



## The Breaking Point: Examining the Potential Liability of Maple Baseball Bat Manufacturers for Injuries Caused by Broken Maple Baseball Bats

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### I. INTRODUCTION

Both participating in and watching sporting events involves some risk of injury.<sup>1</sup> The shelves of law libraries are filled with cases involving injuries sustained by players, coaches, and spectators at baseball games,<sup>2</sup> hockey games,<sup>3</sup> golf outings,<sup>4</sup> and numerous other recreational events.<sup>5</sup> Some of these injuries are attributable to new technology designed to increase player performance.<sup>6</sup>

Participants in athletic competitions are constantly looking to gain a competitive advantage over their opposition. In order to gain this competitive edge, players have resorted to such things as performance enhancing drugs and stealing signs and plays from opposing teams. One of the most effective ways, however, players seek to gain a competitive edge is through improvements in player equipment. Equipment manufacturers have responded by creating new technologies designed to

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1. *See generally* Sanchez v. Hillerich & Bradsby Co., 128 Cal. Rptr.2d 529 (Cal. Ct. App. 2002); Vines v. Birmingham Baseball Club, Inc., 450 So.2d 455 (Ala. 1984).

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

3. *See* Nemarnik v. Los Angeles Kings Hockey Club, L.P., 127 Cal. Rptr.2d 10 (Cal. Ct. App. 2002).

4. *See* Am. Golf Corp. v. Superior Court, 93 Cal. Rptr.2d 683 (Cal. Ct. App. 2000).

5. *See* Branco v. Kearny Moto Park, Inc., 43 Cal Rptr.2d 392 (Cal. Ct. App. 1995) (motocross); Sunday v. Stratton Corp., 390 A.2d 398 (Vt. 1978) (skiing).

6. *See* Sanchez, 128 Cal. Rptr.2d at 529 (Injury caused by high performance metal baseball bat).

increase player performance. These equipment manufacturers, however, owe a duty of care to both participants and non-participants not to substantially increase the dangers which are inherent in the sport.<sup>7</sup>

Many of these equipment manufacturers produce equipment specifically designed for amateur and professional baseball players. Although Major League Baseball (“MLB”) has never permitted the use of high performance aluminum alloy baseball bats,<sup>8</sup> baseball bat manufacturers have nonetheless tried to improve the design of wood bats.<sup>9</sup> The quest to improve the design of wood bats has led to the production of maple baseball bats. Maple bats were initially created to give players an alternative to wood bats made from ash, which was the traditional wood of choice for nearly every professional baseball player.<sup>10</sup> Maple baseball bats quickly became popular, and popularity soared in 2001, when Barry Bonds broke MLB’s single-season home run record using a maple bat.<sup>11</sup>

As more players make the switch to maple bats, it appears as though there is a visible increase in the number of broken bats.<sup>12</sup> It is nearly impossible to determine if more bats are actually breaking because The Elias Sports Bureau, the official statistics keeper of MLB, does not keep track of such a statistic.<sup>13</sup> However, it is likely that people are noticing an increase in the number of bats that break violently into two or more pieces.<sup>14</sup> As a result, players, coaches, sportswriters, and other media

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7. *Id.* at 536.

8. MLB regulations require the bat to be one solid piece of wood. *See infra* note 94.

9. Baseball bat manufacturers have tried to improve upon the design of wood bats by using different types of wood, such as maple and bamboo to construct the bats. Baseball Bat Materials, <http://www.baseball-bats.net/baseball-bat-materials/index.html>. Additionally, they have designed bats with increasingly thinner handles and larger barrels in order to make the bat more top heavy, which gives a player more “snap” in his swing. Barry Bloom, *MLB Issues Update on Maple Bat Study*, MLB.com, [http://mlb.mlb.com/news/article.jsp?ymd=20080909&content\\_id=3444168&vkey=news\\_mlb&fext=jsp&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20080909&content_id=3444168&vkey=news_mlb&fext=jsp&c_id=mlb) (last visited Oct. 15, 2010).

10. Tom Verducci, *The Danger of Maple Bats is a Major Problem for MLB*, Sports Illustrated.com, [http://sportsillustrated.cnn.com/2008/writers/tom\\_verducci/06/17/verducci.maplebats](http://sportsillustrated.cnn.com/2008/writers/tom_verducci/06/17/verducci.maplebats) (last visited Oct. 14, 2009).

11. Peter Funt, *Baseball’s Bat and Gall*, THE BOSTON GLOBE, [http://www.boston.com/bostonglobe/editorial\\_opinion/oped/articles/2009/07/16/baseballs\\_bat\\_and\\_gall](http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/07/16/baseballs_bat_and_gall) (last visited Oct. 14, 2009).

12. Lou Dzierzak, *Batter Up: Shattering Sticks Create Peril in MLB Ballparks*, SCIENTIFIC AMERICAN, <http://www.scientificamerican.com/article.cfm?id=baseball-bat-controversy> (last visited Oct. 15, 2010).

13. *Id.*

14. This observation is supported by the fact that maple bats are more likely to break into two or more pieces than ash bats, and more players began using maple bats during this time period than ever before. *See infra* note 29.

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personalities have called for the prohibition of maple bats, before a player, coach, or fan is seriously injured or even killed.<sup>15</sup>

Presently, MLB and other professional and amateur leagues continue to permit the use of maple bats.<sup>16</sup> Consequently, players continue to use maple bats, and the bats continue to break violently, creating an increased risk of injury to players, coaches, and spectators of the game.

Part II of this Comment will examine the history of maple bat use, the controversy surrounding the use of maple bats, and three incidents that occurred during MLB games involving maple bats. Part III of this Comment will use the three incidents discussed in Part II to examine the potential liability of maple bat manufacturers as a result of injuries sustained by players, coaches, and umpires (collectively “participants”) and by spectators and other non-participants such as concession vendors, stadium security officers, and ushers (collectively “non-participants”) including the potential problems that could prevent recovery. Part III.A. examines a negligence action brought against a maple bat manufacturer alleging that the manufacturer was negligent when it manufactured a wood bat using maple wood. Part III.B. examines a products liability action against a maple bat manufacturer alleging the bat has a design defect because it was manufactured from maple wood.

