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"WHO PUT THAT THERE?"

DEVELOPMENTS IN THE DOCTRINE OF ASSUMPTION OF RISK IN SPORTING IN NEW YORK

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Introduction - The Past is not always Prologue

Prior to September 1, 1975, New York was a "contributory negligence" state with regard to claims made by injured persons under a tort theory. In practical application, if an injured person contributed in any way (even one percent) to the happening of his or her accident, he or she could recover nothing from any other party. The cold, clinical use of this rule by juries often led to either of two unfortunate results - (1) an injured person who may have contributed to, but had not been the sole cause of, the accident nevertheless recovered nothing from another party who had some, but not all, responsibility, or (2) a jury would disregard the contributory fault of the injured person to provide recovery if the injuries were severe, thus depriving the defendant of the benefit of the victory that the law allowed.

A defendant who could prove that the plaintiff assumed the risks of the activity in which he or she was injured would be successful in defeating the plaintiff's claims. In the Spring of 1974, Roy Passantino was a member of the varsity baseball team at Newtown High School in Queens County. In the course of trying to steal home from third base, young Roy lowered his head and ran full-speed into the opposing catcher. Both players fell to the ground. The catcher was uninjured, but Roy was completely paralyzed. On his behalf a lawsuit was commenced against the Board of Education of the City of New York in Queens County Supreme Court. The jury awarded Roy $1,800,000, but the Appellate Division, Second Department, reduced the verdict to $1,000,000.

In a strongly worded dissent written in opposition to the decision of his peers, Justice Cohalan of the Second Department voted to reverse the judgment and to dismiss the complaint. Noting that "The 18-year-old plaintiff, for one unfortunate moment, permitted his aggressiveness to overcome his common sense," the Justice felt that "in my judgment, and despite his pitiful plight, he neither proved the existence of any negligence on the part of the Board of Education,...nor did he absolve himself of contributory negligence or overcome the fact that he assumed the risk." Passantino v. The Board of Education of the City of New York, 52 A.D.2d 935, 383 N.Y.S.2d 639 (Appellate Division, Second Department, 1976). The Court of Appeals of New York agreed, and it reversed the judgment in Roy's favor and dismissed his complaint. Passantino v. The Board of Education of the City of New York, 41 N.Y.2d 1022, 395 N.Y.S.2d 628 (Court of Appeals, 1977).

One can only guess as to how the Passantino family and their lawyer felt after the Court of Appeals had dismissed their claims. As a practical matter, the Passantino case reflected the harsh results which could be visited upon injured persons as a result of a strict application of the doctrines of contributory negligence and of assumption of risk, but the decision also was entirely proper, given the state of the law as it then existed.

As had been happening in other states, lawyers in New York (especially plaintiff's lawyers) lobbied the state legislature to adopt a "comparative negligence" rule in place of the contributory negligence doctrine. Such a rule was adopted in the form of Article 14-A of the Civil Practice Law and Rules of New York, which became effective on September 1, 1975. Claims which arose before that date were still subject to the contributory negligence doctrine.

The rule is one of pure comparative negligence - one hundred percent of the responsibility for the happening of any accident and any resulting injury is apportioned among all parties, whether plaintiff or defendant. Any damages to which an injured person is entitled are reduced by that person's degree of fault. Whereas under the doctrine of contributory negligence, the plaintiff had the duty to show that he or she was free of any fault, under the rule of comparative negligence the defendant had the obligation to set up the plaintiff's comparative fault as an affirmative defense to the plaintiff's claims.

What of the doctrine of assumption of risk?

Section 1411 of the Civil Practice Law and Rules laid out the territory:

> Sec. 1411. Damages recoverable when contributory negligence or assumption of risk is established.
>
> In any action to recover damages for personal injury, injury to property, or wrongful death, the culpable conduct attributable to the claimant or to the decedent, including contributory negligence or assumption of risk, shall not bar recovery, but the amount of damages otherwise recoverable shall be diminished in the proportion which the culpable conduct attributable to the claimant or decedent bears to the culpable conduct which caused the damages.

Assumption of risk was now to be considered as a part of any comparative fault the plaintiff might bear for the happening of the accident and or his or her injuries.

Since the enactment of the comparative negligence doctrine in 1975, the courts in New York have continued to wrestle with the doctrine, especially with regard to the concept of assumption of risk. The decisions are sometimes confusing, and the logic is sometimes tortured in the name of consistency, but a line of cases has developed in New York which discuss the role of the doctrine of assumption of risk.

The arena of sport is especially fertile ground for application of the doctrine, as one would be hard-pressed to name a sport where a participant would not be subjected to the possibility of injury. The cases decided in New York since the comparative negligence doctrine came into effect do, indeed, reflect a wide variety of sports settings in which there has been claim of injury.

Implied Assumption of Risk vs. Express Assumption of Risk

It is important to note the distinction between implied assumption of risk and express assumption of risk. The assumption of risk mentioned in CPLR Section 1411 is an implied assumption of risk, the concept being that the plaintiff has voluntarily exposed himself or herself to the conduct of the defendant with the understanding that harm or injury might result.

On the other hand, the concept of express assumption of risk presupposes that the plaintiff, orally or in writing or sometimes as a result of his or her actions, has agreed in advance of the activity that the defendant need not use reasonable care for the plaintiff's benefit, thus absolving the defendant of liability for injury to the plaintiff which would otherwise constitute negligence.

While implied assumption of risk is only a factor to be weighed in the comparative negligence process, express assumption of risk can be an absolute bar to recovery by an injured person. It is only proper that, all things being equal, a person who is informed of the risks of a particular activity, who participated voluntarily, and who participated at his or her own risk, should not hold another liable for resulting injury. Usually, the existence of an express assumption of the risk is a question for the jury to decide.

Tales of Donkeys, Yankees and Horsies

In relatively rapid-fire fashion in the mid-1980's, the Court of Appeals of New York decided four cases which have had a continuing effect upon assumption of risk in sports in New York.

At the time of her injury, Christy Arbegast was a student teacher in the South New Berlin school system. She decided that it would be sensible for her to participate in a donkey basketball game which was being held by the senior class of the high school as a fund-raising event. The Buckeye Donkey Ball Company had been retained to provide the donkeys, a helmet for each participant, employees who transported and handled the donkeys, instruction to the participants, and a referee for the game. Two games were to be played - the first between a team of faculty members (including the soon-to-be-injured Ms. Arbegast) and a team of volunteer firefighters, and the second between the faculty and the senior class. Ms. Arbegast safely competed in the first game, but she was assigned a different, larger donkey for the second game. Apparently out of some justifiable concern, she spent most of the second game walking her assigned donkey around the floor, until at the urging of her fellow faculty members, she mounted the donkey, which promptly came to stop, propelling poor Ms. Arbegast over the donkey's head onto the floor, leaving her with a permanent injury to her left arm.

She sued both the school district and the Buckeye Donkey Ball Company, but she settled her claim against the school district before trial, going to trial only against Buckeye. Ms. Arbegast testified that she was informed by Buckeye's employee prior to her participation that she did so at her own risk, and that the donkeys do buck and put their heads down, causing people to fall off. Apparently, this testimony was fatal to her case, as the jury dismissed all of her claims against Buckeye.

After a brief stop at the Appellate Division, which upheld the jury's verdict, the case found its way to the Court of Appeals, which also upheld the jury's verdict. In so holding, the Court had no doubt that

Ms. Arbegast had expressly assumed the risks of her participation in the donkey ball game, and that she should not recover damages as a result:

> We conclude that the comparative causation principle enacted by CPLR 1411 applies to...a domesticated animal, and to the implied assumption of risk by a person injured by such an animal, but not to the express assumption of risk by such a person.....Defendant was entitled to dismissal of the complaint at the end of the plaintiff's case by reason of her admission that she had been informed both of the risk of injury and that 'the participants were at their own risk.'....
>
> The common law distinguished between express and implied assumption of risk. Express assumption, which was held to preclude any recovery, resulted from agreement in advance that defendant need not use reasonable care for the benefit of plaintiff and would not be liable for the consequence of conduct that would otherwise be negligent....
>
> The existence of such an express assumption of risk by the injured party is a matter of defense upon which the burden of proof will be on the party claiming to have thus been absolved of duty,...and will be a factual issue for the jury....
>
> Here there is evidence from which the jury could have concluded that plaintiff had knowledge of the risk and by participating in the games voluntarily assumed it, and no question that plaintiff's conduct in mounting the donkey from which she was thrown was a cause in fact of her injuries....

