128 Peter Abraham, *Colvin's Injury a Warning to Baseball*, BOSTON.COM (Sept. 20, 2010 12:47 PM), http://boston.com/sports/baseball/redsox/extras/extra_bases/2010/09/colvins_ injury.html.
129 Aaron Wakamatsu, *Spectator Injuries: Examining Owner Negligence and the Assumption of Risk Defense*, 6 WILLAMETTE SPORTS L. J. 1, 7 (2009).
130 *Id.*

The stadium owner has a duty to inspect regularly and take "reasonable" care in his protection of the spectator.[131] The classic example is illustrated by a grocery store owner who has a similar "limited" duty of care where a spill has occurred in his store:

> [I]t may be reasonable for a storeowner to conduct periodic inspections, say every hour or so, to look for spills or other potentially dangerous conditions and monitor and clean public areas on his or her property to make sure they are safe. However, it would probably be considered unreasonable to expect a business owner to keep watch all day long to make sure nothing is spilled or broken in the public areas. If a slip and fall case goes to trial, the jury will decide if what the property owner did was reasonable under the circumstances.[132]

A final fundamental assumption is that the victim is a "reasonable" person of average intelligence.[133] Courts use this objective standard to measure landowner conduct in order to determine if a breach of the land-owner's duty of care has occurred.[134] In the case of baseball spectator liability, the "reasonable" person is an average spectator of average intelligence with some experience with the basic rules of baseball and by extension, some understanding of the locations in the stadium and times throughout the game where the risk of injury may be at its ebb.[135] If this "reasonable" person is injured by a risk unknown to that person, that the stadium owner should have been aware of, the stadium owner breaches the limited duty of care and is likely liable for any injury incurred.[136]

B. Assumption of Risk

A stadium owner may deny any duty of care or claim that any duty of care owed was not breached by employing the doc-

131 Gaspard, *supra* note 118, at 233–34 (recognizing that stadium owners "have 'a duty to maintain their premises in a reasonably safe condition and to supervise the conduct of those on the premises to prevent injury.'" (quoting JOHN C. WEISTART & CYM H. LOWELL, THE LAW OF SPORTS § 8.03, at 956–57 (1979))).

132 W. PAGE KEETON ET AL., *supra* note 23, at 497.

133 *Id.*

134 *Id.*

135 Wakamatsu, supra note 132, at 7.

136 *Id.*

trine of assumption of risk by the participant.[137] The assumption of risk doctrine is at the center of the maple bat controversy.[138] When the doctrine is applied by courts, it is a bar to recovery in cases of negligence as a matter of law, however, as the doctrine has evolved, it has been parsed into several variations depending on the method and degree of risk assumed by the participant, or most significantly for our purposes, the spectator.[139]

The New York Court of Appeal's famous 1929 decision in *Murphy v. Steeplechase Amusements*[140] illustrates the basic concept of assumption of risk.[141] There, a young man chose to take part in an amusement park ride called "the [F]lopper,"[142] a carnival ride designed to make participants fall by the stop-start motion of a moving belt, which participants would try to run on.[143] The plaintiff in the case was injured while attempting to run on The Flopper's conveyor belt.[144] Judge Cardozo held that, because the activity's inherent dangers (the sudden jerking motion of the ride), which the participant had chosen to partake, were open and obvious to any reasonable person, the plaintiff could not recover for negligence on the part of the amusement park.[145] Cardozo noted:

> *Volenti non fit injuria* [Latin: "no injury is done to a person who consents"]. One who takes part in such a sport 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 antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquillity. The plaintiff was not

137 Joshua E. Kastenburg, *A Three Dimen[t]ional Model of Stadium Owner Liability in Spectator Injury Cases*, 7 MARQ. SPORTS. L. REV. 197-98 (1996).

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

139 Joshua E. Kastenburg, *A Three Dimen[t]ional Model of Stadium Owner Liability in Spectator Injury Cases*, 7 MARQ. SPORTS. L. REV. 197-98 (1996).