## II. BACKGROUND

### A. *The History of Maple Bats*

Prior to the introduction of maple bats in the 1990s, ash was the sole wood used to produce wood bats since it replaced hickory as the wood of choice in the 19th century.<sup>17</sup> Maple bats were likely introduced to MLB by Toronto Blue Jays all-star Joe Carter in the early 1990s.<sup>18</sup> Maple baseball bat popularity slowly increased until 2001, when it exploded after Barry Bonds broke MLB’s single-season home run record using a maple bat.<sup>19</sup> While it is nearly impossible to determine the exact number of players who currently use maple bats, it is estimated that between fifty-five percent<sup>20</sup> and sixty percent<sup>21</sup> of MLB’s players currently use them.

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15. See generally Verducci, *supra* note 10; Funt, *supra* note 11.

16. See *infra* note 94 (MLB rules only require the bat to be made out of one piece of wood, and do not prescribe the type of wood allowed).

17. Verducci, *supra* note 10.

18. *Id.*

19. Funt, *supra* note 11.

20. Verducci, *supra* note 10.

21. Funt, *supra* note 11.

Most players have switched from ash bats to maple bats because they believe that using a maple bat will increase the distance a ball is hit compared to a similar ball hit with an ash bat. Because maple is a denser, harder wood than ash,<sup>22</sup> it is argued that maple bats are advantageous to ash bats since a ball is more likely to come off a denser, harder object at a higher rate of speed than a less dense object. If a ball comes off the bat at a higher rate of speed, the ball, in theory, should travel further. Additionally, supporters of maple bats contend that the barrels of maple bats do not “flake”<sup>23</sup> like ash bats, resulting in increased longevity of a player’s bat.<sup>24</sup>

A 2005 study conducted by the Baseball Research Center at the University of Massachusetts at Lowell (“BRC Study”), concluded that there are major flaws with the alleged “advantages” of using maple bats.<sup>25</sup> The BRC Study concluded that the batted-ball speeds of ash and maple bats were essentially the same; therefore there is no advantage in getting a longer hit with a maple bat over a similarly made ash bat.<sup>26</sup> Despite the results of the BRC Study, however, many players continue to use maple bats because they “feel” as if they are more advantageous, even if there is no scientific data to support this conclusion.<sup>27</sup>

Additionally, the BRC Study showed that maple bats are actually more dangerous than ash bats, because they are three times more likely to break into multiple pieces than ash bats.<sup>28</sup> The results of the BRC study were supported by a 2008 study conducted by MLB’s Safety and Health Advisory Committee (“MLB Study”).<sup>29</sup> When a maple bat

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22. Verducci, *supra* note 10.

23. *Id.* “Flaking” occurs when pieces or layers of the bat chip off of the barrel of the bat. Andrea Thompson, *The Science Behind Breaking Bats*, LIVE SCIENCE, <http://www.livescience.com/strangenews/080715-baseball-bat.html>. Bats that have flaked barrels are prohibited from game use because the bat is no longer a “smooth, round stick” as required by MLB regulations. *See infra* note 94.

24. Verducci, *supra* note 10.

25. Jeff Passan, *Baseball at Breaking Point Over Maple Bats*, Yahoo! Sports, <http://sports.yahoo.com/mlb/news?slug=jp-maplebats050808> (last visited Oct. 14, 2009).

26. *Id.*

27. In response to a question about maple bats, former Pittsburgh Pirate all-star Nate McClouth stated, “I feel like they’re harder. Whether or not that’s scientifically true, I’m not sure. But psychologically, I feel like they are.” *Id.*

28. *Id.*

29. Press Release, Major League Baseball, MLB, MLBPA Adopt Recommendations of Safety and Health Advisory Committee (Dec. 9, 2008) (on file with author). The MLB study also concluded that maple bats were three times more likely than ash bats to break into two or more pieces. *Id.* The study further noted that maple bats were four times more likely to break due to poor-quality slope of grain than ash bats failing in the same manner. *Id.* Slope of grain describes how straight the grain of the wood is along the edge and flat faces. *Id.* As the straightness of grain decreases, the risk of the bat failing increases. *Id.* Therefore, the main reason why maple bats have a substantially greater

breaks, it often explodes into multiple pieces, sending jagged projectiles in excess of one hundred feet in any direction.<sup>30</sup> Furthermore, because the pieces of the bat do not break evenly, the weight of the splintered pieces is unbalanced, and it is therefore difficult to determine where the pieces will come to rest. This increases the chance that someone will be hit with a piece of a broken bat. If it is difficult to determine where the bat is going to land, it will be difficult to determine whether or not to move out of the way. In contrast, the BRC Study concluded that ash bats, when placed under similar conditions, tended to break innocuously.<sup>31</sup>

The seriousness of the harm resulting from being struck by a jagged piece of a broken wood bat should not be taken lightly. Such projectiles can cause serious injuries and potentially even death.

### B. *The Don Long Incident*

During the eighth inning of an MLB game at Dodger Stadium on April 15, 2008, former Pittsburgh Pirates' center fielder Nate McClouth hit a seemingly innocent double down the right field line.<sup>32</sup> At the time, McClouth, like the majority of MLB players, was using a maple bat.<sup>33</sup> McClouth's hit caused Pirates' hitting coach Don Long to immediately look toward the right field line, where the ball was put in play.<sup>34</sup> Unbeknownst to Long, who was standing in the Pirates' dugout, McClouth's maple bat shattered upon hitting the ball and the jagged barrel of the bat was flying towards him. With Long's attention diverted to the action on the field, the bat struck him on the left side of his face.<sup>35</sup> The jagged barrel sliced through Long's cheek muscle and severed nerves in his face.<sup>36</sup> Doctors had to remove a piece of the broken bat lodged under his skin.<sup>37</sup>

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tendency to break into multiple pieces is because maple bats are produced with an inferior slope of grain than ash bats. *Id.*

30. Verducci, *supra* note 10.

31. Jeff Passan, *Fan's Injury Should Force Bat Policy Change*, Yahoo! Sports, <http://sports.yahoo.com/mlb/news?slug=jp-bats052908&prov=yahoo&type=lgns> (last visited Oct. 14, 2009).

