WCM

ATTORNEYS

LIABILITY FOR SPORTING AND RECREATIONAL ACTIVITIES: A BALANCING ACT

Dennis M. Wade & Nicholas Schaefer

WADE CLARK MULCAHY LLP

New York	**New Jersey**	**Pennsylvania**
180 Maiden Lane, Ste. 901	955 S. Springfield Ave., Ste. 100	1515 Market Street, Ste. 2050
New York, NY 10038	Springfield, NJ 07081	Philadelphia, PA 19102
212.267.1900	973.258.1700	267.239.5526
www.wcmlaw.com	www.wcmlaw.com	www.wcmlaw.com

If you drink don't drive. Don't even putt. – Dean Martin

I know I am getting better at golf because I am hitting fewer spectators. – Gerald Ford

I think Little League is wonderful. It keeps kids out of the house. – Yogi Berra

Introduction

What was true in the Age of Socrates (5th Century BC) is true in the Digital Age: Sport is central to our way of life. The word itself is derived from the Anglo-French "disport," which meant to amuse or divert oneself from life's daily grind. So, we play sports; we watch sports; and we encourage our children to develop through sport their bodies as well as their minds.

But all sport -- whether you are an amateur or professional athlete, a weekend warrior, a parent on the sidelines, or even a fan in a stadium -- carries a degree of risk of physical injury. The question here is how does New York jurisprudence balance the inherent risk of sport against the duty of owners, organizers, coaches and the whole panoply of individuals and entities who foster sporting events to keep participants, fans and even bystanders reasonably safe from harm.

To be sure, the metaphor of "balance" is appropriate to any discussion of sport and recreational activity. But the concept of "balancing" risk against social value is key to understanding New York's jurisprudence on the subject. We begin with *Trupia v. Lake*

George Central School District, the Court of Appeals' recent pronouncement on the Voluntary Assumption of Risk Doctrine.[1]

There, day-camper Trupia, age 11, decided to slide down a stairwell banister at a public school district's summer day camp. Young Trupia's joy ride ended in calamity. Trupia's parents brought an action against the school district, alleging negligent supervision of young Trupia.

The school district, presumably after getting more facts about the incident, sought to amend its answer to assert -- as a complete defense -- primary assumption of the risk. The trial court granted the motion but the Third Department reversed on the basis that the assumption of the risk doctrine was rooted in "athletic and recreational" activities -- not garden variety torts.[2] Because the Departments were evenly divided (First and Third, curtailing use versus Second and Fourth, allowing broader use of the doctrine), leave to appeal was granted.

Put simply, the Court had to decide how the doctrine of assumption of the risk (offering a complete defense to liability) fit with the doctrine of comparative causation. How would the balance between these two doctrines be struck?

Ultimately, the Court made a value judgment about the worth of sport and recreation to our society:

---

[1] *Trupia v. Lake George Central Sch. Dist.*, 14 N.Y. 3d 392 (2010).
[2] *Id.* at 394.

> We have recognized that athletic and recreative activities possess enormous social value, even while they involve significantly heightened risks, and have employed the notion that these risks may be voluntarily assumed to preserve these beneficial pursuits as against prohibitive liability to which they would otherwise give rise. We have not applied the doctrine outside of this limited context and it is clear that its application must be closely circumscribed if not seriously to undermine and displace the principles of comparative causation.[3]

Against that value judgment, the Court concluded that sliding down a banister was mere horseplay and did not qualify for the special protection afforded to sports and recreational activities. And, so, in the context of mere foolery, the primary assumption of the risk doctrine may not be asserted as a complete defense.

The Court concluded:

> We do not hold that children may never assume the risks of activities, such as athletics, in which they freely and knowingly engage, either in or out of school-only that the inference of such an assumption as a ground for exculpation may not be made in their case, or for that matter where adults are concerned, except in the context of pursuits both unusually risky and beneficial that the defendant has in some nonculpable way enabled.[4]

While agreeing with the outcome, Judge Smith in his concurrence pointed out the Court's philosophic pronouncement raised more questions than it answered; specifically, the question of what constitutes an athletic or recreational activity. For example, if an adult slid down a banister, Judge Smith wondered, could that be construed as a form of recreation?

[3] *Id.* at 395.
[4] *Id.* at 396.

Based on *Trupia*, the plaintiff in the case of *Castro v. City of New York*[5] moved to reargue summary judgment, citing a change in law. But *Castro*, unlike *Trupia*, was participating in a softball game at the time of his injury.[6] This seminal fact distinguishes *Castro* from *Trupia's* horseplay. *Castro* assumed the risk by voluntarily participating in a sport.[7]

Before a further discussion on assumption of the risk, we begin with the nuts and bolts of all premises cases.

Premises Liability Primer

In New York, it is well settled a landowner has a duty to maintain the property in a manner that is reasonably safe for those who enter,[8] including all persons whose presence is reasonably foreseeable.[9] It matters not whether the person is a business invitee, an invited guest or a trespasser.[10] In determining reasonableness, the jury considers all of the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk.[11]

Even if the jury determines that the plaintiff's presence was foreseeable, and the landowner ultimately did not maintain the premises in a reasonably safe condition, the jury's job is not over. The jury must determine whether the landowner's negligence was

[5] 94 A.D.3d 1032 (2d Dep't 2012).
[6] 94 A.D.3d at 1032.
[7] *Id.* at 1033.
[8] *Caroline A.*, 23 Misc.3d at 10 (citing *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976)).
[9] *Peralta v. Henriquez*, 100 N.Y.2d 139, 144 (2003).
[10] *Id.* at 143.
[11] *Id. (citing Basso v. Miller*, 40 N.Y.2d 233, 241 (1976)("a landowner must act as a reasonable [person] in maintaining his [or her] property in a reasonably safe condition in view of all the circumstances, including the likelihood of injury to others, the seriousness of the injury, and the burden of avoiding the risk")).

a substantial factor in causing the plaintiff's injury.[12] Substantial factor has been defined as "conduct which has such an effect in producing the harm as to lead reasonable men to regard it as a cause."[13] For example, if an intervening cause brought on plaintiff's injuries then the landowner's negligence may not have been a substantial factor in causing the injury.[14] A third party's injury-causing conduct, on the premises of a landowner, that was unforeseeable, will not result in liability to the landowner.[15] But where a third party's actions are natural and foreseeable on the premises of a landowner, that landowner will still be liable if they fail to act in a reasonable manner.[16]

Assumption of the risk may afford a defense to a claim of fault against the landowner.[17] For example, in *Morgan v. State,*[18] the court found plaintiff's injury did not result from a hazardous condition on the property. Rather it stemmed, the court found, from participation in a ***"highly dangerous sport [bobsledding]***."[19] As such, the landowner was found not responsible because plaintiff voluntarily assumed the risk. Yet, if a landowner maintains the premises in such condition that participation in the sport

---

[12] *See* N.Y. Pattern Jury Instr.—Civil 2:90. The term "proximate cause" is not used in the jury charge for negligence actions because the definition of proximate cause has proven too difficult for the lay juror. *See* N.Y. Pattern Jury Instr.—Civil 2:70 (defining proximate cause: "an act or omission is regarded as a cause of an injury if it was a substantial factor in bringing about the injury, that is, if it had such an effect in producing the injury that reasonable people would regard it as a cause of the injury.") *See also,* the sample verdict sheet attached.
[13] *Bacon v. Celeste*, 30 A.D.2d 324, 325 (1st Dep't 1968).
[14] *See Maheswhari v. City of N.Y.,* 2 N.Y.3d 288, 294 (2004); *Piazza v. Regeis Care Center LLC*, 21 Misc.3d 1108(A) (N.Y. Sup. Ct. Bronx County March 7, 2006).
[15] *Id.*
[16] *Id.*
[17] *Morgan v. State*, 90 N.Y.2d 471, 486 (1997) (court granted summary judgment where plaintiff, injured in a bobsledding incident on defendant's premises, testified that he had been bobsledding for twenty years and had used defendant's course many times, thus assuming the risks, which were in no way heightened by defendant).
[18] 90 N.Y.2d 471, 486 (1997).
[19] *Id.*

includes an additional or heightened risk, the landowner will still be liable for plaintiff's injuries.[20]

