

Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases

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INTRODUCTION

The phrase “assumption of risk” often causes confusion within the legal community because it has several different meanings and is often applied without recognition of these differences.¹ Conduct amounting to contributory negligence is sometimes mislabeled as assumption of risk. The distinction between these two defenses, once largely irrelevant because both completely barred recovery, has been redefined to allow the notion of assumption of risk to remain a viable defense even with the advent of modern comparative fault concepts.

Generally, the defense of assumption of risk can be used when a plaintiff (professional or amateur) voluntarily engages in an athletic or recreational activity involving open and obvious risks. The ice skaters, baseball players, or lacrosse players who voluntarily engage in those sports, and expose themselves to the open and obvious risks involved therein, may have their actions dismissed under this doctrine. Likewise, concert attendees who flail wildly in the mosh pit² or performers who dive into the audience from the stage may also have their action dismissed under the right set of facts.

The *Restatement of Torts (Second)* section 496A defines the general principle of assumption of risk as follows: “A plaintiff who voluntarily assumes a risk of harm arising from the negligent or

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¹ *Rini v. Oaklawn Jockey Club*, 861 F.2d 502, 504-05 (8th Cir. 1988).

² “Mosh pit” is a term for a relatively new phenomenon in which concert attendees congregate in an area near the front of the stage and engage in various types of wild gyrations, such as body slamming.

reckless conduct of the defendant cannot recover for such harm.” The comments to section 496A of the *Restatement of Torts (Second)* identify four meanings courts have given assumption of risk.³

Comment (c)(1) states that assumption of risk applies when a plaintiff has given his express consent to relieve the defendant of any obligation to exercise care for the plaintiff’s protection. The defendant, who otherwise would have a duty to exercise such care, is relieved of that duty.

Comment (c)(2) lends another meaning when the plaintiff has voluntarily entered into some activity that he knows will involve some risk, and thereby has impliedly agreed to relieve the defendant of any duty, and take his own chances. The example given by the comments is of a spectator at a baseball game who may be regarded as consenting to the risk of being hit by a ball.

Comment (c)(3) refers to the situation where the plaintiff, faced with a dangerous condition created by the negligence of the defendant, continues voluntarily to encounter the dangerous condition. The example given is a contractor who continues to work with a piece of machinery that he knows is in an unsafe condition. The plaintiff may not be negligent in using the product if the risk is relatively slight in comparison with the utility of his own conduct, and he may even act with unusual caution because he is aware of the danger. Nevertheless, recovery would be denied because he expressly consents to the risk.

Comment (c)(4) describes the situation in which the plaintiff’s conduct in voluntarily encountering a known risk is itself unreasonable. Here, the plaintiff is barred by both his implied consent to accept the risk, and by his contributory negligence.

³ RESTATEMENT OF TORTS (SECOND) § 496A cmt. c (1977).

The following is illustrative of the distinction between assumption of risk and contributory negligence.

[Defendant] is setting off dangerous fireworks in a public place with reckless indifference to a serious risk of harm to persons in the vicinity. [P1] and [P2] approach the place where [defendant] is acting. [P1], fully aware of the risk, approaches for the purpose of enjoying the spectacle. [P2] is not aware of the risk, but in the exercise of reasonable care for his own protection should discover or appreciate it. [P1] and [P2] are injured by a rocket which goes off at the wrong angle. [P1] is barred from recovery against [the defendant] by his assumption of risk, but [P2] is not barred from recovery for [the defendant's] reckless conduct by his contributory negligence.⁴

I. EXPRESS ASSUMPTION OF RISK

Section 496B of the *Restatement of Torts (Second)* defines express assumption of risk: “[A] plaintiff who by contract or otherwise expressly agrees to accept a risk of harm arising from the defendant’s negligent or reckless conduct cannot recover for such harm, unless the agreement is invalid as contrary to public policy.”

Parties generally may agree in advance that a defendant owes no duty of care to a plaintiff.⁵ An express assumption of risk acts as a complete bar to recovery in a negligence action.⁶ However, for a

⁴ *Id.* at cmt. d, illus. 1.

⁵ *Barbazza v. Int’l Motor Sports Ass’n, Inc.*, 245 Ga. App. 790, 538 S.E.2d 859 (2000); *Lovelace v. Figure Salon, Inc.*, 179 Ga. App. 51, 345 S.E.2d 139 (1986); *United States Auto Club, Inc. v. Smith*, 717 N.E.2d 919 (Ind. Ct. App. 1999); *Werdehoff v. Gen. Star Indem. Co.*, 229 Wis. 2d 489, 600 N.W.2d 214 (1999); *LaFrenz v. Lake Cty. Fair Bd.*, 172 Ind. App. 389, 360 N.E.2d 605 (1977); *Winterstein v. Wilcom*, 16 Md. App. 130, 293 A.2d 821 (1972).

⁶ *Paralift, Inc. v. Superior Court of S.D. Cty.*, 23 Cal. App. 4th 748, 29 Cal. Rptr. 2d 177 (1993); *Saenz v. Whitewater Voyages, Inc.*, 226 Cal. App. 3d 758, 276 Cal. Rptr. 672 (1990); *Day v. Fantastic Fitness, Inc.*, 190 Ga. App. 46, 378 S.E.2d 166 (1989); *Masciola v. Chi. Metro. Ski Council*, 257 Ill. App. 3d 313, 628 N.E.2d 1067, 195 Ill. Dec. 603 (1993); *Harris v. Walker*, 119 Ill. 2d 542, 519 N.E.2d 917, 116 Ill. Dec. 702 (1988); *Barnes v. N.H. Karting Ass’n, Inc.*, 128 N.H. 102, 509 A.2d 151 (1986); *Kotovskiy v. Ski Liberty Operating*

release to insulate a party from liability for his own negligent acts, the parties must express their intent in clear, unambiguous, and unequivocal language.⁷

While such releases are often enforceable, the law frowns upon releases intended to exculpate a party from the consequences of his own negligence, and therefore subjects them close to scrutiny.⁸ To be enforceable, it must be perfectly clear from reading the release that the limitation of liability extends to the negligence of the party attempting to be relieved of a duty of care.⁹ The term “negligence” or comparable language, generally, must appear in the writing.¹⁰ Moreover, a release will not exculpate a defendant from intentional, grossly negligent, reckless, willful or wanton tortious conduct.¹¹

The New York Court of Appeals, in *Gross v. Sweet*,¹² addressed the issue of the general enforceability of releases. In *Gross*, plaintiff enrolled in defendant’s parachute training school. Prior to his first practice jump, plaintiff executed a release including the following language:

I, the undersigned, hereby and by these covenants, do waive any and all claims that I, my heirs, and/or assignees may have against Nathaniel Sweet, the Stormville

Corp., 412 Pa. Super. 442, 603 A.2d 663 (1992).

⁷ *Theis v. J & J Racing Promotions*, 571 So. 2d 92 (Fla. Dist. Ct. App. 1990); *Van Tuyn v. Zurich Am. Ins. Co.*, 447 So. 2d 318 (Fla. Dist. Ct. App. 1984); *O’Connell v. Walt Disney World Co.*, 413 So. 2d 444 (Fla. Dist. Ct. App. 1982); *Paralift*, 23 Cal. App. 4th at 748, 29 Cal. Rptr. 2d at 177; *Bennett v. United States Cycling Fed’n*, 193 Cal. App. 3d 1485, 239 Cal. Rptr. 55 (1987); *Hulsey v. Elsinore Parachute Ctr.*, 168 Cal. App. 3d 333, 214 Cal. Rptr. 194 (1985); *Jones v. Dressel*, 623 P.2d 370 (Colo. 1981); *Masciola*, 257 Ill. App. 3d at 313, 628 N.E.2d at 1067; *Harris*, 119 Ill. 2d at 542, 519 N.E.2d at 917.

