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BASEBALL BATS OUT OF HELL: POTENTIAL THEORIES OF LIABILITY ARISING FROM MAPLE BAT INJURIES

INTRODUCTION

The possibility of a wooden baseball bat breaking while being used by a baseball player during the course of a game is not a novel threat to the safety of players and spectators. In the last decade, however, observers of the game and academic scholars noticed a trend: bats were breaking with greater frequency and in a more dangerous fashion. The increased dangerousness posed by the bats seemed to correlate with the rise in popularity of baseball bats fashioned from maple wood. Traditionally, baseball bats were made of white ash, with a few individual players using models designed from other types of wood. Maple bats' popularity dramatically increased following the 2001 season after Barry Bonds of the San Francisco Giants broke the single-season home run record by hitting an astounding seventy-three home runs with his distinctive black maple baseball bat. While Bonds was not the first player to use maple bats, his feat garnered the attention of both the general public and his baseball-playing peers alike. Following Bonds' example, more and more Major League Baseball ("MLB") players began to use maple bats, believing that the maple bats were harder than their ash counterparts, which increased the hitter's chances of success during any given at-bat.

As previously stated, however, a problem soon arose: maple bats were breaking with both greater frequency and in a fashion that posed

1. See generally James v. Hillerich & Bradsby Co., 299 S.W.2d 92 (Ky. 1957) (boy struck by piece of wooden baseball bat that broke in half).


4. Id.
an increased risk of injury.\textsuperscript{5} When a maple bat breaks, it generally breaks into two large pieces; one piece remains in the batter’s hands and the other, which usually has a sharp edge, flies into the playing field or into the stands.\textsuperscript{6} Ash bats, on the other hand, typically break in a flaking or cracking manner, such that a harmless shard of the outer barrel of the bat flakes off.\textsuperscript{7} Typically when a bat flakes in this manner, the batter is usually aware of the barrel’s damage and could simply replace the bat. However, when a standard maple bat breaks, the hitter is not aware of any impending break, which results in the aforementioned dangerous two-piece break. Studies commissioned by MLB later confirmed both the differences between the types of wood and the increased incidents of broken bats.\textsuperscript{8}

The danger posed by a bat breaking in two became clear in a number of increasingly high-profile incidents. During the 2007 season, a New York Mets fan, James Falzon, was enjoying a game at Shea Stadium in Queens when he was struck in the face by the barrel of a maple bat that had cracked in two. Falzon’s injuries included massive bleeding, a broken nose, and a broken eye socket, which required doctors to install permanent metal plates and pins into his face.\textsuperscript{9} In 2008, Don Long, a coach for the Pittsburgh Pirates, was standing in the team dugout when a sharp-edged portion of a maple bat flew into the dugout.\textsuperscript{10} The edge of the bat sliced though Long’s cheek and caused permanent nerve damage.\textsuperscript{11} Later in that same 2008 season, home plate umpire Brian O’Nora was injured when the barrel of a broken maple bat was sent backwards in his direction, resulting in blood streaming down the umpire’s face.\textsuperscript{12} In 2010, Tyler Colvin of the Chicago Cubs was a base runner when a maple bat split in two during the

\textsuperscript{5} Daniel Malloy, \textit{Maple Bats a Splintering Controversy Around the Majors}, \textsc{Pittsburgh Post-Gazette} (July 13, 2008), \url{www.post-gazette.com/pg/08195/896753-63.stm}.

\textsuperscript{6} Andrea Thompson, \textit{The Science Behind Breaking Baseball Bats}, \textsc{Live Science} (July 15, 2008), \url{www.livescience.com/2699-science-breaking-baseball-bats.html}.

\textsuperscript{7} Id.

\textsuperscript{8} Barry Bloom, \textit{MLB Issues Update on Maple Bat Study}, \textsc{Mlb.com}, (Sept. 9, 2008), \url{http://mlb.mlb.com/news/article.jsp?ymd=20080909&content_id=3444168&vkey=news_mlb&fext=.jsp&c_id=mlb}.

\textsuperscript{9} Dareh Gregorian, \textit{Battered Fan Sues Met Star}, \textsc{New York Post} (Aug. 10, 2010), \url{http://www.nypost.com/p/news/local/manhattan/battered_fan_sues_met_star_g2BQAkhzx8O4e9GbrW M4wK}.

\textsuperscript{10} Jeff Passan, \textit{Baseball at Breaking Point Over Maple Bats}, \textsc{Yahoo! Sports} (May 9, 2008), \url{http://sports.yahoo.com/mlb/news?slug=jp-maplebats050808}.

\textsuperscript{11} Id.

\textsuperscript{12} Plate Umpire O’Nora Hit by Broken Bat, \textsc{USA Today} (June 25, 2008), \url{http://www.usatoday.com/sports/baseball/2008-06-25-umpire-injured_N.htm}. 
course of a game. The sharp point of the maple bat impaled Colvin’s chest and Colvin subsequently had a chest tube installed to prevent a puncture of the lung.