140 Murphy v. Steeplechase Amusements Co., Inc., 166 N.E. 173 (N.Y. 1929). For an in depth discussion on the case, see Robert N. Strassfeld, *Taking Another Ride on Flopper: Benjamin Cardozo, Safe Space, and the Cultural Significance of Coney Island*, 25 CARDOZO L. REV. 2189 (2004).

141 *Murphy*, 166 N.E. at 173.

142 *Id.*

143 *Id.*

144 *Id.* at 174.

145 *Id.*

> seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.[146]

Classically, this type of assumption of risk is termed *primary* assumption of risk.[147] When applied, it operates as a limitation on the stadium owners' duty and thus, a *de facto* defense to claims of negligence against stadium owners. The defendant stadium owner is not negligent either because he owes *no duty* to the plaintiff or because he did not breach any duty owed. Assumption of risk thus operates to frame the scope of duty owed to the plaintiff.[148] If the plaintiff either expressly or impliedly accepts the known category of risk inherent to the activity, he relieves the defendant of the duty to protect the plaintiff from the category of risk encountered.[149] At common law, primary assumption of risk resulted in a complete bar to recovery by the plaintiff.[150]

In *Knight v. Jewett*[151], the California Supreme Court discussed the implications of a *secondary* assumption of risk doctrine.[152] In *secondary* assumption, a defendant owes some duty of care to the plaintiff and has breached that duty in some way, but the plaintiff assumes certain risks of that activity with the full knowledge that he may be injured by the particular risk he has assumed.[153] This limitation of the stadium owners' duty and liability is not necessarily rooted in the plaintiff's awareness of the risk, nor plaintiff's experience level.[154] It often hinges instead on the gravity of the breach imposed on plaintiff and whether or not the plaintiff could "reasonably" assume any heightened risk associated with the defendant's breach.[155] In other words, defendants have a limited legal duty to use due care "*not to increase* the risks to a

146 *Id.*
147 Knight v. Jewett, 834 P.2d 696, 708 (Cal. 1992).
148 TWERSKI & HENDERSON, *supra* note 119, at 465.
149 *Id.*
150 *Id.*
151 *Jewett*, 834 P.2d 696.
152 *Id.*
153 *Id.*
154 *Id.*
155 *Id.* at 708.

participant over and above those inherent to the sport."[156] For example, if a plaintiff encounters an unusually steep slope at a ski resort, yet continues on to ski it and is injured in the process, the owner may be liable for creating an unusually dangerous condition, the unusually steep slope, but that liability may be tempered by the fact-finder when apportioning liability because the skier knowingly proceeded into the condition created by the breach of the owner's limited duty.

Secondary assumption of risk analysis is often merged into the comparative fault regime.[157] States like New York, which have adopted comparative fault regimes, will look to comparative fault calculations where the court assigns a percentage of the responsibility to each party based on the risks each party assumed prior to and during the injury-causing event.[158]

Following the adoption of the comparative fault regime in 1975, New York encountered a dilemma in the manner in which it handled assumption of risk injuries in sporting events.[159] The issue centered on whether the primary assumption of risk doctrine would survive to protect stadium owners from liability by eliminating any duty owed to spectators or whether the comparative fault regime and perhaps a secondary assumption of risk model would supersede the complete bar that primary assumption of risk doctrine imposed.[160]

A seminal case attempting to define the duty under the new comparative fault regime as it relates to premise liability for ball park proprietors was *Akins v. Glen Falls City School District*,[161] in which a spectator was injured by a foul ball.[162] There, the Court of Appeals of New York was tasked with defining the duties of a stadium owner after the lower courts upheld a one hundred thousand dollar jury verdict.[163] The spectator, Robin Akins was attending a high school baseball game, standing approximately sixty feet from home plate be-