⁸ *Van Tuyn*, 447 So. 2d at 318; *O’Connell*, 413 So. 2d at 444; *Masciola*, 257 Ill. App. 3d at 313, 628 N.E.2d at 1067; *Harris*, 119 Ill. 2d at 542, 519 N.E.2d at 917; *Carbone v. Cortlandt Realty Corp.*, 58 N.J. 366, 277 A.2d 542 (1971); *Brown v. Racquetball Ctrs., Inc.*, 369 Pa. Super. 13, 534 A.2d 842 (1987); *Colgan v. Agway, Inc.*, 150 Vt. 373, 553 A.2d 143 (1988).

⁹ *Sirek v. Fairfield Snowbowl, Inc.*, 166 Ariz. 183, 800 P.2d 1291 (Ariz. Ct. App. 1990); *Brown v. Racquetball Ctrs., Inc.*, 369 Pa. Super. 13, 534 A.2d 842 (1987).

¹⁰ *Macek v. Schooner’s, Inc.*, 224 Ill. App. 3d 103, 586 N.E.2d 442, 166 Ill. Dec. 484 (1991); *Colgan*, 150 Vt. at 373, 553 A.2d at 143.

¹¹ *Jones*, 623 P.2d at 370; *Falkner v. Hinckley Parachute Ctr., Inc.*, 178 Ill. App.3d 597, 533 N.E.2d 941 (1989); *Boucher v. Riner*, 68 Md. App. 539, 514 A.2d 485 (1986).

¹² 49 N.Y.2d 102, 424 N.Y.S.2d 365, 400 N.E.2d 306 (1979).

Parachute Center, the Jumpmaster, and the Pilot who shall operate the aircraft when used for the purpose of parachute jumping for any personal injuries or property damage that I may sustain or which may arise out of my learning, practicing or actually jumping from an aircraft. I also assume full responsibility for any damage that I may do or cause while participating in this sport.¹³

The *Gross* court explained that the intention of the parties must be expressed in unmistakable language for an exculpatory clause to insulate a party from liability for his own negligent acts.¹⁴ For a release to be enforceable, it must be plainly and precisely apparent that the limitation of liability extends to negligence or other fault of the party attempting to shed his ordinary responsibility.¹⁵ Although the term “negligence” need not be used, words conveying a similar import must appear in the writing.¹⁶

In light of the strict standard of review, the court held that the release as written was insufficient to exculpate the defendant from liability. Its opaque terminology did not reveal that the plaintiff released defendant from liability for injury that might result from defendant’s failure to exercise due care.¹⁷ As a result, the release merely could have emphasized that the defendant was not responsible for injuries normally associated with skydiving occurring without defendant’s fault. Consequently, the court affirmed the order, reinstated the complaint and dismissed the release defense.

Other factors must also be considered in determining the enforceability of a release. A release that exculpates a defendant from liability for negligent acts may be declared void where disparity

¹³ *Gross*, 49 N.Y.2d at 110, 424 N.Y.S.2d at 369.

¹⁴ *Id.* at 107, 424 N.Y.S.2d at 368 (citing *Willard Van Dyke Prods., Inc. v. Eastman Kodak Co.*, 12 N.Y.2d 301, 304, 239 N.Y.S.2d at 339, 189 N.E.2d 693, 694 (1963) (requiring absolutely clear language)); *Coifalo v. Vic Tanney Gyms, Inc.*, 10 N.Y.2d 294, 297, 220 N.Y.S.2d 962, 964, 177 N.E.2d 925, 926 (1961) (requiring sufficiently clear and unequivocal language); *Boll v. Sharpe & Dohme*, 281 A.D. 568, 570-71, 121 N.Y.S.2d 20, 21-22 (1st Dept. 1953), *aff’d*, 307 N.Y. 646, 120 N.E.2d 836 (1954) (requiring clear and explicit language).

¹⁵ *Gross*, 49 N.Y.2d at 107, 424 N.Y.S.2d at 368.

¹⁶ *Id.* at 108, 424 N.Y.S.2d at 368.

¹⁷ *Id.* at 109-10; 424 N.Y.S.2d at 369-70.

in bargaining power of the parties would render enforcement unconscionable.¹⁸ In addition, a release is void if it violates public policy or contravenes a statute proscribing such agreement.¹⁹ For example, in *Gilkeson v. Five Mile Point Speedway, Inc.*, the plaintiff purchased a ticket from the defendant for entry into an automobile racetrack and paid an additional fee for specific entry into the pit area. To gain access to the pit area, the plaintiff was required to sign a “Release and Waiver of Liability Agreement.” Plaintiff signed the agreement and indicated on the document that he was a member of the pit crew for his friend who was racing. As plaintiff watched the race, a collision occurred between two cars, and one of the cars lost control, striking the plaintiff. Defendant moved for summary judgment, alleging that plaintiff was barred from recovery because of the release and waiver. The court denied the motion on two grounds. First, under N.Y. General Obligations Law § 5-326, any release and waiver agreement is void as being against public policy if the owner or operator of the facility receives a fee for the use of the facility. Since the plaintiff had paid a fee for the ticket and an additional fee for the pit admission, the release was void.²⁰ However, even if there was no statutory provision voiding the release, the court still would have voided the release because of its wording. The court found that the release made no reference to specific risks inherent in being a

¹⁸ See *Jones*, 623 P.2d at 370; *Masciola*, 257 Ill. App. 3d at 313, 628 N.E.2d at 1067; *Weaver v. Am. Oil Co.*, 257 Ind. 458, 276 N.E.2d 144 (1971); *Barnes*, 128 N.H. at 102, 509 A.2d at 151; *Allright, Inc. v. Elledge*, 515 S.W.2d 266 (Tex. 1974);

¹⁹ See *Bien v. Fox Meadow Farms, Ltd.*, 215 Ill. App. 3d 337, 574 N.E.2d 1311, 158 Ill. Dec. 918 (1991); *Garrison v. Combined Fitness Ctr., Ltd.*, 201 Ill. App. 3d 581, 559 N.E.2d 187 (1990); *Harris*, 119 Ill. 2d at 542, 519 N.E.2d at 917; *LaFrenz*, 172 Ind. App. at 389, 360 N.E.2d at 605; *Barnes*, 128 N.H. at 102, 509 A.2d at 151; *Gilkeson v. Five Mile Point Speedway Inc.*, 232 A.D.2d 960, 648 N.Y.S.2d 844 (3d Dept. 1996); *Seaton v. E. Windsor Speedway, Inc.*, 400 Pa. Super. 134, 582 A.2d 1380 (1990); *Allright, Inc.*, 515 S.W.2d at 266; *Crowell v. Hous. Auth.*, 495 S.W.2d 887 (Tex. 1973); see also GA. CODE ANN. § 34-7-22; IND. CODE § 22-3-10-1; N.Y. GEN. OBLIG. LAW § 5-326; OKLA. STAT. TIT. 15, § 212.1.