32. *See* Passan, *supra* note 25.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

C. *The Susan Rhodes Incident*

During the seventh inning of an MLB game at Dodger Stadium on April 25, 2008, ten days after Long's injury, Colorado Rockies' first baseman Todd Helton hit a routine single into center field.<sup>38</sup> At the time, Helton was borrowing a maple bat from a teammate.<sup>39</sup> Helton's base hit caused spectator Susan Rhodes, who was sitting four rows behind the visitor's dugout, to look toward center field where the ball was put into play.<sup>40</sup> Unbeknownst to Rhodes, Helton's maple bat shattered upon hitting the ball and the jagged barrel was flying towards her. With Rhode's attention diverted to the action on the field, the barrel of the maple bat struck her in the face and knocked her unconscious.<sup>41</sup> When Rhodes regained consciousness she had two jaw fractures, one on the upper left side where the barrel struck, and one on the lower right side where the force from the impact reverberated.<sup>42</sup> In order to treat her injuries, doctors surgically inserted four screws and a titanium plate on the right side of her face.<sup>43</sup> Doctors are unsure if she will ever fully recover.<sup>44</sup>

C. *The Tyler Colvin Incident*

Perhaps the scariest maple bat incident occurred on September 19, 2010, during a MLB game between the Chicago Cubs and the Florida Marlins. In the 2nd inning of the game, Cubs catcher Wellington Castillo hit a double down the left field line.<sup>45</sup> Like many maple bats, Castillo's bat shattered upon hitting the ball.<sup>46</sup> At the time, Cubs outfielder Tyler Colvin was on third base.<sup>47</sup> Like Long and Rhodes, when Colvin saw the ball make contact with the bat, his attention was immediately drawn to the ball, which was hit over his head into left field.<sup>48</sup> Colvin turned around to make sure the ball was not going to be caught, and when the ball hit the ground he turned back around to run

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38. See Passan, *supra* note 31.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. Bruce Levine, *Cubs' Tyler Colvin 'OK' After Incident*, ESPN.com, <http://sports.espn.go.com/chicago/mlb/news/story?id=5595865> (last visited Oct. 15, 2010).

46. *Id.*

47. *Id.*

48. *Id.*

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home and was immediately struck in the chest by the jagged piece of Castillo's bat.<sup>49</sup>

Unlike the Long and Rhodes incidents, however, the jagged piece of Castillo's bat impaled Colvin, puncturing his chest.<sup>50</sup> Colvin was rushed to the hospital where doctors were forced to insert a chest tube in order to prevent a collapsed lung.<sup>51</sup> Although Colvin was released from the hospital a few days later, he missed the rest of the season as a result of his injuries.<sup>52</sup>

#### *E. Recent Debate Over Maple Bats*

Incidents such as those that led to the injuries sustained by Long, Rhodes, and Colvin have caused players, coaches, sportswriters, and fans to question the use of maple bats.<sup>53</sup> If a person injured by a maple bat, like Long, Rhodes, or Colvin decided to sue a maple bat manufacturer for his or her injuries, the manufacturer should be unable to claim that the injuries were not foreseeable, because of the increased media attention and because nearly twenty-five bats are broken for every day a game is played.<sup>54</sup>

Part III of this Comment will examine the potential liability of a maple bat manufacturer in two possible causes of action arising from the incidents that led to the injuries sustained by Long, Rhodes, and Colvin. The first section will examine a suit in which a plaintiff injured by a maple bat claims that the bat manufacturer was negligent when it manufactured a wood bat using maple wood. The second section will examine a products liability suit against a bat manufacturer in which a plaintiff injured by a broken maple bat claims that the wood bat was defective in design because it was designed using maple wood, rather than a reasonable alternative such as ash.

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49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. Former Pittsburgh Pirates' manager John Russell and Tampa Bay Rays' manager Joe Maddon have called maple bats "dangerous." See Passan, *supra* note 25. Cincinnati Reds third baseman Scott Rolen stated that he will not let his family sit near the field unless they are behind a protective netting because of the hazard created by maple bats. See Verducci, *supra* note 10.

54. Nearly 1,700 broken bats were collected for study in a two month span from July 2, 2008 to September 7, 2008. Barry M. Bloom, *MLB Issues Update on Maple Bat Study*, MLB.com, [http://mlb.mlb.com/news/article.jsp?ymd=20080909&content\\_id=3444168&vkey=news\\_mlb&fext=.jsp&c\\_id=mlb](http://mlb.mlb.com/news/article.jsp?ymd=20080909&content_id=3444168&vkey=news_mlb&fext=.jsp&c_id=mlb) (last visited Oct. 14, 2009).

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### III. ANALYSIS

#### A. *The Potential Liability of a Maple Bat Manufacturer in a Negligence Action for Injuries Caused by the Negligent Design of a Maple Bat*

Using the incidents that led to the injuries suffered by Long, Rhodes, and Colvin as examples, this section of the Comment will address a hypothetical lawsuit brought by a person injured by a broken maple bat against the bat manufacturer for their injuries. In this case, the plaintiff brought suit alleging that the bat manufacturer was negligent when it manufactured a wood bat using maple wood. It is hornbook law that in order to establish a prima facie case of negligence, a plaintiff must establish: (i) that the defendant owed the plaintiff a duty of care; (ii) that the defendant breached that duty of care; (iii) that the plaintiff suffered an actual injury; and (iv) that the defendant's breach was both a cause-in-fact and proximate cause of the plaintiff's injury.<sup>55</sup>

##### 1. Duty and Assumption of Risk

The first issue that is likely to be contested in a negligence action brought against a maple bat manufacturer is whether the manufacturer owes a plaintiff such as Long, Rhodes, or Colvin a duty of care. Generally, the duty of care owed is "that degree of care which an ordinarily prudent person would exercise under similar circumstances."<sup>56</sup> If a defendant can successfully argue that the plaintiff assumed the risk of injury, however, the defendant owes a substantially lower duty of care,<sup>57</sup> or in some circumstances, no duty of care at all.<sup>58</sup> If a maple bat manufacturer faced a lawsuit alleging negligence in the design of the bat, it is almost certain that the manufacturer would raise the defense of assumption of risk in an attempt to defeat the claim.