The above cases simply illustrate the depth of the threat maple bats pose; they can reach multiple parts of a ballpark and injure players, coaches, umpires, and fans. These examples are not the only instances where maple bats caused someone harm. Maple bats have since caused, and continue to cause, injuries during MLB games. Further, the bats can inflict various types of serious injuries because one can be struck by the barrel (as Falzon was), the sharp edge (Long), or the pointed end (Colvin). The danger the bats pose and MLB’s knowledge of this danger raise one serious legal question: who, if anyone, is liable for all these injuries?

First, this article will explore the traditional doctrine applied to injuries sustained during the course of sporting events, that is, liability does not attach when injuries are sustained by either participants or spectators if the injury is caused by activity that is inherent to the sport. Whether players’ use of maple bats can be considered an inherent part of baseball is considered. Second, this article will consider whether a plaintiff injured by a maple bat can pursue a products liability claim against the manufacturer. Is the manufacturer negligent for using maple when a reasonable, safer, and equally effective alternative—such as ash—is available? Third, this article will examine whether manufacturers may be held liable for failing to adequately warn of the dangers posed by the use of maple bats. While it may seem superfluous to require a warning when all wooden bats pose some level of risk and this risk is commonly known by players and fans alike, successful suits concerning aluminum bats could serve as precedent for plaintiffs in maple bat cases.

I. Negligence

Through the years, many plaintiffs have brought negligence actions against a variety of baseball-related defendants (teams, players, sta-
dium operators, and leagues) after sustaining injuries while observing or participating in a baseball game. The typical simple negligence claim of this ilk is based on a breach of duty theory; the plaintiff claims the stadium operator/team has a duty to protect the plaintiff from equipment sent flying dangerously in the air, and the stadium operator/team’s breach of this duty caused the plaintiff’s injury. The majority of courts that have addressed this issue have done so by following the tradition of non-liability; however, the introduction of new technology to baseball may raise unique issues not previously considered by those courts.

A. Traditional Baseball Rule

The traditional baseball rule posits that baseball teams and stadium operators owe only a limited duty to spectators. One court described this duty as the duty “to provide screened seats, in the areas back of home plate where the danger of sharp foul tips is greatest, in sufficient number to accommodate as many patrons as may reasonably be expected to call for them on ordinary occasions.” To satisfy this limited standard, the protective measures that teams and operators provide pursuant to this duty must be defect free. Still, the duty is a considerably limited one. According to the rule followed by most jurisdictions, so long as a stadium provides screening to protect spectators seated in the area directly behind home plate, it meets its limited duty, thus absolving the stadium operator of any liability for injuries caused by foul balls or broken bats flying into the spectator area during the course of the game. The area behind home plate is singled out for protection by courts because it is considered the most vulnerable section of seating in the park; this section is closest to the action. That proximity to the action increases the likelihood of loose equipment entering the spectator area and reduces the reaction time that


21. See cases cited supra note 20.

22. See cases cited supra note 20.

23. See cases cited supra note 20.

24. Erickson, 65 S.E.2d at 141.

25. Edling, 168 S.W. at 910.

could save an alert spectator from injury.\textsuperscript{27} Although the common "baseball rule" case involves injuries sustained due to foul balls entering the stands, it is important to note for the purposes of this article that courts can and have applied the rule when baseball bats have injured spectators during the course of a game.\textsuperscript{28} 

Various jurisdictions have applied the baseball rule in typical fan injury cases and reached the same result; the courts deemed defendants to have met their limited duty and, thus, courts do not hold them liable for any injury to the plaintiff.\textsuperscript{29} Despite the near uniformity in outcomes, the rationale for applying the traditional baseball rule has varied between the various jurisdictions that have imposed the rule. Some courts have relied on an assumption that any fan attending a baseball game has a basic level of familiarity with the sport.\textsuperscript{30} According to this reasoning, courts presume that fans sitting in unscreened portions of the stadium are fully aware of the inherent danger created by the possibility that foul balls and broken bats may enter the stands.\textsuperscript{31} This rationale is a version of assumption of risk, the legal doctrine that holds a plaintiff equally at fault for any injury or damage that may materialize when said plaintiff encounters a known risk created by the defendant or another third party.\textsuperscript{32} Essentially, the plaintiff is said to have "assumed" the risk by encountering a known danger.\textsuperscript{33} Also, "baseball rule" jurisdictions that have subsequently adopted a comparative negligence regime (where the court awards damages based on the proportion of blame assigned to each party) have not altered the rule's limited duty.\textsuperscript{34} These jurisdictions have reasoned that a fan that purchases a ticket to sit in an unscreened portion of the stands is not "at fault" for anything, and thus, for comparative negligence purposes, no comparison can be made.\textsuperscript{35} 

Another common rationale forwarded by the courts in these cases centers on a desire to protect the institution of baseball; the great 'American pastime.' One court has stated the consequences of imposing a more expansive duty on baseball teams and stadium operators would simply be an unacceptable alteration of the fundamental nature