Arbegast v. Board of Education of South New Berlin Central School and the Buckeye Donkey Ball Company, 65 N.Y.2d 161, 490 N.Y.S.2d 751 (Court of Appeals, decided June 6, 1985).

Soon after Arbegast came Maddox v. City of New York et al, 66 N.Y.2d 270, 496 N.Y.S.2d 726, decided by the Court of Appeals on November 21, 1985. Elliot Maddox was a centerfielder for the New York Yankees, who was injured in a game played against the Chicago White Sox at Shea Stadium in New York City. Maddox was attempting to field a fly ball hit to centerfield, when, as he was running to his left and attempting to stop, his left foot hit a wet spot and slid, and his right foot stuck in a mud puddle, as a result of which his right knee buckled. The knee injury ultimately led to his retirement from professional baseball. In an interesting twist of irony, the Yankees were playing the game at Shea Stadium, the home of the New York Mets, and not at Yankee Stadium, because Yankee Stadium was in the midst of renovation.

At his deposition, Maddox testified that he was aware of the wet and muddy conditions of the field, and specifically of the mud puddle which caused his injury before it happened. During the game he had called the puddling to the attention of the groundskeepers, and he had complained to his manager about the wet and muddy conditions, " establishing his awareness of the defect which caused his injury and of the risk involved. His continued participation in the game in light of that awareness constituted assumption of risk as a matter of law...." Maddox, 496 N.Y.S.2d 726, at 727.

Noting its holding that this case involved Maddox's implied, rather than express, assumption of the risks of his participation, the Court, citing its decision in Arbegast, stated:

> .....In the instant case we deal not with express assumption of risk, but with assumption of risk to be implied from plaintiff's continued participation in the game with the knowledge and appreciation of the risk....The risks of a game which must be played upon a field include the risks involved in the construction of the field....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 to one with less than professional experience in the particular sport....
>
> It is a matter of common experience that water of sufficient depth to cover grass may result in the earth beneath being turned to mud....Plaintiff was sufficiently aware to complain to the groundskeepers. 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 or the mechanism from which the injury results....

Maddox, at 727-730. The Court of Appeals affirmed the order of the lower appellate court, dismissing Maddox's case.

The third of these seminal cases to come out of the Court of Appeals was Turcotte v. Fell and the New York Racing Association, 68 N.Y.2d 432, 510 N.Y.S.2d 49, decided by the Court on November 25, 1986. Ron Turcotte was a professional jockey who, prior to his injury, had ridden more than 22,000 races over a seventeen-year career that included riding "Secretariat" to a Triple Crown in 1973. On July 13, 1978, he was involved in an accident in a race at Belmont Park, which left him a paraplegic. He sued another jockey, the owner of the horse that jockey was riding, and the racetrack owner-operator. The trial court dismissed the claims against the jockey and the horse owner, but allowed the claim against the track owner-operator. The Appellate Division, Second Department, affirmed. The Court of Appeals upheld the dismissal of all claims against the jockey and the horse

owner, but it also directed the dismissal of all claims against the track owner-operator as well.

Justice Simons, writing for the majority, began his discussion by noting that the doctrine of assumption of risk

> as the term applies to sporting events,...involves what commentators call 'primary' assumption of risk....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 risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them and defendant has performed its duty....Plaintiff's 'consent' is not constructive consent; it is actual consent implied from the act of the electing to participate in the activity....
>
> ....Plaintiff's participation certainly was not involuntary in this case....

Turcotte, 510 N.Y.S.2d 49, at 53.

Citing Maddox for the proposition that participants in sporting events may be held to have consented, by their very participation, to the risk of injury from those conditions which are known, apparent or reasonably foreseeable, Justice Simon noted that

> While the courts have traditionally exercised great restraint in the belief that the law should not place unreasonable burdens on the free and vigorous participation in sports, they have recognized that organized, athletic competition does not exist in a vacuum. Some of the restraints of civilization must accompany every athlete onto the playing field. Thus, the rule is qualified to the extent that participants do not consent to acts which are reckless or intentional....
>
> Plaintiff testified before trial to facts establishing that horse racing is a dangerous activity....Such dangers are inherent in the sport. Because they are recognized as such by plaintiff, the courts below properly held that he consented to relieve defendant Jeffrey Fell of the legal duty to use reasonable care to avoid crossing into his lane of travel.... Bumping and jostling are normal incidents of the sport..., not flagrant infractions unrelated to the normal method of playing the game....

Turcotte, at 53-54.

In his discussion of why Turcotte's claims against the track owner-operator should be dismissed, Justice Simon wrote that Turcotte was aware of existing track conditions before the race, and in fact, according to his deposition before trial, Turcotte had seen similar conditions many times before. Further, Justice Simon was impressed by Turcotte's testimony that he had ridden in three prior races on the day of his injury.

"Thus, Turcotte' s participation in three prior races at this same track on the day of his injury, his ability to observe the condition of the track... and his general knowledge and experience...establish that he was well aware of these conditions and the possible dangers from them and he accepted the risk." Turcotte, at 56

Arbegast, Maddox and Turcotte were joined by the Court of Appeals decision in Benitez v. New York City Board of Education, 73 N.Y.2d 650, 543 N.Y.S.2d 29, decided on June 8, 1989.

"Put Me In, Coach, Put Me In!!!"

Sixto Benitez was a nineteen-year-old star athlete at George Washington High School in New York City. Entering his senior year, he was the subject of intense recruiting by a number of top-notch college football programs, and he fully expected to receive a full scholarship to play Division I football. Prior to the 1982 season, the George Washington team had played at a Division B level in the Public Schools Athletic League, a component of the Board of Education of the City of New York. The 1982 season saw the team play at the Division A level, a move that had been made at the insistence of the league because George Washington had been such a dominant team at the Division B level.

The 1982 season at the Division A level had been disastrous for George Washington. Its principal requested a shift back to the Division B level, citing the team's poor record and an unusually high number of injured players. The league rejected the request, and an appeal was filed. The basis for the appeal was the fear that if the team was not returned to Division B, additional serious injuries might result. George Washington's principal wrote that their players were being compelled to "stay another year and shoulder inevitable injuries...against some of the most powerful football teams in the City." Benitez, 530 N.Y.S.2d 825, at 826. This appeal was also denied. The football coach advised the principal to authorize the disbanding of the football program, but league rules mandated that such an action would result in the barring of all of George Washington's athletic teams from league play.

After the decision was made to play the 1983 season at the Division A level, the football coach suggested that the game against John F. Kennedy High School be forfeited because of the high risk of injury to George Washington players. The principal decided that the game should be played. The coach would testify later at his deposition that he knew the game was a mismatch, that it was unsafe for his team to play JFK, that he knew his players were fatigued during the game, that he knew that tired players were more likely to be injured, that he did not have the personnel to rest Benitez, and (possibly most impor-

tantly) that he did not insist on the cancellation of the game because he feared that he would lose his job.

The play in which young Benitez was injured occurred with one minute and seventeen seconds remaining in the first half. To that point there had been a total of fifty-five plays, and Benitez had participated in forty-six of them. On the fateful play, as JFK kicked off to George Washington after yet another touchdown, Benitez attempted to block a JFK player, and in so doing, he suffered a broken neck.

Benitez commenced a lawsuit against the Board of Education, the league and the City of New York, claiming negligence in forcing George Washington to play at the Division A level; forcing his team to play JFK in an obvious mismatch; and in forcing him to play almost the entire first half of the game with no rest or replacement. At his deposition, Benitez testified that he played football voluntarily; that he was adequately trained by a qualified coach; and that he was fatigued prior to his injury but did not tell his coach.

