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INCREASING THE INHERENT RISKS OF BASEBALL: LIABILITY FOR INJURIES ASSOCIATED WITH HIGH-PERFORMANCE NON-WOOD BATS IN SANCHEZ V. HILLERICH & BRADSBY CO.¹

You'll never see pro baseball with aluminum bats . . . . They'd need to put a screen in front of pitchers, put the infielders in the outfield and move the fans back.²

I. Introduction

Participation in any sport involves some risk of injury.³ The goal of decreasing injury risks has sparked important innovations in sports equipment design.⁴ Occasionally, however, innovations have increased the risk of injury to participants.⁵ Where competition be-

5. See, e.g., Press Release, United States Consumer Product Safety Commission, CPSC Announces Consent Agreement with Manufacturers and Distributors of Aluminum Baseball Bats (Apr. 13, 1976), available at http://www.cpsc.gov/CPSCPUB/PREREL/prhtml76/76024.html (announcing agreement between Consumer Products Safety Commission and aluminum bat manufacturers and distributors addressing hazards associated with aluminum bat grips). In 1975, the Commission charged that the one-piece rubber grips and knobs of aluminum bats could deteriorate and separate from the handle, causing the bat to be propelled during a swinging motion and having the potential for striking a person in near proximity to the batter. See id.; see also Sean Millar, Injury of the First Metatar-
tween sports equipment manufacturers drives innovation in design, manufacturers owe athletes a duty of care for designs that increase the safety risks inherent in their sports.\(^6\)

Major League Baseball has never endorsed the use of aluminum and aluminum alloy ("non-wood") bats for its professional athletes.\(^7\) In amateur leagues, young players swing high-performance non-wood bats, designed to weigh less, produce faster swings, and drive the ball harder and farther.\(^8\) The prospect of enhanced hit-

spo[halangeal joint: Turf Toe, at http://podiatry.curtin.edu.au/encyclopedia/turf_toe/ (last modified May 10, 1999) (describing "turf toe" as foot injury historically associated with artificial surfaces). Research indicates artificial surfaces increase friction; the forefoot becomes fixed due to the high friction surface, and momentum from an external force causes the foot to hyperextend. See id. Artificial surfaces gradually become harder and less shock absorbent as they age, also contributing to risk of player injury. See id.; see also Diana Settles, Prevention of Sports Injuries: Snow Skiing, at http://siri.uvm.edu/ppt/sportsinj/ (last visited Jan. 12, 2004) (noting in alpine skiing injuries, ski-pole grip using broad superior plate may cause hyperextension injury to thumb).

6. For a discussion of policy concerns regarding manufacturer liability for equipment designs that increase risks to players, see infra notes 130-36 and accompanying text.

   
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. NOTE: No laminated or experimental bats shall be used in a professional game (either championship season or exhibition games) until the manufacturer has secured approval from the Rules Committee of his design and methods of manufacture.

   . . .


   Baseball bat manufacturers, through advances in modern technology, have been able to create aluminum bats that are lighter in weight than wooden bats yet still meet the required measurement and size standards. These lighter bats allow for faster bat speeds during swings that result in greater hit-ball velocity. Because the ball exits the aluminum bat with a higher velocity than would a ball from a wooden bat, there is naturally a greater danger of injury to defensive players.

   Id.; see also J.J. Trey Crisco, Ph.D. and Rick Greenwald, Ph.D., The Whys and Hows of Baseball Bat and Ball Regulation: A Scientific Perspective, 2000 NAT’L INST. FOR SPORTS SCI. & SAFETY, at http://www.nissan.org/BB_Summary_6.8.00.htm (asserting most compelling reason for regulation of bat performance is possibility of serious injury to pitchers and fielders from being hit with batted ball). The authors note:

   [H]igher performance implies higher batted ball speed, less time to react to the batted ball, and a greater likelihood of contact. It is obvious that
ing and superior durability has made aluminum bats the overwhelming choice among college and amateur leagues. In fact, many believe these state-of-the-art aluminum bats have changed the nature of amateur baseball significantly.

Unfortunately, incidents of devastating injuries to young players, caused by balls sharply batted off of aluminum bats, have become increasingly common. Severe injuries have alarmed parents, ended young athletic careers, and precipitated legislative attempts to prohibit the use of non-wood bats by minors. Such increases in contact speed can increase the severity of injury. Further, the number of high speed hits, the greater the risk of injury.

Id.; see also Press Release, New York City Council Member Jim Oddo, At Bat: The Safety of Our Kids and One Councilman’s Fight to Ban Aluminum and Bring Back Wood (Mar. 25, 2002) [hereinafter Oddo Press Release] (advocating ban of aluminum bat use by minors and describing new generation of aluminum bats and their startling departure in design from traditional wood counterparts), available at http://www.nyssf.org/baseballbats.html. Oddo criticized the use of aluminum bats as follows:

Graphite and aluminum combinations? Bats with pressurized air chambers? Triple wall bats with coiled Springsteel? Bats made of scandium and other highly advanced materials? Bats developed under a cryogenic process? Electric bats? Is this baseball? Are these the tools we want in the hands of our little leaguers and high school athletes? The bats are becoming lighter, the swings quicker, and the balls are traveling faster and farther — all with a blatant disregard for the pitcher, or the third baseman, for that matter.

Id. (quoting Oddo); see also Barnett, supra note 2 (providing design aspects of Hillerich & Bradsby’s Louisville Slugger “Air Attack 2” alloy bat). “The bat’s thin walls create a ‘trampoline effect’ when a ball hits it. To prevent denting, the bat is filled with pressurized gas.” Id.

9. See Barnett, supra note 2 (noting while these young players are allowed to use wood bats, almost no one does). For a discussion of the prevalence of aluminum bat use by amateur teams, see infra notes 26-30 and accompanying text.

10. See generally Michelle A. Cusimano, Note, National Collegiate Athletic Association Strikes Out Aluminum Bat Manufacturer, 43 N.Y.L. SCH. L. REV. 1061, 1069-73 (2000) (describing revolutionary effect non-wood bats have had on nature of college baseball, including better performance statistics than professional players, shattered performance records, football game-like scores, injuries to pitchers early in their careers, repositioning of defensive outfielders, and debate and litigation between manufacturers and NCAA over bat performance standards).

11. See generally Oddo Press Release, supra note 8 (summarizing recent injuries and deaths resulting from balls struck by aluminum bats).

12. See Barnett, supra note 2 (quoting parent of high school pitcher who suffered severe head injuries after being hit by ball sharply batted off aluminum bat). “What disturbed me the most is that [we as parents have] been in the dark about the equipment these kids are using . . . .” Id.; see also Mike Vlahovich, Mead Pitcher Recovering From Line Drive to His Head, SPOKESMAN-REVIEW, Apr. 24, 1997, at N10 (reporting end of local high school pitcher’s prospective collegiate athletic career because of bruise to brain and hearing loss); Oddo Press Release, supra note 8 (introducing bill to ban use of non-wood bats by minors and summarizing accounts of recent injuries and deaths resulting from balls hit off of aluminum bats); Associated Press, Massachusetts Mulls Ban on Aluminum Bats, WASH. TIMES, Oct. 31, 2002, available at http://www.washtimes.com/national/20021031-84246631.htm
injuries have even prompted the designer of one aluminum bat, the popular "Air Attack 2" manufactured by Hillerich & Bradsby's Louisville Slugger Division, to a crusade against his own design by petitioning the Consumer Product Safety Commission to recall all aluminum bats that exceed wood-bat performance standards. Bat manufacturers have long denied that aluminum bats increase the risk of injury to players, alleging only anecdotal evidence exists to

(reporting proposed first-in-the-nation ban on aluminum baseball bats in high school games). In fact, "the Massachusetts Interscholastic Athletic Association took it upon themselves to prohibit the use of non-wood bats in the state high school baseball tournament this spring to be followed by an entire season of wood-only use in 2004." Letter from Shawn McCarthy, Director, League of Fans, to Myles Brand, President, National Collegiate Athletic Association and Scott Blanchard, President, National Federation of State High School Associations (May 8, 2003) [hereinafter League of Fans] (stating Massachusetts ban watched with great interest by other states considering ban of non-wood bats for high school baseball regardless of NFHS mandate), available at http://www.leagueoffans.org/batsletter.html.


MacKay's petition was accompanied by more than twenty technical studies and references to more than 200 exhibits. See Barnett, supra note 2 (conveying MacKay's efforts). The petition was subsequently denied by the Commission. See Letter from Todd Stevenson, Secretary, U.S. Consumer Product Safety Commission, to J.W. MacKay, Jr. (Apr. 5, 2002) (denying MacKay’s petition on basis of insufficient information), available at http://www.cpsc.gov/LIBRARY/FOIA/FOIA02/petition/Baseball.pdf. Among the reasons for denial, the Commission stated:

Developing requirements for non-wood bats would be a complex matter. Essentially, the Commission would need to determine what is an unsafe level of play and what performance requirements for bats are necessary to bring them to a safe level. Current data and information are not sufficient for this task. Any bat, wood or non-wood[,] can produce injuries or death. The Commission cannot simply decree that non-wood bats must perform like wood bats. It cannot presume that wood bats are safe and non-wood bats are unsafe. Rather, it would have to show that performance requirements are necessary to change bat performance from some unreasonable level to an acceptable level. The Commission does not have information to determine where that line should be drawn . . . .

[I]t appears that the NCAA, [the American Society for Testing and Materials], the Amateur Softball Association and the National Federation of State High School Associations are actively involved in evaluating the performance of non-wood bats and their possible impact on safety. The Commission cannot say at this time that their efforts are insufficient. The Commission is asking the staff to continue monitoring bat performance and bat-related incidents and the measures taken by those organizations to address the safety of non-wood bats.