The Court of Appeals has explained the assumption of the risk doctrine applies in limited circumstances. In *Custodi v. Town of Amherst,*[21] plaintiff sustained injuries while rollerblading in her residential neighborhood. Her rollerblade struck a two-inch height differential where a driveway met a drainage culvert.[22] Despite the athletic nature of plaintiff's activity, the Court of Appeals refused to expand the assumption of the risk doctrine beyond sporting events, and sponsored athletic and recreative pursuits taking place at designated venues.[23] The High Court explained:

> "[a]s a general rule, application of assumption of the risk should be limited to cases appropriate for absolution of duty, such as personal injury claims arising from sporting events, sponsored athletic and recreative pursuits that take place at designated venues. In this case, plaintiff was not rollerblading at a rink, a skating park, or in a competition; nor did the defendants actively sponsor or promote the activity in question.[24]

However, a defendant may not successfully assert primary assumption of the risk solely because an athlete has been injured at a sponsored event at a sports venue. For instance, in February 2018, the United States Tennis Association ("USTA") settled a slip

[20] *Id.* The court held that in Siegel v. City of N.Y., defendant was negligent in its maintenance of a torn tennis net that plaintiff tripped over, that a torn tennis net was not an inherent part of the game of tennis and plaintiff did not assume the risk of tripping over the net. Defendant was held liable to plaintiff for his injuries. *Id. at 488.*
[21] 20 N.Y.3d 83 (2012)
[22] 20 N.Y.3d at 86.
[23] *Id.* at 89.
[24] *Id.* In a footnote, the court clarified that in deciding *Custodi*, they were not considering any exceptions to such general rule. *Custodi* at 89, n2. The court's concern was a diminution of the general duty of landowners, since such an expansion would diminish duty to bicyclists, rollerbladers, and joggers.

and fall case with Canadian tennis player Eugenie Bouchard after a Kings County jury found the USTA liable for her accident. In September 2015, Bouchard had finished a late-night match at the U.S. Open and slipped on a training room floor, which was slippery with a cleaning agent, causing a concussion. The USTA argued it did not expect the room to be in use at the time of the accident, and argued plaintiff's own failure to notice the condition. The jury found the defendant 75% liable for the accident.

Bouchard, 24, was once ranked No. 5 in the world and had been a Wimbledon finalist in 2014, but was forced to withdraw from the U.S. Open and subsequent tournaments following her accident. She is currently ranked No. 116. The case settled before proceeding to damages, but illustrates the distinction between participation in sports as opposed to ordinary premises liability.

We next discuss the assumption of the risk doctrine in the context of participants in organized sporting events.

Participants In Sporting Events

As a general rule, a plaintiff who participates in a sporting or recreational activity is held to have consented to those risks, which are known, apparent or reasonably foreseeable.[25] As stated by the Court of Appeals:

> Defendant's duty under such circumstances is a duty to exercise care to make the conditions as safe as they appear to be. If the

[25] *Turcotte v. Fell*, 68 N.Y. 2d 432, 438-39, 510 N.Y.S.2d 49 (1986); *Rubenstein v. Woodstock Riding Club, Inc.*, 208 A.D.2d 1160, 617 N.Y.S.2d 603 (3d Dep't 1994); *Lamey v. Foley*, 188 A.D.2d 157, 594 N.Y.S.2d 490 (4th Dep't 1993).

> risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and the defendant has performed its duty.[26]

This doctrine of primary assumption of risk presents a complete bar to defendant's liability.[27]

To establish plaintiff's assumption of risk, a defendant must show the plaintiff was aware of the potentially defective or dangerous condition and the resulting risk, although it is not necessary to demonstrate the plaintiff foresaw the exact manner in which his injury occurred.[28] Whether a risk is assumed depends on "the openness and obviousness of the risk, plaintiff's background, skill and experience, plaintiff's own conduct under the circumstances, and the nature of the defendant's conduct."[29] But, a defendant does have a duty to exercise reasonable care to protect participants from "unassumed, concealed or unreasonably increased risks."[30]

The seminal case in this area is *Maddox v. City of New York*.[31] In *Maddox*, a member of the New York Yankees sustained a career ending injury while running to

---

[26] *Turcotte, supra*, 68 N.Y.2d at 439.
[27] *Turcotte v. Fell*, 68 N.Y. 2d 432, 438-39, 510 N.Y.S.2d 49 (1986); *Lamey v. Foley,* 188 A.D.2d 157, 594 N.Y.S.2d 490 (4 Dep't 1993).
[28] *Lamey v. Foley*, 188 A.D.2d 157, 594 N.Y.S.2d 490 (4th Dep't 1993).
[29] *Turcotte, supra*; *Rubenstein, supra*; *Lamey, supra; Schiffman v. Spring*, 202 A.D.2d 1007, 609 N.Y.S.2d 482 (4th Dep't 1994); *Benitez v. New York City Bd. of Educ*., 73 N.Y.2d 650, 541 N.E.2d 29 (1989).
[30] See *Schiffman v. Spring*, 202 A.D.2d 1007, 609 N.Y.S.2d 482 (4th Dep't 1994) (quoting *Benitez v. New York City Bd. of Educ*., 73 N.Y.2d 650, 658 (1989)).
[31] 66 N.Y. 2d 270 (1985).

catch a fly ball on a wet, muddy field.[32] Maddox was playing centerfield in a game against the White Sox when he ran to his left to field a fly ball and slipped on a puddle, causing his knee to buckle.[33] Maddox's deposition testimony demonstrated his awareness of the defective conditions, as he testified he had called attention of the groundskeepers to the fact that there was a puddle on the field, and he had previously commented on the wetness of the field to the baseball manager.[34]

In *Maddox*, the New York Court of Appeals recognized that the experience of the injured party, not the alleged tortfeasor, is central to determining whether a sports participant has assumed the risk of injury.[35] The Court stated:

> There is no question that the doctrine requires not only knowledge of the injury-causing defect but also appreciation of the resultant risk (*McEvoy v. City of New York*, 292 N.Y. 654, 55 N.E.2d 517, *affg.* 266 App.Div. 445, 42 N.Y.S.2d 746; *Larson v. Nassau Elec. R.R. Co.*, 223 N.Y. 14, 119 N.E. 92), but awareness of risk is not to be determined in a vacuum. It is, rather, to be assessed against the background of the skill and experience of the particular plaintiff (*Dillard v. Little League Baseball*, 55 A.D.2d 477, 480, 390 N.Y.S.2d 735), and in that assessment a higher degree of awareness will be imputed to a professional than to one with less than professional experience in the particular sport *(see, Heldman v Uniroyal, Inc.*, 53 Ohio App 2d 21, 36, 371 NE2d 557, 567; *Turcotte v Fell, supra)*.[36]

Of significance, the court focused on the experience of plaintiff, holding that "a higher degree of awareness will be imputed to a professional than to one with less than

[32] *Id.* at 275. Though plaintiff was a member of the New York Yankees, the game that evening, June 13, 1975, was being played at Shea Stadium because Yankee Stadium was undergoing renovation. *Id.*
[33] *Id.* at 275. The injuries required three surgical procedures and Maddox was ultimately forced to retire prematurely from professional baseball. *Id.*
[34] *Id.*
[35] *Id.* at 278.
[36] *Id.*

professional experience in the particular sport." [37] Taking the plaintiff's experience as a professional baseball player, with his testimony he had complained of the defect on several occasions, the Court found Maddox was aware of the heightened risk, and his continued participation constituted a primary assumption of the risk.[38] As such, Maddox was completely barred from any recovery for an injury due to the muddy and wet conditions on the field at Shea Stadium that Maddox claimed shortened his career.[39]

