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Baseball Juiced Up: Should the Increased Risk Associated with the Use of Performance-Enhancing Substances Create Tort Liability

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Comments

BASEBALL JUICED UP: SHOULD THE INCREASED RISK ASSOCIATED WITH THE USE OF PERFORMANCE-ENHANCING SUBSTANCES CREATE TORT LIABILITY?

I. INTRODUCTION

Injury is an inherent risk in all athletic competitions, but an alarming trend increasing this danger is the prevalence of steroids, human growth hormones and other illegal performance-enhancing drugs.¹ Most courts, recognizing that injuries are an unavoidable aspect of athletics, adopted the doctrine of “*volenti non fit injuria*” establishing that “one who takes part in . . . a sport accepts the dangers that inhere in it so far as they are obvious and necessary”² This doctrine was the underlying justification for allowing defendants, in sports injury cases, to use the assumption of the risk defense.³ As professional athletes’ use of performance-enhancing drugs becomes increasingly prevalent, a new question that courts

1. See, e.g., Mathew J. Mitten, *Drug Testing of Athletes - an Internal, Not External, Matter*, 40 NEW ENG. L. REV. 797, 798-99 (2006) (exploring prevalence of performance-enhancing drugs); Michael F. Taxin, Note, *The Changing Evolution of Sports: Why Performance Enhancing Drug Use Should Be Considered in Determining Tort Liability of Professional Athletes*, 14 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 817, 842 (2004) (asserting performance-enhancing drug use in American professional sports is rampant and unlikely to stop). “Some athletes at all levels of sports competition are willing to use banned performance-enhancing drugs even though doing so violates the rules of the game, exposes them to sanctions, may adversely affect their health, and may [even] violate federal and/or state law.” Mitten, *supra*, at 798.

2. See *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173, 174 (N.Y. 1929) (restating legal doctrine of “[*v*]olenti non fit injuria”); see also Keya Denner, Comment, *Taking One for the Team: The Role of Assumption of the Risk in Sports Torts Cases*, 14 SETON HALL J. SPORTS & ENT. L. 209, 209 (2004) (“These . . . oft-quoted words of Justice Cardozo . . . have laid the foundation for the use of the defense of assumption of risk by defendants in the expanding area of sports injury cases.”).

3. See generally *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 391-92 (Cal. 2006) (explaining modern assumption of risk defense in sports injury cases); *Bowman v. McNary*, 853 N.E.2d 984, 990 (Ind. Ct. App. 2006) (illustrating modern application of *volenti non fit injuria*); *Brown v. Stevens Pass, Inc.*, 984 P.2d 448, 450 (Wash. Ct. App. 1999) (“Assumption of the risk in the sports participant context ‘is in reality the principle of no duty-hence no breach and no underlying cause of action.’” (citing *Codd v. Stevens Pass, Inc.*, 725 P.2d 1008, 1013 (Wash. Ct. App. 1986))). “[I]n accordance with traditional negligence principles, there is no duty from one participant in a sports activity to another to prevent injury resulting from an inherent risk of the sport.” *Bowman*, 853 N.E. at 990. The defense “relieves the defendant of a duty of care that would have otherwise been owed to the plaintiff

may have to decide is whether an injured athlete may sue on the grounds that a co-participant's use of these drugs caused their injury.

To illustrate this problematic situation, imagine yourself pitching in a Major League Baseball ("MLB") game. You release the pitch and a split second later the batter hits a rocket line-drive striking you directly in the face.⁴ Now suppose that the batter tested positive for, or admitted to taking, steroids. Could you sue the batter, claiming his use of performance-enhancing drugs caused your injuries? Courts have not specifically ruled on this, but have found triable issues in similar fact patterns.⁵

This comment, through a hypothetical lawsuit in which the plaintiff alleges his injuries were caused by a co-participant's steroid use, explores the issue of tort liability in connection with performance-enhancing drugs. Section II provides background information on performance-enhancing drugs, including athletes' motives for using them, their effects on athletic performance, and their prevalence in professional sports.⁶ Further, section II provides the fact pattern for the hypothetical suit, examines the required elements of an actionable sports tort claim, and discusses the available defenses. This section specifically focuses on the duty of care owed between co-participants in athletic activities,⁷ the level of malfeasance deemed to breach that duty,⁸ and the defense of assumption

. . . . This is particularly appealing to defendants in sports injury cases" Denner, *supra* note 2, at 209.

4. See Rob Dibble, Amazing Comeback for Florie (Dec. 6, 2001), <http://espn.go.com/talent/danpatrick/s/2001/0705/1222698.html> (recounting former Boston Red Sox's pitcher Bryce Florie's ordeal). On September 8, 2000, pitcher Bryce Florie was struck in the face by a line-drive causing "several facial-bone fractures" and "significant loss of vision." See *id.*

5. See generally Sanchez v. Hillerich & Bradsby Co., 128 Cal. Rptr. 2d 529, 538-39 (Ct. App. 2003) (finding "evidence raises a triable issue of material fact whether the design and use of the Air Attack 2 [an aluminum baseball bat] substantially increased the inherent risk appellant [a college baseball pitcher] faced").

6. For a further discussion of performance-enhancing drugs, see *infra* notes 15-57 and accompanying text.

7. See generally WALTER T. CHAMPION, JR., FUNDAMENTALS OF SPORTS LAW §1:2 (2006) ("The key to actionable claims in negligence in sports is the defendant's duty of care.").

8. See Taxin, *supra* note 1, at 818-19 (summarizing recent trend of courts to require defendant's actions to be reckless in order to grant recovery in sports injury cases).

of the risk.⁹ It will further assess the policies behind courts' analyses in sports tort cases.¹⁰

Section III applies the established legal standards for sports injury cases to the hypothetical fact pattern.¹¹ After examining the legal standards, section III argues that the assumption of the risk defense does not apply and the defendant's use of steroids breached the duty of care.¹² Moreover, section III demonstrates how the suit would further important societal interests without blunting the valid public policy concerns implicated by the lawsuit.¹³ Section IV theorizes, under the current landscape of sports tort precedent, that an injured athlete could persuasively argue that a co-participant should be civilly liable for using performance-enhancing drugs.¹⁴

II. BACKGROUND

A. Why Do Athletes Use Performance-Enhancing Drugs?

For centuries, athletes have strived to gain a competitive edge by turning to performance-enhancing substances.¹⁵ In the early 1900s, stories surfaced of Olympic athletes experimenting with assorted concoctions hoping to improve performance.¹⁶ During the early 1970s, National Football League players were using steroids and by the mid-1980s, rumors implicating MLB players with steroid use were rampant.¹⁷ Since their initial introduction to mainstream

9. See Denner, *supra* note 2, at 210-16 (examining assumption of risk defense in sports tort cases).

10. For a further discussion of the policies implicated in sports injury cases, see *infra* notes 99-102 and accompanying text.

11. For a further discussion of the legal analysis of the hypothetical fact pattern, see *infra* notes 106-239 and accompanying text.

12. For a further discussion of the application of assumption of risk defense and defendant's duty of care, see *infra* notes 109-83 and accompanying text.

13. For a further discussion of the public policy considerations implicated by hypothetical, see *infra* notes 184-239 and accompanying text.

14. For a further discussion of the theory that a defendant should be found liable for his steroid use, see *infra* notes 240-51 and accompanying text.

15. See E. Randy Eichner, M.D., *Ergogenic Aids: What Athletes Are Using — and Why*, 25 THE PHYSICIAN AND SPORTSMEDICINE 4 (1997), available at <http://www.physsportsmed.com/issues/1997/04apr/eichner.htm> (describing use of performance-enhancing substances during ancient Greek Olympics and in Aztec culture).

16. See *id.* (detailing Olympic athletes' use of substances in 1904). "The winner of the 1904 Olympic marathon . . . took strychnine and brandy during the race. The winner of the 1920 Olympic 100-m dash . . . drank sherry with raw egg before the race. In the 1960 Olympics, [a] Danish cyclist . . . died in the road race from taking amphetamine." *Id.*

17. See Rick Telander, *They Sure Look Like Hall of Famers*, CHI. SUN TIMES, Jan. 10, 2007, at 111 (arguing steroid era in American pro sports could go back "to the

professional sports, star athletes have been continually embroiled in steroids scandals making front page news.¹⁸ The question many ask is why athletes jeopardize their health, reputation, and million-dollar careers by using these illegal substances.¹⁹

The driving force behind each athlete's initial decision to use performance enhancers differs, but in the end, it is all about results.²⁰ Some young players growing up in poverty see "[t]he lure of big money and a better life" that a professional sports career provides and turn to steroids in the hope that it will help them attain this.²¹ Other aspiring athletes are driven purely by the goal of becoming a professional sport star and use illegal performance-enhancing drugs to increase their chances of reaching this goal.²²

mid-1970s, when NFL players – including some on the great Pittsburgh Steelers teams – were loading up"). For a further discussion on steroid use in MLB, see *infra* notes 32-57 and accompanying text.

18. See Buster Olney, *An Outside-the-Park Investigation*, N.Y. TIMES, Apr. 1, 2006, at A15 (commenting on Major League Baseball's "institutional failure" to recognize steroid problems); Tim Layden, *Charging Ahead: San Diego Tries to Overcome Suspensions, Schedule*, Oct. 27, 2006, http://sportsillustrated.cnn.com/2006/writers/tim_layden/10/27/chargers/index.html (explaining that San Diego Chargers player Sean Merriman "admitted to testing positive for the anabolic steroid nandrolone"); Jose Canseco: 'Juiced,' CBSNEWS.COM, Aug. 7, 2005, <http://www.cbsnews.com/stories/2005/08/05/60minutes/main761932.shtml> [hereinafter *Jose Canseco: Juiced*] (recounting statement from Jose Canseco's book, *JUICED*, regarding steroid use); Associated Press, *MVP in 1996 Says Taking Steroids Wasn't a Mistake*, ESPN.COM, <http://espn.go.com/mlb/news/2002/0528/1387969.html> (last visited May 1, 2008) (recounting former MLB MVP's steroid use and discussing player's views on amount of steroid use in MLB); *NFL Probes Report ID'ing Sauerbrun, Mitchell, Steussie*, ESPN.COM, <http://sports.espn.go.com/nfl/news/story?id=2025197> (last visited May 1, 2008) (reporting on NFL players' alleged steroid use).

19. See Taxin, *supra* note 1, at 830-33 (theorizing that use is linked to modern sports environment). "Today, there are tremendous financial incentives on athletes for individual success." *Id.* at 830. "The tremendous emphasis on winning and the pressure on players to perform well [has] led to an increase in weight lifting [sic], body conditioning, and the use of legal — and sometimes illegal — performance enhancing drugs." *Id.* at 831-32.

20. See generally Jim Thurston, *Chemical Warfare: Battling Steroids in Athletics*, 1 MARQ. SPORTS L.J. 93, 100 (1990) ("Athletes take . . . steroids to enhance and maximize athletic performance.").

21. See generally Tom Farrey, *Results: Dominicans Fail More Tests Than U.S. Players*, Apr. 14, 2005, <http://sports.espn.go.com/mlb/news/story?id=2033711> (highlighting results of steroid test from Dominican summer baseball league). "[B]aseball is widely seen as a way out of poverty, and steroids can be obtained at loosely regulated pharmacies." *Id.*

22. See *Jose Canseco: Juiced*, *supra* note 18 (discussing steroids' impact on baseball career). Jose Canseco, a baseball player at the center of the steroid controversy, agreed that he "would never have been a Major League caliber player without steroids . . ." *Id.* Today, many young athletes striving to become professional sports players turn to steroids to help reach this goal. See generally Colin Laitner, *Steroids and Drug Enhancement in Sports: The Real Problem and the Real Solution*, 3 DEPAUL J. SPORTS & CONTEMP. PROBS. 192, 194 (2006) (examining escalating problem of children and teenagers using steroids).

Many professional players, seeing their fellow competitors bulking up on performance-enhancing drugs, believe cutting corners is the only way to remain competitive.²³ In each of these instances, the athlete chose to use a performance-enhancing drug for different reasons, in the hope of gaining a competitive advantage.²⁴

B. Steroid Use In Professional Sports

Over the years, athletes have used a myriad of substances to aid athletic performance.²⁵ Currently in professional sports, the three most prevalent are anabolic steroids, Tetrahydrogestrinone (“THG” which is an undetectable steroid), and human growth hormone (“HGH”).²⁶ Although this comment focuses primarily on steroids, the improvements in athletic performance that HGH provides are extremely similar.²⁷

23. See Olney, *supra* note 18, at A15 (discussing story of former MLB player Wally Joyner).

Wally Joyner, who broke in at about the same time as [Mark] McGwire, Canseco, Rafael Palmeiro and others, revealed last fall that in the spring of 1998, he came face to face with a choice: Use steroids, or fall behind and perhaps out of the game. Joyner's offensive numbers were falling while those of his peers were exploding, even as they entered their 30's. So Joyner tried steroids, taking them twice before flushing the rest of the pills down a toilet.

Id.

24. See Mitten, *supra* note 1, at 799 (“Anabolic steroids . . . do enhance athletic performance by making users bigger, stronger, and faster – while also reducing their recovery time after strenuous exercise.”).

25. See generally MARK FAINARU-WADA & LANCE WILLIAMS, *GAME OF SHADOWS: BARRY BONDS, BALCO, AND THE STEROIDS SCANDAL THAT ROCKED PROFESSIONAL SPORTS* 18-19 (Penguin Group 2006) (explaining use of performance-enhancing substances can be traced as far back as 776 B.C. “when . . . ancient Greek Olympians ate sheep's testicles to spike their testosterone levels before competing”).

26. See Taxin, *supra* note 1, at 832-35 (discussing common performance-enhancing drugs that professional athletes use); *Former Baseball Player Admits HGH Use*, CBSNEWS.COM, June 18, 2006, <http://www.cbsnews.com/stories/2006/06/18/sportsline/main1726693.shtml> (reporting MLB player David Segui admitted to years of HGH use during professional career); *Report: Feds Wanted Grimsley to Help Implicate Bonds*, ESPN.COM, <http://sports.espn.go.com/mlb/news/story?id=2474291> (last visited May 1, 2008) (detailing MLB pitcher being caught with HGH). It should be noted that throughout this comment the word “steroids” refers to all forms of the drug including anabolic steroids and THG.

27. See Taxin, *supra* note 1, at 817 (explaining side effects of HGH). HGH “provides growth to almost every organ and tissue in the human body.” *Id.* at 834. Baseball players are attracted to HGH because it helps them recover faster and avoid injuries. See Baseball's Steroid Era, *Human Growth Hormone (hGH)(sic) – History, Side-Effects, Use in Baseball*, Oct. 30, 2006, <http://thesteroidera.blogspot.com/2006/10/human-growth-hormone-hgh-history-side.html> (analyzing HGH effects, specifically how using it with steroids helps reduce steroid related injuries).