Id.
support a theory of increased risk.\textsuperscript{14} There certainly is no shortage of such accounts.\textsuperscript{15}

In response to serious injuries to minors, the National Federation of State High School Associations ("NFHS") implemented standards on the length and weight of non-wood bats in order to limit the maximum exit-speed of a baseball to 97 miles per hour.\textsuperscript{16} Aluminum bats arguably increase the risk of injury most in the hands of college players, due to stronger batters and faster pitching at this level.\textsuperscript{17} The National Collegiate Athletics Association ("NCAA") adopted aluminum bat performance regulations in 1998, which it

\begin{enumerate}
\item See Frank Lombardi, \textit{Bill to Foil Aluminum Bats}, N.Y. \textsc{Daily News}, Sept. 28, 2002 (noting testimony of President of Louisville Slugger, Marty Archer, at New York City Council hearing held to consider proposed bill to ban aluminum bats), available at http://www.nydailynews.com/news/local/story/22343p-21218c.html. Mr. Archer insisted, '[n]o recognized rule-making body has produced any data to indicate that aluminum bats increase the incidence of injury among players.' \textit{Id.}; see also Massachusetts Mulls Ban on Aluminum Bats, \textit{supra} note 12 (quoting statement from Jim Darby, then Vice President of major manufacturer of aluminum bats, that safety question "has been answered" by multiple tests).
\item See Barnett, \textit{supra} note 2 (observing in 2000 that, while risks associated with aluminum bats had not been determined, much anecdotal evidence existed to indicate balls struck by high-performance non-wood bats hit pitchers more frequently and caused greater damage).
\item High school players have suffered severe injuries by balls batted off of aluminum bats. See id. One example is the injury suffered by Jeremy Brett, a high school baseball player in Enid, Oklahoma, who was struck in the face by a line drive hit off of an aluminum bat in 2000. See id. His face and skull needed five metal plates, 75 staples, and 12 screws to repair the damage. See id. Today, Brett continues to suffer from headaches and blind spots in his vision. See id. An Oklahoma Federal Court awarded Brett $100,000 in December of 2001. See id. In fact, similar injuries involving aluminum bats have caused deaths. See Oddo Press Release, \textit{supra} note 8 (reporting deaths of 17-year-old in 1997 and 14-year-old in 1998, both deaths associated with aluminum bat use).
\item Severe injuries associated with aluminum bats have been reported outside of the United States as well. See Barnett, \textit{supra} note 2 (reporting deaths of at least seven high school players in Japan since 1974, resulting in requirement that all high school players wear specially designed helmets).
\item See Barnett, \textit{supra} note 2 (noting college injuries). During the 2000 NCAA regional playoffs in Minnesota, two college pitchers were hit in the face in one week; both pitchers suffered broken jaws, and one had to have titanium plates inserted to repair the damage. See id.
\end{enumerate}
planned to implement in August of 1999 after further study; this decision was based partly on the 54 percent increase in team home-run averages between 1994 and 1998, and the NCAA’s desire to restore competitive balance to the game.18 Explaining its decision to delay implementation, the NCAA recognized the real potential for injury but asserted the importance of its adoption of independent verifiable testing to assure appropriate standards for collegiate competition.19 In the meantime, college pitcher, Andrew Sanchez, suffered a fractured skull when a baseball, estimated by one expert to have been traveling as fast as 107 miles per hour, struck him in the forehead.20

A California Court of Appeal recently revived Sanchez’s attempt to seek relief in negligence actions against the NCAA and aluminum bat manufacturer, Hillerich & Bradsby.21 Part II of this Note begins with background information on non-wood bats, including prevalence, advantages, disadvantages, and performance evaluation standards.22 Part III presents (1) the facts, arguments, and procedural background of Sanchez v. Hillerich & Bradsby Co.; (2) California’s assumption of risk doctrine; (3) the evidence presented

18. See Theodore A. Breidenthal, New Standards for Baseball Bats Effective in August 1999, NCAA News, Aug. 17, 1998 (reporting original effective date for new guidelines as January 1, 1999 and subsequent delay to August 1, 1999 to allow independent study), available at http://www.ncaa.org/news/1998/19980817/active/3550n01.html; see also Kelly & Pedersen, supra note 8 (noting after receiving research that indicated rising rate of serious injuries to pitchers from batted line drives, NCAA adopted stricter guidelines for performance standards of aluminum bats, but postponed implementation); Lon Eubanks, NCAA Mutes the Bats; College Baseball: Changes in Specifications Will Limit Home Run Potential Beginning With the 2000 Season, L.A. TIMES, Aug. 13, 1998, at Cl (reporting NCAA’s decision). Following NCAA efforts to provide a safer playing environment, manufacturers of both wood and non-wood bats brought antitrust law suits, each alleging that the NCAA had conspired to lock the other out of the market. See Kelly & Pedersen, supra note 8. The courts upheld the NCAA’s right to change the guidelines. See id. However, after subsequent studies, the NCAA’s expert panel raised the maximum batted-ball exit-velocity from 93 to 97 miles per hour, and the NCAA adopted these regulations in 2000. See id.

19. See Breidenthal, supra note 18 (reporting statements from NCAA).

20. See Sanchez v. Hillerich & Bradsby Co., 128 Cal. Rptr. 2d 529, 539 (Cal. Ct. App. 2002) (noting expert James G. Kent’s estimation that ball that hit Sanchez “was traveling between 101 and 107.8 miles per hour, probably closer to the latter speed than the former”); see also Barnett, supra note 2 (describing pitcher’s injury).


22. For background information on use and standards for aluminum bat performance, see infra notes 26-54 and accompanying text.
by Sanchez to defeat defendants' motions for summary judgment; and (4) the analysis upon which the court of appeal relied in reaching its decision to reverse summary judgment and revive Sanchez's action. 23 Part IV examines a defendant's duty of care in the sports context under California's assumption of risk doctrine and employs an interjurisdictional comparison of duty assessment as it might be applied to similar plaintiff-athletes in negligence actions. 24 Part V of this Note concludes by addressing the possible impact of Sanchez on the aluminum bat controversy in light of mounting evidence that although newer generations of aluminum bats offered breakthrough performance advantages, they may have increased injury risks for countless amateur players. 25

II. BACKGROUND ON HIGH-PERFORMANCE NON-WOOD BATS

A. Prevalence of Use

Amateur teams encourage their players to use aluminum bats, and while these teams still permit their players to use wood bats, almost none do. 26 The vast majority of bats made and used in America are made of aluminum and aluminum alloys. 27 In 2000, consumers spent $93 million on 2.1 million aluminum bats. 28 Many aluminum bat manufacturers offer free bats and compensation to college baseball programs and coaches under endorsement agreements. 29 According to one report, some 150 Division I

23. For a summary of the facts, arguments, and procedural background of Sanchez v. Hillerich & Bradsby, see infra notes 55-70 and accompanying text. For an analysis of relevant assumption of risk theories raised in Sanchez, as well as a review of the evidence presented therein, see infra notes 71-92 and accompanying text.

24. For an application of California's assumption of risk doctrine and related policy considerations, see infra notes 93-141 and accompanying text. For an interjurisdictional comparison of duty assessment applicable to similar plaintiff-athletes in negligence actions, see infra notes 142-84 and accompanying text.

25. For a discussion of the possible impact of Sanchez on the aluminum bat controversy, including governing athletic organizations and sports equipment manufacturers, see infra notes 185-91 and accompanying text.

26. See Barnett, supra note 2 (noting outside of professional baseball, very few wood bats are used).

27. See id. (stating 90% of bats made in America in 2000 were metal based on data from National Sporting Goods Association).


29. See Eubanks, supra note 18 (noting dependence of many college baseball programs on bat manufacturers' financial support). In 1998, approximately 150 Division I coaches had endorsement contracts with bat manufacturers that supplemented their incomes. See id. 'The bat manufacturers have been very good to us and to college baseball in general . . . . We don't have to buy any bats now, and that's a big plus for our program in this day of reduced budgets.' Id. (quoting California State Fullerton baseball coach, George Horton, describing conflict be-
coaches have team and/or personal contracts with various aluminum bat manufacturers.30

B. Advantages: Durability and Performance Edge

The prevalence of aluminum bat use relates to the practical advantages of aluminum over wood.31 Aluminum bats are highly economical for college and youth baseball leagues because they are virtually unbreakable.32 When the NCAA approved the use of aluminum baseball bats for intercollegiate competition in July of 1973, its decision was based in part on increased durability and decreased overall costs of non-wood bats.33

Many argue that the popularity of aluminum bats is primarily attributable to the performance advantages of aluminum over wood.34 By design, some aluminum bats substantially conform to wood-bat performance in total weight, swing weight, and barrel performance.35 However, newer generations of aluminum bats incor-

30. See Barnett, supra note 2 (noting extensive use of aluminum bats in Division I programs).

31. For a discussion of the advantages of aluminum bats, see infra notes 32-39 and accompanying text. Major advantages include durability and batting performance.

32. See Lombardi, supra note 14 (noting testimony of one youth baseball coach at New York City Council hearing held to consider proposed bill to ban aluminum bats). The coach stated that while he usually buys three metal bats per year at $150 each, a ban on aluminum bats would force him to buy 40-50 wood bats per year at $50 each. See id.

33. See Oddo Press Release, supra note 8 (predicting detrimental effects, including injuries and deaths, associated with new generations of aluminum bats).

34. See Cusimano, supra note 10, at 1062 (summarizing advantages of aluminum over wood). "[A]luminum bats became lighter and more powerful as manufacturers started using more durable metal, stretched more thinly. Consequently, aluminum bats enabled batters to swing faster . . . 'and bat speed is what determines power.'" Id. at 1070 (quoting Steven Ashley, High Tech Up at Bat, POPULAR SCI., May 1992, at 108). But see Barnett, supra note 2 (quoting North Carolina State baseball coach, Elliott Avent, as claiming, "[i]f the ball is coming back faster, it's because the players are bigger and swinging harder"); Crisco & Greenwald, supra note 8 (acknowledging statistical increases in many offensive categories are likely attributable to advances in equipment performance and better player performance).