156 *Id.* (emphasis added).
157 Lura Hess, Note, *Sports and the Assumption of the Risk Doctrine in New York*, 76 ST. JOHN'S L. REV. 457, 461 (2002).
158 *Id.* at 462–64.
159 *Id.* at 462–63.
160 *Id.*
161 Akins v. Glen Falls City School District, 424 N.E.2d 531 (N.Y. 1981).
162 *Id.* at 532.
163 *Id.*

hind a three foot fence.[164] There was no seating in that area, so Akins stood by the fence to observe the game.[165] The Court of Appeals noted that there was no evidence presented that the stadium owner had not made enough seating available behind the backstop and no evidence that the bleachers were so full as to preclude her from sitting there.[166] The plaintiff presented evidence as to the low cost of providing a higher fence down the first and third base lines as indicative of the stadium owner's lack of fulfillment of his duty to provide adequate protection for spectators.[167] The Court of Appeals defined the duty owned to the spectator as follows: 1) The owner must screen the most dangerous section of the field—the area behind home plate; and 2) the screening that is provided must be sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion.[168]

The *Akins* court therefore articulated a fairly bright-line rule:

> "where a proprietor of a ball park furnishes screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest and that screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game, the proprietor fulfills the duty of care imposed by law and, therefore, cannot be liable in negligence."[169]

This special limited duty exception to the comparative fault regime is often referred to as "the baseball rule."[170] The dissent noted that the continued use of the "baseball rule" in large part ignores the statutory mandates of the comparative fault regime in favor of a limited duty rule exempting stadium owners from liability, akin to primary assumption of risk,

164 *Id.*
165 *Id.*
166 *Id.* at 534.
167 *Akins*, 424 N.E.2d at 536–37.
168 *Id.* at 533.
169 *Id.* at 534.
170 *See generally Bellezzo v. State of Arizona Board of Regents*, 851 P.2d 847 (Ariz. Ct. App. 1992) (recognizing that, as a general rule, stadium owners "must screen the most dangerous section of the field—the area behind home plate—and the screening that is provided must be sufficient for those spectators who may be reasonably anticipated to desire protected seats on an ordinary occasion" (quoting *Akins*, 424 N.E.2d at 533)),

where the court removes the liability question from the jury.[171] The baseball rule has been codified in Illinois[172] and Colorado[173] and has been applied in various cases where spectators have been injured by errant foul balls and bats.[174] The baseball rule continues to be used as a framework by which the majority of jurisdictions determine cases involving spectators injured by balls and other flying objects "inherent" to the game.[175]

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171 *Akins*, 424 N.E.2d at 537.

172 Baseball Facility Liability Act, 745 ILL. COMP. STAT. ANN. 38/10 (LexisNexis 2009).

> 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.

Id.

173 Colorado Baseball Spectator Safety Act of 1993, COLO. REV. STAT. ANN. § 13-21-120 (West 2005).

> 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.
>
> . . . [T]he assumption of risk . . . 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 . . . . [A]n owner shall not be liable for an injury to a spectator resulting from the inherent risks of attending a professional baseball game, and . . . 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 risks of attending a professional baseball game.

Id. § 13-21-120(4)(a)–(b).

174 *See, e.g.*, Edward C. v. City of Albuquerque, 241 P.3d 1086 (N.M. 2010) (adopting the baseball rule); Tucker v. ADG, Inc., 102 P.3d 660 (Okla. 2004) (same); Benejam v. Detroit Tigers, Inc., 635 N.W.2d 219 (Mich. Ct. App. 2001) (same); *Akins*, 424 N.E.2d 531 (same); Gunther v. Charlotte Baseball, 854 F. Supp. 424 (D.S.C. 1994) (same); McNiel v. Ft. Worth Baseball Club, 268 S.W.2d 244 (Tex. Civ. App. 1954) (same).

175 *Edward C.*, 241 P.3d at 1097–98 (noting that the "vast majority of jurisdictions that have considered the issue" hold that, on the one hand, "[s]pectators must exercise ordinary care to protect themselves from the inherent risk of being hit by a projectile that leaves the field of play," and, on the other, owners "must exercise ordinary care not to increase that inherent risk").