1. *How Do Steroids Help Performance?*

Initially, experts claimed there was not a demonstrable link between steroid use and improved athletic performance, but more recent studies have completely disproven this original claim.²⁸ Steroids, along with proper weightlifting and dieting, create bigger, stronger and faster athletes.²⁹ Further, steroids shorten the amount of time muscles need to fully recover from workouts or other strenuous activity.³⁰ For professional athletes, the combination of increased strength and faster recovery translates into highly improved on-field performance.³¹

In baseball, both batters and pitchers find steroids to be extremely helpful.³² Steroids are attractive to hitters because the increased strength helps “turn an infield ground ball into an outfield

28. See George Fan, Comment, *Anabolic Steroid and Human Growth Hormone Abuse: Creating an Effective and Equitable Ergogenic Drug Policy*, 1994 U. CHI. LEGAL F. 439, 443-46 (1994) (linking improved athletic performance with anabolic steroids). “The first scientific studies on steroids, however, mistakenly concluded that they had no effect on athletic performance. Recent studies have confirmed what athletes have always believed - steroids improve athletic performance.” *Id.* at 443 (citation omitted).

29. See *id.* at 443 (“[S]teroids increase an athlete’s strength if the athlete combines steroid use with: (1) an intense weight training program before and during the steroid regimen; and (2) a high-protein, high-calorie diet.” (citing Herbert A. Haupt & George D. Rovere, *Anabolic Steroids: A Review of the Literature*, 12 AM. J. OF SPORTS MED., 469, 481 (1984))); Taxin, *supra* note 1, at 835 (reviewing use of legal and illegal supplements, concluding that “[a]thletes today are bigger, stronger, faster, and more aggressive”).

30. See Taxin, *supra* note 1, at 832 (explaining steroid use can “reduce recovery time for muscles”); FAINARU-WADA & WILLIAMS, *supra* note 25, at 43 (discussing importance of recovery time and benefit provided by steroids). “The sooner [the] body could bounce back from the stress of an intense workout or a particularly painful game, the sooner [the athlete] could return to the weight room or the practice field. This was also the greatest but least-known value of using steroids.” *Id.*

31. See Fan, *supra* note 28, at 466 (quoting testimony of former steroid user) (“Athletes today . . . see the immediate results of anabolic steroids and keep on taking the drugs.”).

32. See Ron Kroichick, *Rapid Recovery is the Key for Pitchers in a Long Season*, S.F. CHRON., May 3, 2005, at C1 (noting benefits of steroids can be “huge asset[s] for pitchers and hitters alike”); see generally GEORGE J. MITCHELL, REPORT TO THE COMMISSIONER OF BASEBALL OF AN INDEPENDENT INVESTIGATION INTO THE ILLEGAL USE OF STEROIDS AND OTHER PERFORMANCE ENHANCING SUBSTANCES BY PLAYERS IN MAJOR LEAGUE BASEBALL 170 (2007) (discussing benefits steroids provided to pitcher Roger Clemens).

According to [MLB trainer Brian] McNamee, from the time that McNamee injected Clemens with Winstrol through the end of the 1998 season, Clemens’s performance showed remarkable improvement. During this period of improved performance, Clemens told McNamee that the steroids “had a pretty good effect” on him. McNamee said that Clemens also was training harder and dieting better during this time.

Id. Winstrol is “an injectable anabolic steroid.” MITCHELL, *supra*, at 94.

hit and turn a regular home run into a tape-measure home run.”³³ Moreover, steroids allow hitters to wait a split-second longer before beginning their swing and provide them with massively improved power, enabling them to hit the ball harder, farther, and with more velocity.³⁴ Pitchers, on the other hand, are enticed by the potential reduction in recovery time provided by steroids; this allows them to pitch at full strength with greater frequency.³⁵ Reducing recovery time helps “relievers who want to be available for 70 to 80 appearances per season, or starters who need to shed soreness between outings.”³⁶ Beyond the advantages in strength and recovery time, steroids benefit players in many other facets of the game.³⁷

Athletes on steroids experience a boost not only in their physical abilities, but they also benefit from psychological improvements.³⁸ Current and former steroid users continually assert that

33. Sal Ruibal, *Scholars: Steroids Can Help Home Run Hitters*, USA TODAY, Feb. 24, 2005, at 9C (internal quotation omitted); see also Lee Jenkins, *Baseball: Taking a Swing With Steroids*, N.Y. TIMES, June 14, 2004, at D1 (detailing batters ability “to jerk the bat around faster, creating power”). A “tape-measure home run” is “an extremely long home run.” Baseball Basics: Lingo, MLB.COM, http://mlb.com/mlb/official_info/baseball_basics/lingo.jsp (last visited May 1, 2008).

34. See Ruibal, *supra* note 33, at 9C (citing Charles Yesalis, professor of health and human development and leading expert on steroids). Mr. Yesalis found the following:

[S]teroids produce greater muscle mass and that translates into faster bat speed. Batting power is generated by muscles in the player’s forearms, shoulders and especially the hips, all areas that can be improved with steroids. “That increased bat speed means [a player] can wait longer on the pitch” “Even if the contact is not solid, the added power will give the ball more velocity.”

Id. Steroids produce “weight gain, almost all of it muscle, and with that strength to lift ever greater weights. For a baseball player, it mean[s] the ability to whip the bat with greater force and drive the ball with more authority than ever before.” FAINARU-WADA & WILLIAMS, *supra* note 25, at 64.

35. See Kroichick, *supra* note 32, at C1 (reporting twenty-one of forty-seven minor league baseball players who tested positive for steroids were pitchers). “[A]n often overlooked benefit of performance-enhancing drugs: Not only can they help increase muscle mass, they also can accelerate recovery after games and workouts.” *Id.* Victor Conte, the founder of a lab that supplied performance-enhancing drugs to numerous MLB players, explained “the clear” was a liquid steroid that “helps the athlete with recovery time.” Mitchell, *supra* note 32, at 32.

36. Kroichick, *supra* note 32, at C1.

37. For a further discussion on the additional effects steroids have on playing ability, see *infra* notes 38-46 and accompanying text.

38. See WILLIAMS & FAINARU-WADA, *supra* note 25, at 64 (discussing how steroids provide “self-confidence that border[s] on a feeling of invincibility”); Ruibal, *supra* note 33, at 9C (quoting Michael Sachs, sports psychologist and professor of sports kinesiology at Temple University, regarding increased confidence felt by players while taking steroids). “Going up to the plate, the batter is going to feel much more confident and in control That translates into better overall play, which certainly includes hitting more home runs.” *Id.* (internal quotation omitted).

they feel “invincible” and exceptionally confident when they are taking steroids, providing them with the belief that they will hit the ball farther.³⁹ One player even said that the real advantage of performance-enhancing drugs is not the increased strength and speed but the mental confidence supplied by them.⁴⁰ Whether it is the improvements in speed, strength, and recovery time or the mental edge, it is undeniable that steroids help players perform at a higher level.⁴¹

2. *Pervasiveness of Steroid Use in Professional Sports*

Steroid use is widespread in professional sports; nevertheless, it is impossible to accurately calculate the number of players using steroids and other performance-enhancing drugs.⁴² The difficulty is twofold: athletes have discovered ways to avoid testing positive for performance enhancers, and many drugs are simply undetectable.⁴³ Moreover, MLB only recently instituted a drug testing pol-

39. See Jenkins, *supra* note 33, at D1 (citing Dr. Harrison Pope, director of biological psychiatry laboratory at McLean Hospital/Harvard Medical Center and commenting on his twenty years of research on steroids). “[C]ountless athletes tell him they feel invincible when performing with steroids, providing a psychological edge on par with the physical advantage.” *Id.* Other players explained teammates on steroids had “extra confidence” in their ability to hit the ball. See *id.*

40. See *id.* (commenting on players’ attitudes when taking steroids). “They have this different attitude, like they’re invincible, and they’re just going to crush it. I think that’s the real edge.” *Id.* (internal quotation omitted)

41. For a further discussion on steroids, see *supra* notes 25-40 and accompanying text.

42. See Jenkins, *supra* note 33, at D1 (discussing difficulty in assessing steroid use in MLB due, in part, because even in 2004 “[n]o active major leaguer [had] been positively identified for steroid use”); Jere Longman, *Drug Testing: Drugs in Sports Creating Games of Illusion*, N.Y. TIMES, Nov. 18, 2003, at D1 (examining possibility that no sports achievements can be viewed without doubting they were achieved using steroids).

Athletes are believed to be using some substances, like human growth hormone, for which there are no screening tests. And scientists have said they believe other undetected designer steroids, like THG, are in use. Thus, a negative drug test does not assure that an athlete is not using [sic] illicit substances.

Id.

43. See FAINARU-WADA & WILLIAMS, *supra* note 25, at 58 (discussing how BALCO founder Victor Conte helped athletes “conceal [] what otherwise would be a telltale sign of the use of an undetectable steroid: an abnormally low testosterone level”); Fan, *supra* note 28, at 446 (recognizing “exact incidence of steroid abuse among . . . professional athletes is unknown”); Taxin, *supra* note 1, at 834 (noting there is no test available to check for HGH); Paul Hagen, *Ryan Howard Forced to Face “Natural” Questions*, PHILA. DAILY NEWS, Sept. 5 2006, <http://www.philly.com/mld/dailynews/sports/15440902.htm> (on file with author) (discussing designer steroids). “There is no test for human growth hormone and the BALCO scandal uncovered the fact that there are mad scientists out there designing designer steroids specifically made to avoid detection.” *Id.* BALCO is the Bay

icy.⁴⁴ The lack of reliable testing and the absence of a drug policy resulted in inaccurate estimates of the number of MLB players using illegal substances.⁴⁵ Despite this, a few things are certain: a number of athletes cheated, many others did not, and the non-users aware of the problem were only recently able to force MLB to adopt a testing policy.⁴⁶

The 1980s marked the beginning of MLB's problems with steroids.⁴⁷ Rumors swirled that MLB players were using steroids but league officials continually disregarded the allegations.⁴⁸ Even in the mid-1990s, when star players and general managers openly acknowledged that a significant steroids problem existed, Commissioner Bud Selig ignored the issue.⁴⁹ Finally, the combination of book releases, admissions of steroid use by former and current players, and the "cartoonish jawlines and foreheads" of players forced MLB to act.⁵⁰

Area Laboratory Co-Operative, an entity that supplied numerous MLB players with performance enhancing substances. See MITCHELL, *supra* note 32, at SR-17.

44. See Jenkins, *supra* note 33, at D1 (commenting on baseball's decision not to test until 2003 because it was perceived that steroids were for football, not baseball, players); see also FAINARU-WADA & WILLIAMS, *supra* note 25, at 71 (discussing Barry Bond's steroid use). "No athlete subject to drug testing dared use Winstrol [(a detectable steroid)] because the likelihood of getting caught was so great. But of course that wasn't an issue for [Barry] Bonds and baseball as the 1999 season approached [T]he sport was still years away from confronting its steroid problem." *Id.*

45. See Longman, *supra* note 42, at D1 (recognizing many athletes do not use steroids, but this cannot be proven). "In fact, sports administrators and scientists believe that most athletes are clean. But there is no way to prove this in a world of uneven, imperfect drug testing and designer steroids that may not be detectable . . ." *Id.*

46. See generally Olney, *supra* note 18, at A15 (discussing willingness of players' union and baseball commissioner "to turn a blind eye" to steroid problem). In one poll, forty-four percent of MLB players stated they "felt pressure" to take steroids but the union did little to address the issue. See *id.* Moreover, "[s]everal former MLB . . . players such as Jose Canseco, Ken Caminiti[] . . . and Steve Courson have admitted using anabolic steroids to enhance their on-field performances." Mitten, *supra* note 1, at 798.

47. See generally MITCHELL, *supra* note 32, at 60-76 (discussing early warning signs of steroid use in MLB). "Reports of steroid use in Major League Baseball began soon after the widely publicized discipline of Canadian sprinter Ben Johnson at the Summer Olympic Games in September 1988." *Id.* at SR-14.

48. See Laitner, *supra* note 22, at 198 (quoting MLB spokesperson Pat Courtney) ("I don't think that the concern is . . . that [steroids are] being used."); Olney, *supra* note 18, at A15 ("For years – beginning in 1989, in fact – I had heard executives, scouts and players speculate about steroid use.").

49. See Olney, *supra* note 18, at A15 (quoting Commissioner Bud Selig: "If baseball has a problem, I must say candidly that we are not aware of it.").

50. See Mitten, *supra* note 1, at 798 (listing prominent MLB players admitting to steroid use); Olney, *supra* note 18, at A15 (noting appearance of steroid-using MLB players); Jose Canseco: *Juiced*, *supra* note 18 (discussing release of Jose Can-

In 2002, MLB adopted the first in a series of drug testing programs that are continually criticized because of their possible loopholes.⁵¹ Under the 2002 program, all MLB players were required to take an anonymous drug test.⁵² If five percent of the players tested positive for steroids, the League would implement a permanent plan; otherwise, testing would be discontinued.⁵³ The results showed five to seven percent of the players tested positive, prompting additional testing.⁵⁴ Today, MLB subjects players to announced and unannounced drug tests.⁵⁵ A positive test for performance-en-

seco's book that included "an account of his use of anabolic steroids and human growth hormone").

51. See generally FAINARU-WADA & WILLIAMS, *supra* note 25, at 264 (commenting on MLB's drug testing policy). "[B]aseball's new policy was riddled with unanswered questions and potential loopholes. It was still far weaker than the so called 'Gold Standard' – the Olympic program that the world's track stars faced – and too often could be beat by using human growth hormone, insulin, or other undetectable drugs." *Id.*

52. See Laitner, *supra* note 22, at 198 ("Finally, in 2002, under substantial public pressure, the MLB and players association agreed to a temporary policy of unannounced and anonymous testing . . .").

53. See *id.* at 198-99 (discussing first MLB drug testing program).

Drug testing beyond 2003 was not automatic under the program. Random testing only would be implemented beginning in 2004 if 5% or more of the players tested during anonymous "survey testing" in 2003 tested positive for steroids, with a refusal to submit to a test counting as a positive result. If the 5% threshold was met, however, mandatory random testing would begin with the 2004 season, carrying with it the possibility of discipline if a player failed a second steroids test

MITCHELL, *supra* note 32, at 54.

54. See Laitner, *supra* note 22, at 199 (providing results of initial drug tests). "In November 2003, Major League Baseball announced that between 5% and 7% of players who participated in the survey testing in 2003 had tested positive for steroids; mandatory random testing therefore was triggered to begin in the 2004 season." MITCHELL, *supra* note 32, at 55.

55. See MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM 6-7 (2006), available at <http://mlbplayers.mlb.com/pa/pdf/jda.pdf> (listing number of times and when players will be tested).

1. In-Season Testing. During each championship season covered by this Agreement (which, for purposes of this Section only, shall commence with the first spring training voluntary reporting date and conclude with the final day of the post-season), all Players shall be tested for the presence of Performance Enhancing Substances and Stimulants as follows:

(a) Each Player shall be tested within five days of reporting to spring training. Collections under this Section 3.A.1(a) will be made in conjunction with the Clubs' spring training physicals, to the extent practicable for the collecting entity and taking into consideration the facilities utilized by the Club for its spring training physicals.

(b) All Players will be selected for an additional unannounced test on a randomly selected date.