35. See Crisco & Greenwald, supra note 8 (explaining significance of total weight and swing weight). Importantly, a difference in barrel construction may lead to what is "commonly referred to as 'trampoline effect.'" Id. In particular, the authors commented:

[T]o make a metal bat . . . perform like a wood bat, the bats must have similar total weight, swing weight, and barrel performance. The total weight is the weight of the bat, typically measured without any grip material. Swing weight is a measure of how the weight is distributed along the length of the bat; for two bats of the same total weight, a bat with more
porate thinner, lighter construction that affects ball exit-speed by allowing faster swings and increasing the trampoline effect.\textsuperscript{36} Aluminum bats also feature a much larger "sweet spot" than wood bats.\textsuperscript{37}

A comparison of offensive statistics of players using wood bats in summer leagues and aluminum bats during the regular season suggests that aluminum bats enhance player performance.\textsuperscript{38} The distinction has become especially apparent at the college level, where young players have posted higher performance statistics than professional players and have shattered long-held records.\textsuperscript{39}

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weight towards the grip can be swung faster . . . . Barrel performance . . . can be described as follows. The more a baseball deforms on impact, the more energy is lost, and the slower the baseball can rebound. The barrels of modern metal baseball bats can deform more than those of their predecessors. By designing a bat to deform more, the ball will deform less. This trampoline effect results in greater ball rebound and therefore increased batted ball speed.

\textit{Id.} (citations omitted). \textit{See Former Bat Designer Requests Government Intervention, 1 Locker Room, at http://www.naso.org/lockerroom/LockerRoom0500.html} (May 15, 2000) (citing statements by Jack MacKay arguing one can retain cost-effectiveness of aluminum bats without increased dangers allegedly presented by newer designs); \textit{see also} Hawes, \textit{supra} note 13 (reporting that MacKay believes there is a place in bat industry for aluminum bats that perform like wood bats).

36. \textit{See} Crisco & Greenwald, \textit{supra} note 8 (explaining physical advantages of thinner, lighter aluminum bats); \textit{Science at the Stadium: Teacher Resource, at http://www.turnerlearning.com/etfs/bball/science.htm} (last visited Oct. 16, 2003) (explaining "trampoline effect"). The article explains the "trampoline effect" is when "the bat will deform more, causing the ball to deform less, retain more energy, and rebound faster." \textit{Id.} Authors Criso and Greenwald also explain hitting the ball on the sweet spot is advantageous because less energy is lost to vibrations and more energy is transferred to the ball. \textit{See id.}

37. \textit{See} MacKay’s Petition, \textit{supra} note 13; Oddo Press Release, \textit{supra} note 8 (defining "sweet spot" as part of bat that most effectively launches ball and citing data estimating "sweet spot" of aluminum bat is 470% larger than that of wood bats).

38. \textit{See} Barnett, \textit{supra} note 2 (summarizing results of 1997 study conducted by William Thurston, baseball coach at Amherst College in Massachusetts and former editor of NCAA’s Baseball Rules Committee, tracking 90 players participating in both wood and metal bat leagues). A batting average decrease of .107 accompanied the players’ switch to wood bats and home run percentages dropped 67%. \textit{See id.}

39. \textit{See} Stefan Fatis, \textit{Mettle Test: NCAA Puts Aluminum Bats to Test of Fire, St. Louis Post-Dispatch,} May 6, 1996, at 18 (reporting at 1996 College World Series, teams pounded 48 home runs in 14 games where previous record was 29). “Some homers sailed over the bleachers, 30 feet high, into a parking lot 450 feet from home plate. So was it the strong tail wind? Or an exceptional crop of hitters? Or was it the state-of-the-art aluminum bat[s]?" \textit{Id.}
C. Disadvantages: Inherent Difficulties in Performance Measurement

Aluminum bats have undoubtedly changed the nature of amateur baseball, in some ways for the worse.\(^4\) Many commentators argue that a college player’s performance using aluminum bats is not a reliable indicator of the player’s skill and ability to hit well with wood bats in professional baseball.\(^5\) Concerns about player safety, however, clearly trump player evaluation issues.\(^6\)

Inherent difficulties in measuring aluminum bat performance potential further complicate a comparison to wood bat performance or a determination of appropriate performance standards.\(^7\) For instance, the performance of aluminum bats differs over time; with use, the metal may develop more spring, increasing the trampoline effect and producing faster exit-speeds.\(^8\) Additionally, evaluations must consider the much larger “sweet spot” of an aluminum bat and how this affects exit-speed.\(^9\) Moreover, it is acknowledged that some factors affecting performance of aluminum over time are not yet well understood by the scientific community.\(^10\) Finally, there is an obvious conflict of interest in relying on manu-

\(^4\) See generally Cusimano, supra note 10, at 1071 (summarizing changes in sport of baseball resulting from innovations in aluminum bat materials and design); see also Sanchez v. Hillerich & Bradsby Co., 128 Cal. Rptr. 2d 529, 537 (Cal. Ct. App. 2002) (characterizing NCAA's own concerns regarding aluminum bat usage and supporting that characterization with portions of NCAA's 1998 letter from its Baseball Rules Committee to organizations under its umbrella). “The NCAA not only believed that the newer aluminum bats created an increased risk of harm to players, but it also believed that use of these bats changed the nature of the sport of college baseball.” Id.


\(^6\) See generally Barnett, supra note 2 (discussing alleged dangers of new generations of aluminum bats).

\(^7\) See id. (observing alleged hazards of aluminum bats are difficult to measure and thus allegations are difficult to confirm or negate). “What you find is you are naive about what a bat is doing . . . . There is a whole lot more going on than you thought.” Id. (quoting NCAA spokesman Wally Renfro's observations of difficulties encountered in measuring aluminum bat performance).

\(^8\) See id. (recounting conclusions about aluminum bat performance already confirmed by NCAA studies).

\(^9\) See Oddo Press Release, supra note 8 (stating aluminum bats' sweet spot is 470% larger than that of wood bats).

\(^10\) See Crisco & Greenwald, supra note 8 (noting other factors likely to influence bat performance, such as bat shaft flex, are not yet well understood).
facturers to adequately test and disclose performance results when such a disclosure may harm sales.\textsuperscript{47}

D. Recent Debate

Stricter NCAA requirements went into effect in 2000, but experts allege obvious loopholes still exist which allow manufacturers to increase exit-speed.\textsuperscript{48} Researchers criticize the NCAA for failing to publicly disclose the testing methods and results upon which it relied in implementing its new performance standards.\textsuperscript{49} Although methods of measuring aluminum bat performance remain the subject of debate, research supports the conclusion that batted balls exit aluminum bats faster than they exit wood bats.\textsuperscript{50} A commonsense inference from this conclusion is that a faster exit-velocity constitutes an increased risk of injury to defensive players — as one expert has questioned, "if [the ball] is hit harder more often, isn’t there a greater risk of injury?"\textsuperscript{51}

Governing athletic organizations have issued stricter performance regulations in light of recent studies, and there appears to be new initiative to discover and regulate aluminum bat perform-

\textsuperscript{47} See Barnett, supra note 2 (relaying assertion of bat designer Jack MacKay and others that manufacturers’ lab tests fail to adequately reveal possible exit-speeds because applied swing speeds are underestimated); League of Fans, supra note 12 (likening bat manufacturers’ responsibility for student-athlete safety in baseball to a “fox-guarding the henhouse” model).

\textsuperscript{48} See Kay Hawes, Baseball Bat Standards Return to the Examination Table: New Focus is on Potential Loophole Involving Swing Speed, The NCAA News, at http://www.ncaa.org/news/2000/20000410/active/3708n01.html (Apr. 10, 2000) (noting Dr. Jim Sherwood’s discovery); see also Crisco & Greenwald, supra note 8 (alleging loophole discovered by Sherwood was obvious and positing such a belated acknowledgment was evidence that studies upon which NCAA relied may have failed to consider certain performance factors).

\textsuperscript{49} See Crisco & Greenwald, supra note 8 (noting NCAA-mandated regulation of baseball bats using performance measurements from Baum Hitting Machine (“BHM”)). The BHM is a research tool developed at the University of Massachussets. See id. Since 1997, “no public disclosure has been made of the BHM’s methodology, calibration, or result validation.” Id. Arguably, this system of testing is fundamentally flawed because methods cannot be examined or reproduced by other laboratories. See id.

\textsuperscript{50} See Alan M. Nathan, Characterizing the Performance of Baseball Bats, 71 Am. J. Phys. 134, 134 (2003) (citing study using high speed video techniques to accurately measure pre-collision and post-collision ball and bat speeds to conclusively demonstrate improved effectiveness of some aluminum bats); see also Crisco & Greenwald, supra note 8 (recounting long-held belief that metal bats out-perform wood bats was not scientifically validated until recently). Specifically, the belief was validated in three conclusive studies conducted in 1999 and 2000. See id.

\textsuperscript{51} See Barnett, supra note 2 (quoting NCAA’s Bill Thurston’s attempt to simplify issues of increased risk).
ance.\(^{52}\) Unfortunately, however, over the course of this debate, players were injured.\(^{53}\) This Note now examines one attempt to adjudicate harms that occurred in absence of aluminum bat performance standards and addresses the legal considerations facing similar plaintiff-athletes.\(^{54}\)

III. SANCHEZ v. HILLERICH & BRADSBY CO.

A. Background

1. Facts

Andrew Sanchez, a college pitcher, sustained serious head injuries in 1999 when a line-drive ball hit with an "Air Attack 2" aluminum alloy bat struck him in the head.\(^{55}\) Sanchez’s injuries required the care of a neurologist for more than two years and caused him to drop out of college.\(^{56}\)

The bat was supplied to the University of Southern California ("USC") batter pursuant to an agreement between Hillerich & Bradsby and USC; the agreement stated that USC would receive compensation for the team’s exclusive use of Hillerich & Bradsby’s

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52. See Nathan, supra note 50, at 134 (citing long-awaited validation of suspected aluminum bat performance advantages in conclusive studies); see also supra notes 16 & 18 and accompanying text (discussing new performance regulations imposed by high school and collegiate athletic organizations). But see League of Fans, supra note 12 (criticizing governing athletic organizations’ efforts to regulate non-wood bat performance as insufficient). In a letter to the NCAA and to NFHS presidents, on behalf of a sports industry watchdog group founded by Ralph Nader, McCarthy states:

To be sure, the bat performance rules and testing standards that are now in use represent a positive step forward from the scarcely regulated bat industry of the mid-to-late 1990s. But these regulations still fall dangerously short of where they should be. Representatives of the NCAA and NFHS have each stated in the past that they want the performance of bats to be wood-like, yet neither governing body is willing to either: 1) require bats to be made out of wood; or 2) require bats that are not made out of wood to not exceed the performance of wood in any way.