Although the defense of assumption of risk varies from jurisdiction to jurisdiction, generally a defendant owes no duty to protect a voluntary participant against a risk of harm that is inherent in a sport.<sup>59</sup> A risk is inherent in the sport if its elimination would "(1) chill vigorous

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55. 57 Am. Jur.2d *Negligence* § 71 (2010).

56. *Marshall v. S. Ry. Co.*, 62 S.E.2D 489, 491 (N.C. 1950).

57. *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr.2d 529, 535-36 (Cal. Ct. App. 2002).

58. *Ruth v. The Phillies*, No. 99-1685, 2001 U.S. Dist. LEXIS 8216 (D.N.J. Jan. 4, 2001).

59. *Sanchez*, 128 Cal. Rptr.2d at 535-36.



participation in the sport, and (2) alter the fundamental nature of the sport.”<sup>60</sup>

While courts have held that the risk of being struck by a piece of a broken wood bat is a risk inherent in the sport of baseball,<sup>61</sup> courts have not specifically addressed whether the risk of being struck by a *maple* baseball bat is a risk inherent in the sport.<sup>62</sup>

Based on the test set forth by the California Court of Appeals in *Sanchez v. Hillerich and Bradsby Company*,<sup>63</sup> a plaintiff such as Long, Rhodes, or Colvin has a strong argument that the use of maple wood bats is not inherent in the sport of baseball. Although baseball has been played since the mid-19th century,<sup>64</sup> maple baseball bats were not introduced to the game until the early 1990s.<sup>65</sup> Thus, prior to the introduction of maple bats, the game was played for nearly 150 years without maple bats. Consequently, because maple bats are not inherent in the sport, then the risks associated with the use of maple bats are likewise not inherent in the sport. If the game was played for 150 years without the use of maple bats, it is hard to imagine how the elimination of the risk of being struck by a broken maple bat would alter the fundamental nature of the game.

Additionally, the BRC Study concluded that maple bats have no advantage in gaining a longer hit than a similarly made ash bat.<sup>66</sup> Therefore, elimination of maple bats would not alter any aspect of the game, and would create a safer environment for both participants and non-participants, where fewer bats break into multiple pieces and fly onto the field and/or into the stands.

Moreover, there is no evidence to suggest that the elimination of maple bats would chill vigorous participation in the sport. It is highly unlikely that the elimination of maple bats from baseball would cause people to decide not to participate in the sport. Because the test set forth in *Sanchez* has conjunctive elements, in order to prove that the risk of being struck by a broken maple baseball bat is not inherent in the game, a

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60. *Id.* at 536.

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

62. At first glance it may seem logical to conclude that because one court has determined that being hit by a piece of a broken wood bat is inherent in baseball, then other courts will automatically conclude that being struck by a maple baseball bat is covered by that general rule. Courts should be reluctant to have such a knee-jerk reaction to that argument without first considering the merits of such an argument, however. Courts frequently carve out exceptions to their own rules, and because the elimination of maple bats would not alter any aspect of the game and would make the game safer, a court in this situation should carve out such an exception for maple bats.

63. *Sanchez*, 128 Cal. Rptr.2d at 535-36.

64. *Verducci*, *supra* note 10.

65. *Id.*

66. *Passan*, *supra* note 25.

plaintiff such as Long, Rhodes, or Colvin need only establish either that the elimination of maple bats would not chill vigorous participation in the sport, or alter the fundamental nature of the sport.<sup>67</sup> Because the elimination of maple bats would not alter the fundamental nature of the sport nor chill vigorous participation in the sport, this is a burden that a plaintiff such as Long, Rhodes, or Colvin should be able to satisfy.

It is also likely that a supporter of maple baseball bats would argue that the game of baseball has evolved over time, and that maple bats are simply part of the evolution. Such an “evolution,” however, should not be allowed to occur when it has no utility in the sport and actually increases risks that are already inherent in the sport. When an evolving aspect of a sport makes the game more dangerous, the elimination of such an “evolution” should be encouraged, especially when there will be no impact on how the game is played, let alone the fundamental nature of the game.

Therefore, this situation is fundamentally different from the evolution of equipment in other sports such as high performance swimsuits and high performance golf clubs. Swimsuits used by swimmers have continued to evolve over time, and the suits worn today are much more technologically advanced than in previous years. These new high tech swimsuits, such as the Speedo LZR Racer, help place the body in the best position to swim while repelling water and reducing drag.<sup>68</sup> Unlike maple bats, these suits have had a substantial impact on the sport, as evidenced by the fact that 108 new world records were set by swimmers wearing the suits in just over one year, between February 2008 and March 2009.<sup>69</sup>

Likewise, the clubs used by golfers have continued to evolve over time. The invention of high performance alloy golf clubs created a substantial performance advantage over the hickory shaft clubs used in the early 20<sup>th</sup> century by creating a bigger “sweet spot” that allows more forgiveness for off center hits.<sup>70</sup> With a bigger sweet spot, golfers have more consistency in their ball striking ability.<sup>71</sup> Therefore, these

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

68. Chris Hogg, *Japanese Search for New Swimsuits*, BBC NEWS, [http://news.bbc.co.uk/2/hi/in\\_depth/7434159.stm](http://news.bbc.co.uk/2/hi/in_depth/7434159.stm) (last visited Feb. 1, 2010).