\textsuperscript{27} Id.
\textsuperscript{29} Supra note 18.
\textsuperscript{31} Id.
\textsuperscript{32} Black's Law Dictionary (9th ed. 2009).
\textsuperscript{33} Id.
\textsuperscript{34} Neinstein v. L.A. Dodgers, Inc., 229 Cal. Rptr. 612 (Cal. Ct. App. 1986); Arnold v. City of Cedar Rapids, 443 N.W.2d 332 (Iowa 1989).
\textsuperscript{35} Id.
of the “pastime.” For example, the court viewed the installation of screening around the entire ballpark as an unacceptable solution because it would obstruct the view for spectators and would reduce the number of foul balls entering the stands. Although it may seem counter-intuitive for the courts to believe that a reduction in foul balls entering the seating areas would be a negative consequence, because foul balls are the main cause of harm in these cases, the courts consider this part of the overall fan experience, reasoning that many spectators look forward to the opportunity of catching a game-used baseball. This court also expressed fear that increasing the duty of baseball teams and leagues will result in costs being passed on to the fans. The court was concerned that baseball teams would need to spend more on safety precautions and liability insurance if a more expansive duty existed. The baseball teams would then pass this cost on to the fans by increasing the price of tickets. According to this line of thinking, the perception of baseball as a national institution makes this outcome unacceptable, as it reduces the average American's ability to attend a professional baseball game.

Nearly all jurisdictions impose a similarly limited duty on teams to protect participants in any sporting activity. Essentially, liability does not attach to the team when the injury to the participant arises from a risk that is inherent in that particular sport; again, knowledge of inherent risks is attributed to the injured party and courts apply a form of assumption of the risk. This duty may become even more limited when the participant is a professional, due to his standing as a sort of “expert” in his field. However, if the risk is one which is not inherent in the sport, or if an inherent risk is concealed or unreasonably increased, assumption of the risk may not apply.

B. Sanchez v. Hillerich & Bradsby Co.

While the application of the traditional baseball rule may seem like an insurmountable hurdle for plaintiffs injured by maple bats, a recent
California decision, concerning the use of aluminum bats, may serve as guidance for plaintiffs in this area. Andrew Sanchez was pitching for California State University, Northridge ("CSUN") against the University of Southern California ("USC") on April 2, 1999. Both the National Collegiate Athletic Association ("NCAA") and the Pac-10 Conference ("PAC 10") sanctioned the game. Sanchez was facing a USC hitter using an "Air Attack 2" model aluminum bat, manufactured by Hillerich & Bradsby ("H&B"), when a sharply hit ball struck him in the head. As a result, Sanchez suffered serious head injuries and subsequently brought suit against H&B as the manufacturer and against the NCAA, the PAC 10, and USC as sanctioning organizations. At trial, H&B conceded the Air Attack 2 aluminum bat "substantially increases the speed at which the ball leaves the surface of the bat." An expert who had tested the Air Attack 2 for H&B testified that the particular model at issue was designed in such a way that balls leaving its surface could travel at a velocity that would not allow a human being standing on a pitcher's mound (sixty feet and six inches from the batter at home plate) to react in time to avoid being struck. The defendants argued that Sanchez signed a release assuming the risk of injuries inherent in the sport as part of his scholarship with CSUN and Sanchez admitted he had used a metal baseball bat in games since the age of six.

The defendants in the case moved for summary judgment, believing the plaintiff failed to establish the aluminum baseball bat had caused the injury. The trial court granted the motion, but on appeal, the California Appellate Court found a triable issue, overruling the lower court. Specifically, the appellate court believed that a triable issue of material fact existed as to whether the design and use of the Air Attack 2 model "substantially increased the inherent risk" faced by Sanchez. H&B's liability was based on the design of the Air Attack 2, thus sounding in products liability. The NCAA, PAC 10, and USC's liability, however, was based on their duty not to increase the

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48. Id.
49. Id.
50. Id.
51. Id.
52. Id.
53. Id.
54. Id.
55. Id.
56. Id. at 715.
57. Id. at 715.
inherent risks of the sport of baseball, thus raising questions about the applicability of the baseball rule to this simple negligence claim.  

The court relied on several pieces of evidence in the record to determine that a triable issue of material fact existed with regard to the liability of the entities regulating the use of aluminum bats. The NCAA had issued reports acknowledging the danger posed by aluminum bats and was set to impose new guidelines designed to reduce this danger the following season. Also, statistical analysis showed the number of hits and runs scored by players increased dramatically in collegiate baseball following the introduction of new aluminum bat technology. The court believed the increase in danger to players and the increase in offensive production tended to show that the NCAA believed the "[use of aluminum bats] changed the nature of the sport of college baseball."