C. Adoption, Applications, and Exceptions to the "Baseball Rule"

Several courts have found that the baseball rule does not shield owners from liability where the owners' actions have increased the risk such that it falls outside of normal risks inherent to the game.[176] This increased risk falls outside of what is "open and obvious" to the spectator.[177] Those courts have been willing to at least analyze that increased risk under a secondary assumption of risk analysis to determine if the owners have failed to discharge any duties owed to the spectator.[178]

One of the earliest and most often cited cases where the application of assumption of risk doctrine failed to shield stadium owners from liability was *Ratcliff v. San Diego Baseball Club of the Pacific Coast League*.[179] There, the California Court of Appeals found that the "baseball rule" did not shield the stadium owner from liability where a bat was mistakenly thrown into a walkway just prior to the start of a game.[180] The case involved a plaintiff walking to her seat during the warm-up for a baseball game.[181] She was injured when the player accidentally released his bat during a swing and it subsequently struck her.[182] The court reasoned that the stadium owner's duty to provide a reasonably safe stadium needed to be examined by a jury and that the baseball rule could

176 "[W]hen a stadium owner . . . has done something to increase the risks beyond those necessary or inherent to the game, . . . the courts have generally . . . allowed claims to proceed for a jury to determine whether the duty was breached." *Id.* at 1097. "Although [stadium owners] generally have no legal duty to eliminate (or protect a [spectator] against) risks inherent in the sport itself, it is well established that [owners] generally do have a duty to use due care not to increase the risks . . . over and above those inherent in the sport." Knight v. Jewett, 834 P.2d 696, 708 (Cal. 1992).

177 For example, although "a ski resort has no duty to remove moguls from a ski run, it clearly does have a duty to use due care to maintain its towropes in a safe, working condition so as not to expose skiers to an increased risk of harm. . . . [Such] risk, posed by a ski resort's negligence, clearly is not a risk inherent in the sport that is assumed by a participant." *Jewett*, 834 P.2d at 708 (citing Donald M. Zupanec, Annotation, *Liability for Injury or Death from Ski Lift, Ski Tow, or Similar Device*, 95 A.L.R.3D 203 (1979).

178 *See Edward C.*, 241 P.3d at 1093–97.

179 Ratcliff v. San Diego Baseball Club, 81 P.2d 625 (Cal. Ct. App. 1938).

180 *Id.* at 627–28.

181 *Id.* at 626.

182 *Id.*

not *per se* shield the owner from liability.[183]

The jury absolved the player from liability, calling the player's actions accidental, incidental, and inherent to the game, but found the stadium owner liable for the injuries based on a duty to maintain a reasonably safe environment for spectators based on the relatively common (but particularly dangerous) hazard of a thrown bat entering the grandstand area.[184] The crux of the holding was that the stadium owner should have known that the danger of a flying bat occurred often enough to warrant protection from such a hazard for the spectators before or during a game in that area.[185] The danger, however, was not so "open and obvious" that the spectator could have assumed the risk.[186] The matter was submitted to the jury setting a precedent for flying bat injuries to defeat summary judgment motions and proceed to the jury.[187]

Similarly, the Court of Appeals of New Mexico found that a general negligence standard applied to a case involving a fan injured by a hit ball in a picnic area.[188] In *Crespin v. Albuquerque Baseball Club*,[189] the family of an infant sued the city of Albuquerque and the baseball clubs involved in the game as well as the batter.[190] The ball hit the boy while he was sitting in the picnic area beyond the outfield fence before the game had commenced.[191] The trial court ruled that the defendants were entitled to summary judgment, based on the baseball rule.[192] However, the appellate court reversed, finding that a genuine issue of fact existed as to whether the city, which owned the ballpark, had breached a duty by failing to protect or warn the plaintiffs in the picnic area about pregame fly balls.[193] The appellate court refused to apply the