69. Associated Press, *Fina Adopts New Rules for Swimsuits*, ESPN.COM, <http://www.sports.espn.go.com/oly/swimming/news/story?id=3980056> (last visited Feb. 1, 2010). It is worth noting that due to the substantial performance increase caused by these suits, swimming’s governing body has since adopted new rules regulating the use of these suits. *Id.*

70. C. Shira, *Advanced Materials in Golf Clubs*, in *THE ENGINEERING OF SPORT* 52 (A.J. Subic ed., 2000).

71. *Id.*

evolutions are not analogous to the evolution of baseball bats made from maple wood, which do not change the way the game of baseball is played, except increase the risks to those on and off the field.

Even if a court is not persuaded by the argument that the risk of being struck by a piece of a broken maple bat is not inherent in the sport of baseball, such a ruling is not fatal to the plaintiff's case. 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.<sup>72</sup> Therefore, in order to overcome the defense of assumption of risk, a plaintiff such as Long or Colvin could argue that the use of maple baseball bats increases the inherent risk of being struck by a piece of a broken wood bat.

Although there are currently no published opinions in which a litigant has made this precise argument in the context of maple bats, litigants have made similar arguments in other contexts. In *Sanchez*, a college pitcher was struck in the head by a line drive batted off of a high performance aluminum alloy bat.<sup>73</sup> *Sanchez*, the pitcher, sued the manufacturer of the bat, Hillerich & Bradsby Company, among others, claiming that the use of the high performance aluminum alloy bat<sup>74</sup> increased the inherent risk in baseball that a pitcher would be hit by a line drive.<sup>75</sup> The bat manufacturer responded to *Sanchez*'s argument by moving for summary judgment on the ground that the doctrine of assumption of risk barred the claim since the risk of being struck by a line drive was inherent in the sport of baseball.<sup>76</sup>

In order to defeat the bat manufacturer's defense, *Sanchez* argued that the doctrine of primary assumption of risk did not apply because the design of the bat enabled a batter to hit a ball at speeds in excess of that which would allow a pitcher to avoid being hit.<sup>77</sup> Therefore, he argued, the use of the aluminum alloy bat increased the inherent risk of a player being struck by a line drive.<sup>78</sup> Relying on the court's decision in *American Golf Corporation v. Superior Court*,<sup>79</sup> the *Sanchez* court denied the bat manufacturer's motion for summary judgment on the

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72. *Am. Golf Corp. v. Superior Court*, 93 Cal. Rptr. 2d 683 (Cal. Ct. App. 2000).

73. *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr.2d 529, 531 (Cal. Ct. App. 2002).

74. It is important to note that the bat in question was made in full compliance with existing National Collegiate Athletic Association (NCAA) regulations, which required extensive testing. *Id.* See discussion *infra* Section III(A)(2).

75. *Sanchez*, 128 Cal. Rptr.2d at 531.

76. *Id.* at 532.

77. *Id.* at 533-34.

78. *Id.*

79. *Am. Golf Corp. v. Superior Court*, 93 Cal Rptr.2d 529 (Cal. Ct. App. 2001).

ground that there was a genuine issue of material fact as to whether the design and use of the bat substantially increased the inherent risks faced by baseball players.<sup>80</sup> The *Sanchez* court held that a defendant “owes a duty to participants not to increase the risk of harm over and above that inherent in the sport.”<sup>81</sup>

Similarly, in *Branco v. Kearny Moto Park, Incorporated*,<sup>82</sup> the same court used an identical analysis to defeat a motion for summary judgment made by a motocross course owner and designer.<sup>83</sup> In *Branco*, a BMX racer crashed his bike and injured himself during a race at a motocross course that contained multiple jumps.<sup>84</sup> Jumps and falls are unquestionably an inherent danger in the sport of motocross. Nevertheless, the court held that the sport did not mandate jumps designed in such a way as to create “an extreme risk of injury.”<sup>85</sup> Using the reasoning of the *Sanchez* court, this result should not come as a surprise. In *Branco*, the defendant designed a course that increased the risk that a BMX racer would crash over and above that which is inherent in the sport. Therefore, the defendant was precluded from arguing that the doctrine of assumption of risk barred the claim.

The decisions of the California Court of Appeals in *Sanchez* and *Branco* support the argument that maple bats increase the inherent risk of being struck by a broken bat over and above that which is inherent in the sport. Because a maple bat is three times more likely to break into multiple pieces than an ash bat,<sup>86</sup> there is an increased chance that a participant or non-participant will be struck by a piece of the shattered bat. Additionally, because a broken maple bat often explodes into more than two pieces, the risk of being struck by a broken bat is increased even more since it is possible for more than one person to be struck by pieces of the same shattered bat. Therefore, the use of maple bats increases the inherent risk of being struck by a broken wood bat over and above that which is inherent in the sport.

Moreover, as exemplified in the incidents involving Long, Rhodes, and Colvin, when a maple bat breaks, the ball is often simultaneously put into play. A participant or non-participant who is paying attention to the game would likely focus his or her attention on the ball immediately as it

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80. *Sanchez*, 128 Cal. Rptr.2d at 538.

81. *Id.* at 536 (citing *Am. Golf Corp.*, 93 Cal. Rptr.2d at 688).

82. *Branco v. Kearny Moto Park, Inc.*, 43 Cal. Rptr.2d 392 (Cal. Ct. App. 1995).

83. *Id.*

84. *Id.* at 394. It is important to note that the track in question apparently complied with the American Bicycle Association’s rules and regulations regarding track design. *Id.* See discussion *infra* Section III.A.2.