C. Sanchez's impact on maple bat litigation

While the Sanchez decision dealt with the issue of an aluminum bat causing an injury, much of the reasoning used by the court is equally applicable in the maple bat context. The court rejected many common arguments used in support of the traditional baseball rule in finding that the bat manufacturer and the NCAA could be held liable for an injury sustained as a result of using an aluminum bat. Specifically, while there is no duty to protect against risks that are inherent in the sport, there is a duty to not unreasonably increase those risks. Thus, MLB and its teams could theoretically be held liable for allowing maple bats to be used if a court determined the use of a maple bat "unreasonably" increased the inherent risk of being struck by a broken bat.

Much of the evidence relied upon by the court in Sanchez to find a triable issue has corollaries in the realm of maple bats. Similar to the studies showing an increased velocity of balls leaving the Air Attack 2, studies have shown that maple bats break in a different manner than their ash counter-parts; where ash bats "crack and flake," maple bats break in two pieces with sharp edges. The underlying reason for these different modes of breaking is related to differences inherent in

58. Id.
59. Id.
60. Id. at 714.
61. Id.
62. Id.
63. Id.
64. Supra note 6.
the woods themselves. Ash is a “ring porous” wood, meaning the pores that create voids in the wood are concentrated in a few areas, creating the flaking effect in the bats. Maple, on the other hand, is “ring diffuse,” meaning the pores are more evenly distributed throughout the wood. This creates the splitting effect of a broken maple bat.

Ultimately, it is difficult to predict exactly how a court would apply the traditional baseball precedents to a case where a maple bat causes an injury. The precedent cases have generally held that no entity should be liable for risks that are inherent in the sport of baseball. In Sanchez, the court looked at the possible impact of eliminating the risk posed by aluminum bats. It did so to determine if that risk was inherent in the sport. The court stated that if elimination would “chill vigorous participation in the sport; and . . . alter the fundamental nature of the activity,” then that risk was inherent in the sport. While other jurisdictions have not adopted specific definitions of when a risk is inherent in the sport, they are generally in agreement that an unreasonable increase in an inherent risk is not assumed by a participant of the sport. Following this line of reasoning, allowing maple bats to be used despite knowledge of the increased risk they pose would seem to qualify as an increase in the inherent risk of broken bats, especially when it is known that ash is available as a suitable, safer replacement. The key question, not reached by the court in Sanchez is whether the increase in the risk is “unreasonable” or not. Certainly, arguments could be made for either side, as maple bats certainly pose an increased risk, but it is unclear at what point that increase is unreasonable.

II. Product Liability

A plaintiff suffering an injury as a result of a broken maple bat may choose to file suit under a products liability theory. Such a hypothetical plaintiff could argue that the bat itself was defective, and this defect proximately caused the injury. This theory of liability would be unrelated to the bat being made of maple, and as such is outside the scope of this article. However, one case on point, decided more than...
half a century ago, explicitly rejected this argument. In *James v. Hillerich & Bradsby*, the Supreme Court of Kentucky held that any defect in the bat at issue did not materially increase the dangerousness of using a wooden baseball bat; even those bats without defects posed a risk of breaking and causing injury. Thus, the manufacturer was not liable for the injury suffered when the allegedly defective bat broke in two because the defect itself was not a proximate cause of the injury.

The *James* case does not serve as precedent in other jurisdictions; however, its reasoning seems applicable to the modern approach taken by most jurisdictions in manufacturing defect cases. However, in the context of baseball bats made of maple, an injured plaintiff may advance the theory that the bat was defectively designed. The plaintiff would then argue that by designing bats that use maple wood, the manufacturer increased the risk of harm and as a result the design was defective. Different jurisdictions apply different tests to determine if a design defect was present; thus, whether the manufacturer would be held liable for such a defect could very well depend on the jurisdiction in which the claim is brought.

**A. Consumer-contemplation test**

Courts traditionally applied the Second Restatement’s consumer-contemplation test when the issue of a defectively designed product was raised. The consumer-contemplation test states a product is unreasonably dangerous when it is “dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics.” Many jurisdictions have since altered their analysis, either foregoing the consumer-contemplation test altogether for a different standard, using consumer expectations as a factor in a larger analysis, or allowing the plaintiff to advance a consumer contemplation theory only under certain circumstances. Currently, MLB teams play their home games in eighteen different American

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71. *Id.* at 94.
72. *Id.*
73. Restatement (Second) of Torts § 402A (1965).
75. Restatement (Second) of Torts § 402A, Comment i, at 352 (1965).
jurisdictions. Of those jurisdictions, only Wisconsin adheres to the traditional consumer-contemplation test, applied to the exclusion of the other alternatives. Eight other jurisdictions use the consumer-contemplation test as either an alternative theory or in conjunction with another test. Application of the test to a manufacturer’s inclusion of maple in wooden baseball bats would seem to favor the manufacturer. Much of the same reasoning used by the Supreme Court of Kentucky in *James* would seem to be applicable under the consumer-contemplation test. A consumer would understand the inherent risk of any wooden bat: the bat may break and cause an injury. Although the inclusion of maple increases this risk, the issue is not whether the danger was enhanced but rather what were the consumer’s expectations - has the bat become so dangerous that it will not perform to the expectations of the ordinary consumer? Again, *James* may serve as guidance here because the decision may turn on whether the inclusion of maple would materially increase the always present risk posed by wooden baseball bats.

