

# Spectator Injuries: Examining Owner Negligence and the Assumption of Risk Defense

Aaron Wakamatsu\*

## INTRODUCTION

People attend sporting events for various reasons. A person may attend for the love of the game, because friends or family persuaded the person to go, or to impress that special someone. However, injuries to spectators can affect anyone at or near the game. Spectators who lawfully purchase tickets to attend sporting events are business invitees and are able to recover damages from stadium owners who “knew or should have known that a condition existed which posed an unreasonable risk to the spectators, the spectators could not have discovered and protected themselves against this risk, and the owners failed to exercise reasonable care for the spectator’s protection.”<sup>1</sup> The purpose of this article is to: (1) analyze the current duty of care owed by stadium owners to spectators in baseball and hockey; (2) identify when any assumption of risk defenses might be available to owners; (3) examine recent spectator injuries in baseball and hockey; and (4) draw conclusions by applying the standards and defenses to recent events.

## BASEBALL

At almost every baseball game, there is a chance for significant injury to a spectator. In fact, at Major League Baseball (MLB) games, more than 35 people have died from being hit by an errant ball or a broken bat at a ballpark.<sup>2</sup> A Milsten study revealed that there are more than 35 spectator injuries from foul balls at MLB games for every one million spectator visits.<sup>3</sup>

Courts have concluded that stadium owners and teams do not owe a duty to protect their patrons from “common, frequent, and expected” risks.<sup>4</sup> Getting hit by a foul ball is a “common, frequent, and expected” risk where the injured party is unlikely to recover.<sup>5</sup> However, when the spectator is injured in a manner that is not a “common, frequent, and expected” risk of baseball, the spectator will probably recover damages.<sup>6</sup> For example, spectators have sued and won lawsuits after an iron gate struck the spectator’s knee while watching the ball game,<sup>7</sup> after a spectator tripped over a support beam and fell down a staircase at Wrigley Field,<sup>8</sup> and after a

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\* Aaron Wakamatsu is a J.D. candidate at Willamette University College of Law (May 2010).

<sup>1</sup> Walter T. Champion, Jr. *Sports Law in a Nutshell* 120-121 (3d ed. 2005).

<sup>2</sup> *Sports Spectators Experience the Action (and Injuries)*, Total Injury: Personal Injury Lawyers Nationwide, <http://www.totalinjury.com/sports-spectator-injuries.asp>.

<sup>3</sup> James E. Winslow, Adam O. Goldstein, *Spectator Risks at Sporting Events*, *The Internet Journal of Law, Healthcare and Ethics*, Vol. 4, No. 1 (2007), available at <http://www.ispub.com/ostia/index.php?xmlFilePath=journals/ijlhc/vol4n2/sport.xml> (last visited Oct. 24, 2008).

<sup>4</sup> *Jones v. Three Rivers Management Corp.*, 394 A.2d 546, 551 (1978).

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Murray v. Pittsburgh Athletic Co.*, 188 A. 190, 191 (Pa. 1936).

<sup>8</sup> *Martin v. Angel City Baseball Ass'n*, 40 P.2d 287, 287 (Cal.App.2d 1935).

spectator fell into a hole while getting refreshments at a concession stand.<sup>9</sup>

One of the first baseball cases that identified a stadium owner's standard of care owed to its fans was *Crane v. Kansas City Baseball & Exhibition Co.*<sup>10</sup> The plaintiff was a spectator who, after paying for admission to the game, voluntarily chose to sit in an unprotected part of the stadium.<sup>11</sup> After a foul ball struck the plaintiff, he sued the ballpark owners, claiming the defendants were negligent in not screening the entire grandstand.<sup>12</sup> The court found in favor of the owners, reasoning that the owners "engaged in the business of providing a public entertainment for profit" and only needed to exercise "reasonable care," which they did by providing protective screening for "nearby" spectators.<sup>13</sup> The screening protected spectators behind home plate and also protected spectators a few feet down the first-base and third-base lines.<sup>14</sup> Also, the spectator could have sat in one of the protected seats, and the plaintiff had "full knowledge of the risks and dangers of the situation."<sup>15</sup>

In April 2008, the Nevada Supreme Court denied relief to a spectator hit by a foul ball at a minor league baseball game in an unprotected concession area.<sup>16</sup> The victim, Kathleen Turner, was sitting at a table eating a sandwich when a foul ball struck her in the face, breaking her nose, lacerating her face, and knocking her unconscious.<sup>17</sup> The court adopted a "limited duty rule," used in 12 jurisdictions at the time the case was decided.<sup>18</sup> The "limited duty rule" requires stadium owners and operators to take the following precautions: (1) "provide a sufficient amount of protected seating for those spectators 'who may be reasonably anticipated to desire protected seats on an ordinary occasion[,]'" and (2) "provide protection for all spectators located in the most dangerous parts of the stadium, that is, those areas that pose an unduly high risk of injury from foul balls (such as directly behind home plate)."<sup>19</sup> The court reasoned that the stadium owner met the limited duty standard by providing "sufficient protected seating" and thus did not have any further duty to protect spectators from foul balls.<sup>20</sup>

There are also instances where ballpark owners must protect spectators from bats that fly out of players' hands. Seventy years ago, a California court held that a baseball club was negligent in failing to protect spectators walking on an entrance passageway about "forty or forty-five feet" from home plate and first base.<sup>21</sup> The plaintiff was walking on an unprotected area of the passageway to her seat, and the seat was behind the protective screening.<sup>22</sup> After the batter swung at a pitch and missed the ball, the bat flew out of the batter's hands and injured the

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<sup>9</sup> *Louisville Baseball Club v. Butler*, 160 S.W.2d 141 (Ky. 1942).