In *Anad v. Kapoor*,[40] the Court of Appeals considered the assumption of risk doctrine in the context of a golfing nightmare.[41] Plaintiff Anad, defendant Kapoor and two other friends set out for nine holes on a public track in Suffolk County.[42] While plaintiff's drive hit the fairway, defendant's shot flew into the rough.[43] Without waiting for defendant to find his ball in the rough, plaintiff went directly to his ball on the fairway.[44] Meanwhile, defendant spotted his ball in the rough and -- without yelling "fore" or providing any other warning -- shanked the ball, which ultimately struck plaintiff in the eye.[45] Plaintiff suffered from retinal detachment and permanent loss of vision in the injured eye and sued defendant.[46]

---

[37] *Id.*
[38] *Maddox v. City Of New York*, 66 N.Y. 2d 270, 278-279 (1985).
[39] *Id.*
[40] 15 N.Y.3d 946 (December 21, 2010).
[41] *Id.*
[42] *Id.*
[43] *Id.*
[44] *Id*.
[45] *Anad v. Kapoor*, 15 N.Y.3d 946 (December 21, 2010).
[46] *Id.*

In its analysis, the Court of Appeals began with the general rule a participant in a sport or recreational activity assumes the associated and inherent risks of participation.[47] It then examined the duties of co-participants and the general facts and circumstances surrounding the injury.[48] The Court of Appeals held the defendant's failure to warn of his shot did not constitute intentional or reckless conduct which unreasonably increased the inherent risks associated with participation in golf.[49] Moreover, the Court explained "being hit without warning by a "shanked" shot while one searches for one's own ball is a commonly appreciated risk of golf."[50]

In 1997 the Court of Appeals addressed a number of cases all involving assumption of the risk in sport.[51] In *Morgan v. State[Bobsledding]*,[52] *Beck v. Scimeca[Karate]*,[53] and *Chimerine v. World Champion John Chung Tae Kwon Do Inst. [Martial Arts]*,[54] the Court of Appeals affirmed dismissals based on assumption of the risk, stating none of the injuries was sustained as a result of an unreasonably heightened risk, but rather as a result of risks inherent in participation.[55] But, in *Siegel v. City Of New York*, the Court of Appeals found the defective condition on the premises constituted an

[47] *Id.* (citing *Morgan v. State*, 90 N.Y.2d 471, 484 (1997)).
[48] *Anad v. Kapoor*, 15 N.Y.3d 946 (December 21, 2010).
[49] *Id.*
[50] *Id.* (citing *Rinaldo v. McGovern*, 78 N.Y.2d 729, 733 (1991)).
[51] *Morgan v. State* 90 N.Y.2d 471 (1997)).
[52] Plaintiff injured in a bobsledding accident during a national championship race. *Morgan*, 90 N.Y. 2d at 479-480.
[53] Plaintiff injured when attempting to perform a "jump roll" tumbling technique during karate class at a school where had been a student for approximately 15 months. *Id.* at 481.
[54] Plaintiff injured herself during her fourth class at defendant's martial arts training school when attempting to perform a jumping maneuver. *Id.* at 481-482.
[55] *Morgan v. State* 90 N.Y.2d 471, 486-488 (1997)).

unreasonably heightened risk.[56] Siegel, a 60-year-old man was injured when his foot was caught in a torn vinyl net that divided the indoor tennis courts at a tennis club in Brooklyn. Siegel had been a member of the club for 10 years and had played doubles there once a week.[57] Siegel's deposition testimony further reflected he had known about the torn divider for over 2 years, and though he had never informed the club's management of the problem, he knew other members had.[58] Defendants argued, and the lower courts agreed, that electing to continue to play tennis for a long period of time after becoming aware of the defect constituted an acceptance of the heightened risk associated with the sport.[59]

Nonetheless, the Court of Appeals disagreed and reversed.[60] After providing an extensive discussion of the assumption of the risk doctrine and the continued duty of landowners to maintain their premises in a reasonably safe condition,[61] the Court determined a torn tennis court divider is not "inherent" in the sport of tennis, and a player, no matter how experienced should not be deemed to have assumed or accepted that risk.[62] The court stated:

> It cannot reasonably be disputed that nets separating indoor tennis courts, such as the one at issue here, are inherently part of the playing and participation of the sport at such facilities. In such circumstance, they prevent interference from bouncing balls and trafficking players on adjacent courts. But a torn or allegedly damaged or dangerous net--or other safety feature--is by its nature not automatically an inherent risk of a sport as a matter of law for summary judgment purposes…Our precedents

[56] *Id.* at 488.
[57] *Id.* at 482.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.* at 483-486.
[62] *Id.* at 488.

> do not go so far as to exculpate sporting facility owners of this ordinary type of alleged negligence.[63]

While many risks are considered "inherent" in the sport, risks that do not inhere in the sport (such as a torn or defective net) may not warrant the protection of the assumption of risk doctrine. As such, a defense asserting the participant's primary assumption of the risk requires a factually specific analysis of what risks actually inhere in the sport.

More recently, in *Bukowski v. Clarkson University,*[64] another baseball case, the Court of Appeals reinforced the standard set forth in *Maddox*. Plaintiff, a university baseball pitcher, sued after being hit by a line drive during indoor practice[65]. The Court of Appeals considered: (1) whether the plaintiff appreciated the nature of the risk and voluntarily assumed it; (2) the skill and experience of the plaintiff; and (3) whether the organizer of the activity exercised reasonable care to protect consenting participants from unassumed, concealed or enhanced risk.[66] In this case, plaintiff was found to have been an experienced baseball player and there were no concealed risks unknown to him[67].

In another recent softball case, *Navarro v. City of New York,*[68] the First Department applied the assumption of the risk doctrine to a plaintiff participating in an elective softball class. Plaintiff was injured when a fellow student swung the bat and hit

[63] *Id.* at 488-489.
[64] 19 N.Y.3d 553 (2012).
[65] 19 N.Y.3d at 569.
[66] *Id.* at 356.
[67] *Id.* at 356-57.
[68] 87 A.D.3d 877 (1st Dep't 2011).

plaintiff in the cheek.[69] Citing *Morgan*, the court stated plaintiff assumed the inherent risk of being struck by a baseball bat.[70]

The Second Department also applied the assumption of the risk doctrine recently, in *Rueckert v. Cohen.*[71] Plaintiff, a personal trainer, opted to conduct a personal training session in a swimming pool which was open for free swim[72]. Noting defendant had demonstrated her conduct was not intentional or reckless, but merely incidental,[73] the court found plaintiff had assumed the risk of collision by participating in an open swim.[74]

The Fourth Department extended the assumption of risk doctrine to a professional wrestling performance in *Kingston v. Cardinal O'Hara High School*.[75] Plaintiff, a professional wrestler, sued a private high school, church diocese, and charity for neck and back injuries sustained when plaintiff performed a planned jump from a four-foot high rope onto a wrestling ring and was then pushed out by another wrestler. The Fourth Department affirmed the trial court's granting of summary judgment to defendants on the basis of primary assumption of risk. The Court cited *Maddox* and held *inter alia* "[t]he primary assumption of the risk doctrine also encompasses risks involving less than optimal conditions… 'It is not necessary to the application of assumption of [the] risk that the injured plaintiff have foreseen the exact manner in which his or her injury

[69] *Id.* at 877.
[70] *Id.* at 878.
[71] 116 A.D.3d 1026 (2d Dep't 2014).
[72] 116 A.D.3d at 1026.
[73] *Id.* at 1027.
[74] *Id.* citing *Bleyer v. Recreational Mgt. Serv. Corp.*, 289 A.D.2d 519 (2d Dep't 2001).
[75] 144 A.D.3d 1672 (4th Dep't 2016).

occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results.'"[76]

However, in February of this year, the Fourth Department issued a ruling which could be an outlier and appears to run counter to this line of jurisprudence. In *Tauro v. Gary Gait and Syracuse University,* plaintiff, a player on the women's varsity lacrosse team, was participating in a drill during practice when her coach threw a ball at her, which struck her in the head causing injury. Plaintiff sued arguing her coach unexpectedly threw the ball overhand at a high rate of speed when she expected to field a ground ball. The Court surprisingly denied the defendants' motion for summary judgment based on primary assumption of the risk doctrine. The Court found a question of fact as to whether the high throw was in fact contrary to what was expected during the drill, exposing her to an unexpected risk she could not have assumed.[77]

These cases demonstrate assumption of the risk is a valid defense to a participant in an organized sporting event, although *Tauro,* if unappealed, potentially opens the door to the carving out of further, narrow exceptions. We next address the doctrine as it applies to spectators and bystanders at these same events.