B. Risk-utility test

Beginning in the early 1970’s, the consumer-contemplation test fell into disfavor with many courts because plaintiffs injured by way of a complex but defective product were barred from recovery due to a lack of any reasonable expectation as to how such a complex product should normally function. To provide greater protection for consumers, and consequently creating greater liability for manufacturers, some jurisdictions began to incorporate a risk-utility analysis into de-

77. MLB has teams in California (San Diego Padres, Los Angeles Dodgers, Los Angeles Angels of Anaheim, San Francisco Giants, Oakland Athletics), Colorado (Colorado Rockies), Arizona (Arizona Diamondbacks), Washington (Seattle Mariners), Texas (Houston Astros, Texas Rangers), Illinois (Chicago Cubs, Chicago White Sox), Ohio (Cincinnati Reds, Cleveland Indians), Pennsylvania (Pittsburgh Pirates, Philadelphia Phillies), Missouri (St. Louis Cardinals, Kansas City Royals), Minnesota (Minnesota Twins), Michigan (Detroit Tigers), Wisconsin (Milwaukee Brewers), New York (New York Yankees, New York Mets), Georgia (Atlanta Braves), the District of Columbia (Washington Nationals), Florida (Florida Marlins, Tampa Bay Rays), Maryland (Baltimore Orioles), and Massachusetts (Boston Red Sox). There is also one team located outside of the United States (Toronto Blue Jays).

78. See *Horst v. Deere & Co.*, 769 N.W.2d 536 (Wis. 2009).


80. *Supra* note 74.
sign defect cases. The risk-utility test asks if the magnitude of the danger outweighs the utility of the product.\textsuperscript{81} Essentially, in its purest form, if the likelihood and gravity of potential harm outweighs the benefits and utility of a product, the product is considered to be unreasonably dangerous and thus defectively designed.\textsuperscript{82}

Eight of the jurisdictions that are home to MLB teams use some form of the risk-utility test for design defects.\textsuperscript{83} However, most jurisdictions that have accepted the principles of risk-utility do not apply the pure form of the test. Jurisdictions vary in approach, with some including risk-utility balancing as a factor in a broader consumer-contemplation test, and some doing the reverse— including consumer-contemplation as a factor in a risk-utility test.\textsuperscript{84} Others, such as Illinois, have allowed plaintiffs to use either test when bringing design defect claims.\textsuperscript{85}

The risk-utility analysis requires contemplation of a number of factors. The Illinois Supreme Court specifically identified seven factors to be considered, as first advanced by Vanderbilt Professor John W. Wade.\textsuperscript{86} The factors considered:

1. Usefulness and desirability of the product—its utility to the user and to the public as a whole
2. The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury
3. The availability of a substitute product which would meet the same need and not be as unsafe
4. The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility
5. The user’s ability to avoid danger by the exercise of care in the use of the product
6. The user’s anticipated awareness of the dangers inherent in the product and their availability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions

\textsuperscript{81} See Calles v. Scripto-Tokai Corp., 864 N.E.2d 249, 259 (Ill. 2007).
\textsuperscript{82} Id.
\textsuperscript{84} Supra note 77.
\textsuperscript{85} See Trahan, 156 F. Supp. 2d 690.
7. The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance

Although these factors are not strictly used to the exclusion of others in all jurisdictions, they do represent the general issues addressed when the test is applied. 87

1. Usefulness and Desirability

The usefulness and desirability of the product is debatable; certainly, baseball bats are an integral part of the “American pastime,” and if the courts continue to defer to the sport for this reason, the bats will be seen as both useful and desirable. 88 However, the usefulness of maple baseball bats presents a different question; there is little evidence that bats made of maple provide any performance advantage over bats made of ash, other than any misinformed psychological boost a player may receive from using a supposedly “stronger” wood. 89 Thus, while baseball bats may generally be deemed useful and desirable, models made from maple may not be.

2. Safety Aspects

The safety aspects of maple bats present a challenge to any hypothetical plaintiff. MLB has commissioned studies on the safety of these bats and has subsequently taken measures to reduce their dangerousness. In 2008, MLB turned to the United States Forest Service to study maple bats and determine why the bats were breaking and what could be done about the problem. 90 The Forest Service’s studies identified an issue in the “slope of grain” in some of the bats. 91 According to the study, wooden bats have optimal strength when the grain of the wood runs parallel down the length of the bat; if the slope of the grain is off even a few degrees, the bat could lose up to twenty percent of its strength. 92 Using this information, MLB placed more stringent standards on manufacturers to produce bats with proper “slope of grain,” and has gone so far as to confiscate bats that do not meet its specification. 93 The Forest Service has continued to track the

87. Supra note 81.
91. Id.
92. Id.
93. Id.
frequency of broken bats in games, and reports that the most dangerous “two-piece” breaks have reduced by half since the middle of the 2008 season.\textsuperscript{94}

However, a reduction in the number of breaks has not eliminated the danger posed by a broken maple bats.\textsuperscript{95} Also, the potential injury that may be caused by a broken maple bat is serious, as evidenced by the nature of the injuries suffered by individuals such as Falzone, Colvin, and Long.\textsuperscript{96} Any court would necessarily need to determine both the probability of an injury (which has been altered by the Forest Service study and subsequent MLB regulations) and the likely seriousness of the injury.