183 *Id.* at 626–28.
184 *Id.* at 626.
185 *Ratcliff*, 81 P.2d at 626–28.
186 *Id.* at 628
187 *Id.*
188 Crespin v. Albuquerque Baseball Club, LLC, 216 P.3d 827 (N.M. Ct. App. 2009), *rev'd*, Edward C. v. City of Albuquerque, 241 P.3d 1086 (N.M. 2010).
189 *Crespin*, 216 P.3d 827.
190 *Id.* at 829.
191 Jim Juliano & Alison C. Healey, *Update: Ballpark Liability and the Baseball Rule*, LEGALLY SPEAKING, http://legallyspeakingonline.com/archive_winter09-10_update.html (last visited Feb. 19, 2012).
192 *Crespin*, 216 P.3d at 829; Juliano & Healey, *supra* note 194.
193 *Crespin*, 216 P.3d at 835.

baseball rule to this case, finding "no compelling reason to immunize the owners/occupiers of baseball stadiums" where a general negligence standard should apply.[194] Although New Mexico's Supreme Court had referenced the baseball rule in a prior case,[195] the appellate court declined to "carve out an exception to the usual tort doctrines for the sport of baseball."[196] That decision was appealed, and the New Mexico Supreme Court held that "an owner/occupant of a commercial baseball stadium owes a duty that is symmetrical to the duty of the spectator."[197] The court rejected the baseball rule in favor of a modified mutual duty relationship stating that "the spectator must exercise ordinary care to protect himself or herself from the inherent risk of being hit by a projectile that leaves the field of play and the owner/occupant must exercise ordinary care not to increase that inherent risk."[198] By rejecting the baseball rule, New Mexico recognized the evolution of shared liability in a spectator-injury context, and allowed the case to move through summary judgment as questions of fact as to liability existed.[199]

The *Crespin* decision stands in sharp contrast to the doctrine articulated in *Turner v. Mandalay Sports Entm't*,[200] where the Nevada Supreme Court held that the baseball rule encompassed the entire duty owed by baseball owners-operators to protect spectators from foul balls.[201] There, a spectator was struck by a foul ball while eating in a concession area.[202] Since the concession area was not inherently dangerous, the owner and operator had no legal duty to take precautions to protect spectators in those areas.[203] The court found that spectators assume the risks to the game and this spectator had made a conscious choice to utilize the unpro-

194 *Id.* at 834.
195 McFatridge v. Harlem Globe Trotters, 365 P.2d 918 (N.M. 1961) (affirming district court judgment in favor of a spectator who suffered personal injuries after being struck by a basketball thrown into an audience by a player).
196 *Crespin*, 216 P.3d at 831.
197 Edward C. v. City of Albuquerque, 241 P.3d 1086, 1088 (N.M. 2010).
198 *Id.*
199 *Id.*
200 Turner v. Mandalay Sports Entm't, LLC, 180 P.3d 1172 (Nev. 2008) (en banc).
201 *Id.* at 1176 n.17.
202 *Id.* at 1175.
203 *Id.* at 1176.

tected concession area (near his seat, which was also unprotected).[204] That area did not pose an unduly high risk of injury, thus the stadium owner was under no duty to protect spectators in that area.[205]

Most recently, in *Correa v. City of New York*,[206] a security guard sued ESPN and the owners of Yankee stadium after his right hand was broken by a foul ball during a televised game.[207] The guard was seated on a stool directly behind home plate as part of his duties.[208] Though the area he was sitting in was protected by a net, the foul ball ricocheted through the hole where the camera was positioned and injured him.[209] A New York appellate court found a question of fact existed as to whether the stadium owners provided adequate protection and whether the premises were made reasonably safe.[210] The court further found that the defendants' proposed application of the assumption of risk doctrine presented issues of fact for a jury.[211] The court examined whether the hole in the screen was an ordinary or a heightened risk, because an employee, like a spectator is subject to the normal risks associated with the game but not heightened risk.[212]