²⁰ The question of whether a plaintiff is a “user” of the facility and thus protected by statutes similar to N.Y. GEN. OBLIG. LAW § 5-326 is the subject of much debate. If the plaintiff is truly a spectator or a patron of the facility, such a statute will afford protection. See *Gilkeson*, 232 A.D.2d 960, 648 N.Y.S.2d 844; *Green v. WLS Promotions, Inc.*, 132 A.D.2d 521, 517 N.Y.S.2d 537 (2d Dept. 1987). But see *Lux v. Cox*, 32 F. Supp. 2d 92 (W.D.N.Y. 1998) (stating that a participant in high performance automobile driving school was not a “user” of racetrack, but was student at racing school held at track); *McDuffie v. Watkins Glen Int’l, Inc.*, 833 F. Supp. 197 (W.D.N.Y. 1993) (holding plaintiff was professional race car driver and not “user”).

spectator in the pit area, but merely referred to assuming the risk of negligence of the defendant, which may cause injury or death. The court concluded that plaintiff was not apprised of the risks involved in the situation, and therefore could not be considered to have assumed them.

Regarding minors, some courts²¹ have found, “[P]arents have the authority to bind their minor children to exculpatory agreements. . . . These agreements may not be disaffirmed by the child on whose behalf they were executed.”²² In addition, some states have enacted legislation that affects the enforceability of agreements purporting to release a party from liability for fraud, willful injury or violation of the law.²³

The above discussion points out why the release and waiver language typically appearing on the back of event tickets is unenforceable. First, there is no signature required, making it difficult to argue the existence of an agreement. Second, the ticket holder may not read the provision, and thus may claim lack of notice. Third, the printing is usually so small, it is not viewed as reasonable notice. And fourth, the space on the back of the ticket is so limited, it is impossible to print all the needed exculpatory language. The same analysis would generally apply to signs or notices containing exculpatory language displayed at event venues. Although the sign may be large enough to contain the necessary exculpatory language, it is not an express agreement. Patrons can always claim they never saw it. However, there are statutes²⁴ that require amusement park operators to post signs advising patrons of certain statutory

²¹ *Mohney v. USA Hockey, Inc.*, 5 Fed. Appx. 450, 2001 WL 223852 (6th Cir. 2001).

²² *Id.* at 456, (quoting *Zivich v. Mentor Soccer Club, Inc.*, 82 Ohio St.3d 367, 696 N.E.2d 201 (1998)).

²³ *E.g.*, CAL. CIVIL CODE § 1668 states: “All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law.”

²⁴ N.J. STAT. ANN. 5:3-57 (amusement parks). *See* N.J. STAT. ANN. 5:13-4 *et seq.*, mandating by statute that “[a] skier is deemed to have knowledge of and to assume the inherent risks of skiing” and N.J. STAT. ANN. 5:14-5 *et seq.*, where the identical statutory language mandates assumption of risk in roller-skating. Cases that analyze N.J. STAT. ANN. 5:13-4 (skiing) include *Brough v. Hidden Valley, Inc.*, 312 N.J. Super. 139, 711 A.2d 382 (1998) and *Brett v. Great Am. Recreation, Inc.*, 279 N.J. Super. 306, 652 A.2d 774 (1994).

requirements for completing accident reports on site as a condition precedent to filing suit. That mandate charges a plaintiff with assumption of risk in certain circumstances.

II. IMPLIED ASSUMPTION OF RISK

A plaintiff may voluntarily enter a relationship with a defendant that involves a known, potential risk of injury, and in so doing tacitly consents to relieve the defendant of a duty of care otherwise owed to the plaintiff. Many activities, notably sports and recreational activities, have inherent risks of injury that cannot be eliminated by the exercise of reasonable care.²⁵ Therefore, courts 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.²⁶ As Judge Cardozo stated in these circumstances, “The timorous may stay at home.”²⁷

Viewed from this “no duty” perspective, the assumption of risk doctrine may act as a complete defense by negating the defendant’s duty of care.²⁸ Liability attaches, nonetheless, where the defendant

²⁵ The primary assumption of risk doctrine has been employed in cases unrelated to sports and recreation. *See Baker v. Superior Court*, 129 Cal. App. 3d 710, 181 Cal. Rptr. 311 (1982) (fireman’s rule); *Armstrong v. Mailand*, 284 N.W.2d 343 (Minn. 1979) (fireman’s rule); *Chapman v. Craig*, 431 N.W.2d 770 (Iowa 1988) (fireman’s rule); *Howell v. Clyde*, 533 Pa. 151, 620 A.2d 1107 (1993) (Flaherty, J.) (plaintiff injured by fireworks cannon).

²⁶ *See Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (1992); *Hammond v. Bd. of Educ. of Carroll Cty., Md.*, 100 Md. App. 60, 639 A.2d 223 (1994); *Martin v. Buzan*, 857 S.W.2d 366 (Mo. App. 1993); *Howell v. Clyde*, 533 Pa. 151, 620 A.2d 1107 (1993); *Pestalozzi v. Phil. Flyers Ltd.*, 394 Pa. Super. 420, 576 A.2d 72 (1990); *Johnson v. Walker*, 376 Pa. Super. 302, 545 A.2d 947 (1988); *Bowser v. Hershey Baseball Ass’n*, 357 Pa. Super. 435, 516 A.2d 61 (1986); *Porter v. Miller*, 13 Ohio App. 3d 93, 96 n.2, 468 N.E.2d 134 (1983); *Kennedy v. Providence Hockey Club, Inc.*, 119 R.I. 70, 376 A.2d 329 (1977) *Estate of Frant v. Haystack Group, Inc.*, 641 A.2d 765 (Vt. 1994); *Ridge v. Kladnick*, 42 Wash. App. 785, 713 P.2d 1131 (1986); .

²⁷ *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. 479, 166 N.E. 173 (1929).

²⁸ *See Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (1992); *Ford v. Gouin*, 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724 (1992); *Sprunger v. E. Noble School Corp.*, 495 N.E.2d 250 (Ind. Ct. App. 1986); *Armstrong v. Mailand*, 284 N.W.2d 343 (1979); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *Stanton v. Miller*, 66 Ohio App. 3d 201, 583 N.E.2d 1080 (1990); *Anderson v. Ceccardi*, 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983); *Swagger v. City of Crystal*, 379 N.W.2d 183 (Minn. App. 1985); *Howell v. Clyde*, 522 Pa. 151, 620 A.2d 1107 (1993).

intentionally injures or engages in reckless, willful or wanton misconduct beyond the scope ordinarily contemplated for the activity.²⁹ The doctrine is based on the public policy that one who voluntarily takes a risk should not be permitted to recover money damages from those who might otherwise have been liable.³⁰ Additionally, imposing a duty of care upon participants of sport and recreation would deter people from vigorous participation in such activities.³¹

An example of the implied assumption of risk doctrine is *Turcotte v. Fell*.³² Turcotte was a professional jockey whose career spanned seventeen years. He was severely injured during a race when his horse tripped over the heels of another horse, causing the jockey to be thrown to the ground. Thereafter, Turcotte sued the owner and jockey of the other horse, as well as the owner of the track, alleging common law negligence and violation of state racing rules.

The court focused its attention on one essential element of negligence—the duty to use reasonable care. In determining the existence and scope of the duty, the court declared that the plaintiff's reasonable expectations of the care owed to him by others must be

²⁹ See *Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (1992); *Landrum v. Gonzalez*, 257 Ill. App. 3d 942, 629 N.E.2d 710 (1994); *Sprunger v. E. Noble School Corp.*, 495 N.E.2d 250 (Ind. Ct. App. 1986); *Gauvin v. Clark*, 404 Mass. 450, 537 N.E.2d 94 (1989).

³⁰ See *Howell v. Clyde*, 522 Pa. 151, 620 A.2d 1107 (1993).