<sup>10</sup> *Crane v. Kansas City Baseball & Exhibition Co.*, 153 S.W. 1076 (Mo. App. 1913).

<sup>11</sup> *Id.* at 1077.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Turner v. Mandalay Sports Entertainment, LLC.*, 180 P.3d 1172, 1174 (Nev. 2008).

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1175.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 1175-1176.

<sup>21</sup> *Ratcliff v. San Diego Baseball Club of Pacific Coast League*, 81 P.2d 625, 625 (1938).

<sup>22</sup> *Id.*

plaintiff.<sup>23</sup> The court concluded that the ballclub was negligent in failing to provide protective screening for the passageway because there was sufficient evidence that (1) it was not unusual for bats to slip out of batters' hands and end up in that part of the grandstand, and (2) the "exact line of flight" cannot be determined in advance.<sup>24</sup> The ballclub should have known such an unfortunate incident could happen to a spectator, and thus the ballclub failed to exercise reasonable care in protecting the plaintiff or any other spectator in that area.<sup>25</sup>

Traditionally, courts recognized the often-similar defenses of assumption of risk and contributory negligence, which meant that plaintiffs could not recover damages at all if they voluntarily and knowingly assumed the risk of defendant's negligence. If an emergency situation arose where the plaintiff needed to get to a hospital and needed his intoxicated friend to drive, the plaintiff could not recover damages if the intoxicated friend caused an accident and further injured the plaintiff. In that example, the plaintiff was negligent by voluntarily and knowingly getting in a car with an intoxicated person. But currently, the overwhelming majority of American jurisdictions use a comparative negligence standard, abolishing contributory negligence.<sup>26</sup> Interestingly, in California and Oregon, there is no secondary assumption of risk in sports, so the courts in those jurisdictions center their reasoning on whether the defendant owed a duty of care to the plaintiff.<sup>27</sup> In California, to avoid liability, the defendant has the burden to show that the risk was inherent in the sport itself.<sup>28</sup> If the risk was inherent, then the defendant owed no duty to minimize it.<sup>29</sup> This is expressed as the defense of primary assumption of risk. In Oregon, baseball owners have no duty to protect plaintiffs from the inherent risks of a sport, and it is up to the plaintiff to prove that (1) the defendant had a duty to protect the plaintiff, and (2) the defendant breached that duty.<sup>30</sup> If the foul ball risk is inherent in Oregon, plaintiff's inability to establish the duty is what bars his recovery.

In *Knight v. Jewett*,<sup>31</sup> the California Supreme Court defined two categories of assumption of risk: "primary assumption of risk" and "secondary assumption of risk."<sup>32</sup> "Primary assumption of risk" arises in sports cases when the risk is inherent in the sport itself.<sup>33</sup> The risk is imposed on the plaintiff, even though the plaintiff might have been ignorant of the risk.<sup>34</sup> As a result, a defendant stadium owner has no duty to protect spectators from inherent risks and can assert the defense of primary assumption of risk.

"Secondary assumption of risk" occurs when the defendant subjects the plaintiff to a risk greater than what is inherent in the sport, but the plaintiff knowingly and voluntarily exposed

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> Interview with Dean Richardson, Professor of Law, Willamette University College of Law, in Salem, Or. (Oct. 2008). Currently, 46 of 51 jurisdictions (including the District of Columbia) use comparative negligence.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Knight v. Jewett*, 834 P.2d 696, 700 (Cal. 1992). In *Knight*, a player injured the plaintiff in a game of touch football.

<sup>32</sup> *Id.* at 703-704.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

himself or herself to the greater risk.<sup>35</sup> Although people may expressly or impliedly assume a risk, a spectator injured at a baseball game usually assumes the risk through implied means because there is no contract for the spectator to sign expressly agreeing to assume all responsibility for any injuries sustained.<sup>36</sup>

A spectator at a baseball game impliedly assumes the risk of being hit by a foul ball if the spectator has a choice in where to sit.<sup>37</sup> In *Crane*, the plaintiff chose a seat that was unprotected, got hit by a foul ball, and lost his case at trial.<sup>38</sup> Even at major league parks, where spectators are assigned a specific seat, spectators still impliedly assume the risk. In *Schentzel v. Philadelphia National League Club*, the plaintiff, Mrs. Schentzel, got hit by a foul ball in an unprotected area of Shibe Park.<sup>39</sup> Mr. Schentzel bought the tickets for himself and his wife, assured by a ticket seller that the seats were protected.<sup>40</sup> When the couple realized the seats were not protected by screening, Mr. Schentzel tried to go back to the ticket counter, but could not exchange the tickets due to a very long line.<sup>41</sup> Mrs. Schentzel had never seen a live baseball game before that day and claimed that she knew “nothing” about the game.<sup>42</sup> While Mrs. Schentzel had previously watched baseball games on television, she had never seen foul balls go into the stands.<sup>43</sup> Unlike *Crane*, Mr. and Mrs. Schentzel were assigned unprotected seats, and Mrs. Schentzel, the victim, had no precise knowledge of baseball. However, the court still ruled in favor of the ball club.<sup>44</sup> While Mrs. Schentzel did not expressly assume the risks of being a baseball spectator, the court reasoned that the plaintiff, upon returning to the unprotected seats, had exposed herself to a dangerous situation, and therefore, her conduct implied an assumption of risk.<sup>45</sup>

An implied primary assumption of risk situation occurred in *Turner v. Mandalay Sports Entertainment, LLC*.<sup>46</sup> Although foul balls are “a known, obvious, and unavoidable part of all baseball games,”<sup>47</sup> Mrs. Turner, the victim, chose to sit at a table in an unprotected part of the ballpark despite knowing the risks.<sup>48</sup> Mrs. Turner was unable to see the field from where she sat.<sup>49</sup> Also, warning signs all over the stadium reminded spectators to be aware of foul balls, the team printed a disclaimer which exculpated them from liability should a fan get hit by stray balls or thrown bats, and the public address (PA) announcer warned fans about the danger of foul balls before the game began.<sup>50</sup> Having reasonably informed fans of the inherent risk of foul balls, fans assumed that primary risk and the stadium owner owed them no duty to offer further protection.