These cases, taken together, show that most courts will consider the facts of the particular case to determine whether the baseball rule ought preclude liability rather than allow the baseball rule to provide an absolute shield for stadium owners from liability for any injuries resulting from batted balls or flying bats.[213] The baseball rule may be dwindling in favor of a jurisprudential comparative negligence analysis where spectators or workers are harmed in unusual or unexpected circumstances. The recent cases suggest courts should weigh the merits of the case rather than summarily absolve owners of liability based on the baseball rule and the assumption of risk doctrine. This shift in the state of the law should

204 *Id.*
205 *Id.*
206 Correa v. City of New York, 66 A.D.3d 573 (N.Y. App. Div. 2009).
207 *Id.* at 574.
208 *Id.* at 575.
209 *Id.* at 574.
210 *Id.* at 574–57; Juliano & Healey, *supra* note 194.
211 *Correa*, 66 A.D.3d at 575.
212 *Id.*; Juliano & Healey, *supra* note 194.
213 *See generally* Juliano & Healey, *supra* note 194.

also apply to negligence-based claims for injuries caused by shattered maple bats because of the new and unique danger they pose.

D. Why Maple Bat Injuries Do Not Fall under the "Baseball Rule"

Maple bat injuries should be exempted from the traditional baseball rule. The baseball rule assumes that an owner has discharged the duty by placing netting in certain areas and when the spectator has assumed an "open and obvious" risk by sitting in an unprotected area.[214] The spectator is presumed to be one of average intelligence and experience with baseball and its dangers.[215] The average fan and, for that matter, even the more experienced fan is not aware of the heightened danger of injury to be reasonably expected from maple bats.[216] Maple bats look exactly the same as ash bats to the average spectator, who cannot be expected to anticipate the hidden risk.[217] Even players who are presumed to be experts in the field (no pun intended) have been injured by maple bat shards.[218]

Furthermore, the violence and ferocity with which maple bats shatter has fundamentally altered the risk to spectators.[219] In this respect, MLB and the stadium operators know, based on the above research, that the risk to fans has been increased with the advent of maple bats, yet the protections offered to fans have not been fundamentally altered.[220] The increased likelihood and severity of injury is not yet in the "lexicon" of the average spectator;[221] therefore, the maple bat

214 *See generally* Bellezzo v. State of Arizona Board of Regents, 851 P.2d 847, 851–52 (Ariz. Ct. App. 1992).

215 The average spectator is presumed to be an "adult of reasonable intelligence." Swagger v. Crystal, 379 N.W.2d 183, 185 (Minn. Ct. App. 1985) (quoting Brisson v. Minneapolis Baseball & Ath. Ass'n, 240 N.W. 903, 904 (Minn. 1932)).

216 *Maple Bat Man Strikes Back!*, *supra* note 53.

217 *Id.*

218 Sullivan, *supra* note 12. *See also* Turcotte v. Fell, 502 N.E.2d 964, 969 (N.Y. 1986) ("[A] professional athlete is more aware of the dangers of the activity, and presumably more willing to accept them in exchange for salary, than is an amateur.").

219 *Maple Bat Man Strikes Back!*, *supra* note 218; *Maple vs. Ash*, supra note 116.

220 Nightengale, *supra* note 96; *Maple Bat Man Strikes Back!*, *supra* note 221.

221 Even "players are unlikely to realize the extent to which they increase the risk of injuring others when they step into the batter's box wielding a maple bat." Matthew

injury claim at minimum raises issues of fact regarding breach[222] and defenses grounded in primary or secondary assumption of risk doctrines.[223]

Spectators paying attention to a baseball game usually focus on the player at bat and the batted ball.[224] Assumption of the risk doctrines provide that spectators be aware of events throughout the game that may pose a danger to them inherent in the game of baseball as defined by the experience of the average fan.[225] As such, maple bat dangers are often compared to the threats posed by foul balls, inadvertently released bats, and broken non-maple bats.[226] As to the foul ball, again, because the ball is the focus of the game and when struck, the fan will follow the path of the ball.[227] Therefore, a reasonable spectator would be watching the ball throughout the game.[228] It can be assumed that a fan, hit by a foul ball is either not paying attention to the game or does not react fast enough to get out of the way of the ball.[229]

The released bat poses a similar, but not identical

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, 536 (2010).