3. Available Substitutes

As previously noted above, baseball bats were traditionally made of ash until a relatively recent explosion in the popularity of maple bats.\textsuperscript{97} Studies have shown that ash bats are just as strong as maple bats and break in a less dangerous fashion due to a different structure in the wood.\textsuperscript{98} Accordingly, ash bats would seem to meet MLB’s need for wooden baseball bats while also serving as a safer alternative to maple.

However, one developing issue has raised questions concerning the availability of ash wood: the emerald ash borer. The emerald ash borer is a species of beetle that eats away at and ultimately kills ash trees.\textsuperscript{99} The borer lays its eggs just inside the surface of the ash tree, and these eggs then eat into the interior of the tree.\textsuperscript{100} Because the beetle comes from Asia, the ash trees in the United States have not developed natural parasites with the capability of fighting off the borers. As a result the, borer saps the defenseless ash tree of its nutrients, ultimately killing the plant.\textsuperscript{101} The borers were first discovered in Michigan but have spread to the east coast, and although federal and state governments have released defensive parasites as a measure of damage control, experts believe the United State’s entire ash popu-

\begin{itemize}
  \item \textsuperscript{94} Id.
  \item \textsuperscript{96} \textit{Supra} notes 9, 10, and 13.
  \item \textsuperscript{97} \textit{Supra} note 3.
  \item \textsuperscript{98} \textit{Supra} note 6.
  \item \textsuperscript{99} Anita Hamilton, \textit{The Bug That’s Eating America}, \textit{TIME}, July 4, 2011, at 58.
  \item \textsuperscript{100} Id.
  \item \textsuperscript{101} Id.
\end{itemize}
lation is threatened by the insect.\textsuperscript{102} Not surprisingly, Louisville Slugger, MLB's primary provider of baseball bats, has expressed concern that the demand for ash bats could not be met if maple bats were banned, in part due to the ash borer.\textsuperscript{103} So while ash would be a safer substitute, the availability of the substitute wood is in question and any court hearing such a case would need to consider this issue.

4. Ability to Reduce Danger

Certainly, as the United States Forest Service study has shown, manufacturers of maple bats do have the ability to reduce the danger of a bat splitting in two.\textsuperscript{104} By manufacturing maple bats that adhere to the slope of grain regulations put into place by MLB, the bats are safer and theoretically more useful because the wood is stronger and less likely to break.\textsuperscript{105} Further, imposition of the slope of grain requirements would not unreasonably increase the price of a maple bat. While it is true that bats not made to specification would need to be discarded, increasing the manufacturer's expenses, the ultimate cost passed on to the consumer might not be significant enough to make adherence to the specifications impossible in a business sense. The manufacturers would be able to pass the cost on to MLB teams, entities that have the resources to absorb any slight increase in expenses. The main issue relating to this particular factor is whether the extent of the reduction in dangerousness is sufficient to satisfy the courts. While slope of grain regulations have decreased the number of dangerous "two-piece" breaks in maple bats, the incidents have not been eliminated, as evidenced by the high-profile injury suffered by Tyler Colvin as well as other near misses which have occurred after the regulations were put in place.\textsuperscript{106}

5. User's Ability to Avoid Danger

The user in this case would be the batter, and it is questionable whether he or she would be able to avoid the danger posed by maple bats. As previously stated, the biological properties of the wood used to make maple bats cause them to break in the two-piece fashion that

\begin{itemize}
  \item \textsuperscript{102} Id.
  \item \textsuperscript{103} "It would be extremely difficult, if not impossible to get back to all ash," - MLB Executive Vice President of Labor Relations Rob Manfred, as quoted in Ken Rosenthal, \textit{Baseball, Bat Makers Disagree on Solution to Bat Problem}, Sept. 22, 2010, http://msn.foxsports.com/mlb/story/Ash-may-not-be-solution-to-baseballs-maple-bat-problem-092110.
  \item \textsuperscript{104} Supra note 88.
  \item \textsuperscript{105} Id.
  \item \textsuperscript{106} Supra notes 13 and 88.
\end{itemize}
they do.\textsuperscript{107} One issue within the user's control is narrowing the bat's handle.\textsuperscript{108} Hitters commonly shave down the handles of their bats, thus reducing the overall mass of the bats and increasing their bat speed.\textsuperscript{109} However, this shaving technique presents problems because shaving the handle creates a top heavy bat, making a two piece break more likely.\textsuperscript{110}