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<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 720.

<sup>38</sup> *Crane*, 153 S.W. at 301-302.

<sup>39</sup> *Schentzel v. Philadelphia National League Club*, 96 A.2d 181, 183 (Pa. Super. Ct. 1953). Shibe Park was the Philadelphia Phillies’ home ballpark at the time.

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 187.

<sup>45</sup> *Id.* at 185.

<sup>46</sup> *Turner*, 180 P.3d at 1174.

<sup>47</sup> *Id.* at 1175-1176.

<sup>48</sup> *Id.* at 1174.

<sup>49</sup> *Id.*

<sup>50</sup> *Id.*

A similar incident occurred in 2008 at a Greensboro Grasshoppers minor league baseball game.<sup>51</sup> Carroll Master, a baseball fan, enjoyed taking his family to Grasshoppers games.<sup>52</sup> At a late August game, Master was handing out drinks and food to friends and family sitting on the first-base side of the stands, directly behind first base.<sup>53</sup> Suddenly, a foul ball struck Master in the left eye, crushing it and breaking the bones around the eye.<sup>54</sup> Reconstructive surgery failed, so Master is planning to have the left eye removed and will be fitted with a prosthetic eye.<sup>55</sup> Although it is unknown if Master will attempt to sue the Grasshopper organization, based on the limited facts of the article, this unfortunate incident is similar to *Turner* in terms of implied primary assumption of risk. Thus, it is unlikely that Master will recover any damages.

An interesting situation arises when a player breaks his bat and the debris flies into the stands, injuring a spectator. Broken bats are an inherent risk spectators assume in the primary sense when attending a baseball game. Three-quarters of the way through the 2008 MLB season, more than 1,500 baseball bats had been broken.<sup>56</sup> Also, baseball players, at least at the Major League level, have used wooden bats since baseball's early days.<sup>57</sup> Babe Ruth hit his home runs with bats made from hickory wood, a strong, heavy wood that did not break easily.<sup>58</sup> Many MLB players criticized the heavy hickory wood and switched to bats made from northern white ash wood.<sup>59</sup> Ash bats became popular because ash was lighter, players could swing the bats faster, and batting averages had the potential to increase.<sup>60</sup> But since ash bats were lighter, they broke easier than hickory bats.<sup>61</sup> In the 1990s, some MLB players tried bats made from maple wood.<sup>62</sup> Maple is a stronger wood than ash, so players could hit the ball farther, and maple is "less prone to flaking," so players will probably not break as many maple bats.<sup>63</sup> The vast majority of MLB players stuck with ash bats, but after Barry Bonds broke the single-season home-run record in 2001, more players switched to maple bats.<sup>64</sup> Today, about half the bats in MLB are made from maple.<sup>65</sup>

Arguably, the switch to maple bats exposes spectators to a risk greater than that inherent in the usual baseball game. Maple bats tend to shatter when they break, causing large chunks of wood to fly in all directions.<sup>66</sup> By contrast, white ash "tends to crack and flake off in smaller

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<sup>51</sup> Sonja Elmquist, *Foul ball blinds Hoppers fan, crushing his left eye*, News & Record, (Aug. 27, 2008), available at [http://www.news-record.com/content/2008/08/27/article/foul\\_ball\\_blinds\\_hoppers\\_fan\\_crushing\\_his\\_left\\_eye](http://www.news-record.com/content/2008/08/27/article/foul_ball_blinds_hoppers_fan_crushing_his_left_eye).

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

<sup>56</sup> Chris Ladd, *With Makeshift Bat Cave, MLB to Scan Broken Wood for Fan Safety*, Popular Mechanics (Sept. 5, 2008), available at <http://www.popularmechanics.com/outdoors/sports/4281376.html>.

<sup>57</sup> Andrea Thompson, *The Science Behind Breaking Baseball Bats*, Live Science, at <http://www.livescience.com/strangenews/080715-baseball-bat.html> (last updated July 15, 2008).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

chunks,” making it less likely for a spectator to get hit.<sup>67</sup> Since hickory was used in baseball’s early days, it is unlikely that significant data exists on whether hickory bats shattered as violently as maple. But hickory bats were phased out because ballplayers wanted a lighter bat to make more frequent contact with the baseball, and ash bats are still being used in MLB today.<sup>68</sup>

Maple bats injure spectators because maple wood’s characteristics allow the bat to break in a more violent manner.<sup>69</sup> Maple’s pore structure is “ring diffuse,” which means the pores “are more evenly distributed throughout the wood” than ash.<sup>70</sup> In contrast, ash’s pore structure is “ring porous,” meaning the pores are concentrated in certain areas. But that means the ash bat is “weaker” in some areas, and when the baseball hits the ash bat in that weak area, the bat tends to flake or crack.<sup>71</sup> Generally, batters will notice the flaking and get a new bat before the flaked bat completely breaks.<sup>72</sup> On the other hand, the more durable maple bats do not give a batter any warning that it is about to break.<sup>73</sup> Furthermore, the pore structure allows cracks to “grow in any direction,” allowing large chunks to break off and fly into the stands.<sup>74</sup> Although bats also break because the handles are made thinner today (as opposed to several decades ago),<sup>75</sup> any wooden bat with a thinner handle would break easier, and this does not necessarily explain the difference between maple, ash, and hickory bats. Also, while bats have slipped out of batters’ hands and injured spectators in the past,<sup>76</sup> shattered maple wood is arguably more damaging because (1) the flying jagged edges could conceivably do a lot more damage than a smooth surface, and (2) more flying pieces of wood means more fans could be at risk for injury. This scientific insight into baseball bats appears to show that maple baseball bat makers, Major League Baseball, and the players who use the maple bats all impose a greater risk on the spectator than what the spectator would reasonably expect is inherent in baseball. This eliminates the defense of primary assumption of risk.