222 "A maple bat manufacturer" may "argue that it did not breach its duty of care because the maple bat conformed to MLB regulations." *Id.* at 530 (citing MAJOR LEAGUE BASEBALL, OFFICIAL BASEBALL RULES 6 (2011 ed.), *available at* http://mlb.com/mlb/downloads/y2011/Official_Baseball_Rules.pdf). "However, the fact that the bat conformed to MLB regulations is not determinative on the issue of breach." *Id.* For example, in *Sanchez v. Hillerich & Bradsby Co.*, "the bat in question conformed to NCAA regulations, which required extensive testing and certification. *Id.* (citing Sanchez v. Hillerich & Bradsby Co., 128 Cal.Rptr.2d 529, 532 (Cal. App. 2002)). "Nonetheless, the court did not prevent Sanchez from recovering on this basis." *Id.*

223 "Under the assumption of risk doctrine in most jurisdictions, while a defendant owes no duty of care to a voluntary participant in the sport to protect against the risks inherent in the sport, the defendant does owe a duty not to increase those inherent risks." *Id.* at 527. Accordingly, a plaintiff "could argue that the use of maple baseball bats increases the inherent risk of being struck by a piece of a broken wood bat." *Id.*

224 "A baseball team's crowd normally . . . follow[s] the flight of [a] hit ball," not "the fact that [a] projectile from the spinning end-over-end shard of [a] broken maple bat [is] headed towards the stands." *Sunday Rewind: "Maple Bats Are a Major League Problem"*, RAYS RENEGADE (Jan. 18, 2010, 1:04 AM), http://raysrenegade.mlblogs.com/2010/01/18/sunday-rewind-maple-bats-are-a-major-league-problem.

225 Hess, supra note 157, at 459–61.

226 *See* Ratcliff v. San Diego Baseball Club, 81 P.2d 625, 626 (Cal. App. 1938).

227 Passan, supra note 51.

228 *Id.*

229 *Id.*

threat.[230] When a bat is released, it is, almost without exception, the result of the batter missing the ball.[231] The average spectator watching the player at bat has the opportunity to see the bat rather than the ball coming into the stands.[232] The spectator has a reasonable opportunity to react because the spectator has one focal point, the released bat, rather than the bat and a hit ball.

Finally, ash bats break often enough that a spectator has built an expectation that the bat head may move through the field of play.[233] Some speculate the additional weight of the ash pieces, which do not splinter like maple bats, slows their velocity and traveled distance after the break.[234] Spectators have likely become accustomed to the speed of ash breaks and the traveled distance of the broken pieces of ash creating a "pie slice" danger-zone on the field of play, rather than in the stands.[235] The spectator has the opportunity to keep the focus of the game, the ball, and the broken bat within his or her peripheral vision within this zone of danger.

Maple bats, as discussed, break with greater violence, meaning the bats break into several sharp, dangerous pieces, travel further into the stands when broken because of their increased velocity at the point of impact, and are capable of causing greater damage because of the various projectiles created than an "innocuous" broken ash bat.[236] Moreover, the increased torque placed on the maple bat and the greater distance on a mis-hit ball creates an unconscionable dilemma for the fan.[237] His focus is on the ball, which has likely been hit outside of the zone of danger, even if mis-hit, as demonstrated by the Crisco study.[238] Correspondingly, while the bat has now become several pieces of flying wood, the spectator's focus is on the ball now moving away from the point of impact. Conversely, the fan's attention is no longer on a shard that has traveled farther and faster than the average fan would

230 *See generally Ratcliff*, 81 P.2d 625.
231 *Id.*
232 *Id.* at 626.
233 *Maple Bat Man Strikes Back!*, supra note 53.
234 *Id.*
235 See *Id.*
236 *Maple Bat Man Strikes Back!*, supra note 53.
237 *Id.*
238 Cisco, *supra* note 59.