³¹ See *Ford v. Gouin*, 3 Cal. 4th 339, 11 Cal. Rptr. 2d 30, 834 P.2d 724 (1992) (Arabian, J.).

³² 68 N.Y.2d 432, 510 N.Y.S.2d 49, 502 N.E.2d 964 (1986); In *Maddox v. City of N.Y.*, 66 N.Y.2d 270, 496 N.Y.S.2d 726, 487 N.E.2d 553 (1985), a professional baseball player sued the owner of the stadium for injuries sustained because of a wet outfield. The court dismissed on the grounds of assumption of risk finding that the defect was open, obvious and one of the generally accepted risks of baseball:

There is no question that the doctrine requires not only knowledge of the injury-causing defect but also appreciation of the resultant risk, 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, and in that assessment a higher degree of awareness will be imputed to a professional than one with less than professional experience in the particular sport.

Id. at 278, 496 N.Y.S.2d at 729-30, 487 N.E.2d at 557. "It is not necessary to the application of assumption of risk that the injured plaintiff have foreseen the exact manner in which his or her injury occurred, so long as he or she is aware of the potential for injury of the mechanism from which the injury results." *Id.* at 278, 496 N.Y.S.2d at 730, 487 N.E.2d at 557.

considered along with the wrongfulness of the defendant's action or inaction. This is especially true in professional sports, which involve a greater degree of danger. Thus, the *Turcotte* court stated, "[I]f a participant in a sporting event makes an informed estimate of the risks involved in the activity and willingly undertakes them, then there can be no liability if he is injured as a result of those risks."³³

Since New York's comparative fault statute modified the assumption of risk defense so that it no longer is an absolute defense, the *Turcotte* court found it necessary to consider the risks assumed by plaintiff when assessing a defendant's duty of care.³⁴ Accordingly, the court reasoned,

the analysis of care owed to plaintiff in the professional sporting event by a co-participant and the proprietor of the facility in which it takes place must be evaluated by considering the risks plaintiff assumed when he elected to participate in the event and how those assumed risks qualified defendant's duty to him.³⁵

The risk assumed in this context means that the plaintiff, in advance, has given his: "consent to relieve the defendant of an obligation of conduct toward him, and to take his chances of injury from a known risk arising from what the defendant is to do or leave undone."³⁶ Of course, a defendant who is relieved of his duty of care cannot be charged with negligence.

With respect to sports and recreation, the inherent risks of these activities were said to be incidental to a relationship of free association between the defendant and the plaintiff in the sense that either party is perfectly free to engage in the activity or not, as he wishes.³⁷ The defendant's sole duty in these circumstances is to exercise reasonable care to make the conditions as safe as they

³³ *Turcotte*, 68 N.Y.2d at 437, 510 N.Y.S.2d at 52, 502 N.E.2d at 967.

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 438, 510 N.Y.S.2d at 52-53 (quoting PROSSER & KEETON, TORTS § 68, at 480-81 (5th ed.)).

³⁷ *Id.* at 438, 510 N.Y.S.2d at 53.

appear to be.³⁸ Where the risks of the activity are fully comprehended or perfectly obvious, the plaintiff who engages in the activity has consented to them, and the defendant has satisfied his duty. Moreover, the court explained, a professional athlete is more aware of the dangers of the activity, and presumably more willing to accept them in exchange for a salary, than is an amateur.³⁹

The dangers of speeding horses changing position and bumping each other during a race were risks of which the plaintiff was fully aware, and as such, the defendant jockey was relieved of his duty of care. Further, the plaintiff was cognizant of the track conditions and dangers associated with them. He had participated in three prior races at the track on the day of the accident. He observed the track conditions prior to his ill-fated race and he had experience riding under those conditions. Therefore, the track owner was relieved of the duty of care it owed to the plaintiff. In light of the foregoing, the court affirmed summary judgment.

In 1994, the New Jersey Supreme Court, in *Crawn v. Campo*,⁴⁰ revived a discussion of the concept of assumption of risk. For over twenty years, assumption of risk was largely banished from the scene,⁴¹ in favor of the terminology of contributory negligence. While not expressly reviving assumption of risk, the decision discusses it in great length. Although the court adopted a recklessness standard for sports cases, this standard's application is virtually identical to assumption of risk. Thanks to *Crawn*,⁴² the philosophy behind the assumption of risk doctrine and its application would no longer be a disfavored defense. In this case, a catcher in a softball game sued a base runner that slid into him, causing knee injuries. The trial court and both reviewing courts touched on assumption of risk in their respective decisions. The intermediate

³⁸ *Id.*

³⁹ *Turcotte*, 68 N.Y.2d at 440, 510 N.Y.S.2d at 54.

⁴⁰ 136 N.J. 494, 643 A.2d 600 (1994).

⁴¹ *McGrath v. Am. Cyanamid Co.*, 41 N.J. 272, 276, 196 A.2d 238, 240 (1963).

⁴² *Crawn*, 136 N.J. 494, 643 A.2d 600.

⁴³ 266 N.J. Super. 599, 606, 630 A.2d 368, 372 (1993).

appellate court noted that cases involving primary assumption of risk should preferably be dealt with in terms of no duty:

[T]he Supreme Court . . . noted two distinct meanings of assumption of risk: primary assumption of risk, an alternate expression for the proposition that defendant was not negligent, i.e., either owed no duty or did not breach the duty owed and secondary assumption of risk . . . that there is no reason to charge assumption of risk in its secondary sense as something distinct from contributory negligence.⁴³

The primary holding of *Crawn* was fact-specific; that is, in the case of participant against participant, the standard of care no longer is negligence, but recklessness. The policy arguments in favor of this change were to promote vigorous participation in athletic activities and to avoid a flood of litigation. In upholding the recklessness standard, the court philosophized:

One might well conclude that something is terribly wrong with a society in which the most commonly-accepted aspects of play—a traditional source of a community's conviviality and cohesion—spurs litigation. The heightened recklessness standard recognizes a commonsense distinction between excessively harmful conduct and the more routine rough-and-tumble of sports that should occur freely on the playing fields and should not be second-guessed in courtrooms.⁴⁴

After *Crawn*, other cases⁴⁵ in New Jersey have been dismissed on motion, based upon the assumption of risk/recklessness standard as

⁴⁴ *Crawn*, 136 N.J. at 508, 643 A.2d at 607.

⁴⁵ See, e.g., *Norris v. Nat'l Collegiate Athletic Ass'n*, No. L-1453-93 (Middlesex Cty., N.J., Mar. 6, 1995). In *Norris*, the plaintiff suffered severe eye injuries during a lacrosse game when she was hit in the eye by the ball. She sued alleging that the rules should have required that she wear eye protection. The court held that the risk, which caused her injury, was a known risk and dismissed her case. *Id.*

articulated in *Crawn*. Moreover, in *Schick v. Ferolito*,⁴⁶ the New Jersey Supreme Court, in upholding the recklessness standard espoused in *Crawn*, expanded its application from contact to noncontact sports such as golf. “We perceive no persuasive reasons to apply an artificial distinction between ‘contact’ and ‘noncontact’ sports.”⁴⁷

In 1997, New York’s highest court decided four cases⁴⁸ involving the duty of care an owner or operator of an athletic facility owes to participants injured on those premises while voluntarily engaged in sports activities. In *Morgan*, the plaintiff sustained severe physical injuries as he was driving a two-person bobsled during a national championship race near Lake Placid. The plaintiff was an experienced amateur bobsledder who had competed in the Olympics and had been bobsledding at the same facility for over twenty years. The plaintiff and his teammate completed their first run without incident, and at the start of the second run, the bobsled tipped over due to the plaintiff’s steering error. The teammate fell out, but the plaintiff continued on the course, and since he could not reach the brakes, the sled rode up on to the wall of the exit run where it went through a twenty-foot opening in the wall and crashed into a concrete abutment.