85. See *id.* at 398.

86. See MLB Press Release, *supra* note 29.

is put into play, and not even notice that the bat broke into multiple pieces and is flying towards them.<sup>87</sup>

This is precisely what happened to Long, Rhodes, and Colvin. When Long heard the ball make contact with McClouth's bat, his attention was immediately drawn to the ball, which was traveling down the right field line.<sup>88</sup> Likewise, when Rhodes heard the ball make contact with Helton's bat, her attention was instantly drawn to center field, where the ball was put into play.<sup>89</sup> Similarly, when Colvin saw Castillo make contact with the ball, his attention was drawn toward the ball, which was hit over his head into left field.<sup>90</sup> Thus, the attention of Long, Rhodes, and Colvin was drawn away from the bat that was flying toward them. The fact that these events are three times more likely to occur demonstrates that the use of maple bats increases the inherent danger of a person being struck by a broken wood bat over and above that which is inherent in the sport. This is analogous to the increased risk of being struck by a line drive off a high performance aluminum alloy bat,<sup>91</sup> and the extreme risk of falling from a BMX bike due to the construction of multiple jumps on a motocross course.<sup>92</sup> Therefore, a court should not apply the defense of assumption of risk to prevent a claim brought by a participant or non-participant, because the manufacturer has increased the risk of being struck by a broken bat.

## 2. Breach

In order to establish a *prima facie* case of negligence, a plaintiff such as Long, Rhodes, or Colvin must also establish that the bat manufacturer failed to exercise the requisite duty of care when it designed a wood bat using maple wood.<sup>93</sup>

There are numerous factors relevant to determine whether a defendant breached his duty of care. These factors include foreseeability and the type of alternative conduct available. In light of the conclusions of both the BRC Study and the MLB Study, and the recent media

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87. Even if a person were to focus his attention on the broken wood bat, this would distract him from the location of the ball, which often travels at an extremely high rate of speed. Therefore, if a person focused his attention on the broken bat rather than the ball, there is an increased risk that the person will be struck by a line drive. Thus, it could also be argued that the use of maple bats increases the risk that a person may be struck by a line drive.

88. See Passan, *supra* note 25.

89. See Funt, *supra* note 11.

90. See Levine, *supra* note 45.

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

92. See *Branco v. Kearny Moto Park, Inc.*, 43 Cal. Rptr.2d 392 (Cal. Ct. App. 1995).

93. 57 Am. Jur.2d *Negligence* § 71 (2010).

coverage of the issue, maple bat manufacturers should not be able to claim that an injury caused by a broken maple bat is unforeseeable.

Moreover, the availability of alternative conduct is further evidence that wood bat manufacturers breach the duty of care owed when they produce wood bats using maple wood. A bat manufacturer has the option of producing the exact same bat, but simply substituting traditional ash for the maple wood. This simple change would significantly reduce the risk of being struck by a broken wood bat.

A maple bat manufacturer in this situation would likely argue that it did not breach its duty of care because the maple bat conformed to MLB regulations.<sup>94</sup> However, the fact that the bat conformed to MLB regulations is not determinative on the issue of breach. In *Sanchez*, the bat in question conformed to NCAA regulations, which required extensive testing and certification.<sup>95</sup> Nonetheless, the court did not prevent Sanchez from recovering on this basis. Similarly, although the BMX course in *Branco* appeared to conform to American Bicycle Association standards, the court did not prevent Branco from recovering simply because the course complied with the association's standards.<sup>96</sup>

While complying with industry standards may be relevant to the determination of breach, it is not dispositive. As Judge Learned Hand famously wrote:

In most cases reasonable prudence is in fact common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. . . . Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.<sup>97</sup>

In *The T.J. Hooper*,<sup>98</sup> the court held that tugboat owners acted unreasonably and breached their duty of care by failing to equip their tugboats with radios, despite the fact that most tugboat owners at the time did not equip their boats with radios.<sup>99</sup> Similarly, in the context of maple bats, a court should not allow a maple bat manufacturer to escape liability simply because the bat conformed to MLB and other league regulations. It is apparent that wood baseball bat manufacturing has

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94. Major League Baseball rules require only that the "bat shall be a smooth, round stick not more than 2 3/4 inches in diameter at the thickest part and not more than 42 inches in length. The bat shall be one piece of solid wood." Official Info: Official Rules, p. 1.10(a), available at <http://www.mlb.com/NASApp/mlb/mlb/officialinfo/officialrules/objectives1.jsp>.

95. See *Sanchez*, 128 Cal. Rptr.2d at 532.

96. See *Branco*, 43 Cal Rptr.2d at 392.

97. *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

98. *Id.*

99. *Id.*

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“unduly lagged in the adoption of . . . available devices”<sup>100</sup> by continuing to manufacture bats using maple wood. It is the court who must “in the end say what is required,”<sup>101</sup> and a court should send a message to bat manufacturers that the use of maple bats is an unreasonable danger in light of the absence of utility in the design, the increased risk created by the bats, and the ease with which the risk can be significantly reduced. It is also worth noting the ease of which bat manufacturers can solve this problem. Wood bats have been produced using ash for more than one hundred years, and it would be simple for manufacturers to make the switch from maple to ash.

If a plaintiff such as Long, Rhodes, or Colvin is able to establish that the maple bat manufacturer owed him or her a duty of care, and that the manufacturer subsequently breached its duty through the negligent design of the bat, establishing harm and causation is unlikely to be a contested issue in the case. As a result, this Comment will not examine the harm or causation prong of the analysis that a claimant such as Long, Rhodes, or Colvin would need to establish in order to recover.

*B. The Potential Liability of a Maple Bat Manufacturer in a Products Liability Action For Injuries Caused by a Design Defect.*

1. Products Liability Actions

In addition to the negligence action, a plaintiff such as Long, Rhodes, or Colvin would also likely bring a products liability action. A manufacturer is strictly liable under a products liability theory when it places a product on the market, knowing that it is to be used without inspection for defects, and an injury occurs that is caused by a defect.<sup>102</sup> In contrast to a negligence action, a plaintiff in a strict products liability action is not required to establish that the defendant was at fault. He merely has to show that the product was defective when the defendant placed it on the market.<sup>103</sup>

Strict products liability was first introduced to American courts in *Greeman v. Yuba Power Products, Incorporated*<sup>104</sup>. In that decision, Justice Traynor, writing for the California Supreme Court, reasoned that the purpose of strict liability “is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put

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100. *Id.*

101. *Id.*

102. *Greeman v. Yuba Power Products, Inc.*, 377 P.2d 897, 900 (Cal. 1963).