Id.


54. For a discussion of the facts and legal issues arising in Sanchez, see infra notes 55-129 and accompanying text.

55. See Sanchez, 128 Cal. Rptr. 2d at 531 (summarizing circumstances of plaintiff’s injuries during college game).

Louisville Slugger equipment. At the time of Sanchez's injury, NCAA rules allowed the use of non-wood bats such as the "Air Attack 2." Prior to the start of the 1999 season, the NCAA notified athletic conferences under its umbrella of the dangerous nature of newer metal bats and of its decision to implement new regulations to decrease the maximum exit-speed of non-wood bats, effective August 1, 1999.

2. Arguments

Sanchez filed suit against Hillerich & Bradsby, USC, the NCAA, and the Pacific-10 Athletic Conference ("Pac-10") on March 17, 2000, asserting causes of action for products liability and negligence. Sanchez specifically alleged that "use of this particular bat significantly increased the inherent risk in baseball that a pitcher would be hit by a line drive and that the unique design properties of this bat were the cause of his injuries.

In response to the suit, each defendant moved separately for summary judgment. In support of its motion, Hillerich & Bradsby argued: (1) Sanchez had failed to establish causation; (2) the doctrines of primary and express assumption of risk barred Sanchez's action; and (3) the bat complied with the rules established by the NCAA. In support of its motion, the NCAA argued: (1) the doctrine of primary assumption of risk barred the claim; (2) Sanchez could not establish causation; and (3) it owed no duty to Sanchez because the baseball community was in significant disagreement over the risk presented by aluminum bats at the time of the injury.

57. See Sanchez, 128 Cal. Rptr. 2d at 532 (describing use agreement between school and bat manufacturer).
58. See id. (providing factual and procedural background).
59. See id. (recounting circumstances of the injury). Prior to the start of the 1999 season, the Pac-10 athletic conference had implemented some of the NCAA's proposed standards. See id.
60. See id. Sanchez sued Hillerich & Bradsby, USC, the NCAA, and the Pac-10 for products liability and negligence but subsequently dropped the products liability claims against USC and Pac-10. See id.
61. See id. at 531 (quoting complaint).
62. See Sanchez, 128 Cal. Rptr. 2d at 531. (discussing procedural background of Sanchez).
63. See id. (recounting grounds on which Hillerich & Bradsby based its summary judgment motion).
64. See id. at 533 (stating grounds for NCAA's summary judgment motion). The court could not consider the NCAA's documentation supporting its motion because it was not properly authenticated; the court thus treated NCAA's summary judgment motion as a motion for judgment on the pleadings. See id. at 533-34.
Plaintiff and defendants stipulated to several facts, including: (1) the bat was apparently manufactured in compliance with NCAA regulations; (2) the bat was designed to cause the ball to come off the bat at a higher launch speed than that of wood bats and older metal bats; (3) the bat’s inventor believed the bat substantially increased the risk of a pitcher being hit by a line-drive ball; and (4) the bat’s inventor complained to his former employers at Hillerich & Bradsby about these increased risks. The parties offered deposition testimony of experts and other individuals who had witnessed the injury. Hillerich & Bradsby offered testimony to establish primary assumption of risk and lack of proof of causation.

3. Procedural Posture

The trial court concluded that Sanchez would not be able to prove causation and granted the summary judgment motions of Hillerich & Bradsby, USC, and the Pac-10. The court did not grant summary judgment to the NCAA. Sanchez appealed, and the California Court of Appeal for the Second District granted cer- tiorari to determine whether the trial court had properly granted the defendants’ motions for summary judgment.

65. See id. at 536 (stating undisputed facts).

66. See id. at 532-34 (summarizing deposition testimony presented by all parties).

67. See Sanchez, 128 Cal. Rptr. 2d at 532-33 (summarizing declarations supporting summary judgment motion). One CSUN coach testified to having witnessed this incident as well as other similar ones in the past, and offered his opinion that the risk of being hit by a batted ball was inherent in the sport. See id. at 532. The USC head coach testified the game had not been videotaped and that, in his opinion, metal bats did not perform differently than wood bats. See id. Moreover, Hillerich & Bradsby’s president, Marty Archer, testified his company manufactured bats in conformance with NCAA regulations. See id. Also, CSUN’s head athletic trainer testified that when she presented the college’s disclaimer form to a player, she read aloud the assumption of risk provision word-for-word before the player signed it. See id. Finally, Hillerich & Bradsby offered the plaintiff’s admission at deposition that he knew that pitchers risked being hit by line drives. Id. at 533.

68. See id. at 534 (recounting trial court’s grant of summary judgment to defendants).

69. See id. The NCAA failed to submit admissible evidence, and, thus, the court could not treat its motion as one for summary judgment. See id. Instead, the trial court treated the NCAA’s motion as one for judgment on the pleadings, concluding Sanchez would be unable to truthfully plead causation against the NCAA. See id.

70. For a discussion of the court of appeal’s analysis, see infra notes 71-92 and accompanying text.
B. Primary Assumption of Risk

Both the NCAA and Hillerich & Bradsby asserted California's primary assumption of risk doctrine completely barred Sanchez from recovery for negligence.\(^{71}\) Under this doctrine, a defendant owes no duty to protect a voluntary participant against a risk of harm inherent in the sport.\(^ {72}\) Sanchez opposed the defendants' motions for summary judgment, asserting primary assumption of risk did not apply because the increased risk presented by the bat's design was a substantial cause of his injuries.\(^{73}\) Sanchez argued the design of the "Air Attack 2" enabled a batter to hit a ball at speeds in excess of that which would allow a pitcher to avoid being hit, and thereby increased the risks inherent in baseball.\(^ {74}\) In California, a defendant owes no duty of care to protect a voluntary participant against the risks inherent in a sport, but does owe a duty of care not to increase those inherent risks.\(^ {75}\)

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\(^{71}\) See Sanchez, 128 Cal. Rptr. 2d at 532-33 (reiterating NCAA's contentions).

\(^{72}\) See id. at 535-36 (delineating assumption of risk doctrine as set forth by California Supreme Court). The Sanchez court relied on Knight v. Jewett, 834 P.2d 696 (Cal. 1992), in distinguishing between primary and secondary assumption of risk:

(1) those instances in which the assumption of risk doctrine embodies a legal conclusion that there is 'no duty' on the part of the defendant to protect the plaintiff from a particular risk — the category of assumption of risk that the legal commentators generally refer to as 'primary assumption of risk' — and (2) those instances in which the defendant does owe a duty of care to the plaintiff but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty — what most commentators have termed 'secondary assumption of risk.' . . . First, in 'primary assumption of risk' cases — where the defendant owes no duty to protect the plaintiff from a particular risk of harm — a plaintiff who has suffered such harm is not entitled to recover from the defendant, whether the plaintiff's conduct in undertaking the activity was reasonable (or unreasonable). Second, in 'secondary assumption of risk' cases — involving instances in which the defendant has breached the duty of care owed to the plaintiff — the defendant is not entitled to be entirely relieved of liability for an injury proximately caused by such a breach, simply because the plaintiff's conduct in encountering the risk of such an injury was reasonable rather than unreasonable . . . .

Id. at 535 (emphasis omitted) (quoting Knight, 834 P.2d at 703-04). Defendants also asserted no evidence existed that the "Air Attack 2" increased the speed at which the ball left the bat in this particular case. See id. at 538. Thus, the plaintiff could not prove causation. See id.

\(^{73}\) See id. at 533.

\(^{74}\) See id. at 533 (incorporating statements from Jack MacKay that "Air Attack 2"'s design prevented pitchers from having sufficient time to avoid being hit, and James Kent, whose estimation of ball speed gave pitcher reaction time of only .32 to .37 seconds).

C. Evidence of Increased Inherent Risk

Sanchez offered four witness and expert declarations in support of his increased inherent risk argument.76 Citing an NCAA-initiated study that tracked pitcher injuries from high-performance aluminum bats, William Thurston, a college baseball coach and former Editor of the NCAA Baseball Rules Committee, testified that the design and use of the "Air Attack 2" substantially increased the risk of a pitcher being hit by a line drive over that associated with wood bats or earlier generations of non-wood bats.77 Thurston referred to a compilation and analysis of college baseball statistics and testified that a tremendous increase in hits and runs resulted when players used aluminum bats.78

James G. Kent, a clinical kinesiologist, also offered testimony on the plaintiff's behalf, based on his training as a forensic examiner specializing in the analysis of the biomechanics of trauma, his review of NCAA rules and literature, and his review of the medical evidence of Sanchez's injury.79 Kent estimated that the ball that hit Sanchez was traveling between 101 and 107.8 miles per hour, giving Sanchez only .32 to .37 seconds to avoid being hit — a timeframe that falls below the minimum reaction time required by the NCAA.80

In addition, Jack MacKay testified that he witnessed the timed studies Hillerich & Bradsby performed on the "Air Attack 2."81 MacKay stated, "[the bat] allowed a batter to hit a ball at speeds in