However, the key issue hinges on whether the spectator knowingly and voluntarily exposed himself or herself to that greater risk. MLB season-ticket holders and other MLB fans are likely aware that bats are prone to breaking, and given the negative media coverage maple bats garnered throughout the 2008 season,<sup>77</sup> more knowledgeable baseball fans might not be able to recover damages. Should a fan get hit by maple bat shards at a MLB game, MLB teams might successfully raise the defense of implied secondary assumption of risk. But when spectators do not know much about baseball, they arguably could not knowingly and voluntarily have exposed themselves to that greater risk. In this latter case, a MLB team’s implied secondary assumption of risk defense might fail.

On April 25, 2008, 50-year-old Susan Rhodes, who is “not much of a baseball fan,” went

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<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> See *Ratcliff*, 81 P.2d at 625.

<sup>77</sup> Jeff Passan, *Fan’s Injury Should Force Bat Policy Change*, Yahoo! Sports, at <http://sports.yahoo.com/mlb/news?slug=jp-bats052908&prov=yhoo&type=lgns> (last updated May 30, 2008).

to a Los Angeles Dodgers baseball game with two friends.<sup>78</sup> Rhodes and her two friends sat along the first-base side of the field, in an unprotected area of the ballpark.<sup>79</sup> In the seventh inning, the batter, using a maple bat, hit a broken-bat single.<sup>80</sup> While Rhodes watched the ball, a large piece of the broken bat hit Rhodes, breaking her jaw and giving her a concussion.<sup>81</sup> Rhodes' medical bills in the first month totaled \$7,000.<sup>82</sup> She hired an attorney to see if the Dodgers would help pay for her medical bills, but the Dodgers refused to hand over any money, contending that Rhodes assumed the risk.<sup>83</sup> The Dodgers, along with every other MLB team, announce before each game that fans should be aware of flying balls and bats going into the stands.<sup>84</sup> Similar signs are posted around Dodger Stadium in English and Spanish.<sup>85</sup> Tickets have a similar disclaimer printed on the back.<sup>86</sup> Rhodes contemplated suing the Dodgers and the bat manufacturer,<sup>87</sup> but it appears that she elected not to file a lawsuit.

Although Rhodes said she would like to see netting extended down the baselines to protect fans in that area,<sup>88</sup> MLB commissioner Bud Selig refuses to extend the netting at this time because he feels it is "not a practical solution" and does not want to obstruct the fans' opportunity to watch the game in any manner.<sup>89</sup> It appears that fans have assumed the risk in some capacity and will be unable to recover damages if they get injured by a broken bat or a foul ball. However, the potential of liability for the greater risk of maple bats remains a possibility.

There are three ways in which stadium owners and ball clubs can address and lower risk. First, MLB can prohibit or regulate the use of maple bats in MLB games. Second, all the MLB teams can provide additional screening to further protect the spectators. Finally, all MLB teams can warn fans over the PA system and post warning signs throughout the stadium.

Prohibiting use of maple bats might be sufficient because this eliminates the risk altogether. MLB could also regulate maple bats by suspending their use and not allowing their use in a MLB game until maple bats have been tweaked in a manner that will not pose a risk to spectators. However, this method may significantly affect the game because so many MLB players use maple bats and might suffer decreased performance if the players are forced to switch back to ash bats.

Forcing MLB teams to provide additional screening might work because it stresses safety first at a stadium. Netting is inexpensive and should protect spectators from the pieces of maple bat most likely to cause significant injury. However, a problem arises in a spectator being unable to catch a foul ball. Many baseball fans go to a game not only to cheer on their favorite team, but also in hopes of catching a foul ball to take home. Furthermore, a baseball fan likely wants

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<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> Jim Armstrong, *Bats Shattering Safety in Big Leagues*, Denver Post, (July 21, 2008), available at [http://www.denverpost.com/sports/ci\\_9943664](http://www.denverpost.com/sports/ci_9943664).

to watch a baseball game without any obstructions or distractions. If protective screening is extended too far, one can say a fan's opportunity to fully enjoy the game will be affected.

Warning fans at a baseball game over the PA system and through signs is one of the most cost-effective methods a team can use. Generally, the majority of people at stadiums are intelligent enough to understand the warnings, and parents will likely take further steps to protect their young children from sustaining injury. However, warnings might not always be sufficient to warn people unable to read or comprehend such signs, such as mentally challenged persons and foreigners.

It appears that teams and ballclub owners satisfy their duty of due care by using signs and occasionally reminding fans of the risks of flying balls and bats. It might be impractical or inefficient — and probably annoying — to keep reminding thousands of spectators over the PA system every minute or every inning of possible flying balls or bats. By notifying fans through the PA system and through signs, both the hearing-impaired and the seeing-impaired patrons are notified. Furthermore, in the case of a ballpark like Dodger Stadium, where Hispanics make up a large portion of the facility's patrons, the owners and the team take the added step of warning fans in Spanish. Although mentally challenged people or infants may still not be on notice of the risks, caretakers (and parents or guardians) are likely present to help protect these people.