103. *Id.*

104. *Id.*

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such products on the market rather than by the injured persons who are powerless to protect themselves.”<sup>105</sup>

Holding bat manufacturers strictly liable for producing maple bats would motivate them to design a safer product; one that does not have a propensity to break into multiple pieces as frequently and threaten serious injury as often.

Strict products liability cases arise in three contexts: (i) manufacturing defects; (ii) design defects; and (iii) information or warning defects. A plaintiff such as Long, Rhodes, or Colvin likely has a strong case under a design defect theory.

Unlike manufacturing defects, which focus on a manufacturer’s failure to produce the product in accordance with design specifications, a design defect focuses on whether the design of the product itself creates an unreasonable risk. In determining whether a product creates an unreasonable risk, most courts have adopted either a consumer expectations test,<sup>106</sup> a risk-utility test,<sup>107</sup> or a combination of both.<sup>108</sup> Additionally, some courts require a plaintiff to establish that a reasonable alternative design was available at the time of manufacture that is both technologically and economically feasible.<sup>109</sup> Regardless of the test, however, a plaintiff in a suit against a maple bat manufacturer should prevail.

## 2. The Consumer Expectations Test

Under the consumer expectation test:

A product may be found defective in design if the plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner. . . . A product will be found unreasonably dangerous if it is dangerous to an extent beyond the expectations of an ordinary consumer when used in an intended or reasonably foreseeable manner.<sup>110</sup>

Thus, in a jurisdiction that requires a plaintiff to demonstrate a design defect through the consumer expectation test, a plaintiff such as Long, Rhodes, or Colvin would have to prove that the bat was “dangerous to an extent beyond the expectations of an ordinary

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105. *Id.* at 901.

106. *See* *Leichtamer v. Am. Motors Corp.*, 424 N.E.2d 568 (Ohio 1981).

107. *See* *Barker v. Lull Eng’g. Co.*, 573 P.2d 443 (1978).

108. *See* *Knitz v. Minster Mach. Co.*, 432 N.E.2d 814 (Ohio 1982).

109. *See* *Honda of Am. Mfg., Inc. v. Norman*, 104 S.W.3d 600, 605 (Tex. 2003).

110. *Barker*, 573 P.2d at 454.



consumer.”<sup>111</sup> While it is possible for any wood bat to break into multiple pieces, the use of maple wood substantially increases this risk. Although wood bat users may anticipate the risk that the bat may break and cause injury, these players likely do not understand the extent to which the risk is increased with the use of a maple wood bat, even despite extended media coverage on the subject.

Additionally, maple bats are often used by high school, college, and other amateur players who are likely less experienced and less educated than professional players. Thus, the ordinary consumer of a maple wood bat is not necessarily the more experienced and more informed MLB player who likely has a better understanding of the potential risks of using such bats. Therefore, even under the consumer expectation test, it is unlikely that the ordinary consumer is aware of the increased danger of using a maple bat.

### 3. The Risk-Utility Test

A plaintiff such as Long, Rhodes, or Colvin has an even stronger claim of a design defect under a risk-utility analysis. Under a risk-utility analysis, a product design is defective if “the benefits of the challenged design do not outweigh the risk inherent in the design.”<sup>112</sup> While some players contend that maple bats “feel” like they are harder than ash bats,<sup>113</sup> and therefore are advantageous because of the possibility of hitting the ball further, according to the BRC Study this assertion is erroneous.<sup>114</sup> There simply is no evidence to suggest that the batted ball speed from a maple bat is greater than the batted ball speed from a similarly designed ash bat. This lack of evidence demonstrates a lack of utility in the design of a bat using maple versus a similarly made bat using ash.<sup>115</sup>

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111. *Id.* It is worth noting that neither Long, Rhodes, nor Colvin were the actual users of the bat. *See* Passan, *supra* note 25; *see* Passan, *supra* note 31; Levine, *supra* note 45. Despite this fact, most jurisdictions do not limit recovery only to those who are the actual users of the product, but extend liability to those who could be “reasonably affected” by the defective product. *See, e.g.* GA. CODE ANN. § 51-1-11(b)(1) (2009); ME. REV. STAT. ANN. tit. 14 § 221 (2009). It is hard to understand why a court would prevent a plaintiff such as Long, Rhodes, or Colvin from recovering under this theory simply because he or she was not the actual user of the bat, since he or she is just as likely to be injured by such bat.

112. Knitz, 432 N.E.2d at 818.

113. Passan, *supra* note 25.

114. *Id.*

115. Although some players contend that maple bats are advantageous to ash bats because the barrels do not “flake” the way that ash bats do (resulting in increased longevity of a player’s bat) this assertion is not necessarily conclusive. There does not appear to be any scientific evidence confirming the claim that maple bats have a greater life span than a similarly made ash bat. Even if one were to assume, *arguendo*, that

Furthermore, because both the BRC Study and the MLB Study concluded that maple bats are three times more likely to break into two or more pieces,<sup>116</sup> the risks inherent in using maple bats are greater than those using ash bats. If there is little or no advantage in using maple bats over ash bats, then the benefits of the challenged design cannot outweigh the risks inherent in the design. If the benefits of the challenged design do not outweigh the risks inherent in the design, then the bat manufacturer should be held strictly liable under the risk-utility test.

In some jurisdictions, before a design defect can be established, a plaintiff must also demonstrate that there is a reasonable alternative design that would have prevented or significantly reduced the risk of injury.<sup>117</sup> In order to be reasonable, some jurisdictions require the alternative design to be both economically and technologically feasible at the time the incident occurred.<sup>118</sup> This additional requirement should not prevent a plaintiff such as Long, Rhodes, or Colvin from recovery.