76. See Sanchez, 128 Cal. Rptr. 2d at 533 (recalling statements given in deposition testimony).
77. See id. (stating results of Thurston's studies).
78. See id. (restating Thurston's conclusions).
79. See id. (recalling Kent's expert qualifications).
80. See id. at 533, 538-39 (quoting Kent's conclusions based on review of evidence and literature). Kent stated:
[I]t is more probable than not that Mr. Sanchez's head injury resulted from the use of a baseball bat which possessed mechanical properties allowing a batted ball to attain a flight velocity in excess of a velocity that would allow for a reasonable reaction time by a pitcher in a post-delivery posture in a game situation.
Id. at 540. Kent's estimation of a reaction time falling between .32 and .37 seconds falls below the NCAA-accepted reaction time of .39 seconds. See id. at 540-41 (noting most experts who provided information to NCAA Rules Committee believed college pitchers need approximately .4 seconds to react and move to avoid being struck). Specifically, Kent asserted:
At 94 mph the ball will [reach the pitcher] in approximately .371 seconds
. . . . [Use of] high powered aluminum bats often result in speeds well in excess of 100 [miles per hour]. At 100 mph, the ball will [reach the pitcher] in .354 seconds; at 110 mph . . . in .321 seconds.
Id. at 541.
81. Sanchez, 128 Cal. Rptr. 2d at 533 (noting designer's testimony).
excess of that which would have given a pitcher time to avoid being hit.” 82 Thus, in MacKay’s opinion, the bat substantially increased the risk of a pitcher being hit by a batted ball.83

D. Analysis and Reversal of Summary Judgment

1. Primary Assumption of Risk

The court of appeal reversed the trial court’s grant of summary judgment for the defendants, holding sufficient evidence had been presented to establish a genuine issue of material fact as to whether the design and use of the “Air Attack 2” substantially increased the inherent risks faced by baseball players.84 In its analysis, the court of appeal relied on a similar case, Branco v. Kearny Moto Park, Inc.85

In Branco, the plaintiff crashed his BMX bicycle and injured himself while participating in a race around a motocross course containing jumps.86 The plaintiff’s expert witness testified that the design of a particular jump on the course created an extreme risk of injury above the risks inherent in motocross.87 The appellate court reversed the lower court’s summary judgment decision and held that while jumps and falls were inherent in the sport of motocross, the sport did not mandate jumps designed in such a way as to create an extreme risk of injury.88 The plaintiff’s expert testimony regarding the design of the jump created a triable issue of

82. See id. (quoting MacKay’s deposition testimony). MacKay designed and tested bats for ten years and Hillerich & Bradsby paid him as a consultant for their Louisville Slugger division. See id.

83. See id. MacKay testified he warned Hillerich & Bradsby of the increased safety risks inherent in the design of the “Air Attack 2,” but his warnings were ignored. See id. He eventually resigned from Hillerich & Bradsby. See id.; see also MacKay’s Petition, supra note 13 (petitioning Consumer Product Safety Commission to recall all non-wood bats that exceeded performance of wood bats). In his petition, MacKay asserted, “non-wood bats (primarily composed of aluminum and composite materials) have become increasingly dangerous.” Id. MacKay stated such bats have a faster bat swing speed, a larger sweet spot, and a lower balance point than wood bats, allowing the ball to achieve a faster exit velocity such that a pitcher does not have time to react if a ball is batted directly toward him. See id. For these reasons, MacKay asserted that some non-wood bats present an unreasonable risk of injury. See id.

84. See Sanchez, 128 Cal. Rptr. 2d at 538 (finding evidence sufficient to establish material issue of whether “Air Attack 2” substantially increased inherent risks in baseball by increasing speed at which baseball left bat when compared to other metal and wood bats).

85. 43 Cal. Rptr. 2d 392 (Cal. Ct. App. 1995); see also Sanchez, 128 Cal. Rptr. 2d at 537-38 (finding Branco’s analysis persuasive).

86. See Branco, 43 Cal. Rptr. 2d at 394-95 (describing circumstances of plaintiff’s injury).

87. See id. at 395, 398 (discussing expert’s testimony on behalf of plaintiff).

88. See id. at 398 (discussing holding).
fact as to whether the design of the jump increased the risks of injury above those inherent in motocross. Similarly, the Sanchez court of appeal found the expert testimony offered by the plaintiff supported a material issue of fact as to whether the primary assumption of risk doctrine should apply to bar the action.

2. *Causation*

The defendants argued that because the speed of the ball leaving the bat was never established, Sanchez could not attribute causation to use of the "Air Attack 2." The court of appeal rejected that argument, emphasizing Dr. Kent’s estimation of the speed at which the ball was traveling, and concluding that his expert opinion and the evidence on which he relied were sufficient to create a triable issue of fact regarding causation.

IV. **APPORTIONING LIABILITY: ANALYSIS OF SANCHEZ ON REMAND**

A. *California’s Assumption of Risk Doctrine*

1. *Duty*

A negligence action can only arise where the defendant owed a duty to the plaintiff. In determining whether primary assumption of risk applies and bars a plaintiff’s relief in California, the inquiry does not begin with the question of whether the plaintiff assumed the risk; rather, the inquiry begins and ends with an assessment of whether the defendant owed a duty of care to the plaintiff. A determination of the existence of a duty is a question of law to be decided by the court. The court considers the nature of the sport and the general relationship of each party to the sport to decide, as

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89. See *id.* (reversing summary judgment).
90. See *Sanchez*, 128 Cal. Rptr. 2d at 538 (holding evidence sufficient to establish material issue of fact and defeat motion for summary judgment).
91. See *id.* 538-39 (rejecting proposition that summary judgment must be granted when causation not established).
92. See *id.* (stating holding).
a matter of public policy, whether the defendant should owe the plaintiff a duty of care.96

2. Inherent Risk

Integral to the court's determination of the existence of a duty is the inherency of the risk presented by the defendant's conduct.97 Generally, no duty exists to protect the plaintiff against a risk inherent in the sport.98 If the defendant's conduct presented a risk inherent in the sport, he or she owes no duty to the plaintiff, and recovery is barred.99 If the defendant's conduct presented a new or additional risk to the sport, then the defendant may have owed a duty of care to the plaintiff.100 If a duty may have been owed, secondary assumption of risk governs, allowing possible recovery for the plaintiff under California's comparative negligence principles.101

Whether the defendant's conduct was an inherent risk turns on the nature of the sport and the relationship of the defendant and plaintiff to that sport.102 The standards of the industry define the nature of the sport.103 A risk is inherent in the sport if its elimination would (1) chill vigorous participation in the sport, and (2) alter the fundamental nature of the sport.104

B. Applying Primary Assumption of Risk to Sanchez

As acknowledged by the Sanchez court, the risk of a sharply batted ball striking a defensive player is inherent in the sport of base-

96. See Sanchez, 128 Cal. Rptr. 2d at 535 (relying on Shannon v. Rhodes, 112 Cal. Rptr. 2d 217 (Cal. Ct. App. 2001)).
97. See id. (noting California's objective approach to determination of existence of duty).
98. See Knight, 834 P.2d at 708 (explaining duty in sports context).
99. See Bidar, 669 P.2d at 158 (demonstrating where there was no duty, there was no breach); see also Am. Golf Corp. v. Superior Court, 93 Cal. Rptr. 2d 683, 687 (Cal. Ct. App. 2000) (noting same).
100. See Knight, 834 P.2d at 708 (noting "it is well established that defendants generally do have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport").
101. See Sanchez, 128 Cal. Rptr. 2d at 536 (discussing court's analysis).
102. See id. (stating considerations for determining inherency of risk).
103. See id. (explaining nature of sport and citing relevant California law); see also Ferrari v. Grand Canyon Dories, 38 Cal. Rptr. 2d 65, 68 (Cal. Ct. App. 1995) (describing inherent risks of skydiving and snow skiing and implying industry standards place acceptance of risks on participants).
104. See Sanchez, 128 Cal. Rptr. 2d at 536 (providing guidance for determining inherent risk).
ball. 105 Sanchez acknowledged his awareness of this risk. 106 The court should still permit Sanchez to seek relief under comparative fault principles because the design of the "Air Attack 2," which maximized ball exit-speed, increased the risk of injury beyond those inherent in baseball. 107 Due to this increased risk, the defendants may owe a duty of care to Sanchez, and primary assumption of risk should not bar relief. 108

1. **Negligence Claim Against Hillerich & Bradsby**

The wrongful conduct at issue is Hillerich & Bradsby's purposeful design of the "Air Attack 2" to increase exit-speed of batted balls. 109 Based on the evidence presented, Sanchez may be able to prove that Hillerich & Bradsby increased the inherent risks of baseball by knowingly designing the "Air Attack 2" to maximize exit-speed. 110 It is "undisputed that the Air Attack 2 was designed to cause the ball to come off the bat at a higher launch speed than with wood bats and older metal bats." 111 After witnessing timed studies, MacKay asserted the design did increase exit-speed, "it thus follows that the ball must have reached

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105. See id. (characterizing sport of baseball).

106. See id. (acknowledging foundational facts of case established prima facie showing of assumption of risk unless inherent risks had been increased by defendants' conduct).

107. For a discussion of the inapplicability of the primary assumption of risk defense in *Sanchez*, see infra notes 105-29 and accompanying text.

108. See generally Knight v. Jewett, 834 P.2d 696, 708 (Cal. 1992) (noting while defendants generally have no duty to eliminate or protect participants from inherent risks, defendants do have duty not to increase these risks). One can infer that a defendant who increases the risks beyond those inherent in the sport still faces potential liability.

109. See *Sanchez*, 128 Cal. Rptr. 2d at 531 (summarizing plaintiff's allegations that particular design properties of "Air Attack 2" caused his injuries).

110. A strong argument exists that Hillerich & Bradsby's conduct of designing bats to increase the exit-speed of a batted ball created a duty of care to athletes. A bat design that purposefully increases ball exit-speed, necessarily decreases reaction time for defensive players and increases the risks of injury in baseball over those inherent in the sport. As stated in the *Sanchez* opinion, Hillerich & Bradsby undisputably designed the "Air Attack 2" to increase ball exit-speed. See id. at 538-39. The court of appeal also found at least a triable issue as to whether the defendants knew and appreciated the nature of the increased risk. See id. at 538. Studies may also support the conclusion that the design of the bat increased exit-speed of batted balls. See supra notes 81-83 and accompanying text (recounting Jack MacKay's testimony).

111. *Sanchez*, 128 Cal. Rptr. 2d at 536.