At trial and prior to the case being given to the jury, the judge dismissed the claims against the City of New York. As against the remaining defendants, the jury awarded Benitez $1,250,000, to be reduced by the thirty percent fault the jury placed upon Benitez for the happening of the accident. Appeals were taken to the Appellate Division, First Department.

In affirming the jury verdict in Benitez's favor, the court noted:

> While plaintiff was a voluntary participant in the game, never having complained of being tired, the law does recognize, especially in student-teacher relationships, that a degree of indirect compulsion exists nonetheless....The rationale is that the student is understandably reluctant to refuse to participate for fear of the negative impact such refusal might have on his or her grade or standing. Such reasoning applies here. Plaintiff was 'one of the best football players to come out of GW,' he had a 'drawer full' of letters from colleges. In such circumstances, it is not at all surprising nor legally fatal to his cause that plaintiff had not asked to be taken out of the game.

Benitez, at 827.

The Board of Education and the league filed appeals to the Court of Appeals. The Court began its discussion by stating that "To be sure, application of the personal injury principles of duty, breach and proximate cause in the context of sports injuries almost invariably includes a discussion also of assumption of risk." Benitez, 73 N.Y.2d 650, 543 N.Y.S.2d 29, at 32. Citing Turcotte, Arbegast, and Passantino, the Court held that "as an integral part of athletic competitions, persons are generally held by their actual and implied consents to the risks of injury-causing events which are known, apparent or reasonably foreseeable consequences of the participation." Benitez, at 32.

Using language which was to achieve landmark status in New York courts, the Court of Appeals held " that a board of education, its employees, agents and organized athletic councils must exercise ordinary reasonable care to protect student athletes voluntarily involved in extracurricular sports from unassumed, concealed or unreasonably increased risks." Benitez, at 33. The Court reversed the decision of the Appellate Division and the trial court, dismissed all remaining claims against the board of education and the league and voiding the jury verdict in Benitez's favor.

> Fatigue and, unfortunately, injury are inherent in team competitive sports, especially football. Benitez was concededly an excellent athlete, properly equipped and well-trained. He was playing voluntarily in the same manner as he had for the previous year and one-half against Division A competition and had not requested rest or complained. Within the breadth and scope of his consent and participation, plaintiff put himself at risk in the circumstances of this case for the injuries he ultimately suffered....The injury in this case, in sum, was a luckless accident arising from the vigorous voluntary participation in competitive interscholastic athletics.

Benitez, at 34.

The Benitez decision, like Turcotte, Arbegast and Maddox before it, was to have far-reaching consequences and significant vitality. The lesson learned was clearly that athletes who play a sport voluntarily and with an awareness of the risks involved cannot expect the protection of the courts in the event of injury, as long as the injury did not result from unknown, concealed or unforeseeable factors. As we shall see below, the courts of New York have been consistent in their application of these four decisions in a variety of sports settings

Can You Really Fall Through a Window While Playing Ring-o-Levio?

Apparently, you can. Just ask Patrick Kelly, an unfortunate young man who suffered that fate during a game of ring-o-levio at his grade school in Great Neck on August 7, 1985. While attempting to "capture" another boy, poor Patrick stumbled and fell into and through a glass window on the ground floor of the building. In dismissing Patrick's claims (and in so doing, actually spending the better part of a paragraph debating the correct spelling of the game's

name and finally noting, "We need not resolve this issue."), the Appellate Division, Second Department, held that Patrick, by his voluntary participation in the game, had assumed the risk that he might suffer injury. Kelly v. Great Neck Union Free School District, 192 A.D.2d 696, 597 N.Y.S.2d 136 (1993), citing Turcotte and Maddox.

While the Kelly case might provide a somewhat unusual sports setting for the application of the doctrine of assumption of risk, it should come as no surprise that the bulk of the cases dealing with the doctrine in sports involve more "traditional" athletic pursuits. However, with the exception of those decisions which deal with swimming and diving (which will be discussed below separately), the lessons of the Arbegast-Maddox-Turcotte-Benitez line of cases are to be found as the lynchpins of the reasoning of the courts, regardless of the sport involved.

Baseball/Softball (and you thought holes were only found on golf courses!

Baseball and softball have provided particularly fertile ground for the application of the doctrine of assumption of risk. The most common causes of injury seem to have been the condition of the playing surface, or the presence of a foreign object, or both.

Lori Parisi, a 13-year-old second baseman on a modified softball team , volunteered to warm up one of the team's pitchers during a practice in the school gym. She turned to look at the gym clock to check the time, and as she turned her attention back to the pitcher, she was struck in the face by a ball. The Appellate Division, Third Department, refused to dismiss her claims, noting that questions of fact existed as to whether the school district had exercised reasonable care to protect Lori from unassumed, concealed or unreasonably increased risks of injury, citing Benitez. The court held further that any assumption of risk which might be attributed to Lori as a result of her voluntary participation in the practice was to be weighed by the jury in its determination of the comparative fault of the parties (citing Arbegast). Parisi by Parisi v. Harpursville Central School District, 160 A.D.2d 1079, 553 N.Y.S.2d 566 (1990).

The school gym was not very friendly to young Steven Marlowe, either, as he was struck in the face and mouth by a baseball bat inadvertently thrown by a classmate during gym class. Noting that "plaintiff assumed the risk that a bat might be thrown accidently...," (citing Turcotte) the court held that the school district had breached no duty to protect Steven from unassumed, concealed or unreasonably increased risks (citing Benitez). Marlowe v. Rush-Henrietta Central School District, 167 A.D.2d 820, 561 N.Y.S.2d 934 (Fourth Department,1990).

A line of cases has developed featuring baseball players and softball players who claim injury as a result of the presence of some object not normally found on a ball field , or as a result of some defect present in the field itself. Without exception, the appellate courts deciding these cases have applied the doctrine of assumption of risk, as set forth in Arbegast, Turcotte, Maddox and Benitez, to the facts presented; almost without exception, the courts have found that the injured player assumed the risks of participation in the game or practice, and on that basis, the claims have been dismissed. See Russini v. Incorporated Village of Mineola, 184 A.D.2d 561, 584 N.Y.S.2d 622 (Second Department, 1992)(player was injured when he tripped into a hole on the basepath while running from second base to third base; the hole was six inches deep and twelve inches wide, and the player had observed the poor condition of the field before the game); Hoffman v. City of New York, 172 A.D.2d 716, 569 N.Y.S.2d 99 (Second Department, 1991)(catcher assumed the risk of collision with a baserunner attempting to score from third base, even though he claimed to have stepped into a hole as he planted his feet to prepare for the collision); Kennedy v. Rockville Centre Union Free School District, 186 A.D.2d 110, 587 N.Y.S.2d 442 (Second Department, 1992)(player assumed risk of being struck with second ball in play during pre-game warm-up); Pascucci v. Town of Oyster Bay, 186 A.D.2d 725, 588 N.Y.S.2d 663 (Second Department, 1992)(player was injured during a softball game when he ran into a light pole in fair territory; the risk presented by the pole was not a concealed one, and the plaintiff consciously assumed the risk by his voluntary participation in the game); Ferraro v. Town of Huntington, 202 A.D.2d 468, 609 N.Y.S.2d 36 (Second Department, 1994)(another "light pole" case); Gonzalez v. City of New York, 203 A.D.2d 421, 610 N.Y.S.2d 569 (Second Department, 1994)(infant plaintiff was injured while sliding into home plate during a game; allegedly, there was a depression in the ground around home plate); Giovinazzo v. Mohawk Valley Community College, 207 A.D.2d 980, 617 N.Y.S.2d 90 (Fourth Department, 1994)(softball player claimed injury while playing on a field that featured wet, spongy areas where a player's foot could become stuck); Rich v. Attanasia, 209 A.D.2d 396, 618 N.Y.S.2d 106 (Second Department, 1994)(another collision at home plate); Esposito v. Carmel Central School District, 640 N.Y.S.2d 606 (Second Department, 1996) (college baseball player assumed the risk of injury by his voluntary participation in a

practice at the local high school, when he was struck in the eye by a ball while pitching batting practice).