2. Additional Random Testing. In addition to the testing conducted pursuant to Section 3.A.1 above, an additional 600 tests shall be conducted of randomly selected Players at unannounced times for the presence of Performance Enhancing Substances and Stimulants. Of these

hancing substances results in a suspension without pay and triggers more severe sanctions for any future violations of MLB's drug policy.⁵⁶ Under the current testing program and its predecessor, a few players have tested positive, but many others, using undetectable "designer steroids," circumvent MLB's drug policy.⁵⁷

C. A Hypothetical Fact Pattern

Imagine the following situation: You are standing on the pitcher's mound in an MLB game, an experience one former pitcher equated with looking "down the barrel of a loaded gun."⁵⁸

additional tests, as many as 60 tests may be conducted at unannounced times during the off-season (i.e., the period not covered by the Section 3.A.1 definition of the championship season); provided, however, that any off-season tests shall only be for the presence of Performance Enhancing Substances.

Id.

56. *See id.* at 15 (listing penalties under MLB's steroid policy).

1. First positive test result: a 50-game suspension;
2. Second positive test result: a 100-game suspension; and
3. Third positive test result: permanent suspension from Major League and Minor League Baseball; provided, however, that a Player so suspended may apply, no earlier than one year following the imposition of the suspension, to the Commissioner for discretionary reinstatement after a minimum period of two years. The Commissioner shall hear any such reinstatement application within 30 days of its filing and shall issue his determination within 30 days of the closing of the application hearing. A Player may challenge the Commissioner's determination on such application under the Grievance Procedure set forth in Article XI and any such challenge may include a claim that a suspension beyond two years would not be for just cause; provided, however, that the Arbitration Panel shall have no authority to reduce any suspension imposed pursuant to this Section 8.B.3 to a period of less than two years.

Id.

57. *See* Jeff Passan, *Baseball's HGH Problem*, June 7, 2006, <http://sports.yahoo.com/mlb/news?slug=jphgh060706&prov=yhoo&type=lgns> (on file with author) (noting baseball's testing policy still has numerous loopholes and problems); *Players Suspended Under Baseball's Steroids Policy*, ESPN.COM, <http://sports.espn.go.com/mlb/news/story?id=2474192> (last visited May 1, 2008) (listing names of 111 major and minor league players suspended under testing policy). Recent federal investigations uncovered that players during the 2005 season, a year after MLB testing began, were receiving and using performance-enhancing substances despite the new testing policy. *See Report: Feds Wanted Grimsley to Help Implicate Bonds*, *supra* note 26 (quoting MLB pitcher Jason Grimsley). Grimsley explained he had received and used steroids and HGH, and continued to use HGH even after MLB began to test for performance-enhancing substances because the test could not detect it. *See id.*

58. Dibble, *supra* note 4. Former MLB pitcher Rob Dibble wrote: Few people will ever know what it's like to look down the barrel of a loaded gun and survive. And pitching in the major leagues can sometimes feel just like that. The hitter is standing there, ready to do some damage with that bat in his hand. Sixty feet and six inches is not as far as you think.

You look toward home plate, only sixty feet six inches away, and a batter of “freakish” size - looking more like Paul Bunyan than a baseball player - is at bat.⁵⁹ You release the pitch, the batter swings, makes solid contact with the baseball, sending a line-drive directly at you.⁶⁰ A split second after the batter hits the ball, you are unable to avoid it and the rock-hard baseball “ricochet[s] off [your] head,” making a gruesome sound “audible throughout the stadium.”⁶¹

Woozy from the impact and badly hurt, you suddenly realize that blood is already all over you and the pitching mound.⁶² After discovering the extent of your injuries, you find out some pitchers make it back to MLB after an incident of this type, but many others do not.⁶³ You recover physically, but psychologically you cannot bring yourself to play baseball again. While you try to forget the incident, one vivid memory you have is of the batter who looked unnaturally strong.

Later, MLB drug testing uncovers, or there is an admission, establishing that when the batter hit the baseball that ricocheted off your head, he was using performance-enhancing drugs, specifically steroids.⁶⁴ After doing some research, you learn steroids provide

Id. The distance between home plate and the pitcher’s mound is sixty feet and six inches. See generally MAJOR LEAGUE BASEBALL RULES 1.07 (2007), available at http://mlb.mlb.com/mlb/downloads/y2007/01_objectives_of_the_game.pdf.

59. See FAINARU-WADA & WILLIAMS, *supra* note 25, at XI (“The sportswriters who covered . . . [McGwire] wrote that . . . [he] has Popeye’s forearms and shoulders as broad as Paul Bunyan’s); Buster Olney, *Baseball; the Bigger They Are, the More They’re Falling*, N.Y. TIMES, Mar. 31, 2002, at 8A (describing alleged steroid user and former MLB star Mark McGwire’s appearance during 2002 record-breaking season); Jose Canseco: *Juiced*, *supra* note 18 (explaining that during his MLB career Jose Canseco was 6’4” and 250 pounds). McGwire “drew a national following in 1998 as he set the single-season home run record, and fans were fascinated by his tape-measure shots and his Paul Bunyan size and strength.” Olney, *supra*.

60. See Dibble, *supra* note 4 (discussing experience of getting hit). “All I can remember was letting the ball leave my hand, and then it was right in front of my eyes.” *Id.*

61. *M’s Soriano Out of Hospital After Taking Liner off Head*, ESPN.COM, <http://sports.espn.go.com/mlb/news/story?id=2566253> (last visited May 1, 2008).

62. See Dibble, *supra* note 4 (detailing injuries suffered by Boston Red Sox pitcher Bryce Florie after being hit). “Florie bled profusely and sustained several facial-bone fractures on the spot. Tests also revealed a significant loss of vision.” *Id.* Florie explained he still gets uncomfortable thinking about the incident. See *id.*

63. See *id.* (discussing effects on pitcher’s career). “Some pitchers never make it back. Some pitchers simply stop progressing because of the fear factor.” *Id.*

64. See Ruth S. Hochberger, *Bridging the Great Divide: A Symposium on the State of Legal Journalism*, 56 SYRACUSE L. REV. 443, 454-55 (2006) (commenting on leaked grand jury testimony showing MLB players Barry Bonds and Jason Giambi admitted to taking performance-enhancing substances); Barry M. Bloom, *Agreement on Tougher Drug Testing Policy*, Jan. 13, 2005, http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_news.jsp (on file with author) (discussing MLB drug testing). Jose Canseco admitted that during his career he “strengthened [his] body and []per-

users with the ability to swing the bat much faster and hit the ball much harder than otherwise possible.⁶⁵ You believe had the batter not been on steroids, your injury would have been much less severe or the incident would have never happened. Can you sustain your argument and win a sports tort suit?

D. Sports Tort Analysis

In sports tort cases, as with all tort cases, the plaintiff must establish that the defendant had a duty, the defendant breached the standard of care, and the breach caused the plaintiff's injuries.⁶⁶ The first hurdle in a sports tort case is establishing the defendant owed a duty to the plaintiff.⁶⁷ If a duty exists, the next issue is whether the defendant breached the duty; in sports injury cases, courts apply a recklessness standard.⁶⁸ Courts adopted this standard in response to unique policy interests involved in athletic injury cases and the participants' assumption of certain inherent risks.⁶⁹ Finally, if the defendant's conduct was reckless, the plaintiff

formance with a cocktail of steroids and growth hormones . . ." *Jose Canseco: Juiced*, *supra* note 18.

65. For a further discussion on steroids, see *supra* notes 28-41 and accompanying text.

66. See *McElhaney v. Monroe*, No. 13454, 1989 WL 7987, at *2 (Ohio Ct. App. Feb. 1, 1989) (explaining burden on plaintiff in sports injury case). In order for the plaintiff to successfully defeat a defendant's motion for summary judgment he must overcome four obstacles. The plaintiff must establish:

1. That a legal relationship exists between himself and the defendant which sufficiently creates a legal duty on the part of the defendant;
2. that defendant breached his duty of care;
3. that the plaintiff suffered injuries; and
4. that the defendant's breach proximately caused the plaintiff's injuries."

Id. "It is axiomatic that an individual injured during the course of a team athletic competition cannot recover . . . from another participant if the latter has not breached a recognized duty of care." Stanley L. Grazis, Annotation, *Liability of Participant in Team Athletic Competition for Injury to or Death of Another Participant*, 55 A.L.R. 5th 529 (1998) (listing requirements for sports tort suits).

67. See Alexander J. Drago, *Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 583, 590 (2002) (discussing consequences if court finds no duty). "[C]ourts often hold as a matter of law that a plaintiff who voluntarily participates in a sporting or recreational activity is owed no duty of care with respect to the obvious risks associated with the activity." *Id.* If a party is relieved from his or her duty of care a co-participant's suit fails automatically. See *id.* at 592.

68. See generally *Cruz v. Gloss*, 57 Pa. D. & C. 4th 449, 463 (Ct. Com. Pl. 2002) (citing *Mark v. Moser*, 746 N.E. 2d. 410, 416 (Ind. Ct. App. 2001)) (examining applicable standard of care in sports injury cases). "[A] clear majority[] have adopted a standard of 'reckless or intentional conduct' or 'willful and wanton or intentional misconduct.'" *Id.*

69. See *id.* at 464 (discussing pertinent policy considerations).

Principal among the public policy considerations is the law's recognition that the rules of conduct between competing athletes must be different

must prove causation - that the conduct caused the plaintiff's injury.⁷⁰

In addition, the plaintiff must establish that a duty existed between the parties to avoid the assumption of the risk defense.⁷¹ "The doctrine of primary . . . assumption of the risk can perhaps more accurately be described as a way to define a defendant's duty. A defendant simply does not have a duty to protect a sports participant from dangers which are an inherent and normal part of a sport."⁷² Most courts refuse to find co-participants liable if an injury was caused by an inherent risk.⁷³ Courts apply three different standards to decide if an injury was caused by an inherent risk: (1) an objective standard; (2) a subjective standard; or (3) a combined subjective-objective standard.⁷⁴ A duty, however, is not an inflexible fact but is a policy decision finding that "the particular plaintiff is entitled to protection."⁷⁵ The importance of initially establishing

. . . Aggressive play is an inherent aspect of competitive sports . . . [and] [t]he need to permit players to compete fully and aggressively without the threat of needless litigation is essential To permit claims for simple negligence would stifle vigorous participation and fundamentally alter the nature of the sport itself.

Id. Further, courts apply a recklessness standard "because of considerations of the participants' assumption of risk . . ." Grazis, *supra* note 66.

70. See generally CHAMPION, *supra* note 7, at §1:2 ("[B]efore a defendant may be found liable . . . a duty must exist, breach of which is the proximate cause of the plaintiff's injuries."). Due to the fact-specific nature of causation, a full discussion of it is beyond the scope of this comment.

71. See Denner, *supra* note 2, at 214 (discussing primary assumption of risk). "[T]he general consensus is that primary assumption of the risk acts as a defense against a plaintiff's negligence claim . . . because it attacks a plaintiff's prima facie case of negligence by negating the duty a defendant owes to the plaintiff . . ." *Id.*

72. Scott v. Pac. W. Mountain Resort, 834 P.2d 6, 13-14 (Wash. 1992).

73. See generally Bowman v. McNary, 853 N.E.2d 984, 990 (Ind. Ct. App. 2006) ("[I]n accordance with traditional negligence principles, there is no duty from one participant in a sports activity to another to prevent injury resulting from an inherent risk of the sport."); Amanda M. Winfree, Note, *Increasing the Inherent Risks of Baseball*, 11 VILL. SPORTS & ENT. L.J. 77, 95 (2004) (discussing duty between co-participants). "Generally, no duty exists to protect the plaintiff against a risk inherent in the sport. If the defendant's conduct presented a risk inherent in the sport, he or she owes no duty to the plaintiff . . ." *Id.* While courts will use different "moniker[s] . . . to identify the defense (express, implied, primary, secondary, etc.), the rationale is the same." Drago, *supra* note 67, at 608.

74. See Winfree, *supra* note 73, at 101-06 (detailing different approaches courts use to find what constitutes inherent risk in sports tort cases). Due to the overlap under the combination standard, this comment will only fully discuss the objective and subjective standards independently.

75. See generally Avila v. Citrus Cmty. Coll. Dist., 131 P.3d 383, 391 (Cal. 2006) (citation omitted) (explaining duty and when it exists).

A legal duty arises when the defendant is under an obligation for the benefit of the plaintiff. The crucial issue . . . centers upon whether the plaintiff's interests are entitled to legal protection against defendant's conduct In the area of injuries arising out of a sporting event, two

the existence of a duty between the plaintiff and defendant is paramount because without it, the suit will fail.⁷⁶

Some jurisdictions have adopted an objective duty analysis. The court “analyze[s] the nature of the activity[,] . . . the role of each of the parties” with respect to that particular activity, and considers public policy, before deciding whether a duty exists.⁷⁷ This analysis focuses on the particular sport and the defendant’s role or relationship in it, instead of the plaintiff’s subjective knowledge.⁷⁸ A risk is inherent if removing it would “chill vigorous participation” or change “the fundamental nature” of the sport.⁷⁹ Additionally, co-participants have an affirmative duty to avoid increasing “inherent risks.”⁸⁰ Under this duty analysis, cases hinge “on the nature of the sport[,] . . . the inherent risks of that sport” and if a co-participant unnecessarily increased those risks.⁸¹ If the court concludes a

apparently conflicting policies mold the concept of duty[:] . . . [giving] an injured player . . . recourse . . . [and] preserv[ing] the vigor of athletic contests

McElhanev v. Monroe, No. 13454, 1989 WL 7987, at *2 (Ohio Ct. App. Feb. 1, 1989) (citation omitted).

76. See *CHAMPION*, *supra* note 7, at §1:2 (discussing importance of establishing duty of care in sports tort cases). “The key to actionable claims in . . . sports is the defendant’s duty of care. If no duty exists then the plaintiff’s claims will undoubtedly fail.” *Id.*

77. See *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529, 535 (Ct. App. 2003) (explaining what courts consider when determining existence of duty); *Denner*, *supra* note 2, at 214 (discussing duty analysis in sports tort cases).

78. See *Avila*, 131 P.3d at 392 (outlining duty analysis in athletic injury cases). [A] court need not ask what risks a particular plaintiff subjectively knew of and chose to encounter, but instead must evaluate the fundamental nature of the sport and the defendant’s role in or relationship to that sport in order to determine whether the defendant owes a duty to protect a plaintiff from the particular risk of harm.

Id. “Assumption of risk . . . is a policy-driven concept that flows from the legal relationship of the parties, not their subjective expectations.” Heidi C. Doerhoff, Note, *Penalty Box or Jury Box? Deciding Where Professional Sports Tough Guys Should Go*, 64 Mo. L. REV. 739, 751 (1999) (discussing assumption of risk in sports tort cases).

79. See *Sanchez*, 128 Cal. Rptr. 2d at 536 (listing two factors examined to decide if particular risk is inherent).

80. See *Avila*, 131 P.3d at 392 (distinguishing between inherent risks where no duty is owed and duty to avoid acting recklessly); *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992) (“[I]t 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.”). The court decides if, on the facts alleged, a defendant breached his or her duty by enhancing the inherent risks of the sport. See *Avila*, 131 P.3d at 393.