[76] *Id.* at 1673; *citing Maddox v. City of New York, supra.* and *Bouck v. Skaneateles v. Aerodrome, LLC*, 129 A.D.3d 1565, 1566 (4th Dep't 2015).
[77] 2018 WL 795305 (4th Dep't 2018).

Spectators/Bystanders

While assumption of the risk still comes into play in spectator claims, the presumptions and analysis are quite different where a spectator or bystander is injured. With spectators, the general landowner maintenance duties apply; that is, the duty to maintain the premises in a reasonably safe condition for all of those who enter.[78] The landowner's duty, then, to spectators at sporting events is to "to prevent injury to those who come to watch the games [played on its field]."[79]

In *Akins v. Glenn Falls City Sch. Dist.*, New York's Court of Appeals premised its analysis upon the landowner's duties and not plaintiff's assumption of the risk.[80] Specifically, the Court reasoned that "This case does not involve the "culpable conduct" (CPLR 1411) -- be it assumption of risk or contributory negligence -- of a spectator injured in the course of a baseball game."[81] It recognized a spectator's right to choose to sit in an unprotected seat, and framed the duty accordingly.[82]

In *Akins*, a woman attended a high school baseball game and was hit in the eye by a foul ball while standing behind a 3-foot fence on the third base line.[83] Plaintiff had opted to stand behind a three foot fence along the sidelines, as opposed to sitting in the stands, which were protected by a chain link backstop that was 24 feet high and 50 feet

[78] *Akins v. Glenn Falls City Sch. Dist.*, 53 N.Y. 2d 325, 329 (1981) (citing *Basso v. Miller*, 40 N.Y.2d 233, 241 (1976); *Scurti v. City of New York*, 40 N.Y.2d 433 (1976)).
[79] *Akins*, 53 N.Y. at 329.
[80] *Akins v. Glenn Falls City Sch. Dist.*, 53 N.Y. 2d 325, 327 (1981).
[81] *Akins*, 53 N.Y.at 327.
[82] *Id.* at 331.
[83] *Id.* at 328.

wide.[84] At the outset of its analysis, the Court recognized the landowner had a duty to make the premises reasonably safe for those who enter.[85] Equally, the Court recognized the need to draw a line as to the level of protection required.[86] The Court held "in the exercise of reasonable care, the proprietor of a ball park need only provide screening for the area of the field behind home plate where the danger of being struck by a ball is the greatest."[87] In *Akins*, the majority believed their holding was consistent with the general duty to keep the premises reasonably safe for those who enter.[88] The *Akins* precedent has also been extended to hockey arenas;[89] however, certain courts have refused to extend the precedent to include automobile raceways.[90]

Yet, in certain spectator situations, the doctrine of assumption of the risk is still alive and well in the New York State Courts.[91] The courts have found a place where the

---

[84] *Id.*
[85] *Id.* at 329.
[86] *Id.* at 330.
[87] *Akins v. Glenn Falls City Sch. Dist.*, 53 N.Y. 2d 325, 331 (1981).
[88] *Id.* (stating, "In so holding, we merely recognize the practical realities of this sporting event. As mentioned earlier, many spectators attending such exhibitions desire to watch the contest taking place on the playing field without having their view obstructed or obscured by a fence or a protective net. In ministering to these desires, while at the same time providing adequate protection in the most dangerous area of the field for those spectators who wish to avail themselves of it, a proprietor fulfills its duty of reasonable care under such circumstances.").
[89] See *Gilchrist v. City of Troy*, 67 N.Y. 2d 1034 (1986).
[90] *Cortwright v. Brewerton Int'l Speedway, Inc.,* 145 A.D.2d 297 (4th Dep't 1989) (stating "The exposure to danger is greater in the present case than in baseball. The danger of a foul ball traveling to a seat exists only when a batter swings at a pitched ball, a particular moment in time during which a viewer's attention is normally directed at the batter. The danger of a stone flying from the track is a constant threat during a race when cars are speeding by. A patron watching racecars positioned around the track is not able to remain vigilant against such a danger. Likewise, the proximity of the seating to the track in this case provides little time to react to avoid being struck, even if one was able to see the projectile.") *Id.* at 300.
[91] See e.g. *Abato v. County of Nassau*, 65 A.D. 3d 1268 (2d Dep't 2009)(defendant raised assumption of the risk as a defense to a woman injured while a spectator at a hockey game); *Reyes v. City of New York*, 65 A.D. 3d 996 (2d Dep't 2008) (coach injured when hit in the face by a foul ball while standing in the third base dugout was determined to have assumed the risk).

landowner's duty to a spectator stops and the spectator's primary assumption of the risk begins.[92] In *Roberts v. Boys and Girls Republic, Inc., et al.,* New York's First Department held a spectator struck by a baseball bat in an off field, on-deck practice area located immediately adjacent to the field of play, assumed the obvious risk of being struck by a bat.[93] In *Roberts,* plaintiff was struck by a baseball bat while present near the baseball field to watch her son practice with his team.[94] The First Department reiterated a defendant's duty is limited to "'exercise[ing] care to make the conditions as safe [on the field] as they appear to be. If the risks of the activity are fully comprehended or perfectly obvious, [the] plaintiff has consented to them and [the] defendant has performed its duty'."[95] Here, the Court believed the premises owners had fulfilled their duty of making the premises reasonably safe, and it was the spectator herself who assumed the risk by walking into the path of the on deck batter.[96]

But the Second Department questioned an expansive view of the primary assumption of the risk doctrine to spectators.[97] In *Abato v. County of Nassau,*[98] the court considered whether plaintiff, merely by sitting in the stands, had assumed the risks

---

[92] See *Roberts v. Boys and Girls Republic, Inc., et al.,* 850 N.Y.S.2d 38 (1st Dep't 2008).
[93] 850 N.Y.S.2d 38, 38-40 (1st Dep't 2008).
[94] *Id.* at 39.
[95] *Id.* at 40 (quoting *Turcotte,* 68 N.Y.2d at 439).
[96] *Id.* ("Indeed, it has been held in remarkably similar circumstances that "the danger associated with people swinging bats on the sidelines while warming up for the game" is inherent in the game of baseball and, accordingly, a risk assumed, even by child participants (*Napoli v. Mount Alvernia, Inc.*, 239 A.D.2d 325, 326, 657 N.Y.S.2d 197 [1997]). While it is true that plaintiff was not a participant, but a spectator, or perhaps even a mere bystander, she still assumed the risks entailed by her voluntary proximity to the game (*see Koenig v. Town of Huntington,* 10 A.D.3d 632, 633, 782 N.Y.S.2d 92 [2004]), among them the risk of being hit by a swung bat.
[97] See *Abato v. County of Nassau,* 65 A.D. 3d 1268 (2d Dep't 2009); *Reyes v. City of New York,* 51 A.D. 3d 996 (2d Dep't 2008).
[98] 65 A.D. 3d 1268 (2d Dep't 2009).

associated with her injuries.[99] Ultimately, on rather unique facts (plaintiff was stomped by other fans trying to catch T-shirts jettisoned into the audience) the Court found the risks faced by Abato were not ""known, apparent or reasonably foreseeable consequences" of attending the hockey game."[100]

By contrast, in *Reyes v. City Of New York*, the Second Department applied the assumption of risk doctrine to a fact pattern similar to *Akins*.[101] In *Reyes*, plaintiff, a former minor league baseball player, was coaching from the third base dugout when he was injured by a foul ball.[102] The Second Department performed its analysis on assumption of risk, rather than on the landowner's duty, despite plaintiff's allegation the third base dugout was less protected than the first base dugout.[103] No doubt, plaintiff's status as a former player and now coach, together with his admitted awareness of the risk of a foul ball led the Court to dismiss the case based upon plaintiff's primary assumption of the risk.[104]

Bystanders at sporting events, even if they are not actively engaged in watching the event, are categorized by the courts in the same manner as spectators.[105] So, bystanders, by being in close proximity to the event, may be deemed to have assumed the risk associated with attending and/or participating in the sporting event. For example, in

---

[99] *Abato*, 65 A.D. at 1269.
[100] *Id.* (citing *Turcotte*, 68 N.Y.2d at 439).
[101] *Reyes v. City of New York*, 51 A.D. 3d 996 (2d Dep't 2008).
[102] *Id.*
[103] *Id.*
[104] *Id.*
[105] See e.g. *Newcomb v. Guptill Holding Corp.*, 31 A.D. 3d 875 (3rd Dep't 2006); *Koenig v. Town of Huntington*, 10 A.D. 3d 632 (2d Dep't 2004); *Sutfin v. Scheuer*, 145 A.D. 2d 946, 947-948 (4th Dep't 1988).