Furthermore, prohibiting or regulating use of maple bats could prove costly in several respects. First, players might have contracts with maple bat companies and would have to terminate those deals, losing significant sums of money. Second, maple bat companies could sue MLB, a MLB team, or the player, resulting in costly litigation. Third, in an extreme case, players who experienced success with maple bats might experience a drop-off in performance. Those players could get traded or demoted to the minor leagues, and those teams the players played for might see a downturn in their revenues.

In an article published in the *Sports Lawyers Journal*,<sup>90</sup> Scott B. Kitei cited two cases that attempted to explain why many seats at a baseball stadium are left unprotected. First, in *Benejam v. Detroit Tigers, Inc.*, the Michigan Court of Appeals said:

There is an inherent value in having most seats unprotected by a screen because baseball patrons generally want to be involved with the game in an intimate way and are even hoping that they will come in contact with some projectile from the field (in the form of a souvenir baseball).<sup>91</sup>

Second, in *Akins v. Glen Falls City School District*, the New York Court of Appeals concluded, “[M]any spectators prefer to sit where their view of the game is unobstructed by fences or protective netting and the proprietor of a ball park has a legitimate interest in catering to those desires.”<sup>92</sup> In his article, Kitei also noted that the Seattle Mariners take extra steps to protect fans at Safeco Field by offering fans the opportunity to “lessen their

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<sup>90</sup> Scott B. Kitei, *Is the T-Shirt Cannon “Incidental to the Game” in Professional Athletics?*, 11 Sports Law J. 37 (Spring 2004).

<sup>91</sup> *Id.* at 41-42. See also *Benejam v. Detroit Tigers, Inc.*, 635 N.W.2d 219, 222 (Mich. App. 2001).

<sup>92</sup> Kitei at 42. See also *Akins v. Glen Falls City School Dist.*, 424 N.E.2d 531, 533 (N.Y. 1981).

risk” by exchanging their ticket close to the field for a ticket in the upper deck.<sup>93</sup>

In summary, because baseball has been around for a long time and its inherent risks are widely known, spectators with little knowledge of the game impliedly assume the primary risks of the game and generally cannot recover damages for injuries suffered at a baseball game. And even risks that are not inherent, such as fragile maple bats, might not lead to owner liability since owners might raise an implied secondary assumption of risk defense against knowledgeable fans.

## HOCKEY

Like baseball stadium owners, arena owners and operators must exercise reasonable care to protect spectators at hockey games.<sup>94</sup> A hockey team might breach its duty of care to a spectator if the team does not eliminate or adequately warn spectators of dangers that cannot be reasonably expected.<sup>95</sup> When hockey first came to the United States, it was arguably easier for teams to breach the duty of care to spectators.<sup>96</sup> If spectators had never seen an ice hockey game before, surely they could not have reasonably expected a puck to fly into the seats. It is important to note that ice hockey does not have as deep a history in the United States as baseball.<sup>97</sup> One court decision used this reasoning to imply that, at least a half-century ago, arena owners and hockey teams in the United States had a heightened duty of care to hockey spectators, at least as compared to the duty of care owed to baseball spectators by arena owners and baseball teams.<sup>98</sup>

In *Gilchrist v. City of Troy*,<sup>99</sup> a New York appellate court applied a two-prong reasonable care test — used previously only in baseball cases — to determine if a state’s rink owner exercised reasonable care in protecting its spectators at a hockey game. While the plaintiff and her infant son were attending an amateur hockey game at a facility owned by the defendant, a hockey puck struck the plaintiff’s son in the face.<sup>100</sup> The infant “was standing behind the dasher boards” (which encircle the skating surface) in an unprotected area of the facility at the time of the injury.<sup>101</sup> The *Gilchrist* court cited *Akins v. Glens Falls City School Dist.*,<sup>102</sup> where the New

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<sup>93</sup> Kitei at 43.

<sup>94</sup> Champion, *supra* note 1, at 128.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

<sup>97</sup> Alexander Cartwright created the first rules for baseball in 1845, and his rules were widely adopted in the United States. In contrast, the modern ice hockey game started in Canada in the 19th century and did not come to the United States until the Western Pennsylvania Hockey League, a semi-professional league, was founded in 1901. For more information on the respective histories of baseball and hockey, see *The History of Baseball — Alexander Cartwright*, About.com, <http://inventors.about.com/library/inventors/blbaseball.htm>; *Semi Professional Hockey Leagues: Western Pennsylvania Hockey League*, History of North American Hockey, [http://www.hockeyleaguehistory.com/Western\\_Pennsylvania\\_Hockey\\_League\\_1901.htm](http://www.hockeyleaguehistory.com/Western_Pennsylvania_Hockey_League_1901.htm).

<sup>98</sup> *Morris v. Cleveland Hockey Club, Inc.*, 105 N.E.2d 419, 426 (Ohio 1952) (“There is sound reasoning for the baseball rule [of assumption of risk]. Baseball is the national pastime of the United States. . . . Although hockey is becoming ever more popular, it is not nearly so universally played as is baseball, and, as we have pointed out, its dangers are certainly not so obvious to a stranger to the game as would be the dangers incident to baseball.”).

<sup>99</sup> *Gilchrist v. City of Troy*, 113 A.D.2d 271, 273-274 (N.Y. App. Div. 3 Dept. 1985); see also *Sawyer v. State of New York*, 127 Misc.2d 295 (N.Y. 1985) (similar case decided ten months earlier).

<sup>100</sup> *Gilchrist*, 113 A.D.2d at 272.

<sup>101</sup> *Id.* at 272-273.

<sup>102</sup> 53 N.Y.2d 325 (1981).