The shaving of bat handles raises two issues: could an unshaven bat allow the user to avoid the danger of the bat breaking and does shaving the handle constitute misuse of the bat. First, although shaving a bat handle may make it more symmetrical and less likely to break in two, it is unlikely the danger posed by maple bats would be avoided. As previously stated, the problem with the maple bats is caused largely by the natural composition of the wood itself, not with the way the bats are structured.\textsuperscript{111} For this reason, it is unlikely that a simple prohibition on shaving bat handles will avoid the danger posed by maple bats. Second, although a manufacturer would not be liable if the product was used in a way that it was not designed for, shaving bats does not constitute misuse.\textsuperscript{112} “Misuse” of a product, in the legal sense, requires one use the product in a manner not contemplated by the manufacturer.\textsuperscript{113} Although the product in this instance – the bat – is altered from its manufactured state when it is shaved down, it is foreseeable that MLB players will make these alterations, as they have been doing so for years.\textsuperscript{114}

6. \textit{Anticipated Awareness of the Danger}

Certainly, as the number of maple bat related injuries during baseball games increase, the problem becomes sharper in the public's focus. As such, one could anticipate that fans and players alike would be aware of the dangers posed by a maple baseball bat. Accordingly, this factor would weigh in favor of the manufacturer.

7. \textit{Feasibility of Spreading the Loss}

MLB has already sought ways to spread potential losses by increasing liability insurance and the amount a bat manufacturer must pay

\textsuperscript{107} Passan, supra note 89.
\textsuperscript{108} \textit{Id}.
\textsuperscript{109} \textit{Id}.
\textsuperscript{110} \textit{Id}.
\textsuperscript{111} \textit{Id}.
\textsuperscript{112} \textit{Id}.
\textsuperscript{113} \textit{See generally} Harville v. Anchor-Wate Co., 663 F. 2d 598 (5th Cir. 1981); Schwartz v. American Honda Motor Co., 710 F. 2d 378 (7th Cir. 1983).
\textsuperscript{114} \textit{Id}.
for a license to sell the bats. Any spreading of the loss would, in all likelihood, ultimately fall in the lap of the fans, who are the consumers of the professional baseball product. Bat manufacturers would increase the cost of the bats to pay insurance and licensing fees, while players and teams purchasing the equipment would seek additional revenues to account for whatever increased expenses that results on their end. Ticket prices would be increased to ultimately make the consumer pay for this new cost. As previously noted, courts have frowned upon increasing the cost of tickets to spread the loss of liability. Seemingly, then, this factor could cut in either direction; it would be feasible for manufacturers to increase prices to spread the loss, but courts may frown upon the increased price of a ticket to a MLB game. However, given the great number of consumers involved, the average increase in ticket prices would likely be slight and the impact on the fans may not be considered as much of a negative as it would in other contexts.

C. Unreasonable Dangerousness

One jurisdiction that is home to MLB teams does not apply either the consumer-contemplation or risk-utility test. Missouri, home of the Kansas City Royals and St. Louis Cardinals, instead asks if the product creates an unreasonable danger to the user. The Missouri court has expressly refused to apply what they deem to be “artificial standards” created by the consumer-contemplation and risk-utility tests; the court also refuses to define what constitutes “unreasonably dangerous.” Instead, the jury is left to decide the question. Because of the vague nature of Missouri’s standard, it is difficult to predict whether a maple bat would be considered ‘unreasonably dangerous.’ Certainly, maple bats are dangerous, but whether or not they are unreasonably dangerous would be decided by a jury.

III. Failure to Warn

A third theory a plaintiff could forward following an injury caused by a maple bat would be the manufacturer failed to warn of the dan-
ger the bat poses. Most jurisdictions recognize a cause of action similar to that described in the Second Restatement:\(^{121}\)

One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier:

a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and

b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and

c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.\(^{122}\)

On the surface, it appears that a plaintiff injured by a maple bat would lose at the outset under subsection (b) of the Second Restatement test because manufacturers have reason to believe that users would realize the dangerous condition of the product. This is not only because of the high-profile nature of injuries caused by broken maple bats, but because courts have recognized an implied knowledge of the fundamental nature of the game of baseball even when the plaintiff pleads ignorance.\(^{123}\) However, recent litigation focused on the dangerous nature of aluminum bats may provide guidance for plaintiffs seeking to advance a failure to warn theory against manufacturers of maple bats.