112. See id. at 533 (noting MacKay's opinion based on his involvement in design of "Air Attack 2" and presence at Louisville Slugger's testing center when timed studies were performed).
[Sanchez] sooner than if [the batter] had used a bat other than the Air Attack 2.” 118 If the ball reached him sooner, he had less time to react, increasing the risk of injury. 114 If the inherent risk of being injured by a batted ball was increased, then a predicate duty of care existed to support a negligence action. 115

If Hillerich & Bradsby could demonstrate that elimination of aluminum bats such as the "Air Attack 2" would both chill vigorous participation in the sport and alter the fundamental nature of the sport, it could thereby prove that the additional risk presented by the bat was inherent in the sport. 116 However, elimination of aluminum bats designed to maximize exit-speed would neither alter baseball’s fundamental nature nor deter vigorous participation. 117 Many believe such an elimination would have the opposite effect of encouraging participation and returning the game of baseball at the amateur level to its traditional form. 118

113. Id. at 539.
114. See id. (noting Sanchez’s reaction time was only .32 to .37 seconds, which falls below acceptable minimum time required by NCAA).
115. See, e.g., Knight v. Jewett, 834 P.2d 696, 708 (Cal. 1992) (stating question of assumption of risk much more amenable to resolution by summary judgment under duty analysis, where existence and scope of defendant’s duty of care legal question decided by court).
116. See Sanchez, 128 Cal. Rptr. 2d at 556 (stating “[a] risk is inherent in a sport if its elimination (1) would chill vigorous participation in the sport; and (2) would alter the fundamental nature of the activity”).
117. For a discussion of how use of high-performance non-wood bats may have altered college baseball from its traditional form, see supra note 10.
118. See Sanchez, 128 Cal. Rptr. 2d at 537-38 (quoting 1998 NCAA letter to college baseball organizations and coaches). The court quoted a substantial portion of a letter sent by the NCAA Baseball Rules Committee, expressing the committee’s belief that newer generations of aluminum bats had both changed the nature of college baseball and increased the risk of harm to players. Id. Portions of the letter summarize findings from the NCAA committee that convened in 1998 to examine the escalating performance levels of aluminum bats:

Alarmed by the continuing increase in performance, the anecdotal and statistical evidence that the game of college baseball has been significantly altered by aluminum bat performance, and concerned about the increased safety risk, the committee determined to study the matter in depth in the summer of 1998 . . . . All interested manufacturers, experts, and other knowledgeable persons were invited to make presentations to the committee . . . . The committee was unanimously convinced that bat performance was indeed a safety risk to pitchers and infielders, that there has indeed been a change in the way the college game of baseball is played, and that the available evidence was more than sufficient to justify a change in the rule as soon as practically possible. There is simply no question that aluminum bats substantially outperform traditional wood bats, that the risk of injury to pitchers and infielders is real, and that a performance limit on aluminum bats was required to bring the game of baseball closer to its traditional form.

Id. at 537.
Because the increased risk of injury presented by a bat designed to increase exit-speed is not a risk inherent in baseball, relief is not barred, and some liability may be apportioned to Hillerich & Bradsby. The trier of fact could then determine the relative fault of plaintiff and defendant and apportion liability.

2. **Negligence Claim Against the NCAA**

The court must assess the NCAA's conduct in allowing high-performance non-wood bats to be used without implementing performance standards in order to determine whether a duty was owed to Sanchez. After reaching the conclusion in 1998 that certain aluminum bats may present an increased risk of injury to players, the NCAA undertook a performance evaluation and adopted maximum exit-speed requirements, which it planned to implement in 1999. The NCAA undertook this initiative in an effort to fulfill a duty to protect players from increased risks. However, the NCAA's delay in the implementation of performance guidelines may have constituted negligence. Once the NCAA validated its suspicions of increased danger in 1998, it may have had a duty to avoid delay in suspending or eliminating the bats under *Knight v. Jewett*.

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119. See id. at 538 (noting presence of triable issue of fact as to defendants' knowledge and appreciation of existence of increased risk). If a court finds primary assumption of risk inapplicable, the issue becomes one of secondary assumption of risk, in which case the relative fault of both plaintiff and defendants must be compared. See id. Hillerich & Bradsby may face apportionment of liability under secondary assumption of risk if the jury finds the design of the "Air Attack 2" not only increased ball exit-speed, but also risks inherent in baseball.

120. See id. at 538 (allocating responsibility for liability apportionment to trier of fact); Donohue v. San Francisco Housing Auth., 20 Cal. Rptr. 2d 148 (Cal. Ct. App. 1993) (concluding trier of fact responsible for liability apportionment).


122. See id. (quoting reaction of Baseball Rules Committee Chair, Bill Rowe, Jr., to rescheduling of implementation of new performance standards). Mr. Rowe stated, "I am disappointed that the implementation date was moved from January 1 to August 1, 1999, but am confident that the effects of these recommendations will make the game safer for all participants and provide a better competitive balance between offense and defense." Id.

123. Because the NCAA's testing and implementation of new guidelines was not the conduct that increased risk, it follows that the only conduct which could have constituted the NCAA's alleged negligent breach of duty was either its delay in implementing the guidelines or its failure to temporarily ban non-wood bats while conducting tests.

124. See *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992) (delineating duty analysis). Under California's duty analysis, duty can extend to conduct the defendant...
The NCAA asserted that it owed no duty to the defendant because, at the time of the injury, significant disagreement in the baseball community existed over the performance of aluminum bats. 125 The NCAA’s argument has merit: without taking the time to independently study bat performance, the NCAA could not impose effective performance standards. 126 The inherent difficulties in measuring performance have been previously discussed, and debate over measurement considerations continues today. 127 In light, however, of the NCAA’s conclusion in 1998 that “there is simply no question that . . . [r]isk of injury to pitchers and infielders is real,” it might have temporarily suspended the use of aluminum bats, implemented preliminary performance regulations, or taken some other protective measure during its study period. 128 Even if testing unavoidably delayed implementation of protective regulations, delay in suspending use of the suspect bats was avoidable and contributed to the continued existence of increased risk. 129 Thus, the NCAA may have owed a duty to Sanchez that would support a claim of negligence.

C. Policy Considerations

1. Sports Equipment Manufacturers

In determining whether Hillerich & Bradsby should owe Sanchez a duty of care as a matter of public policy, the court will necessarily look to the role each of the parties played in the sport. 130 The evidence already presented weighs in favor of finding that a manufacturer of newly designed sports equipment should

had a duty to avoid engaging in, as well as conduct it had a duty to undertake in order to protect the plaintiff from a particular risk. See id.

125. See Sanchez, 128 Cal. Rptr. 2d at 533 (noting NCAA’s assertion it owed no duty to Sanchez).

126. See Breidenthal, supra note 18 (quoting NCAA Executive Committee Chair’s emphasis on acquiring “independent, verifiable testing to assure that we have appropriate bats for collegiate competition . . . ”).

127. For a discussion of the complexities of aluminum bat performance measurement, see supra notes 40-51 and accompanying text. In addition, continued manufacturer assurance that these bats did not increase danger to players may support the argument that the NCAA’s delay in implementation for the purpose of undertaking an independent study was not unreasonable. See Oddo Press Release, supra note 8.

128. See Sanchez, 128 Cal. Rptr. 2d at 537 (quoting NCAA’s 1998 letter expressing safety concerns).

129. See Lombardi, supra note 14 (describing examples of injuries to teenage baseball players associated with aluminum bats).

130. See Knight v. Jewett, 834 P.2d 696, 708-09 (Cal. 1992) (noting nature of defendant’s duty in sports context depends heavily on nature of sport). Furthermore, the scope of the legal duty owed will also frequently depend on defendant’s
owe a duty of care to athletes with respect to any design feature that has increased the risks inherent in the sport.131

The Sanchez case provides an excellent illustration of the underlying policy considerations. In examining the role each of the parties played in the sport, the court will note that Sanchez was a college player who had to compete using equipment provided by his school and approved by his school’s rule-making organization.132 Hillerich & Bradsby was a designer and manufacturer of aluminum bats, providing free bats to colleges and other amateur teams.133 Sanchez was an amateur player unable to differentiate aluminum bats which perform substantially like wood bats from those which, by design, maximize exit-speed and present an increased risk of injury.134 Hillerich & Bradsby purposefully designed its bats with the goal of increasing ball exit-speed, tested its designs, and is in a better position to determine any increase in exit-speed capabilities and act accordingly to communicate and/or limit the increased risk.135 Where a manufacturer’s conduct has increased the risks inherent in the sport, that manufacturer should be subject to liability to an injured participant.136

2. Athletic Organizations

The court will again look to the role each party played in the sport in determining, as a matter of public policy, whether athletic

role in, or relationship to, the sport. See id. at 709. See also Sanchez, 128 Cal. Rptr. 2d at 535 (discussing public policy in considering both parties’ roles in sport).

131. See Knight, 834 P.2d at 708 (noting defendants generally have no duty to eliminate or protect participants against inherent risks, but defendants have duty not to increase risks beyond those inherent in sport).

132. See Sanchez, 128 Cal. Rptr. 2d at 532 (noting college players at USC must use equipment provided and approved by their school). While one who voluntarily participates in a sport may consent to certain inherent risks in that particular sport, that individual does not consent to a breach of duty by others that increases the risks beyond what the participant consented to, even where the participant is aware of the possibility of misconduct by others. See generally Knight, 834 P.2d at 709 (“[A]lthough a [participant] may have acted with knowledge of the potential negligence, he or she did not consent to such negligent conduct or agree to excuse the [defendant] from liability in the event of such negligence.”).

133. See supra note 29 and accompanying text.

134. See supra note 43 and accompanying text.

135. Risk limiting actions might include: (1) disclosure of manufacturer testing data to governing athletic organizations; (2) warning to users that increased exit-speed capability is a feature of the bat’s design and, thus, reaction time is reduced; (3) redesign of the bat to return it to more traditional performance capabilities; or (4) recall of bats which exceed traditional wooden bat performance.


https://digitalcommons.law.villanova.edu/mslj/vol11/iss1/3
organizations like the NCAA should owe players like Sanchez a duty of care. The NCAA was the governing body responsible for sanctioning and regulating the equipment used by its amateur players. The NCAA may have had a duty to test new equipment where any suspicion of increased injury to players exists. This organization may also have had a duty to suspend the use of suspect equipment until it could assess the risks associated with the equipment’s performance capabilities. For reasons already discussed, however, it is more appropriate to place the duty of testing new designs and disclosing results of such testing on the shoulders of the manufacturer.