Newcomb v. Guptill Holding Corp.,[106] plaintiff was standing in a practice rink at a roller skating arena when the defendant fell through an opening from the main rink into the practice rink and landed on plaintiff.[107] The Court reasoned plaintiff, merely by being in the practice rink, assumed the risks inherent in roller skating and affirmed the lower court's granting of defendant's summary judgment motion.[108]

Yet, bystanders, even experienced ones, do not always assume the risk according to the New York jurisprudence. In *Gortych v. Brenner*,[109] plaintiff, an experienced biker and runner, visited Central Park one weekend morning for a bike workout with a friend.[110] When he arrived at Central Park, he learned a biathlon race[111] was proceeding in the park, though the park remained open to the general public.[112] Defendant, a participant in the biathlon collided with plaintiff, causing plaintiff to sustain serious physical injuries.[113] The trial court considered plaintiff's experience as both a runner and biker, but ultimately determined an issue of fact existed as to whether plaintiff assumed the risks associated with biking in Central Park during the biathlon.[114]. The First Department affirmed, noting there was an issue of fact as to whether plaintiff fully appreciated and therefore consented to all of the risks invovled.[115]

---

[106] 31 A.D. 3d 875 (3d Dep't 2006).
[107] *Newcomb*, 31 A.D. at 876.
[108] *Id.* at 657.
[109] 27 Misc.3d 1236(A) (N.Y. Sup. June 9, 2010).
[110] *Gorytech*, 27 Misc. at 1.
[111] Though one co-author, Dennis Wade, is an avid runner, having completed the New York City Marathon and other races in Central Park, we recognize not everyone may be familiar with the term "Biathlon." A Biathlon is a race consisting of three legs: running, biking, and running.
[112] *Id.* at 2.
[113] *Id.*
[114] *Id.* at 5-6.
[115] 83 A.D.3d 497, 498 (1st Dep't 2011).

According to a recent decision in the Second Department, sometimes there need not even be a bystander present for the court to hold that a defendant would have liability to any bystander. In *Behar v. Quaker Ridge Golf Club,*[116] a golf club was found to have breached its duty to exercise reasonable care in the maintenance of its property to prevent foreseeable injury. The problem -- golf balls were flying off the course and onto the neighbor's property.[117] The Second Department found the golf course would likely have been held liable for any injuries that resulted to bystanders on the neighboring property.[118]

"The Netting Controversy"

While protective netting behind home plate has been a default feature of stadiums for years, debates have sprung up around how far the netting should extend down the first and third baselines. As technology, training methods, and in-game strategy have evolved, players across Major League Baseball ("MLB") are increasingly selling out for power and bat speed, emphasizing hitting balls in the air, and looking for pitches to pull. In 2017 alone, eight batters hit at least 200 pitches at velocities greater than 95 miles per hour, and *445 batters* hit at least one pitch with an exit velocity of 105 miles per hour or more. Yankees sluggers, Giancarlo Stanton and Aaron Judge, each posted an exit velocity over 120 miles per hour last season. At those speeds, regardless of the attentiveness of a given fan, it is virtually impossible to adequately defend oneself.

[116] 118 A.D.3d 833, 988 N.Y.S.2d 633, 636 (2d Dep't 2014).
[117] *Id.*
[118] *Id.* This case primarily involved private nuisance and trespass issues, but the court did address forseeable injuries that could have occurred.

Sports fans, and baseball fans in particular, can be skeptical of change, but in September 2017, a one-year-old girl was struck by a 105 mph line drive off the bat of then-Yankee Todd Frazier. The child suffered multiple facial fractures and cranial bleeding and the high profile incident spurred widespread calls for increased safety in MLB stadiums.

Indeed, the accident occurred despite the Yankees' compliance with the recommendations MLB had in place at the time. As of September 2017, ten of thirty major league teams had netting in the ballparks extending to the far ends of both dugouts. But, in the remaining twenty -- Yankee Stadium included -- the netting only reached the beginning of the dugouts.

Following the accident, the Yankees announced a plan to expand netting well beyond those standards both at Yankee Stadium and at their Spring Training facility in Florida. And, after a winter to think it over, it seems a tipping point has been reached, as all thirty teams announced in early February 2018 they would be expanding protective netting as far as the end of each dugout for the 2018 season.

So while sports franchises are capable of prevailing on sport-related spectator injuries, here we have an example of organizations opting for expanded safety measures regardless of their exposure to liability.

The National Hockey League ("NHL") has also grappled with the issue of protective netting following a tragic accident. In March 2002, a 13-year-old died after

being struck in the head by a deflected slap shot at a Columbus Blue Jackets game, prompting the league-wide implementation of netting above the boards behind the goals in all arenas. At the time, some fans objected, as they feared the nets would impede their ability to watch the game. Yet, MLB has had netting behind home plate for decades and those seats are still considered to be the best in the house.

Unfortunately, the netting has not stopped all accidents, as two fans were struck by stray pucks while attending Chicago Blackhawks games at the United Center in May 2013 and May 2014, leading to law suits. Patricia Higgins sued United Center after she was hit by a puck while sitting in the lower bowl in the corner of the rink outside of the sections shielded by netting. Higgins claimed she suffered a concussion, among other injuries, and sued seeking $50,000. Illinois, however, has passed a law -- The Hockey Facility Liability Act or "Hockey Act" -- which limits the liability of the owners and operators of hockey facilities. Specifically, as there were no defects in the protective glass and netting -- the accident occurred simply because they were not wide or tall enough -- the Hockey Act barred Higgins from recovery, and the Appellate Court of Illinois upheld the United Center's victory on summary judgment.[119]

Gerald Green also sued the Blackhawks, claiming the netting in the arena was insufficient, arguing it should be expanded to cover the corners of the rink as well. Green was struck in the face by a stray puck while sitting just beyond the edge of where the safety netting extended, and claimed he had suffered brain damage as a result. The matter was settled for an undisclosed amount in 2016. So, in advising sport facility

[119] *Higgins v. United Ctr. Joint Venture*, 2017 IL App (1st) 160828-U, *appeal denied*, 89 N.E.3d 754 (Ill. 2017).

clients, one may consider the value of expanding safety measures above and beyond the threshold for liability.