An unusual set of facts was presented in Pichardo v. North Patchogue Medford Youth Athletic Assoc., Inc., 172 A.D.2d 814, 569 N.Y.S.2d 186 (Second Department, 1991). The plaintiff's decedent, a nineteen-year-old shortstop for a Connie Mack summer league team, was struck and killed by lightning during a game. Citing Turcotte and Benitez, the court held that "by electing to continue to play baseball in weather conditions which were readily apparent (at some point in the game, thunder was heard and some lightning was seen in the distance), the plaintiff's decedent assumed the risks inherent in continued play." Pichardo, at 187.

McCrorey v. City of Buffalo, 210 A.D.2d 908, 620 N.Y.S.2d 660 (Fourth Department, 1994), presents a case in which the court upheld the player's right to present his case to a jury. Stephen McCrorey was injured when he ran into a chain link fence during pre-game warm-ups. The Appellate Division, Fourth Department, found that there were questions of fact relative to whether the construction of the field and the height and condition of the fence presented risks inherent in the sport of baseball and if so, whether the plaintiff had assumed those risks. See also, Ferone v. Sachem C.S.D. at Holbrook, 639 N.Y.S.2d 43 (Second Department, 1996), where the plaintiff softball player was injured when he ran into a soccer goal post while chasing a long fly ball; the court found that he had assumed the risks of injury by voluntarily playing, and that the goal post was not a concealed hazard.

Soccer (Everyone thinks he's Pele)

Most commonly, claims brought by players injured during a soccer game involve poor field conditions. The most common complaints are of fields that are wet or muddy or both, and of fields that are uneven or poorly maintained. Nevertheless, injured players have been held time and again to have assumed the risks of their voluntary participation in the game, and their claims have been dismissed. See Schiffman v. Spring et al, 202 A.D.2d 1007, 609 N.Y.S.2d 482 (Fourth Department, 1994); Reilly v. Long Island Junior Soccer League, 627 N.Y.S.2d 784 (Second Department, 1995); Alvarez v. Incorporated Village of Hempstead, 637 N.Y.S.2d 463 (Second Department, 1996).

Michelle LaMountain, a fifteen-year-old member of the junior varsity soccer team at South Colonie Central High School, was injured when, as she attempted to kick the ball, she was "run over" by three players on the opposing team, as a result of which she sustained injuries to her left knee and leg. Noting that her participation in the game was voluntary and that, as a player with more than four years of experience, she knew or should have known of the risks of physical contact with other players, the court dismissed her claims, citing Turcotte and Benitez. LaMountain v. South Colonie Central School District, 170 A.D.2d 914, 566 N.Y.S.2d 745 (Third Department, 1991).

On June 16, 1989, David Nielson, age nine, and his four-year-old sister were playing on a town soccer field. In the course of their play, they climbed onto the netting of a soccer goal, propelling it onto the ground and onto them. Both children were injured, and their mother commenced an action against the town. The trial court granted the town a dismissal of all claims. The Appellate Division, Fourth Department, reversed, holding that it could not be said as a matter of law that the children assumed the risks of injury , and further that there were questions of fact as to whether the town had a breached a duty to keep the field and its attendant equipment safe. "The Town owes to those who use its parks a duty of ordinary care against foreseeable danger....Consistent with that duty, the degree of care to be exercised must take into account the known propensity of children to roam and climb and play." Nielson v. Town of Amherst, 193 A.D.2d 1073, 598 N.Y.S.2d 878 (Fourth Department, 1993) But see Shelmerdine v. Town of Guilderland, 636 N.Y.S.2d 213 (Third Department, 1996)(where irrigation system drain cover, surrounded by depressed ground, was present in the playing field, injured soccer player nonetheless assumed the risks of injury by his voluntary participation, where he had played on that field many times previous to his injury).

Football ("Put me in, coach!", Part 2)

On November 1, 1981, Richard Locilento, a 17-year-old senior, dislocated his shoulder during an intramural tackle football game at his school. Believe it or not, someone in authority at John A. Coleman Catholic High School in Ulster County thought that it was reasonable to conduct a tackle football game without issuing any protective equipment whatsoever to the participants - imagine the surprise when young Richard dislocated his shoulder in the process of tackling another player!

The Locilento family sued the school, claiming that it had been negligent in failing to provide proper equipment, in failing to properly supervise the game, and in failing to properly train the players. The jury found in Richard's favor, but it apportioned forty

percent of the liability onto him and sixty percent onto the school. Both parties appealed to the Appellate Division, Third Department.

In affirming the jury's determination, the Appellate Division noted its disagreement with the school's position that since Richard voluntarily participated in the game, he assumed the risk of injury. Citing Arbegast, the Court held that "Defendants' argument fails to make the distinction between express and implied assumption of risk....Here, there is no suggestion of an express assumption which would in fact act as a bar to recovery....Rather, plaintiff's voluntary participation clearly speaks to an implied assumption, which is simply a factor relevant in the assessment of culpable conduct." Locilento v. John A. Coleman Catholic High School, 134 A.D.2d 39, 523 N.Y.S.2d 198, at 200 (1987).

Johnny Chan suffered paralysis and mental impairment after falling on a patch of ice while playing touch football in a schoolyard. In a curious decision in which it found the school district liable, the jury also found that while Johnny had assumed the risks of injury as a result of his participation, his assumption of such risk was not a proximate cause of his injury in any way. In other words, the jury found the school district solely liable, even though Johnny assumed the risk that he might be injured. The Appellate Division, Second Department, rode to the rescue in the name of judicial consistency, reversing the jury's determination as to the apportionment of liability and directing that a new trial be held to determine the relative degrees of comparative fault between Johnny and the school district. Chan v. Board of Education of the City of New York, 162 A.D.2d 576, 557 N.Y.S.2d 91 (1990).

Other recently reported cases have witnessed only unsuccessful plaintiffs, all holding that the injured player assumed the risk of injury by voluntary participation in a situation where there was no concealed or unforeseeable risk or condition. See Snyder v. Morristown Central School District No.1, 167 A.D.2d 678, 563 N.Y.S.2d 258 (Appellate Division, Third Department, 1990) (plaintiff was injured during a coeducational touch football game played on a wet field); Morales v. Diaz, 187 A.D.2d 295, 589 N.Y.S.2d 456 (Appellate Division, First Department, 1992)(plaintiff was injured while playing football on a field he knew to be wet, muddy and slippery, and he assumed the risk of slipping and falling while trying to catch a pass); Tarigo v. Club Med Hualtulco, 207 A.D.2d 709, 616 N.Y.S.2d 503 (Appellate Division, First Department, 1994)(plaintiff was playing "flag football" at a resort; he fell over a flag and sustained injury; citing Pascucci, infra. and Maddox, the court held that the risk posed by the flags was not concealed, that the defendant exercised its duty of making the playing field as safe as it appeared to be, and that the plaintiff assumed the risks of injury by his voluntary participation in the game.).

Tennis (After all, the game is played on a "court"!)

Tennis players who have been injured by coming into contact with an object which formed a part of the playing area have been generally unsuccessful in their attempts to obtain recovery for their injuries. The appellate courts have held that they assumed the risks of injury by their voluntary participation, and that the claimed injuries were not the result of concealed or unforeseeable conditions existing on or around the court. See Viniar v. Town of Oyster Bay, 197 A.D.2d 683, 603 N.Y.S.2d 18 (Appellate Division, Second Department, 1993) (plaintiff sustained injury when she ran into the net); Delaney v. Town of Hempstead, 204 A.D.2d 511, 611 N.Y.S.2d 306 (Appellate Division, Second Department, 1994) (plaintiff was injured when she collided with a wooden fence at the rear of the court).