The plaintiff claimed negligence in the design of the course. The trial court held the State liable for damages, but the appellate division reversed and the court of appeals affirmed the reversal, finding that there was no evidence that the opening of the wall engendered risks beyond those inherent in a sport which involves streaking down a mountainside on a sheet of ice at speeds approaching eighty miles per hour. The accident was solely the result of dangers inherent in a highly risky sport. While testimony showed that a slanted wall could have been installed, evidence also showed that installing such a wall might have been more dangerous to the competitors than the operational configuration.

⁴⁶ 167 N.J. 7, 767 A.2d 962 (2001).

⁴⁷ *Id.* at 18, 767 A.2d at 968.

⁴⁸ *Morgan v. State of N.Y.*, *Beck v. Scimeca*, *Chimerine v. World Champion John Chung Tae Kwon Do Inst.*, *Siegel v. City of N.Y.*, 90 N.Y.2d 471, 662 N.Y.S.2d 421, 685 N.E.2d 202 (1997).

In *Beck*, the plaintiff was injured while participating in class at defendant's karate school. The plaintiff, who was thirty years old, had been a student at the school for fifteen months, attending two or three classes a week. He was injured while attempting a "jump roll," a technique in which the student tumbles over an obstacle—one that he had executed on prior occasions. On the day of the accident, the instructor had left the classroom and placed in charge of the class, a fifteen-year-old student who raised the height of the obstacle higher than it had been for the plaintiff's previous "jump rolls." When the plaintiff attempted the roll at the increased height, he landed awkwardly and suffered a spinal injury. Both the appellate division and the court of appeals affirmed dismissal of the action. The allegation that a student of superior skill (though youthful) was placed in charge of the class does not, standing alone, warrant a trial. The court found that it was indisputable that the plaintiff assumed the risk of landing incorrectly. The fact that the barrier was set at a higher level, a circumstance of which the plaintiff was keenly aware, reinforced the finding that the risks involved were open and obvious.

In *Chimerine*, the plaintiff injured her knee while attempting a kicking maneuver at a martial arts school. She claimed that because she had only taken three classes, she did not understand the risks inherent in martial arts training. The court found that a reasonable person of participatory age or experience must be expected to know that there is a risk of losing one's balance when performing athletic maneuvers.

In *Siegel*, the plaintiff was injured when he tripped playing tennis. His foot snagged in the torn hem at the bottom of the net. His deposition testimony showed that he had been a member of the club for ten years, and that he had known for over two years that the side-divider net was ripped, although he had never informed the facility of the problem. The trial court dismissed the case, the appellate division affirmed, but the court of appeals reversed and reinstated the complaint. In this case the defendant argued that the torn net was an inherent risk in the sport, and the plaintiff should have assumed the risk of tripping. However, the court of appeals found as a matter of law that a torn net, or any allegedly damaged or dangerous net, or any other safety feature, is by its nature not automatically an inherent

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risk of the sport, for summary judgment purposes. Rather, it may qualify as and constitute an allegedly negligent condition occurring in the ordinary course of property maintenance.⁴⁹

In *Morgan*, the court followed Judge Cardozo's formulation of the tort policy debate:⁵⁰

One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. . . . A different case would be here if the dangers inherent in the sport were obscure or unobserved, or so serious as to justify the belief that precautions of some kind must have been taken to avert them.⁵¹

The *Morgan* court acknowledged that with the abandonment of the contributory negligence rule, the doctrine of assumption of risk within the sports and entertainment context required reexamination in light of the adoption of comparative negligence. Under this reexamination, a facility owner or operator continues to owe a duty of care to make the conditions at the facility as safe as they appear to be. "If the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty."⁵²

It is important to note that the assumption of risk doctrine applies equally to the amateur or novice participant as it does to the professional. "Correspondingly, for purposes of determining the

⁴⁹ An interesting contrast to *Siegel* is *Cevetillo v. Town of Mount Pleasant*, 262 A.D.2d 517, 692 N.Y.S.2d 426 (2d Dept. 1999). In *Cevetillo*, plaintiff was injured playing tennis when she tripped on a crack in the tennis court surface. The court held that *Siegel* was not applicable because *Siegel* involved a defect in a safety device, and since *Cevetillo* involved the actual sport surface, the plaintiff was held to have assumed the obvious risk. *Id.*; see also *Green v. City of N.Y.*, 263 A.D.2d 385, 693 N.Y.S.2d 43 (1st Dept. 1999).

⁵⁰ *Morgan*, 90 N.Y.2d at 482, 662 N.Y.S.2d at 425, 685 N.E.2d at 206.

⁵¹ *Id.* (quoting *Murphy v. Steeplechase Amusement Co.*, 250 N.Y. at 482-483, 166 N.E. 173).

⁵² *Morgan*, 90 N.Y.2d at 484, 662 N.Y.S.2d at 426, 685 N.E.2d at 207 (quoting *Turcotte v. Fell*, 68 N.Y.2d 432, 439, 510 N.Y.S.2d 49, 53, 502 N.E.2d 964, 968 (1986)).

extent of the threshold duty of care, knowledge plays a role but inherency is the *sine qua non*.⁵³ The lack of knowledge of the plaintiff was critical in *Baker v. Briarcliff School District*.⁵⁴ In *Baker*, the sixteen-year-old plaintiff was injured while playing in a varsity field hockey practice. She was injured when she was struck in the mouth by a stick while she was not wearing her mouth protector. Plaintiff testified that she did not recall the coach telling her to wear her mouth protector that day, although she knew of the requirement that it must be worn. The defendant moved for summary judgment on the grounds that her failure to wear the mouthpiece constituted assumption of risk. The trial court denied the motion and the appellate division affirmed. The court found:

Students who voluntarily participate in extracurricular sports assume the risks to which their role exposes them, but not risks which have been unreasonably increased. Thus, notwithstanding a player's assumption of the risks inherent in playing any sport, a school district remains under a duty to exercise reasonable care to protect student athletes involved in extracurricular sports from unreasonably increased risks.⁵⁵

Thus, the court found a question of fact as to whether the school district unreasonably increased the risk of injury, and such a question defeats summary judgment.

However, even if there is an unreasonable increase in the risk presented, as long as that increased risk is open and obvious, assumption of risk may apply. In *Gilman v. Molly Fox Studios, Inc.*,⁵⁶ the plaintiff was injured when she fell over a fellow classmate in an aerobics class. Plaintiff claimed that the class was overcrowded and that the overcrowding caused the contact with the classmate. The court held that even if the class were overcrowded,

⁵³ *Id.* at 484, 662 N.Y.S.2d at 427, 685 N.E.2d at 208. *Sine qua non* is defined as follows: "An indispensable condition or thing; something on which something else necessarily depends." BLACK'S LAW DICTIONARY 1390 (7th ed. 1999).

⁵⁴ 205 A.D.2d 652, 613 N.Y.S.2d 660 (2d Dept. 1994).

⁵⁵ *Id.* at 655, 613 N.Y.S.2d at 662.

⁵⁶ 225 A.D.2d 404, 640 N.Y.S.2d 3 (1st Dept. 1996).

since plaintiff had attended ten previous classes that she claimed were also overcrowded, by voluntarily participating in the class, she consented to all the risks.