New York State General Obligations Law – Recreational Use Statute

As with many other states, New York enacted a "recreational use" statute to limit the liability of landowners who allow the public to use their land without paying a fee.[120] The statute provides in pertinent part:

> 1. Except as provided in subdivision two,
>
> a. An owner, lessee or occupant of premises, whether or not posted as provided in section 11-2111 of the environmental conservation law, owes no duty to keep the premises safe for entry or use by others for hunting, fishing, organized gleaning as defined in section seventy-one-y of the agriculture and markets law, canoeing, boating, trapping, hiking, cross-country skiing, tobogganing, sledding, speleological activities, horseback riding, bicycle riding, hang gliding, motorized vehicle operation for recreational purposes, snowmobile operation, cutting or gathering of wood for non-commercial purposes or training of dogs, or to give warning of any hazardous condition or use of or structure or activity on such premises to persons entering for such purposes;
>
> b. An owner, lessee or occupant of premises who gives permission to another to pursue any such activities upon such premises does not thereby (1) extend any assurance that the premises are safe for such purpose, or (2) constitute the person to whom permission is granted an invitee to whom a duty of care is owed, or (3) assume responsibility for or incur liability for any injury to person or property caused by any act of persons to whom the permission is granted.
>
> 2. This section does not limit the liability which would otherwise exist
>
> a. For willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity; or
>
> b. For injury suffered in any case where permission to pursue any of the activities enumerated in this section was granted for a consideration other than the consideration, if any, paid to said landowner by the state or

[120] *New York General Obligations Law §9-103.*

> federal government, or permission to train dogs was granted for a consideration other than that provided for in section 11-0925 of the environmental conservation law; or
>
> c. For injury caused, by acts of persons to whom permission to pursue any of the activities enumerated in this section was granted, to other persons as to whom the person granting permission, or the owner, lessee or occupant of the premises, owed a duty to keep the premises safe or to warn of danger.
>
> 3. Nothing in this section creates a duty of care or ground of liability for injury to person or property.[121]

As the text of the statute explains, landowners who permit members of the general public to use their land for the activities enumerated in the statute are immune from claims of ordinary negligence.[122] Moreover, the statute applies regardless of whether the landowner has consented to the public's use of its property for recreational purposes.[123] But in order to trigger this statutory protection, defendant must prove the following:

---

[121] *Id.* (portions of statute omitted).

[122] *Sena v. Town of Greenfield*, 91 N.Y. 2d 611, 615 (1998); *Albright v. Metz*, 88 N.Y. 2d 656, 661-662 (1996).

[123] *Guereschi v. Erie Blvd. Hydropower, L.P.*, 19 A.D. 3d 1022, 1022-1023 (4th Dep't 2005). In *Guereschi*, father and son were kayaking on the reservoir of defendant's hydroelectric facility. Plaintiff contended that since the facility was required by the terms of its hydroelectric facility permit to allow boating on the reservoir that the statute should not apply. The Court of Appeals disagreed, stating "it is irrelevant "whether the landowner has consented or has been induced to consent to the use of the land" for recreational purposes (*Bragg v. Genesee County Agric. Socy.*, 84 N.Y.2d 544, 551, 620 N.Y.S.2d 322, 644 N.E.2d 1013). The purpose of the statute is to promote the recreational use of private land, and thus, "[w]hen individuals enter or use the property of another in pursuit of one or more of the specified recreational categories, with or without permission from the owner, they do so at their own peril and without potential recourse to sue for damages based on failure of landowners to maintain usual safekeeping measures" (*Farnham v. Kittinger*, 83 N.Y.2d 520, 525, 611 N.Y.S.2d 790, 634 N.E.2d 162). As plaintiff and his son were engaged in an activity specified in the statute and were doing so on premises that were suitable for that activity, the requirements for the application of the statute were met (*see Bragg v. Genesee County Agric. Soc.*, 84 N.Y.2d at 551-552, 620 N.Y.S.2d 322, 644 N.E.2d 1013)." *Id.*

(1) The injured party was pursuing one of the statutorily enumerated activities on the premises;[124]

(2) The property was physically conducive to the activity at issue; and,[125]

(3) The property is of a type that is appropriate for pursuing the activity at issue as recreation.[126]

Where the property itself is not suited for the recreational use that caused injury, the statute will not afford the defendant immunity.[127] The statute may also prove inapplicable if the land is already open for public use pursuant to some type of *quid pro quo* arrangement.[128]

In *Baker v. County of Oswego,*[129] plaintiffs commenced a wrongful death action against, among others, the county property owners when a vehicle collided with the all terrain vehicle in which the deceased was a passenger.[130] The accident occurred at the intersection of a road and a recreational trail owned by the defendant County.[131] Finding

---

[124] *Blair v. Newstead Snowseekers, Inc.*, 2 A.D. 3d 1286, 1288 (4th Dep't 2003).

[125] *Id.* "A substantial indicator that property is 'physically conducive to the particular activity' is whether recreationists have used the property for that activity in the past; such past use by participants in the sport manifests the fact that the property is physically conducive to it" *Id.* (quoting *Albright v. Metz,* 88 N.Y.2d 656, 662, (1996), quoting *Iannotti v. Consolidated Rail Corp.,* 74 N.Y.2d 39, 45, 544 N.Y.S.2d 308 (1989)).

[126] *Id.*

[127] *Pulis v. T.H. Kinsella, Inc.*, 204 A.D. 2d 976 (4th Dep't 1994) (holding that the statute did not apply to injuries sustained by all terrain vehicle driver that occurred in the gravel pit of a property because the gravel pit was not suitable and appropriate for recreational purposes. *Id.*

[128] *Testani v. NorthShore Equestrian Center*, 156 Misc. 2d 1031, 1033 (N.Y. Sup. Dec. 1, 1992) ("Here, the equestrian trail owned by the defendants is open to the residents of Old Westbury and defendants "need no encouragement" from the immunity offered by statute. Indeed, they are powerless to close the trail to the easement owners. It is also noted that the recreational use statute applies only when the gratuitous permission of a landowner is concerned. Here, the easement suggests a *quid pro quo,* an additional factor which would take defendants' property outside the protection of the statute.") *Id.*

[129] 77 A.D. 3d 1348 (4th Dep't 2010).

[130] *Baker,* 77 A.D. at 1349.

[131] *Id.*

the recreational use statute was inapplicable to the County because it was a governmental entity,[132] the Fourth Department stated:

> Here, statutory immunity does not apply to the County inasmuch as the trail is actively advertised, operated and maintained by the County "in such a manner that the application of such immunity would not create an additional inducement to keep the property open to the public for the specified recreational activities set forth in [the statute]".[133]

As *Baker* made clear, the statutory immunity will not always apply, when an application would subvert the very purpose and nature of the statute. In *Baker*, granting immunity would provide no further incentive to the defendant County to maintain the premises in a manner fit for public use.[134] As such, courts will consider who the landowner is, as well as the nature of the activities and type of property, before granting the immunity enumerated by New York General Obligations Law §9-103.

In the recent case of *King v. Cornell University*[135], the defendant university attempted to assert the recreational use statute when an intoxicated college sophomore fell into a gorge on campus after crossing over a split rail fence that ran along the gorge trail. The Third Department's inquiry was a specific one: was the decedent hiking as described in the statute?[136] The court noted the decedent's conduct at 3:30 am was not "hiking" as described in the statute.[137]

---

[132] "When the landowner is a government entity, however, the appropriate inquiry is the role of the landowner in relation to the public's use of the property in determining whether it is appropriate to apply the limited liability provision of [that statute]" *Id.* (quoting (*Quackenbush v. City of Buffalo,* 43 A.D.3d 1386, 1387 (4th Dep't 2007)).
[133] *Id.* (quoting *Quackenbush* supra).
[134] *Id.*
[135] 119 A.D.3d 1195, 990 N.Y.S.2d 329, 330 (3d Dep't 2014).
[136] *Id.*
[137] *Id.*

In another recent Third Department case, the statute insulated defendants from liability. The plaintiff in *McTown v. Town of Waterford,*[138] operated an ATV and sustaned injuries when he drove the ATV into an open drainage ditch in the town park.[139] Despite evidence showing the park was unimproved and contained open and grassy areas, and there was no prior ATV use because of signs in the park prohibiting vehicles, the statute shielded defendants from liability.[140]

One caveat to the statute has developed recently. Where the negligence alleged by an injured plaintiff is not solely related to the property itself, the recreational statute will not be a complete bar to recovery.[141] In *Shay*, the issue of question was whether property owners enabled guests' activity in their four-wheel-drive utility vehicle in a culpable way, thus taking the inquiry outside the realm of the property itself[142].

New York State General Obligations Law - Skiing

New York's General Obligations Law creates specific duties for both skiers and ski area operators.[143] As the statute enumerates, skiing is a particularly hazardous

[138] 94 A.D.3d 1182 (3d Dep't 2012).
[139] *Id.* at 1184.
[140] *Id.* at 1183-84.
[141] *Shay v. Contento*, 92 A.D.3d 994 (3d Dep't 2012).
[142] *Id.* at 997.