81. See *Denner*, *supra* note 2, at 214 (noting important factors courts use when determining duty owed in sports tort cases).

particular risk was inherent to the activity, no duty exists and the suit fails.⁸²

Other jurisdictions apply a subjective standard to determine if a duty exists. This duty analysis begins with the familiar proposition: “a plaintiff . . . injured as a result of a risk inherent in the sport” cannot recover because “the defendant has no duty” to protect a co-participant from the danger.⁸³ An inherent risk is one the plaintiff understood existed, fully appreciated the character of, and, knowing this, voluntarily encountered.⁸⁴ In most cases, juries decide if a danger is inherent; but if any reasonable participant in the particular activity would understand the risk, the court decides.⁸⁵ The court will find there is not a duty if the defendant “exercise[d] reasonable care to make the conditions as safe as they appear to be.”⁸⁶ Conversely, if a plaintiff establishes they did not implicitly assume the particular risk at issue in the case, a duty exists and assumption of the risk does not bar recovery.⁸⁷ Under either standard, if a duty is not established, assumption of the risk applies and the suit fails.⁸⁸

82. See *Brown v. Stevens Pass Inc.*, 984 P.2d 448, 450 (Wash. Ct. App. 1999) (citing *Codd v. Stevens Pass, Inc.* 725 P.2d 1008, 1013 (Wash. Ct. App. 1986)) (“Assumption of the risk in the sports participant context ‘is in reality the principle of no duty-hence no breach and no underlying cause of action.’”).

83. See generally *Stevens Pass, Inc.*, 984 P.2d at 452 (citing *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6 (Wash. 1992)) (discussing how parties lack duty to guard each other from injury caused by inherent risks).

84. See *Home v. N. Kitsap Sch. Dist.*, 965 P.2d 1112, 1119 (Wash. Ct. App. 1998) (quoting *Kirk v. Wash. State Univ.*, 746 P.2d 285, 288 (Wash. 1987)) (outlining requirements). “[E]vidence must show 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.” *Id.*

85. See *Stevens Pass, Inc.*, 984 P.2d at 450 (citing W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 68, at 489 (5th ed. 1984)) (summarizing procedures to decide what constitutes inherent risks); *Kirk*, 746 P.2d at 288 (listing factors required). The evidence must establish a party is aware of a risk, fully comprehends the extent of it, and freely confronts it. See *id.*

86. *Drago*, *supra* note 67, at 592-93.

87. See generally *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 13-14 (Wash. 1992) (explaining implied primary assumption of risk).

Implied primary assumption of risk arises where a plaintiff has impliedly consented (often in advance of any negligence by defendant) to relieve defendant of a duty to plaintiff regarding specific *known* and appreciated risks. It is important to carefully define the *scope* of the assumption, i.e., what risks were impliedly assumed and which remain as a potential basis for liability.

Id. at 13.

88. See *CHAMPION*, *supra* note 7, at § 1:2 (“If no duty exists then the plaintiff’s claim with undoubtedly fail.”).

If a duty is established, the fact finder must decide if the defendant breached that duty.⁸⁹ The vast majority of jurisdictions have adopted recklessness as the proper standard of care in sports tort cases.⁹⁰ Beginning in the 1970s, courts renounced the application of a traditional negligence standard because it led to ad hoc decisions, invited tort litigation, and did not further society's interest in promoting and supporting athletic participation.⁹¹ The recklessness standard maintains fundamental aspects of sport by avoiding unnecessary judicial intervention when participants are injured.⁹²

Players are liable under the recklessness standard if their actions are willful or in reckless disregard of another player's safety.⁹³ This involves a conscious decision by the participant to follow a course of conduct, knowing there is a substantial risk of injuring others.⁹⁴ For example, merely sliding into base and injuring a com-

89. See generally *McElhancey v. Monroe*, No. 13454, 1989 WL 7987, at * 2 (Ohio Ct. App. Feb. 1, 1989) (explaining second aspect plaintiff must establish is that defendant breached duty of care).

90. See Erica K. Rosenthal, Note, *Inside the Lines: Basing Negligence Liability in Sports for Safety-Based Rule Violations on the Level of Play*, 72 *FORDHAM L. REV.* 2631, 2647-48 (2004) (examining standard applied by majority of courts in sports injury cases); Grazis, *supra* note 66 (“[C]ourts have found that the duty of care owed by participants in team athletic events . . . is measured . . . by willfulness or recklessness standards . . .”). “Most courts hold that a defendant’s conduct must be at least reckless before the plaintiff can recover for his injuries.” See Rosenthal, *supra*, at 2647-48.

91. See *Nabozny v. Barnhill*, 334 N.E.2d 258, 260-61 (Ill. App. Ct. 1975) (explaining need for standard of recklessness in sports tort cases). The court found that “a player is liable for injury in a tort action if his conduct is such that it is either deliberate, wilful [sic] or with a reckless disregard for the safety of the other player . . .” *Id.* at 261. The court was persuaded to adopt this standard to ensure “unreasonable burdens” were not placed on participants in athletics and “to control” tort litigation. See *id.* at 260-61. Further experience had shown applying a negligence standard led to inconsistent ad hoc decisions. See Taxin, *supra* note 1, at 823 (discussing three factors leading courts to adopt recklessness standard).

92. See *Hackbart v. Cincinnati Bengals Inc.*, 601 F.2d 516, 524-26 (10th Cir. 1979) (adopting reckless standard in professional sports injury suits); *Nabozny*, 334 N.E.2d at 261 (balancing interests involved before adopting recklessness standard); *Mark v. Moser*, 746 N.E.2d 410, 417-19 (Ind. Ct. App. 2001) (advocating recklessness standard in sports injury cases); *Cruz v. Gloss*, 57 Pa. D. & C.4th 449, 465-69 (Ct. Com. Pl. 2002) (outlining numerous considerations that led courts to adopt recklessness standard).

93. See, e.g., *Nabozny*, 334 N.E.2d at 261 (stating recklessness standard). “A reckless disregard for the safety of other players cannot be excused. To engage in such conduct is to create an intolerable and unreasonable risk of serious injury to other participants.” *Id.*

94. See RESTATEMENT (SECOND) OF TORTS § 500 (1965) (defining reckless conduct). Recklessness is defined as:

The actor’s conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unrea-

petitor fails to establish liability, but deliberately colliding with—and subsequently injuring—an infielder is reckless.⁹⁵ In both instances, the specific injury was not the intended goal, but in the latter the base-runner consciously acted in a manner that unreasonably endangered the fellow player.⁹⁶ Whether the defendant's conduct is reckless is a question of fact.⁹⁷ In cases where courts have found reckless conduct, defendants have consistently demonstrated behavior that is inconsistent with the fundamental aspects of the specific sport involved.⁹⁸

Policy concerns are paramount in sports tort cases and often drive a court's analysis.⁹⁹ Specifically, courts want to encourage spirited participation in athletics and avoid flooding the judiciary with sports injury litigation.¹⁰⁰ "These concerns are balanced against the recognition that 'some controls are necessary to protect the players, and the recognition that some of the restraints of civili-

sonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.

Id.

95. See *Picou v. Hartford Ins. Co.*, 558 So. 2d 787, 788 (La. Ct. App. 1990) (finding base runner who slid into second base and injured plaintiff did not act recklessly); *Dotzler v. Tuttle*, 449 N.W.2d 774, 779 (Neb. 1990) (citing *Bourque v. Duplechin*, 331 So. 2d 40 (La. Ct. App. 1976)) (finding recklessness where defendant intentionally "ran out of his way . . . to run into the plaintiff second baseman, who was standing 5 feet away . . .").

96. See *McElhanev v. Monroe*, No. 13454, 1989 WL 7987, at *3 (Ohio Ct. App. Feb. 1, 1989) (differentiating between negligence and recklessness). Reckless conduct encapsulates intent to act which the player knows, or should have known, unreasonably endangers fellow participants. See *id.* The player does not have to intend to cause the specific injury. See *id.*

97. See *Moser*, 746 N.E.2d at 420 ("If . . . the court determines that plaintiff did not assume the risk, then the cause proceeds to a jury to determine, as a question of fact, whether the co-participant intentionally or recklessly caused the injury.").

98. See generally *Hackbart v. Cincinnati Bengals Inc.*, 601 F.2d 516 (10th Cir. 1979) (reversing decision for defendant where defendant struck back of plaintiff's head); *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill. App. Ct. 1975) (holding defendant liable for kicking soccer goaltender causing skull and brain damage); *Greer v. Davis*, 921 S.W.2d 325 (Tex. App. 1996) (finding material issue existed over whether defendant recklessly caused collision in softball game).

99. See *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 392 (Cal. 2006) ("When the injury is to a sporting participant, the considerations of policy and the question of duty necessarily become intertwined with the question of assumption of risk."); *Taxin*, *supra* note 1, at 819 (explaining change of standard of care to recklessness is "based largely on public policy concerns"); *Rosenthal*, *supra* note 90, at 2659 (discussing importance of public policy in athletic injury cases). "Particularly in the realm of sports-injury cases, courts have considered broader policy concerns in determining the appropriate standard that one participant owes to another participant." *Id.*

100. See generally *Rosenthal*, *supra* note 90, at 2652-53 (explaining courts' policy rationales for applying recklessness standard). "There are two main policy reasons put forth by courts . . . (1) promoting vigorous competition and participation; and (2) avoiding a flood of litigation." *Id.*

zation must accompany every athlete onto the playing field.’”¹⁰¹ Finding a player liable for steroid use will not undermine either of these interests. On the contrary, it will discourage the use of performance-enhancing substances by professional athletes, furthering an important societal interest.¹⁰²

III. ANALYSIS

This section focuses on the arguments the plaintiff may make to the court; however, it must be noted that there are numerous counter-arguments to holding professional athletes liable for their use of performance-enhancing drugs. The section finds (1) steroid use, under the subjective or objective standard, is not an inherent danger;¹⁰³ (2) using steroids is reckless because it endangers fellow athletes;¹⁰⁴ and (3) public policy supports finding proven users liable.¹⁰⁵

A. Steroid Use Is Not an Inherent Danger

If an injury is caused by a risk inherent to the sport, a sports tort suit will fail. Performance-enhancing substances are not, however, inherent athletic risks.¹⁰⁶ Instead, performance-enhancing

101. *Id.* (citing *Nabozny*, 334 N.E.2d at 260) (additional citation omitted). “[T]he law should not place unreasonable burdens on the free and vigorous participation in sports However, we also believe that organized, athletic competition does not exist in a vacuum. Rather, some of the restraints of civilization must accompany every athlete onto the playing field.” *Nabozny*, 334 N.E.2d at 260.

102. *See* George W. Bush, President of the United States, State of the Union Address by the President (Jan. 20, 2004), *reprinted in* 2004 WL 81372, at *10 (discussing steroid use in professional sports). The President stated:

To help children make right choices, they need good examples. Athletics play such an important role in our society, but unfortunately, some in professional sports are not setting much of an example. The use of performance-enhancing drugs like steroids in baseball, football, and other sports is dangerous, and it sends the wrong message, that there are shortcuts to accomplishment and that performance is more important than character.

Id.

103. For a further discussion of the subjective and objective standards applied to the hypothetical, see *infra* notes 107-47 and accompanying text.

104. For a further discussion on why the court should find steroid use is reckless, see *infra* notes 148-85 and accompanying text.

105. For a further discussion of public policy furthered by holding the defendant liable, see *infra* notes 186-243 and accompanying text.

106. *See generally* Drago, *supra* note 67, at 608 (concluding that despite different terminology used to describe defense, defendants usually avoid liability if “injury was caused by a risk inherent in the activity”); Taxin, *supra* note 1, at 835-36 (focusing on disparity created by performance-enhancing substances). “The changing physical make-up of athletes has resulted in an uneven playing field whereby players taking drugs have a competitive advantage.” *Id.* This competitive

substances undermine the essence of sport by creating unnatural disparities in athletic ability and increase the threat of injury to co-participants.¹⁰⁷ Even if a player is injured by what appears to be an inherent risk, the assumption of the risk defense should not succeed if it is established the defendant was using steroids at the time of the incident.¹⁰⁸

1. *Objective Duty Analysis*

The pitcher did not assume the risk of the batter's steroid use. Being hit in the face by a batted baseball is an inherent risk of pitching in professional baseball, but the increased danger created by the batter's steroid use is not.¹⁰⁹ Using an objective duty analysis, the court will examine the nature of baseball, the relationship between the batter and the pitcher, and the public policies involved.¹¹⁰ After examining each factor, a court may conclude that the batter owed a duty to avoid increasing the inherent risks of baseball.

A batted ball hitting a pitcher is an inherent risk of pitching in MLB, meaning batters do not have a duty to protect pitchers from

advantage now threatens to undermine the "integrity" of sports. See Mel Antonen, *Players Want Steroids Problem Solved*, USA TODAY, Dec. 9, 2004, available at http://www.usatoday.com/sports/baseball/2004-12-09-players-steroids-policy_x.htm (citing President George W. Bush) ("President Bush urged baseball to take 'strong steps' to confront the steroids issues because drug use 'diminishes the integrity of the sport'").

107. See Mitten, *supra* note 1, at 800 (discussing essence of sports). "Although achieving maximum individual performance and winning is the objective of athletic competitions, the essence of sports is that all participants play by the same rules." *Id.* Performance-enhancing substances create larger, stronger and faster athletes increasing the likelihood of injury when a collision occurs. See Stephen Chapman, *A Large Problem the NFL Finally Is Willing to Tackle*, CHI. TRIB., Dec. 10, 1986, at 21 (analyzing steroids' effect on football). "The rise of steroids has coincided with a sharp decline in the length of playing careers [S]teroids are affecting the outcome of games . . . [which] forc[es] players to use them, with willing users driving out abstainers. By causing irritability and belligerence, steroids also exacerbate the game's inherent violence." *Id.*

108. For a further discussion of this fact pattern, see *supra* notes 58-65 and accompanying text.

109. See Dibble, *supra* note 4 (commenting on possibility of being hit). Former Major League pitcher Rob Dibble explained that "[e]very pitcher gets drilled from time to time. It's just part of the job. I've been hit on every part of my body from my groin to my foot to my back." *Id.* Inevitably, pitchers are struck by batted balls, but players using steroids increase this danger by hitting the ball with more velocity. See Ruibal, *supra* note 33 (analyzing steroids' effects on batting power).

110. See Denner, *supra* note 2, at 214 (outlining factors courts examine in sports tort cases to determine existence of duty). "The court . . . look[s] first at whether the nature of the activity in question was inherently dangerous, and then examine[s] the relationship of the parties to that activity in order to determine whether the defendant owed the plaintiff a duty of care." *Id.*

this inherent danger.¹¹¹ This, however, does not undermine the plaintiff's claim.¹¹² The reason is that baseball does not permit batters to unnaturally alter their hitting ability by using steroids, which in turn increases the danger created by this otherwise inherent risk.¹¹³ The increased danger drastically alters the analysis. It is unlikely a court will dismiss a claim by finding that illegal drug use is an inherent risk of playing MLB.¹¹⁴

*Avila v. Citrus Community College District*¹¹⁵ exemplifies the types of inherent dangers involved in baseball.¹¹⁶ In that case, a batter filed suit seeking damages for a head injury sustained after a pitcher intentionally threw a pitch at him.¹¹⁷ The doctrine of primary assumption of the risk barred the batter's suit because "being intentionally hit . . . is . . . an inherent risk of the sport . . ." ¹¹⁸ Steroids, unlike the strategic and traditional practice of intention-

111. For a further discussion of this danger, see *supra* notes 58-60 and accompanying text.

112. For a further discussion of the facts giving rise to the pitchers civil claim against the batter, see *supra* notes 58-65 and accompanying text.