anticipate with his experience watching ash bat pieces fall harmlessly into the infield.[239]

Thus, the average fan is unable to predict the unique, unexpected dangers of maple bats. Experience dictates that fans like Falzon are likely aware of the classical dangers of the game, foul balls in the stands, released bats into the stands and ash bats into the infield as a regular spectator of the game. However, the new dangers posed by the more violent and dangerous maple bat should place him outside the class of fans barred from recovery by the baseball rule.

Furthermore, the danger area long considered by courts to include only the backstop should be expanded to include the baselines and dugout areas which, with the advent of maple bats, appear to be the new areas of risk. While fans will have to cope with a slightly more constricted view, it is important to note that the netted backstop area seats are some of the most expensive and desirable in the stadium, and fan safety should trump any concerns of a decreased fan experience. The stadium owners and Major League Baseball should recognize that this new risk poses a unique and heightened danger to players and spectators alike and should extend the netting from the backstop to the baselines before a more lethal maple bat injury occurs. This would discharge the new and heightened duty owed by the stadium owners with respect to the new and heightened risk posed by the maple bat.

In short, the baseball rule is still applicable in cases where the danger is one that can be appreciated by the average fan, that of a flying ball or released bat. However, the protections currently afforded the average fan are not commensurate with the new and unexpected dangers posed by maple bats. The zone of danger most likely to injure a fan has extended to the area behind the dugouts and a new and heightened duty should be discharged by the stadium owner to provide protection behind these newly endangered areas. If stadium owners provide this heightened protection, fans who elect to sit outside of this area will do so at their own peril and the baseball rule and assumption of risk doctrine will still limit the owners' duty as to those areas. However, stadium owners who do not extend these protections should not be afforded protec-

239 *Id.*

tions provided by a rule that never contemplated the advent of maple bats or their potential for creating dangerous and potentially deadly results.

CONCLUSION:THE CASE AT HAND

Courts should heed the precedent set in *Akins*[240] and *Crespin*[241] allowing maple bat injuries to go to a jury rather than allowing the baseball rule to adhere. Stadium owners and Major League Baseball are aware that maple bats present an increased and specific danger for which the average fan is ill-equipped. They present a new and dangerous threat to the average fan, but one that happens often enough that stadium owners can anticipate and prepare for, by extending the netting to the newly endangered seating areas. Again, because maple bats break with more ferocity and violence, this risk is not the same as that posed by ash bats. For this reason, maple bats introduce a whole new category of danger, and MLB and the Stadium owner should be held liable under a secondary assumption of risk analysis, for breaching their duty not to increase the dangers of the game, when choosing not to protect spectators from the increased risk. Stadium owners and Major League Baseball could discharge that duty by increasing the protected area along the first and third base lines to a distance commensurate to the increased zone of danger posed by maple bats.

This increased threat is palatable and can strike out at any moment to a spectator or player of any skill level or expertise. Just ask Shawn Colvin. Colvin, a promising rookie playing late in the season was hit in the chest with a maple bat shard as he watched a ball sail into the outfield while he stood on third base.[242] The piece of bat hit him in the chest, penetrating the chest cavity and piercing his lung.[243] He was hospitalized for almost a week and was lucky to have escaped more serious injuries.[244] Only time will tell if Major League Baseball will heed the warnings and install more safety net-

240 Akins v. Glens Falls City School Dist., 424 N.E.2d 531 (N.Y. 1981).
241 Crespin v. Albuquerque Baseball Club, LLC, 216 P.3d 827 (N.M. Ct. App. 2009), *rev'd*, Edward C. v. City of Albuquerque, 148 N.M. 646 (N.M. 2010).
242 Abraham, *supra* note 131.
243 *Id.*
244 *Id.*

ting or wait until a catastrophic event occurs which will force their hand to the same end.