However, it has been held that the issue of a player's assumption of risk must be left to the jury to decide, where the injury was the result of the player's contact with an object not normally present on a tennis court, and thus not necessarily foreseeable to the player. Irving Radwaner was playing on Court H at the USTA Flushing Meadows Center, when his foot became entangled in a "dragging divider net" which was in place to divide the courts. Upon trial, he was awarded $183, 132.50 by the jury. The center appealed, and the jury verdict was affirmed. In holding that the issue of the plaintiff's assumption of risk, and of the foreseeability of such risk, was properly before the jury to decide, the court held that "we cannot say that a dragging divider net is a hazard to which tennis players must be normally exposed....A triable issue of fact remains when engendered additional risks exist that do not inhere in the sport." Radwaner v. USTA National Tennis Center, 189 A.D.2d 605, 592 N.Y.S.2d 307 (Appellate Division, First Department, 1993).

An unusual issue was presented in Conolly v. St.John's University, 176 A.D.2d 625, 575 N.Y.S.2d 68 (Appellate Division, First Department, 1991). Carol Conolly, a member of the women's varsity tennis team at St. John's University and the recipient of an athletic scholarship, sustained injury during a game played on one of the school's courts - a court she claimed was defective. The university brought a motion for summary judgment seeking dismissal of

her lawsuit; the trial judge denied the motion and the university took an appeal. On appeal, St. John's claimed that Conolly had assumed the risks of injury when she voluntarily played on a tennis court she knew to be defective. Conolly's response was that she was not playing "voluntarily;" she was required to play in all university tennis matches to preserve her scholarship, including those matches to be played on a court she knew to be defective. The Appellate Division, First Department, decided that there was a triable question of fact as to whether her decision to play on the defective court was in fact a "voluntary" act, and the case was returned to the lower court for trial.

Ice Hockey (God bless the rink rat!)

The decisions involving assumption of the risk of injury in hockey games have been uniform in their denial of recovery to the injured player, and consistent in their application of the respective decisions in Turcotte, Maddox and Benitez. All reported cases hold that the player assumed the risk of injury by voluntary participation in the game, and that there was no breach of duty by the defendant. See Cassese v. Ramapo Ice Rinks, Inc., 208 A.D.2d 488, 616 N.Y.S.2d 797 (Appellate Division, Second Department, 1994); Greenberg v. North Shore Central School District No.1, 209 A.D.2d 669, 619 N.Y.S.2d 151 (Appellate Division, Second Department, 1994).

Skiing (How can I get hurt on all that nice white snow?)

It would be reasonable to expect that the reported cases involving skiing accidents also involved novice or inexperienced skiers. In fact, all of the cases I have found involved injury to experienced skiers.

Nina Fabris, an experienced intermediate skier, had spent the day of January 11, 1986, skiing at Holiday Mountain Ski Area in Sullivan County. At 9:00 P.M., she began to ski the "Christmas Bowl" trail for the first time that day; she encountered icy conditions half-way down, and she tried to stop along the side of the trail. However, she was unable to bring herself to a complete stop, and ultimately, she lost control, fell on her buttocks and slid 155 feet down the slope into a fence post which was placed some 45 feet from the base of the trail. The fence was in place to separate the trail from the loading area of the chair lift. Ms. Fabris sued the Town of Thompson, the owner of the ski area. The town brought a motion for summary judgment, claiming that Ms. Fabris had assumed those risks of injury that are inherent in skiing, and further that the town had not breached any duty it owed to her. The trial judge disagreed and denied the motion; the town took an appeal to the Appellate Division, Third Department.

While noting that "voluntary participants in the sport of downhill skiing assume the inherent risks of personal injury caused by...terrain, weather conditions, ice, trees and man-made objects that are incidental to the provision or maintenance of a ski facility," the court determined that there was a question of fact regarding the placement of the fence, such that the town's motion was properly denied.

> The town contends that the fence was the demarcation of the absolute limit of skiable terrain and was a visible trailside obstruction of a common and known nature hardly different from a grove of trees. The town further argues that contact with visible solid objects on the perimeter of the ski trail, whether a fence, tree or chair-lift support,...is among the known assumed risks of skiing. While the town correctly states this principle of law, the location of the post here is in factual dispute. If indeed the post was located on the ski trail, the town could be found to have failed to maintain its property in a reasonably safe condition....
>
> We are unable to conclude on this record, as a matter of law, that plaintiff assumed the risk related to a man-made obstacle of this type within the confines of the ski trail. Accordingly, with the location of the post being determinative and remaining unresolved, the order denying the town's motion for summary judgment must be affirmed.

Fabris v. Town of Thompson, 192 A.D.2d 1045, 597 N.Y.S.2d 477 (1993), at 478.

See also, McKenney v. Dominick, 190 A.D.2d 1021, 593 N.Y.S.2d 644 (Appellate Division, Fourth Department, 1993), another case where issues relating to the scope of the skier's assumption of risk were for the jury to decide.

The Appellate Division, Third Department, had an opportunity to "hit the slopes" again in Giordano v. Shanty Hollow Corp., 209 A.D.2d 760, 617 N.Y.S.2d 984, decided on November 3, 1994. As compared to Fabris, this case involved an injury that was related to the topography of the slopes, rather than to the presence of some man-made object.

James Giordano was an experienced skier of intermediate to advanced ability. Prior to the day of his injury, he had skiied at Hunter Mountain many times, including many runs down the particular trail on which ultimately he was injured. In fact, his injury occurred during his second run on that trail that day. Acording to him, he unexpectedly encountered a steep drop in the trail, causing him to become airborne. As he landed, the tip of his right ski caught on an unseen natural object on the trail, resulting in a severe injury to his right leg. Later, he would tes-

tify that the steep drop and the presence of natural objects on the trail were not obvious to him, and that he was not aware of them as he came to the area where he was injured.

Giordano sued the ski area owner, claiming that it had been negligent in failing to warn of the hazardous conditions created by the steep drop and objects on the trail. In turn, the ski area owner contended that Giordano was injured as the result of a risk inherent in the sport, and that he had voluntarily assumed the risks of his injury. The owner 's motion for summary judgment was denied, as the trial judge found question of fact for the jury to decide. The owner appealled, and the Appellate Division, Third Department, reversed and dismissed Giordano's complaint.

Citing Turcotte, Maddox, and its prior holding in Fabris, the court noted:

> As a result of plaintiff's voluntary participation in the activity, defendat's duty was to make the conditions as safe as they appeared to be, and if the risks of the activity were fully comprehended or perfectly obvious, plaintiff consented to them and defendant performed its duty....Awareness of the risk assumed must be assessed against the background of the skill and experience of the particular plaintiff....
>
> ....Risks of personal injury caused by, among other things, terrain, weather conditions, ice, natural objects and man-made objects that are incidental to the provision or maintenance of a ski facility are inherent in the sport of downhill skiing....Considering plaintiff's experience and skill level, we are of the view that he knew or should have known that sudden changes in grade, including those caused or enhanced by snowmaking or grooming, and the presence of natural objects...can and do occur.... Based upon the undisputed facts, we conclude that as a matter of law plaintiff assumed the risk of injury in this case and that defendant performed its duty.

Giordano, at 984-985.

It is interesting to note that the court included risks associated with snowmaking and grooming of the slopes and trails as risks to be expected and assumed by skiers, since those activities are a maintenance function of the ski area owner and not a natural feature to be found as a part of the topography of the ski trails. A case could be made that the Giordano decision has in some way codified a "skiers beware" philosophy. See DiCruttalo v. Blaise Enterprises, Inc., 211 A.D.2d 858, 621 N.Y.S.2d 199 (Appellate Division, Third Department, 1995) for a similar result from the same court.