113. See *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529, 538-39 (Ct. App. 2002) (detailing inherent risk of baseball before finding material issue of fact existed over whether pitcher could sue metal baseball bat producer for increasing risks thereby avoiding assumption of risk defense). The court explained:

The essence of a baseball game is the contest between the defense, the pitcher and other players in the field, and the batter, for mastery over what happens to the pitched ball. The batter wants to hit the ball safely, usually away from the defense, so that the batter can advance on the bases. The defense wants to get the batter out, either by striking the batter out, or by causing the batter to hit the ball to a spot where one of the defensive players can make a play on it. Inherent in this mix is the risk that the pitcher, or any infielder, may have to catch, or avoid being hit with, a sharply batted ball.

Id. at 536. MLB Rule 5.03 states: "The pitcher shall deliver the pitch to the batter who may elect to strike the ball, or who may not offer at it, as he chooses." MAJOR LEAGUE BASEBALL RULES 5.03 (2007), available at http://mlb.mlb.com/mlb/official_info/official_rules/ball_in_play_5.jsp.

114. For a further discussion of the dangers steroid use has on co-participants, see *supra* notes 28-41 and accompanying text.

115. 131 P.3d 383 (Cal. 2006).

116. See *id.* at 393-95 (reasoning that being intentionally thrown at while at bat is inherent risk of playing baseball).

117. See *id.* at 385-86 (presenting factual background of case). The plaintiff was at bat when the pitcher allegedly threw the baseball at him intentionally, striking him in the head. See *id.* The pitch "cracked" the plaintiff's batting helmet and caused him dizziness and pain. See *id.* at 386.

118. See *id.* at 393 (citing evidence showing intentionally being hit is inherent to baseball).

Pitchers intentionally throw at batters to disrupt a batter's timing or back him away from home plate, to retaliate after a teammate has been hit, or to punish a batter for having hit a home run. Some of the most respected baseball managers and pitchers have openly discussed the fundamental place throwing at batters has in their sport.

ally throwing at a batter, undermine the sport of baseball by casting doubt on all of the players' achievements.¹¹⁹ Moreover, steroid use, contrary to the "beanball" (a practice utilized by baseball teams and their pitchers for over two centuries), is a recent phenomenon that has given baseball a "black eye."¹²⁰ If the plaintiff establishes that the defendant took steroids, the court should conclude that a duty exists, disallowing the assumption of the risk defense.¹²¹

Moreover, finding the batter liable for injuries caused by his steroid use will neither "chill vigorous participation" nor "alter the fundamental nature" of baseball.¹²² Clearly, batters are fundamental to baseball and pitchers will sometimes be hit; but allowing this suit would only "chill" the use of *steroids* and dissuade vigorous par-

Id. The court went on to highlight present and future hall of fame baseball players that have relied on this practice and common terms used to refer to the practice. *See id.* at 393-94 (discussing prevalence of "brushback", "beanball," [and] "chin music"). A brushback is a "pitch that nearly hits a batter" and chin music is "[a] pitch that is high and inside." Baseball Basics: Lingo, *supra* note 33. A beanball is "a ball deliberately pitched at the batter's head." Dictionary, ENCARTA.MSN.COM, http://encarta.msn.com/dictionary_1861685976/bean_ball.html (last visited May 1, 2008).

119. *See* Longman, *supra* note 42, at D1 (highlighting how performance-enhancing substances undermine sports). "No result in any elite sport can be trusted with reasonable certainty to have been achieved without performance-enhancing drugs . . ." *Id.* A prime example of this problem occurred at the end of the 2006 baseball season. *See* Hagen, *supra* note 43 (discussing Ryan Howard's 2006 fifty-three-home-run baseball season).

By the time Howard's 53rd home run of the year had ricocheted off the . . . sign that adorns the facing of the second deck down the right field line in the sixth inning, a column already had been posted on a respected Web site, . . . that baldly asked the question that has been bouncing around the blogosphere for a few weeks now. "Is Ryan Howard juiced?"

Id.

120. *See* Dan Holmes, *An Unofficial History of the Beanball*, http://www.thebaseballpage.com/features/2003/beanball_history.htm (last visited Nov. 11, 2007) (describing use of beanball during 1916 game between Detroit Tigers and New York Giants); Paul McLeary, *ESPN Bobbles a Grounder*, COLUM. JOURNALISM REV., Aug. 2, 2005, *available at* http://www.cjrdaily.org/politics/espn_bobbles_a_grounder.php (describing "black eye" baseball received after numerous star players were implicated with illegal performance-enhancing substances). For a further discussion of the "beanball," *see supra* note 118.

121. *See* Sanchez v. Hillerich & Bradsby Co., 128 Cal. Rptr. 2d 529, 536-37 (Ct. App. 2002) (evaluating use of metal bats that allowed players to hit baseballs with more velocity, thereby avoiding primary assumption of risk); Ruibal, *supra* note 33, at 9C (describing effects of steroids that included faster bat speed allowing players to hit baseballs with increased velocity).

122. *See* Sanchez, 128 Cal. Rptr. 2d at 536 (discussing factors examined to decide if risk is inherent). The court allowed the suit to continue because the metal bat may have increased the risk of baseball and finding the manufacturer liable would not chill participation or undermine fundamental aspects of the game. *See id.* at 538.

ticipation by players taking them.¹²³ Unlike *Avila*, where liability could have drastically changed baseball, players not using steroids would be free to participate and only cheaters would face legal sanctions.¹²⁴ Under the objective duty analysis, a court should hold a legal duty exists because: (1) steroid use is not fundamental to baseball; (2) even though pitchers are hit in the course of the game, steroids increase the chance this will occur and, when it does, that serious injury will result; and (3) finding liability would not discourage participation or reshape an indispensable aspect of the sport.¹²⁵

2. Subjective Duty Analysis

Under a subjective duty analysis, the assumption of the risk defense does not apply to the pitcher's suit. The defense is inapplicable because the specific risk, the batter's enhanced ability created by his steroid use, was not known, fully appreciated, or voluntarily encountered by the pitcher.¹²⁶ The plaintiff implicitly assumed the inherent risks of pitching in baseball, but not the additional danger

123. See *id.* at 536 (listing factors examined to decide if risks are inherent); Dibble, *supra* note 4 (commenting on pitching in MLB). "Every pitcher gets drilled from time to time. It's just part of the job." *Id.*

124. See *Avila v. Citrus Cmty. Coll. Dist.*, 131 P.3d 383, 394 (Cal. 2006) (concluding legal liability was improper). The court explained that:

It is one thing for an umpire to punish a pitcher who hits a batter . . . ; it is quite another for tort law to chill any pitcher from throwing inside, i.e., close to the batter's body—a permissible and essential part of the sport—for fear of a suit over an errant pitch. For better or worse, being intentionally thrown at is a fundamental part and inherent risk of the sport of baseball. It is not the function of tort law to police such conduct.

Id.; see also Antonen, *supra* note 106 (quoting MLB player Damion Easley: "Most guys don't want to be associated with cheating. Steroids are illegal.").

125. For a further discussion of the application of the objective duty analysis, see *supra* notes 106-24 and accompanying text.

126. See *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 13 (Wash. 1992) (citing *Kirk v. Wash. State Univ.*, 746 P.2d 285, 288 (Wash. 1987) (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 68, at 496 (5th ed. 1984))) (explaining assumption of risk). Under the *Kirk* court's analysis, this defense applies when a party "has impliedly consented . . . to relieve defendant of a duty to plaintiff regarding [a] specific known and appreciated risk[.]" *Id.* It must be established 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." *Brown v. Stevens Pass, Inc.*, 984 P.2d 448, 449 (Wash. Ct. App. 1999) (quoting *Kirk*, 746 P.2d at 288) (describing primary assumption of risk applicable in sports torts cases to include inherent risks); see also Winfree, *supra* note 73, at 104 ("Duty analysis in other jurisdictions necessarily involves an assessment of the plaintiff's subjective knowledge or appreciation of the risk.").

he was exposed to through the defendant's unnatural ability to hit the baseball harder and faster.¹²⁷

First, the court will focus on the plaintiff's subjective knowledge.¹²⁸ Particularly, the court will analyze whether the pitcher knowingly encountered the risk by asking if he "*actually and subjectively* knew all facts that a reasonable person in the defendant's shoes would know and disclose, or, concomitantly, all facts that a reasonable person in the plaintiff's shoes would want to know and consider."¹²⁹ The pitcher's general knowledge of steroid use in MLB is insufficient.¹³⁰ In order to have the requisite knowledge, he must have specifically known the *defendant* was on steroids.¹³¹ Presumably, the plaintiff, similar to many MLB players, would know that steroid use is prevalent in the sport, but even this fact is insufficient to establish the required subjective knowledge.¹³²

Second, the court will determine whether the plaintiff voluntarily faced the risk, despite other available and realistic alternatives.¹³³ Here, however, realistic alternatives, which would have

127. See *Barrett v. YMCA of Tacoma-Pierce County*, No. 24416-1-II, 2000 WL 349771, at *5 (Wash. Ct. App. Mar. 31, 2000) (citing *Scott*, 834 P.2d at 16) (explaining that participation in sports establishes implicit assumption of certain risks not including actions that unduly increase inherent risks).

128. See *Home v. N. Kitsap Sch. Dist.*, 965 P.2d 1112, 1119 (Wash. Ct. App. 1998) (noting first factor analyzed is plaintiff's subjective knowledge).

129. *N. Kitsap Sch. Dist.*, 965 P.2d at 1119.

"The test is a subjective one: Whether the plaintiff in fact understood the risk; not whether the reasonable person of ordinary prudence would comprehend the risk." The plaintiff must "be aware of more than just the generalized risk of [his or her] activities; there must be proof [he or she] knew of and appreciated the specific hazard which caused the injury."

Id. (citation omitted). The court further explained that the subjective knowledge component differentiates between contributory negligence and assumption of the risk. See *id.* at 1119 n.35. "Contributory negligence turns on what the plaintiff *should* have known, or . . . what a reasonable person in the plaintiff's shoes *would* have known . . ." *Id.*

130. For a further discussion of steroid use in MLB, see *supra* notes 42-57 and accompanying text.

131. See *N. Kitsap Sch. Dist.*, 965 P.2d at 1120 (citing *Dorr v. Big Creek Wood Prod. Inc.*, 927 P.2d 1148, (Wash. Ct. App. 1996)) (illustrating doctrine knowledge requirement). In *Dorr*, the plaintiff, a logger, knew of the general danger of falling limbs, but his failure to see the specific limb that hit him established the lack of knowledge required to apply assumption of the risk. See *id.* (citing *Dorr*, 927 P.2d at 1148).

132. See *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 15 (Wash. 1992) (holding summary judgment inappropriate because question of fact existed if skier knew of unpadded shed next to ski racecourse).

133. See generally *N. Kitsap Sch. Dist.*, 965 P.2d at 1119 (explaining that after determining subjective component court examines voluntariness factor).

allowed the pitcher to avoid the danger, are not available.¹³⁴ The pervasiveness of steroids in baseball combined with the anonymity of many users creates a dearth of available alternatives.¹³⁵ To avoid the increased danger posed by the batter's steroid use, the pitcher would have to cease pitching and jeopardize a highly lucrative MLB career; this is an unrealistic option.¹³⁶

While assumption of the risk, in many sports injury cases, bars the particular claim, the pitcher's case is easily differentiated.¹³⁷ In *Barrett v. YMCA of Tacoma-Pierce County*, for example, the court applied assumption of the risk to grant summary judgment in favor of the defendant.¹³⁸ In that case, the plaintiff sought damages for injuries he received while teaching his daughter to play basketball.¹³⁹ The court found many commonsensical and reasonable alternatives that would have allowed the plaintiff to avoid the known risks.¹⁴⁰ Specifically, the "[plaintiff] could have decided not to practice dribbling . . . perform the practice differently . . . used another part of the YMCA or waited for the group of children to clear the court . . . [he] could have found another facility, i.e., an outdoor court."¹⁴¹ Here, the options available to the pitcher are starkly different than those available to the plaintiff in *Barrett*.¹⁴² The pitcher's choices were to either pitch against unidentified steroid users, or quit playing professional baseball.¹⁴³ The available alternatives are this absolute for two reasons. First, the pitcher is unable to select the

134. See *id.* at 1119 (citing RESTATEMENT (SECOND) OF TORTS § 496E (1965)) ("Whether a plaintiff decides *voluntarily* to encounter a risk depends on whether he or she elects to encounter it despite knowing of a reasonable alternative course of action.").

135. For a further discussion of the prevalence of steroids in baseball, see *supra* notes 32-57 and accompanying text.

136. See Taxin, *supra* note 1, at 830 (discussing "earning potential" of professional athletes); Ronald Blum, *Baseball Salary Average up 9 Percent to Nearly \$2.7 Million*, Dec. 20, 2006, <http://sports.yahoo.com/mlb/news?slug=apsalaries&prov=ap&type=lgns> (on file with author) (stating average salary for MLB starting pitcher is \$4.87 million and \$1.43 million for relievers).

137. See generally Drago, *supra* note 67, at 391 (discussing that assumption of risk, in context of athletic injury cases, leads courts to find no duty, and thus, no viable claim).

138. See *Barrett*, 2000 WL 349771, at *6 (upholding trial courts decision to grant summary judgment for defendant).

139. See *id.* at *1 (providing factual background of case).

140. See *id.* at *6 (discussing available reasonable alternatives).

141. *Id.* at *6.

142. See *id.* (listing reasonable alternatives available to plaintiff).

143. See generally FAINARU-WADA & WILLIAMS, *supra* note 25, at 143 (explaining MLB drug testing could not detect two designer steroids, "[t]he clear" and "[t]he cream," and no test exists for HGH).

batter(s) he wishes to face in any particular game.¹⁴⁴ Second, assuming the pitcher was able to select the particular batters he would face during a game, it would still be impossible to avoid pitching to steroid users because their identities are usually unknown.¹⁴⁵ Therefore, the batter cannot show the pitcher had the requisite knowledge or that reasonable alternatives were available, making assumption of the risk inapplicable to the case.¹⁴⁶

B. Steroids Unreasonably Endanger Fellow Players

After the court finds the assumption of the risk defense inapplicable, the plaintiff must establish that the defendant's conduct was reckless.¹⁴⁷ Reckless conduct is an intentional act or omission that creates an unreasonable risk of harm to co-participants in a sporting event.¹⁴⁸ While a reckless act must be intentional, the harm itself does not have to be the intended result.¹⁴⁹ Here, the defendant's recklessness arises from his voluntary use of steroids,

144. See MAJOR LEAGUE BASEBALL RULES 3.02-3.08 (2007), available at http://mlb.mlb.com/mlb/downloads/y2007/03_game_preliminaries.pdf (explaining substitution procedure in MLB games).

145. For a further discussion on the inability to identify steroids users in MLB, see *supra* notes 42-57 and accompanying text.

146. See *Home v. N. Kitsap Sch. Dist.*, 965 P.2d 1112, 1119 n.29 (Wash. Ct. App. 1998) (citing RESTATEMENT (SECOND) OF TORTS § 496G (1965)) (stating burden and requirements of assumption of risk defense). "To invoke assumption of risk, a defendant must show that the plaintiff knowingly and voluntarily chose to encounter the risk." *Id.* at 1119.