Assumption of risk as a defense is not limited to plaintiffs who are true participants, but can also be applied to bystanders, spectators and officials.⁵⁷ Moreover, its application as a defense is not solely limited to contact sports or to adults.⁵⁸

In *Wertheim v. United States Tennis Association*,⁵⁹ the assumption of risk doctrine was applied where the plaintiff was not a true participant. Tennis is not, of course, a contact sport. In *Wertheim*, a tennis umpire was hit by a ball during a match, fell down, struck his head and died. The theory of the plaintiff's case was that the rule requiring that line umpires stand in a "ready" position until the ball is in play unreasonably increased the risk of injury. The court held that as a matter of law, being hit by a tennis ball is surely a risk normally associated with the sport, and therefore dismissed the complaint. Another theory espoused by the plaintiff to circumvent the assumption of risk defense was that the rule was reckless, thereby invoking the "enhanced risk" doctrine.⁶⁰ The court did not adopt this theory, stating, "[w]e are of the opinion that if requiring the ready position did enhance the risk of injury to umpires, the degree of

⁵⁷ "Players, coaches, managers, referees and others who, in one way or another, voluntarily participate must accept the risks to which their roles expose them." *Dillard v. Little League Baseball Inc.*, 55 A.D.2d 477, 479, 390 N.Y.S.2d 735, 736 (4th Dept. 1977) (baseball umpire); see also *McGee v. Bd. of Educ.*, 16 A.D.2d 99, 226 N.Y.S.2d 329 (1st Dept. 1962) (accounting teacher assigned as assistant baseball coach), *Schneider v. Am. Hockey & Ice Skating Ctr., Inc.*, 342 N.J. Super. 527, 777 A.2d 380 (2001) (spectator at amateur hockey game).

⁵⁸ While the types of vigorous and recreational activities for which assumption of risk may be applicable are numerous, not all sporting activities will be subject to this defense. In *Shannon v. Rhodes*, 92 Cal. App. 4th 792, 112 Cal. Rptr. 2d 217 (2001), the infant plaintiff was severely injured when she was thrown overboard during the recreational activity of boating. The court held that the doctrine of assumption of the risk does not apply to bar the claim of a passenger in a boat simply being used to ride around a lake. However, one can imagine the opposite result if the boat was a cigarette boat and the passenger knew the purpose of the ride was to display the boat's performance.

⁵⁹ 150 A.D.2d 157, 540 N.Y.S.2d 443 (1st Dept. 1989), *app. denied*, 74 N.Y.2d 613, 547 N.Y.S.2d 846 (1989).

⁶⁰ "Generally the enhanced risk doctrine in sports injury cases involves fact patterns where a co-participant engages in reckless conduct causing injury to another participant." *Id.* at 161,

enhancement was marginal, and the actions of appellant in setting this requirement did not rise to the level of recklessness.”⁶¹

Golf course cases pose interesting issues. One would assume that being hit by an errant golf ball is an inherent risk of golfing. However, some of the cases take a different twist. In *Morgan v. Fuji Country USA, Inc.*,⁶² the plaintiff was hit on the head by an errant golf ball. The golf course had trees between the fourth green and the fifth tee. One of the pine trees shaded the fifth tee and a nearby cart path. The plaintiff was a frequent player, and occasionally he watched golf balls hit from the fourth tee fly over the pine tree and land on either the fifth tee or the adjacent fifth green. For protection from flying golf balls, the plaintiff would routinely stand underneath this particular tree. The tree became diseased and was removed. After it was removed, the plaintiff saw at least four golf balls hit from the fourth tee almost strike golfers who were standing on the fifth tee box. On the day of the accident, the plaintiff was hit as he walked from the fifth tee box to his cart.

The trial court granted summary judgment, ruling primary assumption of the risk completely barred the plaintiff’s claim. The appellate court reversed. The defendant argued that being struck by a golf ball is an inherent risk of the sport, and the appellate court agreed. However, the court stated, “[B]efore concluding a case falls within primary assumption of the risk it is not only necessary to examine the nature of the sport but also ‘the defendant’s role in, or relationship to, the sport.’”⁶³ While property owners ordinarily are required to use due care to eliminate dangerous conditions on their property, some conditions on the property “that otherwise might be viewed as dangerous often are an integral part of the sport itself and a property owner has no duty to remove them.”⁶⁴ For example, “although moguls on a ski run pose a risk of harm to skiers that might not exist were these configurations removed, the challenge and

540 N.Y.S.2d at 445.

⁶¹ *Id.*

⁶² 34 Cal. App. 4th 127, 40 Cal. Rptr. 2d 249 (1995).

⁶³ *Id.* at 133, 40 Cal. Rptr. 2d at 252 (quoting *Knight v. Jewett*, 3 Cal. 4th 296, 317, 11 Cal. Rptr. 2d 2, 43 (1992)).

⁶⁴ *Knight v. Jewett*, 3 Cal. 4th 296, 315, 11 Cal. Rptr. 2d 2, 14 (1992).

risks posed by the moguls are part of the sport of skiing, and a ski resort has no duty to eliminate them.”⁶⁵

However, a ski resort does have a duty to maintain its safety equipment in working condition, “so as not to expose skiers to an increased risk of harm”⁶⁶ because this “type of risk, posed by a ski resort’s negligence, clearly is not a risk that is assumed by a participant.”⁶⁷ Similarly, the golf course must be designed and operated so as to present a playing field that does not offer risks greater than one would expect. Under the facts of *Morgan*, summary judgment was not warranted because evidence could support a finding that the defendant breached the duty of care owed to the plaintiff.⁶⁸

Contrast *Morgan* with *Connelly v. Mammoth Mountain Ski Area*,⁶⁹ wherein the plaintiff, who considered himself an expert skier, collided with a ski lift tower on a difficult run. The plaintiff’s bindings released unexpectedly and he collided with the tower that was visible for at least 200 yards before impact. The theory of liability was that padding on the tower was inadequate. The case was dismissed on assumption of risk grounds, because the ski area had acted reasonably in providing some padding of the tower, and contact with a padded tower was found to be an inherent risk of skiing.

How does one reconcile the differing results in *Morgan* and *Connelly*? In *Morgan*, the club changed the course design by removing the tree, thereby creating a question of fact as to whether the risk of injury was enhanced. In *Connelly*, the tower and its condition were static, thereby not affording the plaintiff the argument that the risk of injury was increased.

⁶⁵ *Id.*

⁶⁶ *Id.* at 316, 11 Cal. Rptr. 2d at 14.

⁶⁷ *Id.*

⁶⁸ See *Hawkes v. Catatank Golf Club Inc.*, 732 N.Y.S.2d 132 (3d Dept. 2001), for another example of a golf course case wherein the design of the course and the knowledge of the owner regarding errant balls in the parking lot created a question of fact, negating the assumption of risk defense for summary judgment purposes.

⁶⁹ 39 Cal. App. 4th 8, 45 Cal. Rptr. 2d 855 (1995).