Apparently, there is a possibility that even a first-time skier can be held to have assumed the risks of injury by voluntarily engaging in the sport. Brent Roberts had never been on skis before the day of his accident. On his first run of the day, he fell after hitting a patch of dirt on the trail, and he was then struck by another skier. The trial court denied the ski area's motion for summary judgment, but the Appellate Division, Second Department, reversed, holding that there were questions of fact as to whether Roberts had assumed the risk of injury, and whether the dirt patch was obvious and apparent, or concealed. Roberts v. Ski Roundtop, Inc., 212 A.D.2d 768, 623 N.Y.S.2d 264 (Second Department, 1995). See also, Rigano v. Coram Bus Service,Inc., Ski Windham Corp., ___A.D.2d___(First Department, 4/25/96).

Boxing/Wrestling

Willie Classen, a professional boxer of some notable success, died subsequent to a fight at the Felt Forum at Madison Square Garden on November 23, 1979. During the fight, he received several blows to the head, and he was examined by the ringside doctor after the ninth round. After the doctor pronouced him fit to continue, the tenth round commenced. Within seconds and after another blow to his head, Classen collapsed ino unconsciousness. He died five days later.

His estate claimed that his death had been caused by the negligence of the promoter, the Garden, and the doctor, for allowing the fight to continue. The defendants claimed that while his death was unfortunate, Classen had participated willingly, and therefore he had assumed the risk of injury. Citing Turcotte, the court agreed with the defendants, noting that the plaintiff, "as a professional boxer, had participated in approximately twenty professional bouts between 1977 and 1979....As such, he knew or should have known of the risks of injury inherent in the sport of professional boxing." Classen v. Izquierdo, et al., 520 N.Y.S.2d 999, at 1001 (Supreme Court, New York County, 1987.) See also, DiMarco v. New York City Health and Hospitals Corporation, 187 A.D.2d 479, 589 N.Y.S.2d 580 (Second Department, 1992).

The issue of proper weight class has had a role in analysis by the courts of the doctrine of assumption of risk relative to claimed injuries by wrestlers. Ceaser DeGala was an experienced high school wrestler, but he sustained injury while wrestling a teammate who was three classifications heavier than he in practice. The Appellate Division, First Department, held that there were questions of fact as to whether the plaintiff was compelled to wrestle - even in practice - above his weight class; whether he voluntarily did so and thereby assumed the risk of injury; and whether the rule prohibiting wrestlers from wrestling

more than one weight class above their own was intended to protect wrestlers such as the plaintiff from injury during practice with teammates as well as during matches with other schools. DeGala v. Xavier High School, 203 A.D.2d 187, 610 N.Y.S.2d 270 (First Department, 1994).

In contrast, in Edelson v. Uniondale Union Free School District, 631 N.Y.S.2d 391 (Second Department, 1995), the Court held that the plaintiff, an experienced high school wrestler, had voluntarily assumed the risk of injury, where he agreed to wrestle an opponent who was in the next highest weight class:

> By his own deposition testimony, the plaintiff ...did not object to the match.
>
> Further, the event leading to the alleged injury suffered by the plaintiff, a blow to the jaw during a 'take-down' move, was reasonably foreseeable in a wrestling match and was not caused by the size of his opponent. Thus, the plaintiff assumed the risk of incurring the blow to the jaw.

Edelson, at 392.

Alexander v. Kendall Central School District, 634 N.Y.S.2d 318 (Fourth Department, 1995) involved an injury sustained by a high school wrestler who was driven from the mat and into the scorer's table. The school district had moved for summary judgment, claiming that the plaintiff had assumed the risks of injury by his voluntary participation in the match. The trial court denied the motion, and the Appellate Division, Fourth Department, agreed with that decision. The Court found that there were questions of fact regarding whether the placement of the scorer's table was a risk which the plaintiff could have knowingly assumed, and whether the injury the plaintiff sustained and the manner in which it was sustained were foreseeable in a wrestling match.

Basketball (another game played on a "court")

Recent cases involving injury to basketball players have involved the playing of the game on an outdoor court, where many of the protections of a gymnasium cannot be found or anticipated. In Brown v. City of Peekskill, 212 A.D.2d 658, 622 N.Y.S.2d 772 (Second Department, 1995), the plaintiff was playing on an outdoor court, when he tripped on a curb present at the edge of the court and sustained injury. The Court, citing Benitez and Turcotte, held that the plaintiff assumed the risk of injury as a result of his voluntary participation on a court on which he had played on prior occasions. See also, Steward v. Town of Clarkstown, 638 N.Y.S.2d 125 (Second Department, 1996) (plaintiff assumed the risk of injury by playing on a court on which he had played on prior occasions, where he was aware of the height differential between the paved court and an area of dirt which surrounded the court); Marescot v. St. Augustine's R.C. School, ___A.D.2d ___ (Second Department, 4/25/96) (plaintiff assumed the risk of injury by playing voluntarily in defendant's gymnasium).

An interesting situation was presented in Lombardo v. Boys Club of East Aurora, 639 N.Y.S.2d 206 (Fourth Department, 1996). During an open gym class, the plaintiff thought it might be a good idea to try to dunk a basketball by launching himself into the air by taking a running leap from a chair. He hung from the rim, and then fell to the floor, sustaining injury. Citing Benitez, the Court found questions of fact as to the level of supervision provided by the defendants, and remanded the case for trial. In a strongly worder dissent, Judge Lawton voted to dismiss plaintiff's complaint, noting that defendant's supervision, or lack thereof, was not "a competent producing cause of plaintiff's injuries." Rather, this plaintiff "was aware of and appreciated the hazard to which he exposed himself," and therefore, his claim should have been dismissed. Lombardo, at 206-207.

Swimming/Diving

The sports of swimming and diving have proved to be fertile ground for litigation revolving around the scope of a plaintiff's knowledge of the risks he or she would face in the course of participation. The seminal case in this area is Smith v. Stark, 67 N.Y.2d 693, 499 N.Y.S.2d 922, decided by the Court of Appeals on February 6, 1986. Paul Smith sustained severe injuries when he dove into the shallow end of an in-ground residential swimming pool. In his cause of action against the pool mnanufacturer, Smith claimed that his injuries were the result of improper depth markings around the pool. The Court sustained the dismissal of Smith's complaint, finding that the lack of depth markings was not the proximate cause of his injuries, in light of his general experience in swimming and diving and his observations of this particular pool prior to his accident:

> ....He was an experienced swimmer familiar with in-ground pools and with the proper method of diving into shallow water. At an examination before trial, he admitted...that he had observed a diving board at one end of the pool, which he knew to be the deep end, and a set of steps at the opposite end of the pool, which he knew to be the shallow end, and that he saw several people standing in the pool.
>
> ....By virtue of plaintiff's general knowledge of pools, his observations prior to the accident and plain common sense, plaintiff must have known that, if he dove into the pool, the area into which he dove contained

shallow water.
Smith, at 923.

The Smith decision set the standard by which New York courts have determined the right of recovery of a person who claims injury as a result of a swimming or diving accident. Its reasoning appears with the same repetitive frequency in swimming and diving cases as Turcotte, Maddox, Arbegast and Benitez appear in decisions regarding other sports.

The Court of Appeals revisited this issue, among others, in Amatulli v. Delhi Construction Corporation, 77 N.Y.2d 525, 569 N.Y.S.2d 337 (1991). This interesting case involved an above-ground pool which, contrary to the directions of the manufacturer, was at least partially installed in-ground, with some surrounding decking. While the pool had an actual depth of only four feet, its method of installation "transformed its configuration in such a manner as to obscure its four-foot depth, which would have been readily apparent as a warning against diving had the pool been installed above ground." Amatulli, at 341.