147. See generally *Mark v. Moser*, 746 N.E.2d 410, 420 (Ind. Ct. App. 2001) (holding that plaintiff's avoidance of assumption of risk enables fact-finder to decide if defendant's conduct was reckless). "If . . . the plaintiff did assume the risk, then the plaintiff's cause fails. . . . If on the other hand, . . . plaintiff did not assume the risk, then the cause proceeds to a jury to determine, as a question of fact, whether the co-participant intentionally or recklessly caused the injury." *Id.*

148. See generally *Bowman ex rel. Bowman v. McNary*, 853 N.E.2d 984, 995 (Ind. Ct. App. 2006) (listing requirements for sports participant's conduct to be reckless). "[R]ecklessness requires that a participant in a sporting activity be (1) conscious of his or her misconduct; (2) motivated by indifference for the safety of a co-participant . . . and (3) know that his or her conduct subjects a co-participant . . . to a probability of injury." *Id.* For a participant to be liable, the act, itself, must be intentional, but not the resulting harm. See *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 525 (10th Cir. 1979) ("[I]n recklessness the intent is to do the act, but without an intent to cause the particular harm."); RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1965) (differentiating between intentional and reckless conduct).

149. See generally *Hackbart*, 601 F.2d at 525 (differentiating between intentional and reckless conduct); RESTATEMENT (SECOND) OF TORTS § 500 cmt. f (1965) (analyzing intent requirement).

despite knowing it substantially and unnaturally alters his strength and playing ability.¹⁵⁰

Past suits between co-participants focus almost exclusively on reckless conduct during a game.¹⁵¹ Here, the pitcher is alleging that off-the-field steroid use is reckless because it fundamentally alters the defendant's on-field abilities.¹⁵² Despite this disparity, ample court precedent supports holding that the defendant's steroid use was reckless.¹⁵³

In *Knight v. Jewett*,¹⁵⁴ the court analyzed a plethora of sports injury cases, concluding that, as a general rule, "defendants . . . have a duty to use due care not to increase the risks to a participant over and above those inherent in the sport."¹⁵⁵ The court found reckless conduct subjected individuals engaging in athletic competition to an unreasonable risk of injury, without requiring the conduct to have occurred solely on the field.¹⁵⁶ Instead, it adopted a fact and sport-specific analysis to determine the recklessness of a particular course of action.¹⁵⁷ Applying this recklessness standard,

150. See *Bowman*, 853 N.E.2d at 994 (summarizing situations where players acted recklessly); see generally *Jenkins*, *supra* note 33, at D1 (explaining immediate and noticeable changes in performance after taking steroids); *Ruibal*, *supra* note 33, at 9C (detailing increased velocity of baseball when hit by steroid user).

151. See generally *Hackbart*, 601 F.2d at 519 (discussing factual background of suit in which NFL player asserted injury was caused by blow to plaintiff's head during play); *Nabozny v. Barnhill* 334 N.E.2d 258, 260 (Ill. App. Ct. 1975) (asserting claim for injury sustained during soccer game when plaintiff kicked goaltender); *Bowman*, 853 N.E. 2d at 984 (examining suit in which injuries were sustained on golf course); *Moser*, 746 N.E.2d at 413 (dismissing suit alleging defendant recklessly cut in front of plaintiff during triathlon); *Dotzler v. Tuttle*, 449 N.W.2d 774 (Neb. 1990) (sustaining suit for conduct on basketball court).

152. For a further discussion of this fact pattern, see *supra* notes 58-65 and accompanying text.

153. For a further discussion of arguments available to the plaintiff, see *infra* notes 159-83 and accompanying text.

154. 834 P.2d 696 (Cal. 1992).

155. *Id.* at 708 (announcing general principle to guide sport injury analysis).

156. See *id.* at 710 (approving majority view that recklessness is proper standard in sports injury cases between co-participants).

157. See *id.* at 710-11 (comparing previous case law). For example, a baseball player could not recover where a co-participant, whose bat accidentally slipped out of his hands, struck the plaintiff. See *id.* at 710 (citing *Gaspard v. Grain Dealers Mut. Ins. Co.*, 131 So. 2d 831 (La. Ct. App. 1961)) (providing example where liability was not established). Recklessness was established where a softball player ran into the second baseman four to five feet out of the base-path and well after the second baseman got rid of the ball. See *id.* at 711 (citing *Bourque v. Duplechin*, 331 So. 2d 40 (La. Ct. App. 1976)) (illustrating cases where liability was established).

it can be established that the defendant breached his duty to the plaintiff by using steroids.¹⁵⁸

First, the plaintiff must prove that the defendant intentionally and consciously chose to act in a particular manner.¹⁵⁹ Here, before batting, the defendant deliberately consumed steroids either through a hypodermic needle or oral administration.¹⁶⁰ It is immaterial which of the aforementioned methods is used; either demonstrates a conscious and calculated decision to take illegal performance-enhancing drugs to gain an unnatural advantage over co-participants.¹⁶¹ The defendant willfully took steroids to produce “greater muscle mass . . . [and] faster bat speed . . . giv[ing] the ball more velocity.”¹⁶² Although the defendant lacked specific intent to hit the pitcher, he deliberately altered his physical ability.¹⁶³ This alteration gives rise to the level of intent necessary to constitute reckless conduct.¹⁶⁴

Reckless conduct is an intentional act done with “a conscious indifference to the consequences of one’s actions.”¹⁶⁵ Many profes-

158. See RESTATEMENT (SECOND) OF TORTS § 500 (1965) (defining reckless conduct).

159. See *id.* at cmt. b (1965) (“Conduct cannot be in reckless disregard of the safety of others unless the act or omission is itself intended . . .”).

160. See Fan, *supra* note 28, at 442 (explaining ways steroids can be taken). “Steroids may be taken in two forms. They can be injected into the body using hypodermic needles or administered orally.” *Id.* Former MLB player and admitted steroid user, Jose Canseco, explained that steroids can be consumed orally or injected with a needle. See *Canseco on Palmerio’s Suspension*, MSNBC.COM, <http://www.msnbc.msn.com/id/8815447/> (last visited May 1, 2008) (reporting on interview between Chris Matthews and Jose Canseco where Canseco explained steroid use).

161. See *Canseco on Palmerio’s Suspension*, *supra* note 160 (reasoning steroids only get into athlete’s body via intentional use). For further discussion of motivating factors for steroid use, see *supra* notes 15-24 and accompanying text.

162. Ruibal, *supra* note 33, at 9C. “Batting power is generated by muscles in the player’s forearms, shoulders and especially the hips, all areas that can be improved with steroids.” *Id.*

163. For a further discussion of how steroids change baseball players’ abilities, see *supra* notes 28-41 and accompanying text.

164. See *Dotzler v. Tuttle*, 449 N.W.2d 774, 782 (Neb. 1990) (“Recklessness is the disregard for or indifference to the safety of another or for the consequences of one’s act.”); RESTATEMENT (SECOND) OF TORTS § 500 (1965) (discussing intent requirement for reckless conduct).

165. *Bowman ex rel. Bowman v. McNary*, 853 N.E.2d 984, 995 (Ind. Ct. App. 2006) (applying general recklessness requirements to sports injury cases); see also RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1965) (defining recklessness).

Recklessness may consist of either two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of physical harm to another, and deliberately proceeds to act, or fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of facts,

sional athletes choose to cheat by using performance-enhancing drugs while remaining callous to the negative implications of their illegal conduct.¹⁶⁶ In particular, baseball players admitting to, or testing positive for, steroid use usually have a cavalier attitude and, in most instances, lack remorse for their actions.¹⁶⁷ This self-absorption and focus on personal accolades, combined with a lack of regret, establishes indifference towards co-participants' safety.¹⁶⁸

Persuading the fact finder to hold that a steroid user knows, or a reasonable person would recognize, that taking steroids "creates an unreasonable risk of physical harm to another" is essential to the outcome of this case.¹⁶⁹ In the former, the participant "knows . . . of facts which create a high degree of risk of physical harm to another."¹⁷⁰ In the latter, the participant knows of the facts, "but does not realize or appreciate the high degree of risk involved, although

but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.

Id.

166. See generally FAINARU-WADA & WILLIAMS, *supra* note 25, at XV-XVI (describing motivation for Barry Bonds's decision to begin using steroids and other performance-enhancing substances).

[A]s the 1998 season ended, Bonds's elite status had slipped a notch. The game and its fans were less interested in the complete player who could hit for average and power, and who had great speed and an excellent glove. The emphasis was shifting to pure slugging. . . . [A]s McGwire was celebrated as the best slugger of the modern era and perhaps the greatest who had ever lived, Bonds became more jealous than people who knew him well had ever seen.

To Bonds it was a joke. He had been around enough gyms to recognize that McGwire was a juicer. Bonds himself had never used anything more performance enhancing than a protein shake from the health-food store. But as the 1998 season unfolded, and, as he watched Mark McGwire take over the game — his game — Barry Bonds decided that he, too, would begin using [performance enhancers].

Id.

167. See *MVP in 1996 Says Taking Steroids Wasn't a Mistake*, *supra* note 18 (quoting now-deceased former MLB player Ken Caminiti's view on steroid use). "I've made a ton of mistakes. . . . I don't think using steroids is one of them." *Id.* Instead of admitting to cheating, players are absorbed by the adulation they receive and legitimize it by crediting their workouts, not the drugs. See Jenkins, *supra* note 33, at D1 (noting players' ability to avoid acknowledgment of steroid use).

168. For a further discussion of the typical view of MLB players towards their steroid use, see *supra* notes 166-67 and accompanying text.

169. See *Bowman ex. rel. Bowman v. McNary*, 853 N.E.2d 984, 994 (Ind. Ct. App. 2006) ("[R]ecklessness requires that a participant in a sporting activity . . . know that his . . . conduct subjects a co-participant . . . to a probability of injury."); RESTATEMENT (SECOND) OF TORTS § 500 (1965) (stating definition of reckless conduct).

170. RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1965) (differentiating between "knowing" and "having reason to know of facts which would lead a reasonable man to realize . . . that his conduct creates an unreasonable risk of physical harm to another. . . .").

a reasonable man in his position would”¹⁷¹ Scrutinizing the facts inescapably leads to the conclusion that the batter possessed the requisite knowledge and consuming steroids created an unnecessary and excessive risk of injury to co-participants.

Upon examining the defendant’s factual knowledge, it is clear that the batter fully understood taking steroids would dramatically increase his strength and boost his batting power.¹⁷² Deliberately injecting steroids is unquestionably done for the purpose of unnaturally aiding performance.¹⁷³ The “drug cocktails” used by one prominent baseball player were specifically “designed to enhance [that] athlete[’]s specific needs” in order to improve his on-field performance.¹⁷⁴ After accepting this premise, the issue becomes whether steroid use creates an unnecessary danger.¹⁷⁵

Athletes are subjected to unreasonable and unnecessary injury risks when co-participants use steroids.¹⁷⁶ The risks players expose themselves to while playing baseball are increased by the disproportionate physical advantage steroid users have over competitors choosing not to cheat.¹⁷⁷ The pitcher’s arguments should either focus on the factual differences between this case and previous

171. *Id.* See also *Bowman*, 853 N.E.2d at 995 (explaining when actors are deemed to have requisite knowledge without realizing “the high degree of risk involved”). Courts use an objective standard whereby an actor “is held to the realization of the aggravated risk which a reasonable man in his place would have, although he does not himself have it.” RESTATEMENT (SECOND) OF TORTS § 500 cmt. a (1965).

172. See *MVP in 1996 Says Taking Steroids Wasn’t a Mistake*, *supra* note 18 (quoting numerous players’ views of steroids). Current MLB pitcher Kenny Rogers explained “[S]teroids can jump you a level or two. The average player can become a star and the star player can become a superstar. And the superstar? Forget it. He can do things we’ve never seen before.” *Id.* Further, it is highly unlikely, almost impossible, for a player to consume steroids unintentionally. See *Canseco on Palmeiro’s Suspension*, *supra* note 160 (indicating players with million-dollar contracts are fully aware of what goes into their bodies). For a further discussion of steroids’ effect on batting ability, see *supra* notes 28-41 and accompanying text.

173. See *Fan*, *supra* note 28, at 442 (stating manners steroids are placed into body).

174. See *FAINARU-WADA & WILLIAMS*, *supra* note 25, at 115 (reporting on performance-enhancing substances Barry Bond’s allegedly used during his baseball career).

175. See RESTATEMENT (SECOND) OF TORTS § 500 (1965) (stating reckless conduct must create unreasonable risk of which player knew or should have known).

176. For a further discussion of the changes in a player’s ability provided by steroids, see *supra* notes 28-41 and accompanying text.

177. See *Fan*, *supra* note 28, at 445 (listing leagues that chose to test for steroids after concluding they gave athletes “unfair competitive advantages”); *Taxin*, *supra* note 1, at 835-36 (“The changing physical make-up of athletes has resulted in an uneven playing field whereby players taking drugs have a competitive advantage.”).

sports injury cases or analogize this case to previous sports tort cases not involving co-participants.¹⁷⁸

The plaintiff has three strong arguments supporting the claim that the defendant's steroid use was reckless. The plaintiff, for example, could highlight the extreme factual differences between previous co-participants' suits involving baseball players and this case.¹⁷⁹ The plaintiff could also argue this case is most akin to premises liability cases brought by injured sports participants.¹⁸⁰ In the alternative, the plaintiff could also argue that this case is one of first impression.¹⁸¹ While a court has never ruled on the issue of steroid use and tort liability, the plaintiff has a strong basis to argue that the defendant's steroid use created an unreasonable danger. Specifically emphasizing how steroids allowed the defendant to hit the ball much faster which simultaneously reduced the time plaintiff had to avoid being hit by the batted ball and increased the injuries he suffered when he was struck.¹⁸² Each argument is different,

178. For a further discussion of the arguments available to the plaintiff, see *infra* notes 179-83 and accompanying text.

179. See generally *Knight v. Jewett*, 834 P.2d 696, 708 (Cal. 1992) (discussing baseball cases). "[N]umerous cases recognize that in a game of baseball, a player generally cannot recover if he or she is hit and injured by a carelessly thrown ball. . . ." *Id.* Moreover, several cases establish the basic proposition that being hit by a batted ball is an inherent risk. See *Bowser v. Hershey Baseball Ass'n.*, 516 A.2d 61, 63 (Pa. Super. Ct. 1986) ("One of the risks inherent in baseball is being hit by a batted ball."). Recently, courts have recognized that there are certain situations where the risk of being hit by a batted ball is not inherent. See *Sanchez v. Hillerich & Bradsby Co.*, 128 Cal. Rptr. 2d 529, 541 (Cal. Ct. App. 2003) (reversing summary judgment because triable issues existed in plaintiff's claim that aluminum baseball bat caused greater risk of being hit by batted baseball).

180. See *Branco v. Kearny Moto Park, Inc.*, 43 Cal. Rptr. 2d 392, 397 (Cal. Ct. App. 1995) ("[O]perators of sports and recreational facilities owe a duty to their patrons to ensure the facilities . . . provided do not increase the risk of injury above the level inherent in the sport . . ."). In *Branco*, the court reversed summary judgment against the plaintiff, a BMX rider, after finding triable issues on whether jumps on a bike track created unreasonable dangers. See *id.* at 398. In another case, the court allowed a suit against ski area operators to proceed, alleging that the race court design was "unnecessarily dangerous." *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 15 (Wash. 1992) (examining suit alleging placement of tow rope shack unnecessarily increased risk of ski racing).