York Court of Appeals reversed a negligence suit against the school district and held that the plaintiff had failed to present evidence that the protective screening was inadequate at the school district's baseball field.<sup>103</sup> The *Akins* court held:

[I]n the exercise of reasonable care, the proprietor of a ball park need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest. Moreover, such screening must be of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire such seating in the course of an ordinary game.<sup>104</sup>

The *Gilchrist* court used the *Akins* rule in a hockey case due to the similarity of spectator risks in baseball and hockey.<sup>105</sup> Therefore, the *Gilchrist* court concluded:

[T]he owner's duty owed to spectators is discharged by providing screening around the area behind the hockey goals, where the danger of being struck by a puck is the greatest, as long as the screening is of sufficient extent to provide adequate protection for as many spectators as may reasonably be expected to desire to view the game from behind such screening.<sup>106</sup>

Here, the appellate court found for the defendant because (1) the city provided reasonable care by "providing adequate screening behind the area of the hockey goals" and (2) the infant could have viewed the game from behind the protective screen.<sup>107</sup> The court also noted that both mother and son had attended hockey games in the past and were familiar with the rules of the game.<sup>108</sup>

In Canada, hockey is a popular sport and, much like baseballs in the United States, flying pucks are treated as inherent risks.<sup>109</sup> Therefore, if a spectator is injured by a deflected puck at a hockey game in Canada, the defendant may successfully raise an implied primary assumption of risk defense against the injured spectator, and the fan will not be able to recover damages. But in the United States, the level of reasonable care for ice hockey arena owners depends on the area of the country where the incident occurred and the popularity of the sport in that area.<sup>110</sup>

In *Morris v. Cleveland Hockey Club, Inc.*, a flying puck hit Morris, a spectator sitting in an unscreened seat at the defendant's arena in Ohio.<sup>111</sup> Morris sat on the side of the rink, about

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<sup>103</sup> *Id.* at 330-332.

<sup>104</sup> *Id.* at 331.

<sup>105</sup> *Gilchrist*, 113 A.D.2d at 274; see also *Ingersoll v. Onondaga Hockey Club, Inc.*, 245 A.D. 137, 139 (N.Y.S. 1935). ("It seems to me, that appellant [Ingersoll] in attending a hockey game occupied precisely the same status as a spectator at a baseball game and that the same rules should be applied in each instance.").

<sup>106</sup> *Id.* at 273-274.

<sup>107</sup> *Id.* at 274.

<sup>108</sup> *Id.* at 275.

<sup>109</sup> *Morris*, 105 N.E.2d at 425-426. The *Morris* court cites two Canadian cases in its opinion: *Elliott v. Amphitheater, Ltd. (Manitoba)*, 3 W.W.R. 225 (Can.); *Mlle. Gervais v. Canadian Arena Co.*, 74 R.J.Q., C.S., 389 (Can.). However, the *Morris* court also points out several differences. In *Morris*, the plaintiff was attending his first hockey game, while the injured fans in the Canadian cases had been to hockey games before. In fact, the injured player in *Elliott* was also a hockey player.

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 420-421.

five feet from a low rail with no screens to protect the spectators.<sup>112</sup> In contrast, the ends of the rink were protected with “heavy wire screens . . . over six feet in height.”<sup>113</sup> Morris sued the hockey club, asserting the club was negligent in failing to provide screening on the sides of the rink to protect the spectators from flying pucks.<sup>114</sup> Morris was attending his first hockey game and admitted he was “unfamiliar with the sport.”<sup>115</sup> The court found for Morris for several reasons.

First, hockey poses a greater risk to spectators because the dimensions of a hockey rink are smaller than the dimensions of a baseball field, not giving spectators as much time to react to deflected pucks.<sup>116</sup> Also, it is arguably much harder to see a hockey puck in an arena than it is to see a baseball in a stadium. A hockey puck is made of black rubber, and games usually take place in a roofed arena with limited lighting on the spectators. In contrast, a baseball game uses a white baseball, and there is significant lighting throughout the baseball stadium.

Second, the *Morris* court also noted that the defendant hockey club knew that a spectator sitting in an unprotected part of the arena was at risk of being hit by a deflected puck.<sup>117</sup> Cleveland Hockey Club was a member of the American Hockey League (AHL), comprised of ten teams.<sup>118</sup> While six of the ten teams put up protective screening on the sides of their rinks, Cleveland was one of the four teams in the AHL that did not provide such screening.<sup>119</sup>

Third, the court reasoned that the risk of a flying hockey puck was not foreseeable to a spectator because hockey does not have the deeply rooted history in the United States that baseball enjoys.<sup>120</sup> Furthermore, while flying baseballs are inherent in the sport of baseball, in contrast, hockey pucks were meant to slide across the ice.<sup>121</sup> Therefore, Cleveland Hockey Club breached its duty of care in failing to provide sufficient screening to protect Morris and the other spectators in the arena.<sup>122</sup>

In Minnesota, hockey spectators also cannot recover damages after being struck by a puck at a hockey game because defendants in that region are more likely to raise successful defenses of implied primary assumption of risk.<sup>123</sup> In *Modec v. City of Eveleth*, a flying puck struck Modec, a female spectator, in an arena building owned by the city, and she sued the city

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<sup>112</sup> *Id.* at 421.

<sup>113</sup> *Id.* at 422.

<sup>114</sup> *Id.* at 421.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 426. A standard North American hockey rink is 200 feet long by 85 feet wide, much smaller than a baseball field. In virtually all MLB parks, the distance from home plate to the center field wall is over 400 feet and is thus “longer” than a hockey rink. Also, with the bases and home plate 90 feet away from each other in a diamond shape, it is clear that a baseball field is much wider than a hockey rink.