Finding that this situation created a new potential danger not envisioned by the manufacturer, the Court found questions of fact which should be left to the jury to decide, as the plaintiff maintained that because of the pool's improper installation, while he was aware of the pool's shallowness around its edges, it appeared to him to be deep enough for him to dive safely. See also, Silverman v. Zebersky, 174 A.D.2d 615, 571 N.Y.S.2d 317 (Second Department, 1991) (material issues of fact were present as to whether plaintiff's conduct in diving into pool was reckless, and whether pool, as designed and installed, was safe for diving); Feldman v. Drum, 178 A.D.2d 504, 577 N.Y.S.2d 144 (Second Department, 1991)(plaintiff's reckless conduct caused her injuries); Bartheld v. Marathon Organization, Inc., 190 A.D. 2d 667, 593 N.Y.S.2d 290 (Second Department, 1993) (the dangers of diving into a four-foot-deep above-ground pool were obvious, and the plaintiff assumed the risks); Sciangula v. Mancuso, 204 A.D.2d 708, 612 N.Y.S.2d 645 (Second Department, 1994)(plaintiff's reckless conduct in diving into pool while fully clothed caused his injuries); Magnus v. Fawcett, 637 N.Y.S.2d 707 (First Department, 1996)(plaintiff was familiar with the pool, having cleaned it and having dived into it on prior occasions); Aronson v. Horace Mann-Barnard School, 637 N.Y.S.2d 410 (First Department, 1991)(plaintiff's injuries were the result of her misexecution of a dive, rather than the result of some defect or dangerous condition present in the pool).

David Heard was seriously injured when he dove off a jetty in shallow water at Rockaway Beach in Queens. Only moments earlier, he had been warned not to do so by a lifeguard. The lawsuit he commenced found its way up to the Court of Appeals, where the City of New York argued that Heard had assumed the risks of injury by his diving, and its duty to him was limited to protecting him from risks that are "assumed, concealed or unreasonably increased," (citing Benitez and Turcotte). The Court agreed, holding that the plaintiff was solely at fault for his injuries. "Plaintiffs here failed to show that the risk actually encountered was unusual to ocean diving or not obvious." Heard v. City of New York, 82 N.Y.2d 66, 603 N.Y.S.2d 414, at 416 (1993). See also, Tillman v. Niagara Mohawk Power Corporation, 199 A.D.2d 593, 604 N.Y.S.2d 649 (Third Department, 1993)(sole cause of plaintiff's injuries was her scaling of dam and her attempt to walk across its top, which she knew was at a dangerous height and was wet); Wayne v. Huey, 200 A.D.2d 424, 606 N.Y.S.2d 223 (First Department, 1994)(sole cause of plaintiff's injuries was her reckless conduct in trying to jump into defendant's pool from the roof of defendant's garage); Clark v. Sachem School District at Holbrook, ___A.D.2d___ (Second Department, 5/6/96)(plaintiff cuased his own injuries by trying to execute dive into shallow end of school pool).

In a somewhat humerous vein, Mitura v. Roy , 174 A.D.2d 1020, 572 N.Y.S.2d 182 (Fourth Department, 1991) involved a claim of injury when the plaintiff and defendant's dog dove into defendant's swimming pool at the same time. While present at a picnic in defendant's yard, the plaintiff dove off the diving doard. At the same time, the defendant's dog dove into the pool, and the plaintiff landed on the dog, sustaining injury to his face. Apparently, the defendant was aware that his dog had a habit of jumping into the pool if it saw a person jump or dive into the pool, and in the past the defendant had put the dog in his garage if people were using the pool. As a result, the Court held that there were questions of fact with regard to the scope of defendant's knowledge, and of plaintiff's knowledge as well, with regard to whether the plaintiff could have assumed a risk that the dog might cause him injury in the course of his diving into the pool.

Golf (is golf a "contact" sport?)

Roberta and Gary Rinaldo were driving on Route 219 in the vicinity of the Eleventh Hole at Springville Country Club, when their windshield was shattered by a golf ball. Defendants McGovern and Vogel, both apparently possessing tremendous slices on their tee shots, had driven their tee shots on that hole either

into or over the trees that separated the Eleventh fairway from the road. The Rinaldos claimed that either or both of the defendants had failed to give adequate and timely warning of their intention to hit their tee shots. The defendants moved for summary judgment, and their motion was granted. In affirming the dismissal of plaintiffs' claims, the Appellate Division, Fourth Department, held that a golfer has no duty to warn persons who are not in the intended line of flight of an intention to hit the ball. Thus, "if a golfer owes no duty to warn a person on another tee or fairway of his intention to hit the ball, he owes no duty to warn a person inside an automobile, driving by the golf course on an adjacent roadway." Additionally, the Court held that the defendants were not negligent for having hit a "bad shot" - "Even the best professional golfers cannot avoid an occasional 'hook' or 'slice.'"

Rinaldo v. McGovern et al, 167 A.D.2d 942, 561 N.Y.S.2d 1006 (Fourth Department, 1990). The Court of Appeals affirmed in all respects. Rinaldo v. McGovern et al, 78 N.Y.2d 729, 579 N.Y.S.2d 626 (1991).

In Egeth v. County of Westchester, 206 A.D.2d 502, 614 N.Y.S.2d 763 (Second Department, 1994), the plaintiff claimed injury while walking over a low mound of earth that separated the Seventh green from the cart path at defendant's golf course. The Appellate Division, Second Department, sustained the dismissal of the plaintiff's claim, holding that the plaintiff had assumed the risk of injury by voluntarily walking in that area, which was not concealed and was obvious, and which was "terrain...inherent to the nature of the golf course." Egeth, at 764.

Victoria Lundein claimed injury when she was struck by a golf ball hit by another golfer on another tee. She claimed that, among other things, the defendant course owner had breached its duty to properly design and maintain the golf course. The Appellate Division, Second Department, citing Maddox, disagreed, holding that the defendant had not breached any duty owed to its patrons by a reasonably prudent golf course owner. Further, citing Arbegast, the Court held that the plaintiff had assumed the risk of injury in her voluntary participation in golf. Lundin v. Town of Islip, 207 A.D.2d 778, 616 N.Y.S.2d 394 (Second Department, 1994).

Motor sports

Masone v. State of New York, 563 N.Y.S.2d 992 (Court of Claims, 1990) involved claimed injury to a dirt bike rider who sustained injury while trying to ride over or jump over a pile of sand which he encountered on a path in a state park. The Court held that the plaintiff was an experienced dirt bike user, that his fellow rider had warned him of the presence of the sand pile, and that the pile was visible from a distance of more than seventy yards up the path. Therefore, the Court found that the plaintiff had assumed the risks of injury by his voluntary use of the path, and his claim was properly dismissed.

In Owen v. R.J.S. Safety Equipment, Inc., et al, 79 N.Y.2d 967, 582 N.Y.S.2d 998 (1992), the Court of Appeals considered tha case of a professional racecar driver who was killed during a race at Orange County Fair Speedway. The plaintiffs claimed that the contour of the track's retaining wall, as well as the placement of barrels near the guardrail, was unique and created a dangerous condition. The defendants claimed that the decedent had assumed the risks of his voluntary participation in the race.

The Court held that there were questions of fact regarding what risks the decedent can be held to have assumed - questions which prevented the dismissal of plaintiffs' claims and which should be decided by the jury.

> Although plaintiff's decedent may have been an experienced race car driver who assumed the risks of injury that ordinarily attend auto races, these affidavits were sufficient to create a triable question of fact as to whether defendants' alleged negligence, if any, engendered additional risks that 'do no inhere to the sport' and, if so, whether the decedent should be deemed to have assumed those risks by voluntarily participating in the race...(citing Turcotte).

Owen, at 999.

On October 9, 1983, Daniel Lamey, a veteran all-terrain vehicle racer, was rendered a paraplegic in an accident that occurred while he was performing a promotional stunt for a television crew. At the time of his accident, he was generally considered to be one of the top three ATV racers in the United States. The course in question was set up on a horse race track which was surrounded by a wooden fence. On the morning of his accident, hay bales were placed on the track in front of the fence. Lamey's accident occurred when, as he approached a corner at high speed, his right rear wheel struck one of the hay bales, causing his ATV to flip and throwing him over the bales into a fence post, severing his spinal cord.

During the course of the litigation, it became apparent that Lamey "generally understood the hazards of riding three-wheel ATVs and the particular risks that arise in connection with racing them in close confines at high speeds..." Lamey v. Foley, 188 A.D.2d 157, 594 N.Y.S.2d 490, at 492 (Fourth Department, 1993). Additionally, only minutes before his accident, he had conducted a videotaped inter-

view in which he expressly acknowledged the risk of crashing during a race.