Now, contrast *Morgan* with *Hornstein v. State of New York*,⁷⁰ wherein the plaintiff was struck in the eye by a golf ball while waiting to tee off. Plaintiff “failed to prove . . . that the proximity of the holes in question constituted a trap or inherently dangerous condition, or that the defendant had created a hazardous condition which it was under a legal duty to remedy.”⁷¹

It is axiomatic that for the defense to be successful, the plaintiff must be engaged in the athletic or recreational activity at the time of the injury, and remoteness will be fatal to the defense.⁷²

It will be instructive to look at this doctrine in the context of minors. A prime example of the accommodation given minors and near-minors by some courts is found in *Benitez v. New York City Board of Education*.⁷³ The nineteen-year-old plaintiff was a star football player on a high school team that all parties agreed was undersized and overmatched when compared to its rivals. Indeed, the principal of the plaintiff’s school requested that the team be dropped to a lower division for fear of injury to the players. The team was not lowered to a different division, and the plaintiff suffered severe injuries while making a tackle. The plaintiff claimed his team was outmatched and outsized, and that the defendant was negligent by unreasonably increasing the risk of his being injured by allowing the mismatch. He also claimed that at the time of the injury, he had played almost the entire game and was tired. In a three-to-one decision, the court decided that since the plaintiff was a student, his participation was not entirely voluntary, based upon a “degree of indirect compulsion.”⁷⁴ Also, the court stated that the defendant unreasonably enhanced the risk of injury by allowing a

⁷⁰ 46 Misc. 2d 486, 259 N.Y.S.2d 902, *aff’d*, 30 A.D.2d 1012, 294 N.Y.S.2d 320 (3d Dept. 1968).

⁷¹ *Id.* at 488, 259 N.Y.S.2d at 902; *see also* *Lundin v. Town of Islip*, 207 A.D.2d 778, 616 N.Y.S.2d 394 (2d Dept. 1994).

⁷² *See Vogel v. Venetz*, 278 A.D.2d 489, 718 N.Y.S.2d 396 (2d Dept. 2000), wherein the plaintiff was injured while loading his snowmobile onto a trailer in a motel parking lot in preparation for riding on locally designated trails. The defendant alleged that the plaintiff was engaged in a sports activity at the time of his accident and that he assumed the risks inherent therein. The court held that plaintiff’s injury was not caused by an inherent danger associated with snowmobiling.

⁷³ 141 A.D.2d 457, 530 N.Y.S.2d 825 (1st Dept. 1988).

⁷⁴ *Id.* at 461, 530 N.Y.S.2d at 827.

mismatched game to occur. Therefore, no assumption of risk defense could stand.

The dissent discussed that the plaintiff was accustomed to playing the entire game, and argued that fatigue is not an increased risk of football, but rather is one of the inherent risks of football. Also, the dissent argued that the indirect compulsion found by the majority was not sufficient to find that the plaintiff was not voluntarily engaging in the game. The dissent would have dismissed the complaint on the grounds of assumption of risk.

The findings of the *Benitez* dissent were adopted in *Edelson v. Uniondale Free School District*.⁷⁵ In *Edelson*, the plaintiff was participating in a high school wrestling match against an opponent who was in a weight classification one category higher than his own. The plaintiff's primary theory of negligence was that it was unreasonable to allow him to wrestle someone in a higher weight class. The court found that the risk that caused the injury was reasonably foreseeable in wrestling, and was not caused by the size of the opponent. Since the risks were not concealed or unreasonably increased, dismissal was appropriate.

Another result contrary to *Benitez* is found in *Burke v. East Brunswick Township Board of Education*.⁷⁶ In *Burke*, the eighth-grade plaintiff sued the school district for injuries received when he was tackled during a football game. He argued that the defendant was negligent in permitting a mismatched contest with the other school team, whose players were of greater size, age, strength, speed and skill. The appellate division affirmed the trial court's dismissal, holding that school districts have no legal duty to match opposing interscholastic teams with players of equal or uniform size, speed, skill or age.

Generally courts have held that minors can assume the risk, but only if they have the capacity to appreciate the dangers presented. In *Abee v. Stone Mountain Memorial Association*,⁷⁷ the eleven-year-old plaintiff was injured while riding on a water slide. At his deposition,

⁷⁵ 219 A.D.2d 614, 631 N.Y.S.2d 391 (2d Dept. 1995).

⁷⁶ N.J. App. Div. 31-2-8311 (Oct. 5, 2001).

⁷⁷ 312 S.E.2d 142 (Ga. Ct. App. 1983), *aff'd*, 314 S.E.2d 444 (Ga. 1984).

he testified that he appreciated the dangers presented by the slide, and indeed he continued on the slide despite this appreciation. The court held that assumption of risk was an appropriate defense and dismissed.

III. CONFUSION OF THE DEFENSES

Many courts refer to primary assumption of risk and secondary assumption of risk, while others distinguish between express and implied. Others confuse primary and secondary assumption of risk. Indeed, comment (c) to the *Restatement of Torts (Second)* states, “[a]ssumption of risk is a term which has been surrounded by much confusion, because it has been used by courts in at least four different senses, and the distinctions seldom have been made clear.”

Some courts define as secondary assumption of risk when the plaintiff voluntarily encounters a known and appreciated risk of injury created by defendant’s negligence.⁷⁸ Unlike its primary form, a plaintiff in the secondary assumption of risk context has not impliedly consented to relieve the defendant of a duty of care.⁷⁹ Secondary assumption of risk is not a complete defense, but has been merged with the defense of contributory negligence under comparative fault laws.⁸⁰

When the plaintiff’s decision to encounter risk is unreasonable, secondary assumption of risk is tantamount to contributory negligence, and the plaintiff’s claim should be submitted to the jury

⁷⁸ See *Galardi v. Seahorse Riding Club*, 16 Cal. App. 4th 817, 20 Cal. Rptr. 2d 270 (1993); *Benefiel v. Walker*, 244 Va. 488, 422 S.E.2d 773 (1992); *Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (1992); *Wagner v. Thomas J. Obert Enters.*, 396 N.W.2d 223 (Minn. 1986); *Armstrong v. Mailand*, 284 N.W.2d 343 (Minn. 1979); *Thompson v. Ruidoso-Sunland, Inc.*, 105 N.M. 487, 734 P.2d 267 (1987); *Mignone v. Fieldcrest Mills*, 556 A.2d 35 (R.I. 1989).

⁷⁹ See *Galardi v. Seahorse Riding Club*, 16 Cal. App. 4th 817, 20 Cal. Rptr. 2d 270 (1993); *Baber v. Dill*, 510 N.W.2d 228 (Minn. App. 1994); *Armstrong v. Mailand*, 284 N.W.2d 343 (Minn. 1979).

⁸⁰ *Bush v. Parents Without Partners*, 17 Cal. App. 4th 322, 21 Cal. Rptr. 2d 178 (1993); *Knight v. Jewett*, 3 Cal. 4th 296, 11 Cal. Rptr. 2d 2, 834 P.2d 696 (1992); *Springrose v. Willmore*, 292 Minn. 23, 192 N.W.2d 826 (1971); *Mima v. City of Akron*, 31 Ohio App. 3d 124, 508 N.E.2d 974 (1986); *Anderson v. Ceccardi*, 6 Ohio St. 3d 110, 451 N.E.2d 780 (1983); *Ridge v. Kladnick*, 42 Wash. App. 785, 713 P.2d 1131 (1986).

for analysis under comparative fault principles.⁸¹ However, if the plaintiff's decision to encounter the risk is reasonable, the court is faced with a dilemma: Should this type of assumption of risk: (1) completely bar recovery; (2) be evaluated under comparative fault principles; or (3) be abolished as a defense?