181. See BLACK'S LAW DICTIONARY (8th ed. 2004) (defining case of first impression). "A case that presents the court with an issue of law that has not previously been decided by any controlling legal authority in that jurisdiction." *Id.*

182. See *Sanchez*, 128 Cal. Rptr. 2d at 538-39 (concluding ball reached pitcher sooner and faster).

It is undisputed that [the bat] . . . hit the ball that fractured appellant's skull. It is also undisputed that the [bat] was designed to and did increase the speed at which the baseball leaves the bat compared to other metal and wood bats. Thus, absent other factors . . . it follows that the ball must have reached appellant sooner . . .

Id. The case proceeded to trial based upon both the increased velocity and the reduction in reaction time caused by the type of bat. See *id.* at 540. Similarly,

but the central issue is the same - the defendant selfishly took steroids knowing this drastically improved his playing ability and unreasonably endangered competitors.¹⁸³

C. Encouraging Cheating Is Not a Good Policy

If the defendant is found liable for steroid use, the policies implicated will be critical to the court's analysis.¹⁸⁴ Examining the specific policies pertinent to sport injury cases, along with the unique policies intertwined with performance-enhancing drugs, illustrates why the defendant should be found liable.¹⁸⁵ Holding the defendant accountable in court will (1) not discourage vigorous participation in professional baseball; (2) not flood the court with litigation;¹⁸⁶ and (3) will create a strong disincentive to use steroids.¹⁸⁷

steroids allow batters to hit baseballs with more force and velocity, thereby reducing the time pitchers have to react to line-drives hit back at them. *See* Jenkins, *supra* note 33, at D1 (citing Dr. Gary I. Wadler, professor of medicine at New York University) (explaining muscle mass accelerates bat speed allowing batters to hit ball with more force); Ruibal, *supra* note 33, at 9C (citing Charles Yesalis, author of *Anabolic Steroids in Sports and Exercise*) ("That increased bat speed means he can wait longer on the pitch . . . [and] the added power will give the ball more velocity").

183. For a further discussion of the effect steroids have on players' abilities, see *supra* notes 28-41 and accompanying text.

184. *See* Avila v. Citrus Cmty. Coll. Dist., 131 P.3d 383, 391 (Cal. 2006) ("When the injury is to a sporting participant, the considerations of policy and the question of duty necessarily become intertwined with the question of assumption of risk."); Bowman *ex rel.* Bowman v. McNary, 853 N.E.2d 984, 991 (Ind. Ct. App. 2006) (analyzing public policy when finding duty of care).

In the area of injuries arising out of a sporting event, two . . . conflicting policies mold the concept of duty. On one hand, an injured player should have a recourse through the courts to be compensated for his injuries. On the other hand, to preserve the vigor of athletic contests, the courts should avoid adopting a standard of conduct which dampens the competitive spirit.

Mcelhaney v. Monroe, No. 13454, 1989 WL 7987, at *2 (Ohio Ct. App. 1989). Specifically in sports tort cases, broad public policy concerns play an important role in decisions. *See* Rosenthal, *supra* note 90, at 2659.

185. *See* Rosenthal, *supra* note 90, at 2652-53 (listing policy concerns in court analysis); Bush, *supra* note 102, at 100 (recognizing negative impact of professional athletes' steroid use on society).

186. *See* Avila, 131 P.3d at 393-94 (finding "legal liability . . . might . . . alter fundamentally the nature of the sport by deterring participants from vigorously engaging in [the] activity . . ."). "Many courts stress the importance of maintaining vigorous participation and avoiding a flood of litigation." Rosenthal, *supra* note 90, at 2662.

187. *See* Taxin, *supra* note 1, at 842-44 (theorizing court's consideration of performance-enhancing substances in tort analysis could reduce incentives to use).

1. *Vigorous Participation Will Continue*

The court must ask whether imposing legal liability on athletes who use steroids will discourage vigorous participation in baseball.¹⁸⁸ Courts fear imposing judicial sanctions will fundamentally alter play by discouraging spirited participation.¹⁸⁹ Before hearing a claim that a player's steroid use caused the plaintiff's injury, the court should impose a precondition on establishing a viable lawsuit. Requiring the plaintiff to affirmatively plead or establish that the defendant tested positive for or admitted to taking steroids absolves concerns that participation in baseball would be inhibited.¹⁹⁰

The simplicity and historical pedigree of baseball supports the conclusion that legal liability for steroid use will not negatively impact the sport. “[It] is a game between two teams of nine players each, under direction of a manager, played on an enclosed field . . . [and] the objective of each team is to win by scoring more runs than the opponent.”¹⁹¹ Baseball has remained relatively unchanged since the first rules were enacted over two centuries ago.¹⁹² Steroids, on the other hand, did not become prevalent in baseball until the late 1980s.¹⁹³ Imposing civil liability on the play-

188. See Rosenthal, *supra* note 90, at 2661 (highlighting issues that concern courts in sports tort cases). “[C]ourts often stress maintaining participation and competition as an important factor to be considered Courts are concerned that excessive tort liability may result in decreased participation in sports.” *Id.* For a further discussion of the fact pattern, see *supra* notes 58-65 and accompanying text.

189. See *Avila*, 131 P.3d at 394 (focusing on effect liability would have on game of baseball); *Mark v. Moser*, 746 N.E.2d 410, 418 (Ind. Ct. App. 2001) (citing *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982)) (“[C]ourts have . . . recognized that ‘fear of civil liability stemming from negligent acts occurring [during] an athletic event could curtail the proper vigor [sic] with which the game should be played and discourage individual participation.’”); see also Rosenthal, *supra* note 90, at 2652 (noting importance of “promoting vigorous competition” when deciding to allow causes of action).

190. See generally *Avila*, 131 P.3d at 394 (finding liability would “chill” practice of throwing inside or “close to the batter’s body . . . for fear of a suit over an errant pitch”).

191. MAJOR LEAGUE BASEBALL RULES 1.01 and 1.02 (2007), available at http://mlb.mlb.com/NASApp/mlb/mlb/official_info/official_rules/objectives_1.jsp.

192. See Baseball Rules Chronology, BASEBALLLIBRARY.COM, http://www.baseballlibrary.com/baseballlibrary/excerpts/rules_chronology.stm (last visited May 1, 2008) (listing changes in baseball rules). In 1845, the “New York Knickerbockers created a formal code of playing rules. The rules limited each team to nine players, [and] laid out the field in . . . [the] ‘baseball square’ (with ninety-foot-sides)” *Id.* Under MLB rules, “the infield shall be a 90-foot square” and the game is between two teams of nine. See MAJOR LEAGUE BASEBALL RULES, *supra* note 191, at 1.01 and 1.4 .

193. See *Olney*, *supra* note 18, at A15 (“In 1988 . . . Washington Post’s Thomas Boswell reported that his sources told him Jose Canseco used steroids.”); *Telander*, *supra* note 17 (theorizing steroid era may have begun in “1988, when a fully juiced

ers choosing to use steroids will not undermine vigorous participation; rather it will further it.

Courts focus primarily on the potentially burdened action and its relation to the sport involved in the lawsuit.¹⁹⁴ Holding the defendant batter culpable would not “decrease . . . competitiveness and enthusiasm,” because players not on steroids would be unaffected – only those players choosing to cheat by using steroids face possible liability.¹⁹⁵ The burdened activity, using steroids to help performance, is not fundamental or essential to baseball; rather, it is a new problem undermining the sport’s legitimacy.¹⁹⁶ The steroid problem in MLB has reached a point where U.S. senators and representatives are calling on MLB officials and players to address and “confront the issue of tainted [baseball] records.”¹⁹⁷ Thus, chilling the practice will positively impact the sport without altering its fundamental components.

Jose Canseco led the American League in home runs, RBI, slugging percentage, and extra-base hits”); *Jose Canseco: Juiced*, *supra* note 18 (“As early as his MVP season in 1988, there were whispers that Canseco was using steroids . . .”).

In a widely reported incident during the Summer Olympics in September of 1988, the Canadian sprinter Ben Johnson was stripped of a gold medal in the 100-meter sprint for testing positive for stanozolol, an anabolic steroid sold under the brand name Winstrol. Days later, the first public speculation appeared about a player’s use of steroids in Major League Baseball.

MITCHELL, *supra* note 32, at 61.

194. *See generally* Avila, 131 P.3d at 393-94 (discussing prevalence of pitching inside and negative effect tort liability would have).

195. *See* Rosenthal, *supra* note 90, at 2656 (discussing policy implications in sports tort cases). Courts fear that finding liability would reduce players’ “level of competitiveness and enthusiasm for fear that they might injure another participant and be liable in court.” *Id.*

196. *See* MITCHELL, *supra* note 32, at SR-8 (explaining negative consequences steroids have had on MLB). “The illegal use of performance enhancing substances poses a serious threat to the integrity of the game. Widespread use by players of such substances unfairly disadvantages the honest athletes who refuse to use them and raises questions about the validity of baseball records.” *Id.* MLB, recognizing the problems posed by steroids, enacted a testing policy to “deter and end the use by [p]layers of [p]rohibited [s]ubstances” MAJOR LEAGUE BASEBALL’S JOINT DRUG PREVENTION AND TREATMENT PROGRAM, *supra* note 55, at 1. Still, all professional baseball players’ accomplishments are viewed suspiciously because of the uncertainty of whether they were achieved with the help of performance-enhancing drugs. *See* Longman, *supra* note 42, at D1 (commenting on modern sports culture where “no result[s] in any elite sport can be trusted with reasonable certainty to have been achieved without performance-enhancing drugs . . .”). For example, Philadelphia Phillies first basemen Ryan Howard belted fifty-three home runs in 2006, but instead of praise, the first question Howard faced was, “Is Ryan Howard juiced”? *See* Hagen, *supra* note 43 (explaining “the standard presumption has become guilty-until-proven-innocent” in baseball).

197. FAINARU-WADA & WILLIAMS, *supra* note 25, at 264 (reporting on Senator Jim Bunning and Representative John Sweeney’s calls on MLB to deal with issues surrounding records set by suspected or known steroid users).

2. *Liability Will Not Flood the Courts with Litigation*

Courts examining sports injury suits regularly emphasize the fear that imposing liability would lead to a flood of litigation.¹⁹⁸ In *Jaworski v. Kiernan*,¹⁹⁹ the court relied on this fear to justify the differential treatment of sports injury cases.²⁰⁰ Courts keenly focus on the facts in each particular case to ensure that a decision to hold a participant liable will not result in this fear becoming a reality.²⁰¹

Requiring an admission of steroid use, or a positive test result for it, combined with the requirement of a causal link between steroid use and the injuries suffered will negate any possibility of a litigation flood.²⁰² The *Jaworski* court discussed the potential domino effect that would occur if sports injury cases were treated the same as simple negligence claims.²⁰³ Each example cited by the court was a common occurrence in the particular sport being discussed, which is not the case here.²⁰⁴ Specifically, the series of events required to sustain a suit of this type will occur infrequently, creating a natural dam to the flood.²⁰⁵ Further, if the plaintiff's suit has the intended effect of reducing the number of professional athletes using performance-enhancing drugs, the chances of future litigation would dramatically decrease.²⁰⁶ The deterrent effect of the lawsuit together with the rarity that the necessary facts will coalesce to sustain it removes the possibility of a litigation flood.

198. See *Jaworski v. Kiernan*, 696 A.2d 332, 338 (Conn. 1997) (noting possible increase in litigation); *Mark v. Moser* 746 N.E.2d 410, 417 (Ind. Ct. App. 2001) (“[S]ome courts have feared . . . a flood of litigation.”).

199. 696 A.2d 332 (Conn. 1997).

200. See *id.* at 338-39 (theorizing possible effects if sports injury cases are not treated differently). “[E]very punter with whom contact is made, every midfielder high sticked, every basketball player fouled, every batter struck by a pitch, and every hockey player tripped would have the ingredients for a lawsuit if injury resulted.” *Id.*

201. See *id.* (noting that encouraging participants to sue is improper public policy); see also Rosenthal, *supra* note 90, at 2656-57 (discussing concern of litigation flood in sports injury cases).

202. See, e.g., *McElhaney v. Monroe*, No. 13454, 1989 WL 7987, at *2 (Ohio Ct. App. Feb. 1, 1989) (explaining burden on plaintiff includes establishing “that the defendant’s breach proximately caused the . . . injuries.”). For a further discussion of the fact pattern, see *supra* notes 58-65 and accompanying text.

203. See *Jaworski*, 696 A.2d at 338 (listing instances where standard of simple negligence could allow suits).

204. See *id.* (noting examples of sports injuries).

205. For a further discussion of facts required to sustain plaintiff’s suit, see *supra* notes 58-65 and accompanying text.

206. For a further discussion on future effects the claim may have, see *infra* notes 207-39 and accompanying text.

3. *Deterring Steroid Use Is Sound Public Policy*

Steroid use is not a problem exclusive to professional athletics; many young athletes, thirsting for professional success, turn to steroids.²⁰⁷ It has become such a pervasive societal problem that President Bush, in his 2004 State of the Union Address, called on professional athletes “to send the right signal . . . and to get rid of steroids now.”²⁰⁸ Unfortunately, steroid use continues and alternative strategies must be explored to combat the problem.²⁰⁹

In this search, civil liability may be an effective tool in the fight against steroid use, particularly because it attacks the financial assets of players using steroids.²¹⁰ Further, professional athletes are “subject to intense media scrutiny” and a tort suit between co-participants would presumably garner immense media attention.²¹¹ This would, in turn, convey a strong negative message to young athletes, potentially dissuading many from taking steroids.²¹²

207. See Laitner, *supra* note 22, at 211 (focusing on steroid use by adolescent athletes). Recent reports have shown that 6.1% of high school students have used steroids. See *id.* Other reports have shown “[a]dolescent abuse of anabolic steroids . . . is a widespread and growing problem.” Fan, *supra* note 28, at 439.

208. See Bush, *supra* note 102, at 100 (recognizing problem of steroids in sports).

209. See Mitten, *supra* note 1, at 806 (“During the 2005 season, several players . . . tested positive for banned substances [in baseball.]”); *Players Suspended Under Baseball’s Steroids Policy*, June 7, 2006, <http://sports.espn.go.com/mlb/news/story?id=2474192> (“111 players have been suspended since baseball’s new steroids policy was implemented prior to the 2005 season.”); *Report: Bonds Failed Amphetamine Test*, Jan. 11, 2007, <http://sports.espn.go.com/mlb/news/story?id=2727325> (reporting on Barry Bond’s recent failed drug test).

210. See Linda S. Calvert Hanson & Craig Dernis, *Revisiting Excessive Violence in the Professional Sports Arena: Changes in the Past Twenty Years?*, 6 SETON HALL J. SPORT L. 127, 143-44 (1996) (discussing advantages of using civil courts in sports injury cases). “Perhaps the most important advantage to the civil suit is that it arguably acts as a greater deterrent. The civil suit strikes directly at the financial incentives that cause sports violence, as the court provides compensation as a remedy to the injured parties.” *Id.*

211. See Laitner, *supra* note 22, at 193 (arguing that “the biggest . . . controvers[y] in modern sports has been enhancement of individual athletic performance through the use of medical intervention, most commonly with steroids.”); Laurie Nicole Robinson, Comment, *Professional Athletes-Held to a Higher Standard and Above the Law: A Comment on High-Profile Criminal Defendants and the Need for States to Establish High-Profile Courts*, 73 IND. L.J. 1313, 1323 (1998) (discussing massive media coverage of professional athletes).