[143] New York's General Obligations Law §18-106 provides:

It is recognized that skiing is a voluntary activity that may be hazardous regardless of all feasible safety measures that can be undertaken by ski area operators. Accordingly:

1. Ski area operators shall have the following additional duties:

a. To post at every point of sale or distribution of lift tickets, whether on or off the premises of the

activity and as such, mandates ski area operators and skiers must take extra precautions to ensure safety.[144] In *Sytner v. State,*[145] the Third Department discussed the legislative intent of Section 18 of New York's General Obligation Law.[146] It stated:

> A review of the legislative history of General Obligations Law Article 18 demonstrates that it was not meant to abolish the application of the common-law duty to warn of dangerous conditions. The statute "protects the existing rights of skiers and ski area operators by providing that each

---

ski area operator, a conspicuous "Warning to Skiers" relative to the inherent risks of skiing in accordance with regulations promulgated by the commissioner of labor pursuant to subdivision four of section eight hundred sixty-seven of the labor law, and to imprint upon all lift tickets sold or distributed, such text and graphics as the commissioner of labor shall similarly specify, which shall conspicuously direct the attention of all skiers to the required "Warning to Skiers";

b. To post at every point of sale or distribution of lift tickets at a ski area notice to skiers and passengers that this article prescribes certain duties for skiers, passengers and ski area operators, and to make copies of this article in its entirety available without charge upon request to skiers and passengers in a central location at the ski area;

c. To make available at reasonable fees, as required by subdivision thirteen of section 18-103 of this article, instruction and education for skiers relative to the risks inherent in the sport and the duties prescribed for skiers by this article, and to conspicuously post notice of the times and places of availability of such instruction and education in locations where it is likely to be seen by skiers; and

d. To post notice to skiers of the right to a refund to the purchaser in the form and amount paid in the initial sale of any lift ticket returned to the ski area operator, intact and unused, upon declaration by such purchaser that he or she is unprepared or unwilling to ski due to the risks inherent in the sport or the duties imposed upon him or her by this article.

2. Skiers shall have the following additional duties to enable them to make informed decisions as to the advisability of their participation in the sport:

a. To seek out, read, review and understand, in advance of skiing, a "Warning to Skiers" as shall be defined pursuant to subdivision five of section eight hundred sixty-seven of the labor law, which shall be displayed and provided pursuant to paragraph a of subdivision one of this section; and

b. To obtain such education in the sport of skiing as the individual skier shall deem appropriate to his or her level of ability, including the familiarization with skills and duties necessary to reduce the risk of injury in such sport.

[144] *Id.*
[145] 223 A.D.2d 140 (3rd Dep't 1996).
[146] *Sytner,* 223 A.D. at 143.

> party's prerogatives to litigate in the event of injury will be governed by common law on a case by case basis.[147]

As such, section 18 of New York's General Obligations law was designed to preserve the common law with respect to the inherent dangers of skiing, except where the statute specifically addresses a hazardous condition.[148]

In *Sytner*, plaintiff, a novice skier, was injured when she encountered an icy patch on a "bunny slope."[149] She crossed from one beginner trail with icy conditions to another icy beginner trail. The cross-over did not contain any warning of the icy conditions, despite the fact employees were working on the trail to remedy the icy conditions.[150] Confirming the trial court's ruling, the Third Department found the State had not met its duties under Section 18 of the General Obligations law because there should have been a warning in the cross-over area so a beginner would have known the hazards on the trail.[151] Moreover, on the facts presented -- and given the skier was a novice-- the court determined the plaintiff did not assume the risk.[152]

Yet, where the skier is a self-described expert, he will be presumed to have assumed the risks associated with skiing, even where the injury was caused by a defective rail slide.[153] In *Martin*, plaintiff, a 17 year old self-described expert skier with 13 years of

---

[147] *Id.*
[148] *Id.*
[149] *Id.* at 142.
[150] *Id* at 141-142.
[151] *Id.* at 143-144.
[152] *Id.*
[153] See *Martin v. State*, 64 A.D. 3d 62 (3d Dep't 2009). A rail slide is a "maneuver in which a skier or snowboarder slides from one end of an elevated, horizontal steel bar to the other before dismounting." *Id.* at 63 n.1.

experience,[154] attempted to slide across a rail lacking an industry standard safety feature when he fell and injured his leg.[155] Plaintiff attempted to argue, like the torn tennis net in *Morgan*, the missing safety feature created a heightened risk.[156] The court disagreed, holding plaintiff assumed the risk, and the missing safety feature was open and obvious, thus no heightened risk was created.[157]

General Business Law §627-a and Automated External Defibrillator Use

Effective July 20, 2005,[158] the New York State Legislature enacted General Business Law §627-a which provides:

> 1. Every health club as defined under paragraph b of subdivision one of section three thousand-d of the public health law whose membership is five hundred persons or more shall have on the premises at least one automated external defibrillator and shall have in attendance, at all times during business hours, at least one individual performing employment or individual acting as an authorized volunteer who holds a valid certification of completion of a course in the study of the operation of AEDs and a valid certification of the completion of a course in the training of cardiopulmonary resuscitation provided by a nationally recognized organization or association.
>
> 2. Health clubs and staff pursuant to subdivision one of this section shall be deemed a "public access defibrillation provider" as defined in paragraph (c) of subdivision one of section three thousand-b of the public health law and shall be subject to the requirements and limitation of such section.
>
> 3. Pursuant to sections three thousand-a and three thousand-b of the public health law, any public access defibrillation provider, or any employee or other agent of the provider who, in accordance with the provisions of this section, voluntarily and without expectation of monetary compensation

[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Martin*, 64 A.D. at 64-65.
[158] *General Business Law §627-a*.

> renders emergency medical or first aid treatment using an AED which has been made available pursuant to this section, to a person who is unconscious, ill or injured, shall be liable only pursuant to section three thousand-a of the public health law.

Health Club is defined as:

> "Health club" means any commercial establishment offering instruction, training or assistance and/or the facilities for the preservation, maintenance, encouragement or development of physical fitness or well-being. "Health club" as defined herein shall include, but not be limited to health spas, health studios, gymnasiums, weight control studios, martial arts and self-defense schools or any other commercial establishment offering a similar course of physical training.[159]

Several courts have addressed the import of this legislation.[160] If the facility meets the definition of a health club and has over 500 members, the facility must have an Automated External Defibrillator ("AED").[161] But the courts have been clear the duty to have an AED available is not the same as the duty to use the AED.[162] The First Department stated:

> As discussed, the common law does not recognize that duty, and to interpret section 627-a as implicitly creating a new duty would conflict with the rule that legislative enactments in derogation of common law, and especially those creating liability where none previously existed, must be strictly construed.[163]

[159] *Public Health Law §3000*-a.
[160] See *Digiulio v. Gran, Inc.*, 74 A.D. 3d 450 (1st Dep't 2010); *Chappill v. Bally Total Fitness Corp*., 2011 N.Y. Slip Op. 30146(U) (N.Y. Sup. January 20, 2011).
[161] *General Business Law §627-a*. See also *Digiulio,* 74 A.D. at 453.
[162] See *Digiulio,* 74 A.D. at 453. *Chappill v. Bally Total Fitness Corp*., 2011 N.Y. Slip Op. 30146(U) (N.Y. Sup. January 20, 2011).
[163] *Digiulio,* 74 A.D. at 453.