Courts are split on the issue. There is authority in favor of retaining this type of assumption of risk as a complete defense.⁸² Nevertheless, some courts have concluded that a plaintiff's assumption of risk, irrespective of reasonableness, should be factored into the comparative fault computation.⁸³ Still other courts have held that this type of assumption of risk is not a defense at all.⁸⁴ Reasons advanced for this extreme position include: (1) it would be anomalous to deny recovery to a plaintiff who acted reasonably while permitting partial recovery to a plaintiff who acted unreasonably; and (2) this type of assumption of risk inequitably punishes reasonable conduct.⁸⁵

The distinction between primary and secondary assumption of risk is exemplified by *Collier v. Northland Swim Club*.⁸⁶ Plaintiff Collier was an eleven-year-old girl who was seriously injured when she struck her head on the bottom of an in-ground swimming pool during diving practice. The plaintiff was an experienced swimmer who had used the pool for several years prior to the accident. She had known the water was only three-and-one-half feet deep, a depth which was clearly marked at the side of the pool. Nevertheless, she sued the

⁸¹ See *Mazzeo v. City of Sebastian*, 550 So. 2d 1113 (Fla. 1989); *Blackburn v. Dorta*, 348 So. 2d 287 (Fla. 1977); *Duffy v. Midlothian Country Club*, 135 Ill. App. 3d 429, 481 N.E.2d 1037, 90 Ill. Dec. 237 (1985); *Perez v. McConkey*, 872 S.W.2d 897 (Tenn. 1994); *Silcox v. Coffee*, 1993 WL 350134 (Tenn. App. 1993); *ITT Rayonier, Inc. v. Puget Sound Freight Lines*, 44 Wash. App. 368, 722 P.2d 1310 (1986).

⁸² See *Smith v. Seven Springs Farm, Inc.*, 716 F.2d 1002 (3d Cir. 1983); *Keegan v. Anchor Inns, Inc.*, 606 F.2d 35 (3d Cir. (Virgin Islands) 1979); *Scoggins v. Jude*, 419 A.2d 999 (D.C. 1980); *Braswell v. Econ. Supply Co.*, 281 So. 2d 669 (Miss. 1973); *Howell v. Clyde*, 533 Pa. 151, 620 A.2d 1107 (1993) (Flaherty, J.).

⁸³ See, e.g., *Mizushima v. Sunset Ranch, Inc.*, 103 Nev. 259, 737 P.2d 1158 (1987).

⁸⁴ *Rini*, 861 F.2d at 502; *Segoviano v. Housing Auth.*, 143 Cal. App. 3d 162, 191 Cal. Rptr. 578 (1983); *Blackburn*, 348 So. 2d at 287; *ITT Rayonier, Inc.*, 44 Wash. App. 368, 722 P.2d at 1310.

⁸⁵ See *Rini*, 861 F.2d at 502; see also *Segoviano*, 143 Cal. App. 3d at 162, 191 Cal. Rptr. at 578.

⁸⁶ 35 Ohio App. 3d 35, 518 N.E.2d 1226 (1987).

pool club alleging negligent failure to warn and inadequate supervision. Defendant moved for summary judgment, and the trial court granted the motion based on the primary assumption of risk doctrine.

On appeal, the court found that the lower court confused the primary and secondary assumption of risk doctrines. The court ruled that under primary assumption of risk, a defendant owes no duty to a plaintiff as a matter of law, because the risks of some activities are so inherent that they cannot be eliminated. The doctrine rests on the fiction that a plaintiff has tacitly consented to the risk, thereby relieving the defendant of any duty.

The *Collier* court continued by stating that secondary assumption of risk occurs when a plaintiff consents or acquiesces in an appreciated, known or obvious risk to plaintiff's safety. This variety of assumption of risk includes those situations in which the risk is so obvious that the plaintiff must have known and appreciated the risk.⁸⁷ Unlike its primary form, the defendant owes a duty to the plaintiff, and factual questions concerning the plaintiff's acquiescence in, or appreciation of, a known risk generally are reserved for a jury.

The lower court stated, as a matter of law, that primary assumption of risk occurs: (1) when defendant owes no duty to the plaintiff; or (2) when the risk of harm is so obviously within the common knowledge that the defendant is relieved of any duty that exists.⁸⁸ Because the second part of this definition relates to secondary assumption of risk, the lower court erroneously blurred the distinction between primary and secondary forms of the defense.

The *Collier* court identified two reasons to support the distinction between the two doctrines. First is the rationale behind primary assumption of risk: the risk of injury associated with the activity is so inherent that it is unavoidable. Although the possibility of injury from diving into a shallow pool exists, the court determined that the

⁸⁷ *Id.* at 37, 518 N.E.2d at 1228.

⁸⁸ *Id.*

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risk is not so inherent as to alleviate pool operators of any duty to all divers:

A rule stating that the risk is inherent would imply that all divers know of and accept the risk, regardless of whether the dive is their first or fifty-first. We cannot believe that such a rule attends aquatic activities as it does baseball games. Rather, proper instruction, warnings, and supervision on diving can, and do, minimize the risk.⁸⁹

Next, secondary assumption of risk is a voluntary acknowledgement that the potential exists for injury rather than a consent to suffer any injury.⁹⁰ Thus, the secondary form of the defense resembles contributory negligence more than primary assumption of risk. The evidence in the *Collier* case failed to show that the plaintiff was aware of the risks of diving, which would have relieved the defendant of its duty of care. Instead, the evidence suggested that the plaintiff was careless in diving, and did not agree to accept the risk of injury.

In sum, the court concluded that the plaintiff's conduct may have amounted to secondary assumption of risk, which must be evaluated by the jury under the state's comparative negligence statute. Accordingly, the lower court's ruling was reversed, and the matter remanded for further proceedings.

CONCLUSION

It is not always easy to identify whether an activity is subject to primary assumption of risk rather than secondary or express rather than implied. Is the risk of injury from horseback riding lessons so inherent as to be unavoidable? Can the risks be minimized by warnings, instruction or supervision? What about the risk of a fan being hit with a puck, or being crushed by a basketball player diving for a loose ball or by a baseball catcher diving for a foul ball?

⁸⁹ *Id.* at 37, 518 N.E.2d at 1229.

⁹⁰ *Id.*

Courts generally allow a defendant to avoid liability in sports or recreational cases if the plaintiff has expressly relieved the defendant of liability (by release and waiver), or if the injury was caused by a risk inherent in the activity. Regardless of what moniker is used to identify the defense (express, implied, primary, secondary, etc.), the rationale is the same. In its future application, the defense of assumption of risk is only limited by our ability to devise new ways to entertain ourselves, either through sports or recreational activities.

In addition, the defense may be wielded against claims that are sports-related but not the result of athletic competition. The recent wrongful death suit⁹¹ filed by the estate of Minnesota Vikings lineman Korey Stringer alleges that the defendants compelled him to practice in hot and humid conditions, despite health concerns raised during the previous days training, and that his weakened medical condition ultimately caused his death. Can the defendants assert assumption of risk? As a professional athlete, did the decedent have the requisite knowledge that his continuing to practice increased the likelihood of injury? Did the decedent have the ability to remove himself from practice if he felt ill, or if he believed the weather conditions increased the chance of a medical emergency? Are severe medical afflictions—and even death—risks that are inherent in the violent and intense world of professional football? Were those risks increased by the actions or inactions of the defendants? All valid questions, the answers to which must await the course of litigation.

*Volenti Non Fit Injuria*⁹²

⁹¹ Stringer v. Minn. Vikings Football Club, L.L.C., File #02-415, Hennepin Cty. Dist. Ct., 4th Jud. Dist. (filed Jan. 16, 2002).

⁹² Justice Cardozo, quoted from *Murphy v. Steeplechase Amusement Co., Inc.*, 250 N.Y. 479, 166 N.E. 173 (1929), translated into English as, “A person cannot be harmed by that to which he or she consents.” BLACK’S LAW DICTIONARY 657 (pocket ed. 1996).