<sup>117</sup> *Id.* at 425.

<sup>118</sup> *Id.* at 422.

<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 426.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 427.

<sup>123</sup> *Modec v. City of Eveleth*, 29 N.W.2d 453, 456-457 (Minn. 1947) (“Hockey is played to such an extent in this region and its risks are so well known to the general public that as to the question before us there is no difference in fact between the two games [baseball and hockey] so far as liability for flying baseballs and pucks is involved.”).

seeking negligence damages.<sup>124</sup> The arena had wire nets behind the goal areas that were “of a sufficient height to protect against possible injury to any spectator sitting behind the goals from a flying puck if it is raised off the ice by a player’s stick.”<sup>125</sup> *Modec*, who had attended many hockey games before, argued that the city should have provided protective screening on the sides of the rink to prevent spectators from serious injury.<sup>126</sup> The *Modec* court found for the city after comparing the risks of hockey to the risks of baseball and finding the two sports’ inherent risks — flying pucks in hockey and foul balls in baseball — were both “matters of common knowledge.”<sup>127</sup>

In the National Hockey League (NHL), the dasher boards are about “40-48 inches” high and shatter-resistant glass on top of the boards is eight feet tall.<sup>128</sup> Before October 2002, only one NHL arena mandated netting behind the goal area.<sup>129</sup> Now every NHL facility requires such netting behind the goals — but it took a teenage girl’s death to change the rule.<sup>130</sup>

On March 16, 2002, Britannie Cecil, 13, attended a Columbus Blue Jackets NHL game in Columbus, Ohio, as an early 14th birthday present.<sup>131</sup> She was sitting in a seat behind one of the goals when a deflected puck struck her in the head.<sup>132</sup> Cecil died two days later.<sup>133</sup> The coroner concluded that the puck caused artery damage and “led to a ‘vicious cycle’ of clotting in the artery and swelling of the brain.”<sup>134</sup> Cecil’s death was the first spectator fatality in NHL history.<sup>135</sup> After Cecil’s death, NHL commissioner Gary Bettman ordered that nets be installed above the glass behind the goal areas of the rink.<sup>136</sup> The netting extends 18 feet above the glass and also protects spectators seated in the corners behind the goal.<sup>137</sup>

In light of the hockey cases U.S. courts have seen throughout the years, it is troubling to learn that the NHL made protective netting mandatory just six years ago. It is even more disturbing in light of *Morris*, a case involving protective netting that was decided in Ohio, the jurisdiction where Cecil’s death took place. Although one might say the Columbus Blue Jackets organization should have put sufficient protective screening all around the rink to protect spectators in light of the *Morris* holding, there are at least three reasons why Columbus might not have needed to do so until late 2002.

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<sup>124</sup> *Id.* at 454.

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.* at 455-457.

<sup>128</sup> AP, *Coroner’s report: Puck snapped girl’s head back, damaging artery*, SI.com., available at [http://sportsillustrated.cnn.com/hockey/news/2002/03/20/puck\\_death\\_ap/](http://sportsillustrated.cnn.com/hockey/news/2002/03/20/puck_death_ap/) (last updated March 20, 2002).

<sup>129</sup> *Id.* America West Arena (now the U.S. Airways Center), the former home of the Phoenix Coyotes, was the only NHL arena that required protective netting. Without the netting, fans enjoying the game in an overhanging balcony would otherwise be subject to serious injury.

<sup>130</sup> Tom Worgo, *The NHL gets nets, but can it stop lawsuits?* Hockey Digest, (Nov. 2002), available at BNET.com, [http://findarticles.com/p/articles/mi\\_m0FCM/is\\_1\\_31/ai\\_91912859](http://findarticles.com/p/articles/mi_m0FCM/is_1_31/ai_91912859).

<sup>131</sup> Associated Press, *Teenage Girl Dies After Getting Hit in the Head*, ESPN.com, available at <http://sports.espn.go.com/nhl/news/story?id=1354060> (last updated March 20, 2002).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Worgo, *supra* note 130.

<sup>135</sup> *Id.*

<sup>136</sup> Worgo, *supra* note 130.

<sup>137</sup> *Id.*

First, spectators today are more protected on the sides of the rink than back in 1952. The NHL has eight-foot-high glass all around the rink, while, in *Morris*, spectators were virtually unprotected and only had a “low rail” to separate themselves from the action.<sup>138</sup> Most of the prior cases discussed in this article are minor league and amateur hockey games, where “the glass is not as high around the rink (as in NHL arenas).”<sup>139</sup>

Second, commissioner Bettman cited a comprehensive report completed after Cecil’s death. He noted that “[t]he primary finding of the analysis and report was that NHL arenas are safe and that they employ reasonable and adequate, procedures and equipment to minimize risk.”<sup>140</sup> Black’s Law Dictionary defines “reasonable” as “fair, proper, or moderate under the circumstances.”<sup>141</sup> The definition does not explicitly state that a “reasonable” action needs to be an option that guarantees fan safety because such an option might be too impractical or impossible to achieve.

Third, hockey has become more popular in the United States since *Morris*. In 1952, there were only six teams in the NHL. Currently, there are 30 teams, 24 of which are based in the United States.<sup>142</sup> The addition of new hockey teams can also be attributed to legendary players getting traded to various parts of the United States, subsequently increasing fan interest.<sup>143</sup> With growing technology and an increasing number of hockey teams throughout the United States, hockey has gained more viewers and fan support, even after an NHL lockout cancelled the 2004-2005 season.<sup>144</sup> Consequently, fans are much more aware of the risks in attending a game.