New York's high court weighed in on the First Department's decision, and itself held the failure to access or use an AED which was actually on the premises was not gross negligence.[164]

As this law and the cases interpreting it are fairly new, the topic is constantly expanding with new case law. In the recent case of *Miglino v. Bally Total Fitness of Greater New York*[165], New York's Court of Appeals addressed the issue of whether General Business Law §627-a creates an independent duty to use automated external defibrillators ("AEDs") in the face of a medical emergency. Here, New York's highest court held this statute does not create any such duty and exonerated a health club and its certified employee for failing to use the club's AED in the face of a cardiac event.[166] The Court of Appeals recognized the statute's limitation of liability when health clubs and their agents voluntarily provide aid to their members and determined the legislature did not intend to impose liability on health clubs for failing to use their AEDs.[167] Moreover, the Court noted to hold otherwise would spawn a whole new field of tort litigation and create increased costs, uncertainty and difficulty for health clubs.[168] In addition, the Court of Appeals emphasized the common law imposed only a limited duty on health clubs during a medical emergency. The common law only requires health clubs call 911 and provide basic CPR or defer to an individual with medical experience.[169]

[164] *DiGiulio v. Gran, Inc.*, 17 N.Y.3d 765 (2011).
[165] 20 N.Y.3d 342 (2013)
[166] *Id.*
[167] *Id.*
[168] *Id.*
[169] *Id.*

Similarly, the Second Department in *Palmer v. City of New York*[170], set forth a new proposition -- where the law requires a facility to have an AED, the facility's non-compliance is not an automatic basis for liability. In *Palmer*, the school's noncompliance did not create liability because it was not the proximate cause of the injury. The plaintiff was breathing and had a pulse.[171] As a result, the AED would not have worked if used.[172] Therefore, the court refused to rule on liability under the specific education law requiring that the school have an AED.[173]

Waivers, Releases and General Obligations Law §5-326

New York courts generally uphold the validity of recreational premises waivers and liability releases, provided such releases are in compliance with New York General Obligations Law §5-326.[174] General Obligations Law §5-236 provides:

> **§ 5-326. Agreements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable**
>
> Every covenant, agreement or understanding in or in connection with, or collateral to, any contract, membership application, ticket of admission or similar writing, entered into between the owner or operator of any pool, gymnasium, place of amusement or recreation, or similar establishment and the user of such facilities, pursuant to which such owner or operator receives a fee or other compensation for the use of such facilities, which exempts the said owner or operator from liability for damages caused by or resulting from the negligence of the owner, operator or person in charge of such establishment, or their agents, servants or employees, shall be deemed to be void as against public policy and wholly unenforceable.[175]

---

[170] 109 A.D.3d 526 (2d Dep't 2013).
[171] *Id.* at 528.
[172] *Id.*
[173] *Id.*
[174] See *Bufano v. National Inline Roller Hockey Association*, 272 A.D.2d 359, 707 N.Y.S.2d 233 (2d Dep't 2000).
[175] *New York General Obligations Law §5-326.*

Accordingly, in order for a release to be valid, any fee paid ***cannot*** be paid to the owner/operator of the recreational facility premises and the language of the release must be clear and unequivocal and clearly spell-out the intent to relieve the defendants of all liability for injuries suffered by the releasing party.[176]

In *Brookner v. New York Road Runners Club*,[177] plaintiff attempted to sue New York Road Runners and the City of New York for injuries he sustained while running the 2004 ING New York City Marathon.[178] The City and New York Road Runners moved for summary judgment on the basis of the release signed by plaintiff,[179] which contained clear and unequivocal language releasing defendants from liability arising from ordinary negligence.[180] The Court granted defendants' motion, finding – despite plaintiff's argument because he had paid an entry fee such release was void under New York General Obligations Law §5-326 – the fee did not go to the City as an admission fee for running on its streets, but to New York Road Runners for participation in the marathon.[181] As such, the Court upheld the validity of the release. Notably, it does not matter whether the release was signed by pen or electronically (as was likely done in *Brookner*); electronic signatures are recognized.[182]

---

[176] *Bufano*, 272 A.D. at 359-360.
[177] 51 A.D. 3d 841 (2d Dep't 2008).
[178] *Brookner*, 51 A.D. at 841-842. Plaintiff claims he was injured somewhere in Brooklyn, meaning he was injured somewhere between miles 2 and 13. See http://www.ingnycmarathon.org/documents/INGNYCM10_Course_Map_For_Media-4.pdf (although this a map of the 2010 course, the course has been substantially the same since it became a 5-borough race).
[179] *Brookner*, 51 A.D. at 841-842.
[180] *Id.*
[181] *Id.* at 842.
[182] See *Scarcella v. America Online*, 798 N.Y.S. 2d 348 (N.Y. Civ. Ct. 2004) (stating that refusal by the courts to treat a series of computer screens and a traditional contract on paper as equivalent would threaten the viability of the internet as a medium of commerce)

Bear in mind, however, there is much interplay between decisional law and the General Obligations Law. Where the sport is highly dangerous, courts normally have read General Obligations Law §5-236 narrowly. For example, in the recent case of *Nutley v. Skydive The Ranch,*[183] the First Department found, although the release was void under General Obligations Law §5-236, plaintiff assumed the risk her parachute would malfunction.[184] The court ruled the main parachute failing to open was a known and commonly appreciated risk of skydiving, and plaintiff had even been given a back-up parachute for just this reason.[185] As such, the First Department found defendant had demonstrated its entitlement to summary judgment, not on the release, but on the assumption of risk doctrine.

With dangerous sports like skydiving, courts have also found other barriers to a strict application of General Obligations Law §5-236. Section 5-236 requires the facility be "recreational" for the statute to apply.[186] If the facility is instructional, as opposed to recreational, General Obligations Law §5-236 will not apply.[187] In *Bacchiocchi v. Ranch Parachute Club, Ltd.*,[188] the Third Department explained:

> The public policy with respect to the liability of a business catering to persons who jump out of airplanes may (*Wurzer v. Seneca Sport Parachute Club,* 66 A.D.2d 1002, 411 N.Y.S.2d 763) or may not (*Gross v. Sweet, supra,* at 107, 424 N.Y.S.2d 365, 400 N.E.2d 306 [dictum]) be

[183] 65 A.D.3d 443 (1st Dep't 2009).
[184] *Id.* at 444.
[185] *Id.*
[186] *New York General Obligations Law §5-326.*
[187] See *Lemoine v. Cornell Univ.*, 2 A.D. 3d 1017, 1019-1020 (3rd Dep't 2003) (Plaintiff paid tuition to take a basic rock climbing course and was injured after she fell from the University's rock-climbing wall).
[188] 272 A.D. 2d 173 (3rd Dep't 2000).

> reflected in General Obligations Law §5-326. That statute renders "[a]greements exempting pools, gymnasiums, places of public amusement or recreation and similar establishments from liability for negligence void and unenforceable." The distinguishing factor in the cited cases seems to be whether the defendant is in the business of providing recreation or instruction.[189]

In *Bacchiocchi*, the court determined the facility was primarily for recreational use with instruction being provided as an ancillary service.[190] As such, General Obligations Law §5-236 was applicable.[191] In other cases, skydiving facilities have been determined by the New York Court of Appeals to be purely instructional facilities.[192] The analysis for whether or not a facility is recreational or instructional is extremely fact intensive and will likely turn on a case-by-case analysis[193].

Conclusion

Legal realists maintain that the law is not discovered; it is made by judges. Some cynical legal realists have suggested that outcome is often more dependant on what "the judge had for breakfast" than existing precedent. While we do not place ourselves in this theoretical camp, there is little doubt that judicial judgments about sport and its value to our society shape outcomes. One cannot adequately explain, for example, the precedent

---

[189] *Lemoine*, 272 A.D. 2d at 174-175.
[190] 272 A.D. at 175.
[191] *Id.*
[192] See *Gross v. Sweet*, 49 N.Y. 2d 102 (1979).
[193] A recent case dealing with a waiver and release is *Deutsch v. Woodridge Segway*, 117 A.D.3d 776 (2d Dep't 2014). In *Deutsch*, renter of two-wheeled Segway (personal transport vehicle) was precluded from bringing an action against the tour operator for vehicles when the Segway caused her to fall. The renter signed a waiver and release expressing renter's intent to release operator from liability, even if the injury was caused by operator's negligence. An important detail from *Deutsch* is that the renter paid a fee to rent the vehicle, not as an admission fee to use the trail, so the waiver and release was enforceable.

in assumption of the risk cases without accepting that judicial attitudes toward sport in general and a sport (say, golf) in particular influence outcome.

Of course, some bright lines do exist. But, in the realm of sport and recreation, care must be taken to consider carefully all the facts before deciding whether a case has merit and what defenses may be credibly raised.

Play ball!