D. Assumption of Risk in Other Jurisdictions

The application of the assumption of risk doctrine and apportionment of liability in sports injury cases varies among jurisdictions and can even vary intrajurisdictionally. States like New York have distinct assumption of risk doctrines, while other jurisdictions have less concrete doctrines. Some jurisdictions, in line with the Third Restatement of Torts, have abandoned primary and secondary assumption of risk theories in favor of a pure comparative fault scheme. Other jurisdictions, such as California, maintain

137. See Sanchez, 128 Cal. Rptr. 2d at 535 (stating role of parties determine duty of care).
139. See Sanchez, 128 Cal. Rptr. 2d at 538 (stating 1998 letter from NCAA to conferences under its umbrella clearly establishes organization awareness of additional danger presented by newer aluminum bats).
140. For a discussion of these policy considerations relating to governing athletic organizations, see supra notes 137-39 and accompanying text.
141. For a discussion of policy concerns relating to manufacturers, see supra notes 130-36 and accompanying text.
144. See Hess, supra note 142, at 458-59, 468 (noting approaches to apportioning liability in sports vary by jurisdiction and many jurisdictions have yet to formulate distinct approach).
145. See Cochran, supra note 143, at 132 (stating Third Restatement of Torts has rejected most forms of assumption of risk); Powers, supra note 3, at 772-73 (recounting most jurisdictions abandoned assumption of risk doctrine after advent of comparative fault, resulting in jury instructions on comparative fault principles only, and including plaintiff’s knowledge or appreciation of risk as one factor for
the assumption of risk doctrine, despite criticism for uneven application.\textsuperscript{146} Jurisdictions which retain some form of assumption of risk take a more subjective approach in determining duty than others.\textsuperscript{147} Ultimately, no negligence scheme should completely absolve a manufacturer of liability when it has knowingly increased the inherent risks of a sport.\textsuperscript{148} Because injured athletes face the additional challenge of meeting their burden of proof under changing assumption of risk doctrines, this Note will briefly examine the facts of \textit{Sanchez} under several jurisdictional approaches.\textsuperscript{149}

1. \textbf{Objective Approach: Inherent Risk}

As previously discussed, California adopted an objective analysis, as delineated in \textit{Knight}, focusing on whether the defendant's

\textsuperscript{146} Commentators have addressed what they perceive to be the uneven application of California's assumption of risk doctrine. See Cochran, \textit{supra} note 143 at 130-36 (noting differing application of California's assumption of risk doctrine). The Second District Court of Appeal in \textit{Sanchez} relied on the assumption of risk scheme laid out by the court in \textit{Knight v. Jewett}. See \textit{Sanchez}, 128 Cal. Rptr. 2d at 535. However, scholars have noted the \textit{Knight} scheme has led to uneven application of the assumption of risk doctrine among California's appellate jurisdictions. See Cochran, \textit{supra} note 143, at 130-36.

In \textit{American Golf Corp. v. Superior Court}, the plaintiff was injured when another player's shot ricocheted off a wooden yardage marker and struck him in the eye. See 93 Cal. Rptr. 2d 683, 686 (Cal. Ct. App. 2000) (restating facts of case). The Second District Court of Appeal reversed the trial court and granted a summary judgment motion on behalf of the defendant, holding primary assumption of risk barred the plaintiff's action, even though the plaintiff was not actually aware of the risk imposed by the wooden markers. See \textit{id}. at 685 (stating holding).

By contrast, in \textit{Morgan v. Fuji Country USA, Inc.}, defendant injured plaintiff with a shot on the fourth hole while plaintiff stood near his tee on the fifth fairway. See 40 Cal. Rptr. 2d 249, 250 (Cal. Ct. App. 1995) (summarizing facts of case). The Fourth District Court of Appeal found the golf course liable for the golfer's injuries, despite the golfer's full knowledge and awareness of risks imposed by the course's removal of a large pine tree that previously protected the fifth tee area. See \textit{id}. at 253; see also Cochran, \textit{supra} note 143 (setting out inconsistencies between \textit{American Golf} and \textit{Morgan}, and asserting that such uneven interpretation indicates need for elimination of assumption of risk doctrine in California).

\textsuperscript{147} For a discussion of objective and subjective approaches to duty, see \textit{infra} notes 150-71 and accompanying text.

\textsuperscript{148} For a discussion of appropriate imposition of liability where manufacturer's conduct has increased risk of injury to athlete, see \textit{supra} notes 130-36 and accompanying text.

\textsuperscript{149} For a discussion of various jurisdictional approaches to duty, see \textit{infra} notes 150-84 and accompanying text.
conduct was an inherent risk of the sport. While defendants have no legal duty to eliminate or protect the plaintiff against risks inherent in a sport, it is well established that defendants generally have a duty to use due care not to increase the risks to plaintiff over and above those inherent in the sport. The focus on inherent risk suggests a plaintiff's subjective knowledge or appreciation of potential risk is not the primary focus in defining the defendant's duty. The duty analysis does not depend on the plaintiff's subjective knowledge or appreciation of the risk.

Hawaii takes an approach similar to that of California with regard to determining duty, focusing objectively on the risk presented by the defendant's conduct. In determining whether the defendant's conduct was an inherent risk of the sport or activity, Hawaii considers the nature of the activity, the relationship of the defendant to the activity, and the relationship of the defendant to the plaintiff. See Bushnell, 50 Cal. Rptr. 2d at 674-75. The Bushnell court stated:

General rules of liability attach when the defendant's conduct is not an inherent risk of the activity or when the defendant's conduct increased the inherent risks in the activity. A defendant also may be charged with the duty to take such precautions as will prevent the risk without having a chilling effect on the nature of the activity.

Id. at 674.

150. The Knight approach was further elaborated in Bushnell v. Japanese-American Religious & Cultural Center, Concord Judo Club, 50 Cal. Rptr. 2d 671, 673-74 (Cal. Ct. App. 1996). Because Knight only involved a defendant who was a co-participant in a sport, the court had occasion to consider only the standard of conduct applicable to co-participants in competitive sports. See Knight, 834 P.2d 696 (Cal. 1992) (addressing liability for injuries sustained when defendant collided with co-participant plaintiff during informal touch football game). In Bushnell, a California court announced a general rule applicable to defendants in noncompetitive, but active, sports. See Bushnell, 50 Cal. Rptr. 2d at 674-75. The Bushnell court stated:

General rules of liability attach when the defendant's conduct is not an inherent risk of the activity or when the defendant's conduct increased the inherent risks in the activity. A defendant also may be charged with the duty to take such precautions as will prevent the risk without having a chilling effect on the nature of the activity.

Id. at 674.

151. See Knight, 834 P.2d at 708 (explaining defendant's duty).

152. See Foronda ex rel. Estate of Foronda v. Haw. Int'l Boxing Club, 25 P.3d 826, 839 (Haw. Ct. App. 2001) (evaluating California's assumption of risk doctrine and inferring plaintiff's subjective knowledge was neither exclusive nor primary focus in duty analysis); see also Knight, 834 P.2d at 709. The Knight court noted:

Rather than being dependent on the knowledge or consent of the particular plaintiff, resolution of the question of the defendant's liability in such cases turns on whether the defendant had a legal duty to avoid such conduct or to protect the plaintiff against a particular risk of harm . . . . [T]he nature of the defendant's duty in the sports context depends heavily upon the nature of the sport itself. Additionally, the scope of the legal duty will also depend on the defendant's role in, or relationship to, the sport.

Id.

153. See Knight, 834 P.2d at 709 (describing objective nature of California's duty analysis).

154. See Foronda, 25 P.3d at 841 (stating "primary implied assumption of risk is a discrete and complete defense where the defendant's conduct at issue is an inherent risk of the sports activity") (footnote omitted).
plaintiff. Under Hawaii’s doctrine, “a defendant may be held liable for either creating or countenancing risks other than those inherent in the sport or for increasing inherent risks.” Where a defendant’s conduct creates a new risk or increases the inherent risk of injury, a court will not apply assumption of risk to bar relief.

Alaska’s duty analysis also focuses on the inherent risks or “necessary dangers” in an activity or sport. If the exercise of reasonable care could mitigate or eliminate a danger, it is not a necessary danger and is therefore not an inherent risk of the sport. Alaska’s courts have defined an unreasonable risk as one for which “the likelihood and gravity of the harm threatened outweigh[s] the utility of the . . . conduct and the burden on the [defendant] for removing the danger.”

As previously discussed, a plaintiff-athlete such as Sanchez should not be barred from pursuing an action against a negligent manufacturer in a jurisdiction that has adopted an objective approach focusing on inherent risk. Any conduct found to increase the inherent risks or necessary dangers of the sport would trigger the existence of the defendant’s duty and eliminate the primary assumption of risk defense.

2. Subjective Approach: Plaintiff’s Knowledge

Duty analysis in other jurisdictions necessarily involves an assessment of the plaintiff’s subjective knowledge or appreciation of the risk. Missouri, for example, takes a slightly more subjective

155. See id. at 836. In absence of such a defense of primary assumption of risk, general comparative negligence principles govern the analysis. See id.

156. Id. at 841. The court went on to state liability should not place unreasonable burdens on free and vigorous participation in the sport. See id.

157. See id. at 844 (holding in favor of defendant boxing ring operator).


159. See id. (quoting Hiibschnman ex rel. Welch v. City of Valdez, 821 P.2d 1354, 1360 n.12 (Alaska 1991)).

160. See id. (relying on State v. Abbott, 498 P.2d 712, 725 (Alaska 1972)).

161. For a discussion of a plaintiff-athlete’s potential negligence claims in such a jurisdiction, see supra notes 105-20 and accompanying text.