The reasonable alternative design in the case against a maple bat manufacturer is simply a similarly designed bat made of ash. Ash bats are technologically feasible, as evidenced by the fact that until the mid 1990s they were the primary source of wood baseball bats since the 19th century.<sup>119</sup> Additionally, there is no evidence to suggest that maple bats are cheaper to manufacture than ash bats. Therefore, the alternative design of an ash bat is both technologically and economically feasible.

Finally, because of the increased chance of a maple bat breaking into two or more pieces, it is likely that the risk of injury to a plaintiff such as Long, Rhodes, or Colvin would have been eliminated or significantly reduced by an ash bat. Although it is virtually impossible for a participant or non-participant to successfully argue that the threat of being struck by a wood bat would be eliminated altogether if the bat were made using ash, the risk is significantly reduced by a bat made of ash since ash bats are three times less likely to break into multiple pieces than maple bats.<sup>120</sup>

In a jurisdiction that requires a plaintiff to establish a reasonable alternative design, this requirement is likely met without difficulty because of already existing ash bats. Therefore, even if Long, Rhodes, or Colvin had to establish that a reasonable alternative design exists, the existence of ash bats is such a design.

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maple bats do not “flake” the way that ash bats do, this is an extremely small benefit in light of the substantial dangers of using a maple bat.

116. See Passan, *supra* note 25; MLB Press Release, *supra* note 29.

117. *Honda of Am. Mfg., Inc. v. Norman*, 104 S.W.3d 600, 605 (Tex. 2003).

118. *Id.*

119. Verducci, *supra* note 10.

120. Passan, *supra* note 25.

#### 4. Defenses to Products Liability Actions

The defenses available to a defendant in a strict products liability case are similar to those available to a defendant in a negligence action.<sup>121</sup> Thus, the arguments a bat manufacturer would likely make in an attempt to defeat the plaintiff's claim in a products liability action are similar to those made in the negligence action.<sup>122</sup>

The strongest potential defense for a manufacturer of maple bats is likely the defense of assumption of risk. As discussed in Section III.A.1., a participant in a sport assumes those risks that are inherent in the sport. In baseball, those risks include the risk of being struck by a broken wood bat. However, this risk should not include the risk of being struck by a broken maple wood bat, because the elimination of maple bats from baseball would not, in the words of the *Sanchez* court, "chill vigorous participation in the sport" or "alter the fundamental nature of the game."<sup>123</sup> This argument is supported by the fact that baseball was played for 150 years before the introduction of maple bats.<sup>124</sup>

Even if a court is not persuaded by this argument, however, the assumption of risk defense should be defeated on the ground that the use of maple bats increases the inherent risk of being struck by a broken wood bat over and above that which is inherent in the sport. As previously discussed in Section III.A.1. of this Comment, maple bats are three times more likely to break into two or more pieces. Moreover, because a batter is likely to put the ball into play when he simultaneously breaks his bat, a participant's or non-participant's attention is likely to be turned towards the action on the field. Therefore, the participant or non-participant is unlikely to notice that the bat was broken and is flying towards him. This increases the chance that a person would be struck by a broken wood bat, because if he is unaware that the bat is coming towards him, then he is defenseless against the bat.<sup>125</sup>

Thus, even though the defense of assumption of risk will likely be raised by the bat manufacturer, the court should not be persuaded by this argument. Maple bats increase the inherent danger that a person will be struck by a broken bat, and the elimination of such bats would have virtually no effect upon the game.

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121. See *Phipps v. Gen. Motors Corp.*, 363 A.2d 955, 959-60 (Md. 1976).

122. See discussion *supra* Section III.A.1.

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

124. See *Verducci*, *supra* note 10.

125. Even if one was aware that the broken bat was coming towards him, because the broken bat is likely to be unevenly balanced, it will be difficult for him to determine where the projectile will land; therefore, it will be extremely difficult for him to get out of the way.

A maple bat manufacturer may also argue that it should not be held strictly liable under a products liability action because the bat conformed to MLB specifications. Because a plaintiff such as Long, Rhodes, or Colvin is not required to establish fault in a strict products liability action, however, this argument should be irrelevant. Even though this argument should fail for the reasons discussed in Section III.A.2., a court should not even allow a bat manufacturer to present this argument in a products liability action because it is not relevant. Therefore, a strict products liability action creates one less hurdle for a plaintiff such as Long, Rhodes, or Colvin on the way to recovery.

Imposing strict products liability upon maple bat manufacturers in these cases is in accordance with the underlying policy reasons for which strict products liability was developed. Baseball bat manufacturers are in the best position to make their products safer. Furthermore, the ease with which bat manufacturers can reduce the risk to both participants and non-participants is striking. The only change a bat manufacturer would need to make in the design of its product is to use ash to manufacture the bat, which is both technologically and economically feasible. Additionally, despite the numerous calls for the elimination of maple bats from baseball, many 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.

Not only have maple bat manufacturers demonstrated an unwillingness to effectively solve the problems created by the maple baseball bats they produce, they continue to place these bats on the market. Because bat manufacturers continue to ignore the problem that they have created, responsibility should lie with them to design a safer product. Since it is often easier for a plaintiff to recover under a strict products liability theory than under a negligence theory, the most effective way to require baseball bat manufacturers to take responsibility for placing a dangerous product on the market is to hold them strictly liable under a products liability action.

#### IV. CONCLUSION

Bat manufacturers have the ability to significantly reduce the risk of injury caused by broken wood baseball bats. While not every serious injury in a sport can be prevented, when such a simple change can be made that would significantly reduce the risk of injury in the sport while having little or no impact whatsoever on the nature of the game, it is unreasonable *not* to implement the change. Because bat manufacturers have demonstrated an unwillingness to stop producing wood bats using maple wood, despite the serious injuries that continue to occur, courts

should encourage those creating the unnecessary and unreasonable risk by holding them accountable either under a theory of negligence or strict products liability. This may be the only way to stop manufacturers from producing these bats before an incident more tragic than the ones that led to the injuries suffered by Long, Rhodes, and Colvin occurs.