A. Brandon Patch Litigation

Brandon Patch was pitching in an American Legion game in Helena, Montana when he was struck in the head by a line drive.\(^{124}\) The batter was using an aluminum bat manufactured by Hillerich & Bradsby (“H&B”). Patch died from the injuries he sustained.\(^{125}\) Patch’s family filed suit against H&B following his death and alleged the company manufactured an unreasonably dangerous product that was designed in such a way that a ball could be hit “so fast you can’t see it.”\(^{126}\) A jury returned a verdict in favor of the plaintiffs, finding

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122. Restatement (Second) of Torts § 388 (1965).
123. See Schentzel, 96 A.2d 181.
125. Id.
126. Id.
that although the product was not defective, H&B had failed to ade-
quately warn of the danger posed by the aluminum bat.127

The verdict surprised H&B, they promptly filed an appeal.128 Al-
though the appeal has yet to be heard, H&B’s motion in support of its
appeal reveals its theory in support of their position of non-liability.129
First, they contend no warning is necessary with a simple and under-
stood product such as a baseball bat.130 Second, the company argues a
warning should only be necessary when it would alter the behavior of
the user, and in the case of a baseball bat, the batter could not possi-
bly be more careful; the bat is only used for one purpose, to swing and
hit the ball as hard as possible.131

B. Patch’s Possible Application to Maple Bats

At the outset, it must be noted that the Patch litigation is not bind-
ing on any court; it was a verdict from a jury in a state trial court, and,
until the appeal is heard, no court will have ruled on the issue.132
However, plaintiffs suing for maple bat-related injuries could look to
Patch as an example of a plaintiff that has successfully advanced a
failure to warn theory against a bat manufacturer.

H&B’s first point of contention is that no warning is necessary be-
cause a baseball bat is a simple, understood product, and as such users
know of the inherent dangers of the product.133 Courts have often
adopted standards in line with this thinking, only requiring warnings
when the danger would not be understood by the user.134 This argu-
ment is similar to the rationale often used to support the “baseball
rule” in negligence cases, and as such a court may be inclined to agree
with H&B on this point.135 As applied to maple bats, the user cer-
tainly knows that the product is breakable. The counter-argument is
that maple bats break in more dangerous fashion and the users are not
aware of this increased danger.136 However, many jurisdictions have
recognized a “sophisticated user” defense in failure to warn cases,
which essentially states that a higher level of understanding is imputed

127. Id.
128. Id.
130. Id. at 11-12.
131. Id.
132. Supra note 124.
134. E.g. Sollami v. Eaton, 772 N.E.2d 215 (Ill. 2002); Carey v. Lynn Ladder and Scaffolding
1966)
135. Supra note 18.
136. Supra note 6.
to the user when that user is a professional with greater knowledge of the products they are using. 137 Certainly, professional baseball players are well aware of the intricacies of their bats; the stories of quirky and superstitious behavior of players regarding the tools of their trade are numerous. 138 As such, professionals would seem to qualify as “sophisticated users” who would understand the differences between maple and ash bats.

Concerning H&B’s second point of contention; most jurisdictions extend a manufacturer’s liability for a failure to warn to bystanders, thus allowing a plaintiff to utilize a failure to warn theory in those jurisdictions with MLB teams. 139 Thus, the idea that the warning would not alter the behavior of those in the field would not be a relevant consideration. Bat manufacturers would have an easy route to avoid liability in such jurisdictions by providing a warning with the maple bat when it is purchased. The user will have been warned and the warning would be extended to any injured bystander. This course of action would resolve an issue raised by H&B in its appeal of the Patch ruling; it would not be required to complete the near impossible task of warning all bystanders of the dangers posed by a product they are not using. 140

Currently, Louisville Slugger, the most popular provider of baseball bats, does not provide warnings on its bats. 141 In fact, the company’s official website mentions that maple bats are more prone to breaking in half without mentioning the danger this could pose for users or those in the field. 142 It is unlikely that such a warning is adequate to exonerate H&B from liability; it does not warn of the danger that is posed by the style of breaking or the possible injuries that can occur. However, if a sufficient warning was sent with the bat, the manufac-

142. Id.
turer could easily limit its liability. For this reason, a plaintiff’s claim that he was not warned of the danger of that product could easily be defeated by a manufacturer; thus, the Patch case may be viewed as an outlier.

CONCLUSION

The problem posed by MLB’s continued use of maple bats is being addressed but not eliminated. Unless maple bats are completely banned, there is no way the danger they pose (when broken) can be reduced to the level ash bats pose because their dangerousness is a result of their biological composition. But, as stated earlier, a complete prohibition would raise several issues. First, there are complaints from the bat manufacturers and MLB that there would not be enough ash to meet the demand, in part due to the ash borer beetle. Second, if MLB banned maple bats and effectively forced manufacturers to design bats with a certain type of wood, a possible restraint of trade suit could be raised by those manufacturers. Third, any prohibition of maple bats would need to be agreed to by the Players’ Union through collective bargaining. This may be an issue in and of itself, seeing as how the players have continued to use these bats despite the risk they pose.

Because of these issues, it is unlikely that maple bats will be banned in the foreseeable future. MLB will continue to study the problem and take strides to reduce the dangerousness of maple bats. But if the bats are still in use, problems will continue to arise and fans and players alike will be at risk of injury caused by a flying barrel or a sharp edge. If there is anything we can be certain of, it is this: where there is an injury, there is likely a lawsuit to follow.

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143. Supra note 6.
146. Supra note 142.

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