162. See supra notes 150-61 and accompanying text.

163. See, e.g., Olson v. Bismarck Parks and Recreation Dist., 642 N.W.2d 864, 871 (N.D. 2002) (holding, in North Dakota, voluntary participants in sporting activities are presumed to have consented to injury-causing events as known, apparent, or reasonably foreseeable consequences of participation).
approach to duty. While the basis of primary assumption of risk is the plaintiff’s consent to accept the risk, the plaintiff must be aware of the facts that create the danger and appreciate the danger itself. The Missouri approach focuses on "what the particular plaintiff in fact sees, knows, understands, and appreciates."  

To invoke the defense of primary assumption of risk in Washington, "the evidence must show that the plaintiff (1) had full subjective understanding (2) of the presence and nature of the specific risk and (3) voluntarily chose to encounter the risk." Thus, Washington’s duty assessment also incorporates the plaintiff’s subjective knowledge and appreciation of the inherent risks of the sport.

In a jurisdiction adopting this more subjective approach, a plaintiff-athlete similar to Sanchez should not be barred from pursuing action for relief by the primary assumption of risk defense. Such a plaintiff may argue that the manufacturer unreasonably increased the risks of injury through its design of equipment and such risks were not obvious or apparent to the plaintiff. A plaintiff may also argue a lack of understanding of the nature and scope of the additional risks presented by new equipment designs. To further support an assertion that increased risks were not apparent or were concealed, a plaintiff like Sanchez might rely on repeated manufacturer assurances that newer designs of equipment presented no increased risk of injury to participants.

164. See, e.g., Lewis v. Snow Creek, Inc., 6 S.W.3d 388 (Mo. Ct. App. 1999). If the risks of the activity are perfectly obvious or fully comprehended, then plaintiff has consented to them, and defendant has performed his or her duty. See id. at 395-96.

165. See id. at 396 (explaining subjective nature of Missouri’s duty analysis).

166. See id. (quoting Sheppard by Wilson v. Midway R1 School Dist., 904 S.W.2d 257, 264 (Mo. Ct. App. 1995)).

167. Brown v. Stevens Pass, Inc., 984 P.2d 448, 450 (Wash. Ct. App. 1999) (delineating evidential burden to establish primary assumption of risk). “The participant must know that the risk is present, and he or she must further understand its nature; and . . . his or her choice to incur it must be free and voluntary.” See id. (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 68 at 487 (5th ed. 1984)) (brackets omitted).

168. See id. at 450-51 (setting forth Washington’s approach to duty).

169. See Lewis, 6 S.W.3d at 396 (basing determination of plaintiff’s knowledge of inherent risks on basis of what plaintiff actually sees, knows, understands, and appreciates).

170. See Brown, 984 P.2d at 450 (requiring plaintiff’s understanding of presence and nature of risk for assumption of risk to bar relief).

171. See Lewis, 6 S.W.3d at 396 (requiring plaintiff must be aware of facts that create the danger and appreciate danger itself); see also Lombardi, supra note 14 (reporting repeated manufacturer assurances that newly designed aluminum bats did not increase safety risks to players).
3. *Other Approaches*

Some jurisdictions consider both subjective and objective factors in determining the existence of duty. In New York's comparative fault regime, "assumption of risk is not an absolute defense" in a negligence action "but [rather] a measure of the defendant's duty of care."  

172 Under this approach, the court will measure the plaintiff's knowledge of risk against the background of the skill and experience of the particular plaintiff.  

173 If the risks of the activity are fully comprehended or perfectly obvious, and the participant has consented to them, then the defendant has no duty of care with regard to these risks.  

174 Participants are not deemed to have consented to unassumed risks or risks that have been concealed or unreasonably increased.  

175 Thus, the existence of a defendant's duty of care necessarily relates to (1) a plaintiff's ability to comprehend the risks, and (2) his or her actual comprehension of the risks.

Indiana takes a similar approach.  

177 Under Indiana doctrine, a sports participant owes no duty of care to a co-participant with re-


173. See id. at 208. The court elaborated: "Correspondingly, for purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the *sine qua non* . . . ." Id. (citations omitted).

174. Id. at 207 (stating by engaging in sport, participants consent to those commonly appreciated risks which are inherent in and generally arise out of nature of sport and flow from such participation).

175. See id. at 208 (stating participant in recreational activity will not be deemed to have assumed unreasonably increased or concealed risks); see also Ruepp v. W. Experience, Inc., 706 N.Y.S.2d 787, 788 (N.Y. App. Div. 2000) (noting hazard concealed or unreasonably increased is not within range of risks assumed by participant in sporting activity); Karr v. Brant Lake Camp, Inc., 691 N.Y.S.2d 427, 428 (N.Y. App. Div. 1999) (holding voluntary participants in sporting activities assume risks to which their roles expose them, but not risks unreasonably increased); Hawley v. Binghamton Mets Baseball Club, Inc., 691 N.Y.S.2d 626, 627-28 (N.Y. App. Div. 1999) (holding sports participants assume risk of injuries normally associated with sport, unless conditions caused by defendant's negligence were unique and created dangerous condition over and above usual dangers inherent in sport).


177. See, e.g., Mark v. Moser, 746 N.E.2d 410 (Ind. Ct. App. 2001) (describing Indiana's Comparative Fault Act, intended to ameliorate harshness of common law contributory negligence, as precluding a slightly negligent plaintiff from recovering damages, even against highly culpable tortfeasor). Under the Act, courts permit plaintiffs to recover damages, reducing them in proportion to plaintiff's fault. See id. However, if a court finds the plaintiff to be more than 50 percent at fault, plaintiff's recovery is completely barred. See id. As a result, Indiana courts will consider plaintiff's subjective knowledge in determining fault, but will also consider objective factors or reasonableness. See id.
spection to risks that are considered to be within the ordinary range of activity involved in the sport. Under this approach, the plaintiff's knowledge of risks receives some consideration, but the inherency of the risk in the sport weighs far more heavily. Indiana takes this slightly more objective approach based on "the policy-driven concept that flows from the legal relationship of the participants in a sport, not their subjective expectations." 

New Hampshire does not recognize implied assumption of risk at all. As a matter of law, participants in certain sports do not assume the dangers inherent in those sports unless they are sports for which the state legislature has explicitly provided. Under such an approach a plaintiff-athlete like Sanchez would not face the initial obstacle of defeating a primary assumption of risk defense. However, an obstacle may exist in that for certain sports, legislative assessment of the inherent dangers of a sport would not be subject to argument or interpretation.

V. Impact of Sanchez v. Hillerich & Bradsby Co.

A. Athletic Organizations

Commentators have stated the California appellate court's decision to allow Sanchez's action does not state a remarkable new principle of law. Nonetheless, the decision seems to extend liability for injuries associated with newly designed sports equipment

178. See id. at 414 (assessing duty of care between co-participants). While the Indiana Supreme Court had not specifically addressed the standard of care between co-participants in athletic events, it had addressed the appropriate standard of care owed by an educational institution and its representatives to students for injuries sustained while playing campus sports. See id.

179. See id. at 418 (explaining that for purposes of determining whether primary assumption of risk doctrine applies, plaintiff's knowledge plays role, but inherency of risks involved in particular sport is sine qua non).

180. See id.

181. See Dean v. MacDonald, 786 A.2d 834, 840 (N.H. 2001) (holding state common law no longer recognized implied assumption of risk as defense to negligence claims arising from sporting events).

182. See Hacking v. Town of Belmont, 736 A.2d 1229, 1234 (N.H. 1999) (stating participants do not assume, as matter of law, dangers inherent in any sport unless explicitly provided by legislature).

183. See Dean, 786 A.2d at 840.

184. See id.

185. See Mike McKee, Bat Ups Chance of Baseball Injuries Appeals Court Rules, at http://www.law.com/jsp/article.jsp?id=1039054489023 (Dec. 24, 2002) (quoting attorney, Wendy Lascher, as stating, "the [Second] District's ruling isn't that novel . . . . It's not stating a remarkable new principle of law . . . just applying law that's in effect.").
to the athletic organizations regulating competition.\textsuperscript{186} As one commentator has noted, "any piece of sports equipment that makes the game more dangerous than its very nature will impose the risk of liability on the institution behind a team or player."\textsuperscript{187} Others are skeptical that Sanchez's action will be met with success.\textsuperscript{188} Regardless of the outcome, Sanchez's case has inevitably brought attention to the increased risks that may accompany newer generations of high-performance equipment. Sanchez's case has also increased awareness on the part of perhaps the most pivotal party to this issue — the governing athletic organizations who are committed to player safety and ultimately responsible for sanctioning equipment.

\textbf{B. Sports Equipment Manufacturers}

In the context of athletic competition, courts have extended a duty of care to a wide range of defendants whose actions have increased the inherent risks of a sport, including coaches, instructors, co-participants, governing organizations, and sports facility owners and operators.\textsuperscript{189} The outcome of Sanchez may support proper application of that duty of care to sports equipment manufacturers as well.\textsuperscript{190} A finding of liability on the part of Hillerich & Bradsby may influence manufacturers to reevaluate their commitment to player safety. Sanchez's preliminary success in defeating these summary judgment motions reinforces the conclusion that where a defendant's conduct may have increased the inherent risks of a sport,

\begin{itemize}
  \item \textsuperscript{186} See id. (quoting California attorney's assessment of possible weight of outcome). "The court's ruling, carried to its logical conclusion, could apply to all new equipment — golf clubs, hockey sticks, tennis rackets and more — that change the nature of games by increasing the risk of injuries." \textit{Id.}
  \item \textsuperscript{187} Id. (stating ruling would potentially apply to any kind of equipment).
  \item \textsuperscript{188} See id. (quoting Mark Eisenhut, NCAA's representative in suit, asserting his confidence NCAA can demonstrate it acted in best interest of all players at time of Sanchez's injury).
  \item \textsuperscript{190} See Knight, 834 P.2d at 705 (Cal. 1992) (stating holding).
\end{itemize}
facile reliance on the primary assumption of risk defense should not automatically bar a plaintiff-athlete’s relief.\textsuperscript{191}

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