In hockey cases, a court might inspect how popular the sport is in that particular state to determine whether a defendant arena owner might succeed in raising an implied primary assumption of risk defense. States in the central and eastern regions of the United States, where hockey is popular, appear to follow *Modex* and refuse to hold a defendant rink owner liable when

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<sup>138</sup> *Morris*, 105 N.E.2d at 421.

<sup>139</sup> Associated Press, *supra* note 131.

<sup>140</sup> Worgo, *supra* note 130.

<sup>141</sup> Black’s Law Dictionary 594 (3d Pocket ed. 2006).

<sup>142</sup> *National Hockey League*, Wikipedia, <http://en.wikipedia.org/wiki/Nhl>. Those six teams, collectively the “Original Six,” are the Montreal Canadiens, Toronto Maple Leafs, Detroit Red Wings, Chicago Black Hawks (now Blackhawks), Boston Bruins, and New York Rangers. The NHL first expanded in 1967, adding six more teams. The NHL’s last expansion came in 2000, when the Minnesota Wild and the Columbus Blue Jackets joined the league.

<sup>143</sup> *Id.* For example, Wayne Gretzky’s trade from the Edmonton Oilers to the Los Angeles Kings on August 9, 1988, helped popularize hockey in the Western part of the United States. Los Angeles, not previously known for having a large hockey fan base, saw a dramatic increase in attendance after Gretzky’s arrival. Gretzky’s popularity in Los Angeles played a factor in the NHL’s addition of West Coast teams. The San Jose Sharks joined the NHL in 1991, the Anaheim Ducks entered the NHL in 1993, and the Phoenix Coyotes moved from Winnipeg in 1996, further popularizing hockey in the “Sun Belt.”

<sup>144</sup> Tripp Mickle, *Hockey Shows Gains in Arenas and on TV*, Sports Business Journal, (Apr. 14, 2008), available at <http://www.sportsbusinessjournal.com/article/58672>. In the 2007-2008 season, 21.2 million fans attended NHL games, overall average attendance increased 1.8 percent, and paid attendance increased 2 percent. Versus and the National Broadcasting Company (NBC), two channels in the United States that televised hockey games in the 2007-2008 season, saw their average ratings rise.

a flying puck injures a spectator.<sup>145</sup> The more popular hockey is in a particular state, the more likely a court will conclude that deflected pucks are an inherent risk of the sport.

To determine whether a defendant arena owner might succeed in raising an implied secondary assumption of risk defense, a court will examine the plaintiff's knowledge of the game. If the plaintiff had attended hockey games in the past or knew the rules of the game, it is unlikely that the plaintiff will recover. In *Morris*,<sup>146</sup> the plaintiff was attending his first hockey game and did not know how the game was played, so Morris could not have been expected to assume any risk while attending the game. In contrast, in *Modoc*,<sup>147</sup> the plaintiff had attended many prior hockey games and thus could be expected to know that a puck could likely deflect into the crowd.

### CONCLUSION

The current state of the law in baseball and hockey appears fair and appears to satisfy reasonable safety expectations. An owner or team should only be required to exercise reasonable care in protecting spectators from those risks which are not an inherent risk of the sport. It would be unreasonable for owners and teams to be required to satisfy a higher standard of care which would guarantee that spectators will be protected from injury in every case. Compliance with such a standard would not only be expensive, it might also have a negative impact on other spectators in watching the performance. For example, forcing a baseball stadium owner to screen every portion of the foul ball area would affect many people who want to see a game without any obstructions and hope to catch a souvenir foul ball.

The current law of only requiring reasonable care appears to satisfy fan interest in the game. Current protections meet the standard of reasonable care, like the limited protective netting at baseball stadiums and hockey rinks. Also, owners and teams have taken further steps to protect spectators at events, like announcing warnings over the PA system, posting warnings throughout the stadium, and hiring security. While these safety measures will adequately protect spectators, the protections will not significantly impair a spectator's ability to enjoy the action.

Spectator injuries resulting from broken maple bats is arguably not an inherent risk of baseball because the flying bat shards expose a spectator to a risk greater than that inherent in the sport. However, teams and baseball owners should not have to ban maple bat use, severely restrict maple bat use, or provide additional protective screening for spectators. These options either prevent fans from fully enjoying the game or prevent players from using maple bats in order to play to their full potential. Warning spectators through signs and through PA announcing would satisfy the owner's duty of reasonable care to spectators because fans would be notified of a possible danger and could take measures to protect themselves from injury. Spectators would still have a chance to watch an unobstructed game, and players who have performed well with maple bats could continue to use those bats. Without issuing any type of

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<sup>145</sup> See e.g. *Riley v. Chicago Cougars Hockey Club, Inc.*, 100 Ill.App.3d 664 (1981); *Moulas v. PBC Productions Inc.*, 570 N.W.2d 739 (Wis. Ct. App. 1997); *Schneider v. American Hockey and Ice Skating Center, Inc.*, 777 A.2d 380 (N.J. Super. Ct. App. Div. 2001); and *Hurst v. East Coast Hockey League, Inc.*, 637 S.E.2d 560 (S.C. 2006).

<sup>146</sup> *Morris*, 105 N.E.2d at 421.

<sup>147</sup> *Modoc*, 29 N.W.2d at 454.

warning to a spectator, an implied secondary assumption of risk defense from the team or the owner might fail because the spectator might not have knowingly or voluntarily assumed the greater risk. In that case, the team and the baseball owner should be held liable for a spectator's injury. However, if teams and ballclub owners take the added step of warning spectators of possible flying bats entering the stands, an implied secondary assumption of risk defense should be successful because fans will have knowingly and voluntarily assumed the risk when they chose to remain in an unprotected area of the stadium.