212. See generally Laitner, *supra* note 22, at 194 (examining incentives that entice some young athletes to begin taking steroids); Farrey, *supra* note 21 (describing how “baseball is widely seen as a way out of poverty” motivating some to use steroids to help reach MLB).

In addition, economic incentives and steroid use are inescapably linked to one another.²¹³ Rewarding professional athletes for their exceptional play with multimillion-dollar salaries influences many young aspiring athletes' decisions to use steroids.²¹⁴ Most leagues impose flimsy penalties on players admitting to steroids use, allowing them to continue earning their prodigious salaries.²¹⁵ For example, in 2001 Jason Giambi signed a lucrative seven-year, \$120-million-dollar deal with the New York Yankees.²¹⁶ Two years later he "admitted to a federal grand jury . . . he took steroids," but was not penalized by MLB or the New York Yankees.²¹⁷ As a result, he and many other professional players reap the benefits of steroid-fueled performances by continuing to receive multimillion-dollar salaries.²¹⁸

213. For a further discussion of the link between economics, baseball and performance-enhancing substances, see *infra* notes 218-31 and accompanying text.

214. See Mitten, *supra* note 1, at 797 ("In today's society, the economic and intangible rewards for extra-ordinary athletic achievements and winning performances are substantial."); Taxin, *supra* note 1, at 831-32 (noting massive financial pressures placed on professional athletes to succeed leading many to use illegal performance-enhancing substances).

Apart from the dangers posed to the major league player himself, however, his use of performance enhancing substances encourages young athletes to use those substances. Young Americans are placing themselves at risk of serious harm. Because adolescents are already subject to significant hormonal changes, the abuse of steroids and other performance enhancing substances can have more serious effects on them than they have on adults.

MITCHELL, *supra* note 32, at SR-8.

215. See Laitner, *supra* note 22, at 198-203 (comparing Olympic testing programs with programs in American professional sports); Taxin, *supra* note 1, at 839 ("Generally, sports leagues are self-regulating because the league oversees all the actions of both the member teams and the players.").

216. See *Giambi Tops Yankees' Arsenal of New Additions*, ESPN.COM, Dec. 19, 2001, <http://espn.go.com/mlb/news/2001/1213/1295293.html> (discussing specifics of profitable contract signed by Giambi).

217. See *Admissions Before BALCO Grand Jury Detailed*, ESPN.COM, Dec. 2, 2004, <http://sports.espn.go.com/espn/news/story?id=1936592> (reporting on Giambi's grand jury testimony and baseball's inability to penalize him). "Penalties for steroid use in baseball started in 2003, but testing with samples identified by players didn't start until 2004, making it unclear if Giambi could be retroactively disciplined for any admission." *Id.*

218. See Lance Williams & Mark Fainaru-Wada, *What Bonds Told BALCO Grand Jury*, S.F. CHRON., Dec. 3, 2004, at A-1 (reporting on leaked grand jury testimony). Barry Bonds, Gary Sheffield and Jason Giambi all testified to taking steroids and other performance-enhancing substances. See *id.* Yet, prior to 2007, Sheffield was rewarded with "a \$28 million contract extension through 2009 . . ." See *Tigers Deal Three Pitchers to Yankees for Sheffield*, ESPN.COM, Nov. 14, 2006, <http://sports.espn.go.com/mlb/news/story?id=2656847>. Moreover, amidst "an ongoing perjury investigation of Bonds and whether he lied before a grand jury," when he claimed he never knowingly took steroids, Bonds was given a one-year, \$15.8 million contract extension, giving him an opportunity to break Henry "Hank" Aaron's career

Taking this into account, civil liability resolves what would otherwise be an extremely inequitable result.²¹⁹ If the pitcher in the hypothetical was earning an average MLB salary before the line-drive ended his career, he would lose millions of dollars in potential future earnings.²²⁰ Further, if the batter was a star slugger earning millions of dollars under a lucrative contract and tested positive for steroid use, he would be suspended fifty games without pay.²²¹ Yet, if the batter admitted to steroid use, he would not face internal league sanctions.²²² Without further penalties, the defendant would, at most, lose a third of his salary while the plaintiff's professional baseball career would be over.²²³

By forcing the defendant to pay damages, he "becomes responsible" for using steroids.²²⁴ Additionally, the pitcher would be awarded a portion of his lost earnings – money otherwise unrecoverable.²²⁵ Ordering the defendant to pay the plaintiff's damages with money earned through cheating is a substantial step in reversing the current trend of rewarding steroid use.²²⁶ Without civil lia-

homerun record. See John Shea, *Deal is Done — Barry is Back: Personal Trainers Will Be on Bonds' Payroll, Not the Team's*, S.F. CHRON., Jan. 30, 2007, at D-1.

219. For a further discussion of the inequities solved by civil liability, see *infra* notes 220-27 and accompanying text.

220. See Blum, *supra* note 136 (listing average salaries per position in MLB baseball for 2007). "Third basemen had the highest average among positions (\$5.87 million), followed by first basemen (\$5.78 million), designated hitters (\$5.59 million), outfielders (\$4.88 million), starting pitchers (\$4.87 million), shortstops (\$4.06 million), second basemen (\$2.79 million) and relievers (\$1.43 million)." *Id.* For a further discussion of hypothetical fact pattern, see *supra* notes 58-65 and accompanying text.

221. See Blum, *supra* note 136 (noting average salaries for position players in MLB ranges from 2.79 million to 5.87 million); MAJOR LEAGUE BASEBALL'S JOINT DRUG PREVENTION AND TREATMENT PROGRAM, *supra* note 55, at 15 (explaining first incidence of testing positive results in fifty-game suspension without pay).

222. For a further discussion on players escaping sanctions even after admitting to using steroids, see *supra* notes 216-18 and accompanying text.

223. For a further discussion of the hypothetical fact pattern, see *supra* notes 58-65 and accompanying text.

224. See Hanson & Dernis, *supra* note 210, at 143-44 (theorizing civil suits could be useful tools in sports injury cases).

225. See *Tomjanovich v. Cal. Sports, Inc.*, No. H-78-243, 1979 WL 210977, at *1 (S.D. Tex. 1979) (awarding professional basketball player monetary damages); Hanson & Dernis, *supra* note 210, at 129 (explaining injuries suffered by Tomjanovich). For a further discussion of the hypothetical fact pattern, see *supra* notes 58-65 and accompanying text.

226. For a further discussion on MLB players receiving multimillion-dollar contracts after admitting to using steroids, see *supra* notes 216-18 and accompanying text.

bility, it is unlikely that teams driven to maximize profits will cease compensating known cheaters.²²⁷

Imposing civil liability for steroid use sends a strong message to the public and to professional athletes using illegal performance-enhancing drugs.²²⁸ Upon entering professional sports, athletes are subjected to round-the-clock coverage of their every move.²²⁹ These highly scrutinized professionals also serve as role models to many young athletes who “seek to mimic” their careers.²³⁰ Rewarding admitted steroid users with multimillion-dollar contracts “sends the wrong message – that there are shortcuts to accomplishment, and that performance is more important than character.”²³¹ The combination of media coverage and the win-at-all-cost mentality has played a major role in the recent spike of steroid use among young athletes.²³² Holding professional athletes civilly liable to co-participants would help ameliorate this otherwise pro-steroids message.²³³

227. See Laitner, *supra* note 22, at 197-98 (theorizing there is conflict of interest in penalizing drug use while league benefits from profits created by it).

Most professional sports organizations are private and therefore have overwhelming power to decide drug related matters for themselves. These leagues are driven by profit, and because enhancement of athletes can lead to better performance, it is possible that profits may rise as a result. In this environment the concerns of financial success . . . and fair competition can . . . conflict.

Id.

228. See Hanson & Dermis, *supra* note 210, at 143-44 (examining possible deterrent effect of civil liability in context of professional sports); Robinson, *supra* note 211, at 1323-24 (discussing relationship between media and professional athletes).

229. See Robinson, *supra* note 211, at 1323 (exploring relationship between media and professional athletes). “Upon entering a professional sports league, the stakes become higher for athletes because the media becomes a player in the game. Athletes’ instant celebrity status, fame, and seven-figure salaries tend to attract more newspaper, radio, and television coverage” *Id.*

230. See Laitner, *supra* note 22, at 192-93 (discussing how athletes serve as models to society and importance of “[e]nsuring that model is . . . positive”); Rosenthal, *supra* note 90, at 2659-61 (noting implications of professional athletes’ liability in sports injury cases).

231. Bush, *supra* note 102, at 100; see also Kroichick, *supra* note 32, at C-1 (discussing difficulties baseball instructors have in convincing teenagers “they can become stronger, and recover faster, without using steroids”). For a further discussion of players rewarded with new contracts after admitting to steroid use, see *supra* notes 216-18 and accompanying text.

232. See Laitner, *supra* note 22, at 210-11 (focusing on increased use of steroids by young athletes). “In all of the governmental hearings on steroids, discussion is prefaced and concluded by statistics and repeated concerns of use by ‘neighborhood kids who idolize’ professional athletes.” *Id.* at 211.

233. For a further discussion of the economic benefits given to admitted steroids users, see *supra* notes 216-18 and accompanying text.

This lawsuit, in particular, would be subject to massive media coverage because steroid use in professional sports is such a divisive issue.²³⁴ If courts were to allow the plaintiff's suit, young athletes would receive what is currently an atypical message, that steroid use will be penalized.²³⁵ Requiring the defendant to pay damages would also undermine the economic incentives that entice aspiring athletes to use steroids.²³⁶ Moreover, it would rebuke the public's view of baseball players, previously hailed as heroes, who have tested positive for, or admitted to using, steroids.²³⁷ Focusing attention on public policy is extremely important because "courts today are more inclined to look toward policy considerations . . . [p]articularly in the realm of sports-injury cases . . ." ²³⁸ Directing the court's focus to the societal problems implicated by steroid use in sports significantly increases the chances of a successful claim.²³⁹

IV. CONCLUSION

Now, more than ever, professional athletes are faced with a choice: follow the rules by not using performance-enhancing substances and chance falling behind, or take performance enhancers.²⁴⁰ Many athletes appear oblivious to the fact that their

234. See Laitner, *supra* note 22, at 193 ("The media tends to cover the use of [steroids] in professional sports but less adequately addresses the issues of use by amateurs and minors."); Robinson, *supra* note 211, at 1324 (examining relationship between media and celebrity athletes). "[T]he media's aggressive style of reporting, coupled with the expansion of television viewership, has created an appetite for the details of celebrities' personal lives." *Id.*

235. See generally FAINARU-WADA & WILLIAMS, *supra* note 25, at 118-20 (examplifying typical treatment of steroid user). Barry Bonds was celebrated in San Francisco as a hero after breaking the single season homerun record; after that season he signed a new five-year \$90 million contract. See *id.*

236. See Mitten, *supra* note 1, at 797 (noting economic rewards given to athletes); Farrey, *supra* note 21 (discussing "lure of big money" motivating some players to turn to steroids). Financially rewarding well-performing athletes creates a significant incentive to use performance-enhancing substances. See Mitten, *supra* note 1.

237. See generally *Balco Bomber Gives Yanks Shot in the Arm*, THE BRONX CHEER, Apr. 23, 2006, <http://www.thebronxcheer.com/?m=200604> (commenting on performance and ovation given to Jason Giambi during recent New York Yankees game). "2 Home Runs. 5 RBIs. And one curtain call. Not a bad afternoon for Balco Bomber Jason Giambi. That's his second multi-homer game of this young season. . . . Yankee fans asked for and received a curtain call from their favorite Balco slugger." *Id.* A curtain call is "the act of a player coming out of the dugout to bow to the crowd, usually after hitting a home run." The Language of Baseball, <http://www.enlexica.com/cgi-bin/find.cgi> (last visited May 1, 2008).

238. Rosenthal, *supra* note 90, at 2659.

239. See *id.* (examining tendency of courts to focus on public policy in sports injury cases).

240. See generally Olney, *supra* note 18 (reporting on former MLB player Wally Joyner).

decisions could have profound effects on the lives of others.²⁴¹ In the short term, bulking up on “juice” not only endangers their health, but places co-participants at an increased risk of injury.²⁴² In the long term, aspiring young athletes, in admiration of professional athletes, will “emulate” their behavior and take performance enhancers.²⁴³ This behavior, combined with the inability of professional leagues to properly police steroid use, requires alternatives to be examined.²⁴⁴

Civil liability is a viable option in the fight against steroid use in professional sports.²⁴⁵ Admittedly, it will be rare for the facts needed to establish a viable suit to arise; but if and when they do, a finding of liability would have monumental results.²⁴⁶ By the same token, the particular facts need not mirror the hypothetical fact pattern put forward here; its purpose was to give substance to the proffered arguments.²⁴⁷

As illustrated by the preceding analysis, attacking the financial assets earned from steroid use would undercut one of the main incentives to use them.²⁴⁸ Moreover, this type of mechanism is particularly necessary because professional franchises have shown a cavalier attitude toward steroid use.²⁴⁹ Franchises continue to employ and re-sign players who have tested positive for, or admitted to taking, steroids.²⁵⁰ Without exploring alternative solutions, performance-enhancing drugs will continue to be a pervasive and dangerous problem, perpetuating a cycle where drug testing methods

241. For a further discussion of the far-reaching effects of steroid use, see *supra* notes 207-39 and accompanying text.

242. For a further discussion on steroid use and players' ability to hit the ball harder and faster, see *supra* notes 32-34 and accompanying text.

243. See Rosenthal, *supra* note 90, at 2669 (“Children admire . . . athletes as heroes, a circumstance of American society which courts must recognize.”). For a further discussion of steroid use and broad public policy implications, see *supra* notes 207-39 and accompanying text.

244. For a further discussion on policing performance-enhancing substances, see *supra* notes 42-57 and accompanying text.

245. For a further discussion on the use of the court system to deter steroid use, see *supra* notes 207-37 and accompanying text.

246. For a further discussion of facts needed to sustain suit, see *supra* notes 58-65 and accompanying text.

247. For a further discussion of the hypothetical fact pattern, see *supra* notes 58-65 and accompanying text.

248. For a further discussion on financial benefits players receive even after admitting to steroid use, see *supra* notes 213-18 and accompanying text.

249. For a further discussion on the contracts awarded to steroids users, see *supra* notes 213-18 and accompanying text.

250. For a further discussion on the practice of continually hiring steroid-positive players, see *supra* notes 213-18.

attempt to adapt to and detect newer, more sophisticated drugs, but continue to be one step behind.²⁵¹

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251. See Eichner, *supra* note 15 (noting well-founded suspicions of use of performance-enhancing drugs); Hagen, *supra* note 43 (noting existence of designer steroids that allow player to avoid positive tests). “In a never-ending game of cat and mouse, athletes who cheat seem always one step ahead of those who try to catch them.” Eichner, *supra* note 15.

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