On the other hand, there was evidence presented that the presence of the fence and the use of the hay bales created hazards not normally to be found at ATV races, and may have been contrary to the way such tracks were to be designed. In light of such conflicting evidence, the Appellate Division, Fourth Department, found questions of fact as to what risks the plaintiff had in fact assumed, and whether those risks were to be expected as a part of the sport.

Horseback Riding (no, not donkeys!)

There are not many reported cases of injury to persons while riding horses recreationally (as opposed to Turcotte) with regard to the doctrine of assumption of risk. Those cases that have been reported have found that the rider assumed the risks of injury by his or her voluntary participation in the sport. See Hammond v. Spruce Meadow Farm, Inc., 199 A.D.2d 1014, 605 N.Y.S.2d 586 (Fourth Department, 1993)(plaintiff, an experienced rider, was thrown from a horse as she attempted to jump an obstacle in wet and muddy conditions; she assumed the risk of her injury); Rubenstein v. Woodstock Riding Club, Inc., 208 A.D.2d 1160, 617 N.Y.S.2d 603 (Third Department, 1994)(12-year-old plaintiff had taken lessons for one and one-half years in handling, showing and riding horses, and she had been taught never to walk behind a horse; during a show she led her horse directly behind another horse, which kicked plaintiff with its hind leg, fracturing plaintiff's left leg; plaintiff was held to have assumed the risks of her injury, notwithstanding her age, based upon her experience and the open and obvious nature of the risk in question).

Track and Field (what goes up, must come down)

Ray Laboy was a first-year member of his high school's track team, and prior thereto, he had had no experience as a pole vaulter. In attempting a vault at his first interscholastic meet, he landed feet first on a seam in the landing mats, forcing them apart and allowing his knee to strike the pavement beneath. The trial court denied the defendant school district's motion for summary judgment, and the case went up to the Appellate Division, Third Department. In affirming the lower court's decision, the Court noted that there were questions of fact as to what risks the plaintiff had assumed, in light of his inexperience, and also as to whether the separation of the landing mats constituted a dangerous condition of which the plaintiff could have had no knowledge. Laboy v. Wallkill Central School District, 201 A.D.2d 780, 607 N.Y.S.2d 746 (Third Department, 1994).

See also, Dukes v. Bethlehem Central School District et al, 629 N.Y.S.2d 97 (Third Department, 1995) (plaintiff high school long jumper broke his leg in a meet held at another school; the Court held that his school bore no responsibility for his injury, as it had exercised no control over the preparation of the long jump pit; the same logic absolved all of the other defendants except the host school).

Umpires and Referees (yes, they can suffer injury, too!)

Richard Wertheim was working as a tennis umpire at the U.S. Open in 1983. He was struck in the groin by an "ace" which had landed "in" and then had spun into Mr. Wertheim. He fell to the court almost immediately. While he received immediate medical attention and was rushed to the hospital, he died four days later of a subdural hematoma.

His estate claimed that the defendant United States Tennis Association had unreasonably increased his risk of injury by requiring him to stand in the "ready" position until the ball was in play. Previously, umpires had been permitted to sit on elevated chairs or stood at full height.

Citing Turcotte and Maddox, the Appellate Division, First Department, directed the dismissal of the estate's claims. The Court noted:

> Being hit by a tennis ball is surely a risk normally associated with the sport as far as umpires are concerned....Here, the decedent was fully aware of the risk of being hit by a ball travelling at a speed in excess of one hundred twenty miles per hour...
>
> We hold as a matter of law that the requirement ...that umpires assume the ready position until the ball is in play was not reckless...

Wertheim v. United States Tennis Association, Inc., 150 A.D.2d 157, 540 N.Y.S.2d 443, at 444,445 (First Department, 1989). See also, Cuesta v. Immaculate Conception Roman Catholic Church, 168 A.D.2d 411, 562 N.Y.S.2d 537 (Second Department, 1990) (Volunteer baseball umpire was struck in the eye by a ball during a game sponsored by a church; plaintiff assumed the risk of his injury; interestingly, the evidence showed that the plaintiff volunteered to be the umpire after another person hollered to him , "Come on, get your butt out there and be the umpire." Cuesta, at 538).

Other sports

Several other sports have been the subjects of recent decisions in New York regarding the doctrine of assumption of risk. These decisions have been

consistent in their analysis and application of the doctrine, and we continue to see the recurring themes of Arbegast, Turcotte, Benitez and Maddox.

Cheerleading

Seventeen -year-old Meggin Cody was injured while participating in a cheerleading event. The accident occurred when two other cheerleaders tried to lift her into the air, and she fell backwards. Previously, this maneuver had been performed with a spotter, and on the night in question, Meggin asked for a spotter. However, none was provided by the school. The Appellate Division, Second Department, in upholding the denial of the school's motion for summary judgment, held that, while Meggin voluntarily participated in the cheerleading program and assumed those risks which were known to her, the school had a duty to protect her from unreasonably increased risks, such as those posed by the absence of a spotter. Cody v. Massapequa Union Free School District No. 23, ___A.D.2d___, (Second Department, 5/6/96)

Volleyball

The plaintiff, a volleyball player at S.U.N.Y. at Stony Brook, injured her leg during practice, when, while trying to spike the ball, she was distracted by the presence of a news cameraman on the opposite side of the court. The Court held that the presence of the cameraman, who was not located immediately in front of the plaintiff at the time of her accident, was not an unassumed, concealed or unreasonably increased risk, so as to constitute a breach of duty by the defendant. Tomaiko v. State of New York, 211 A.D.2d 782, 622 N.Y.S.2d 99 (Second Department, 1995).

Rugby

The young plaintiff sustained eye injuries when a camp counsellor ran into him during a game of rugby in which both campers and counselors played. The Court found that there was a question of fact as to whether the risks to the plaintiff were unreasonably increased by the active participation of the adult counselors. Mauner v. Feinstein, 213 A.D.2d 383, 623 N.Y.S.2d 326 (Second Department, 1995).

Field Hockey

Jean Baker, a sixteen-year-old field hockey player at Briarcliff Manor High School, sustained mouth injuries when she was struck in the mouth during practice. While she had a mouthguard with her, she was not wearing it at the time of her accident. The evidence presented indicated that there was some question as to whether the coach had emphasized the necessity for wearing mouthguards at all times, and whether the plaintiff simply took it upon herself not to wear the mouthguard on the day in question, thus assuming the risk that she might sustain injury. The Court upheld the denial of the school district's motion for summary judgment. Baker v. Briarcliff School District, 205 A.D.2d 652, 613 N.Y.S.2d 660 (Second Department, 1994).

Bobsledding

On January 11, 1986, the plaintiff was seriously injured when the two-man bobsled he was driving crashed during the National Bobsled Championships. The plaintiff was an experienced bobsled driver. The bobsled run in question had been completely reconstructed by the state in preparation for the 1980 Winter Olympic games. Among other things, the exit chute was redesigned, with a concrete abutment being placed at the first opening on the left wall of the chute. On the day of his accident, several hay bales had been placed in the area of this abutment.

The plaintiff's injuries occurred when his bobsled plowed through the hay bales into the concrete abutment. There was little question that the plaintiff, as an experienced bobsled driver, was fully aware of the hazards of his sport; in fact, he had been involved in prior accidents and one of his brothers had been killed in a bobsled accident in 1981. However, the Court found that in its reconstruction of the course, the state had created unreasonable risks for the participants - risks that the plaintiff cannot be said to have assumed; thus, the proximate cause of plaintiff's injuries was the negligence of the state, rather than the plaintiff's assumption of the attendant risks of his participation. Morgan v. State of New York, 618 N.Y.S.2d 967 (Court of Claims, 1994).

Karate

In the course of attending beginners' classes at the defendant karate school, the plaintiff received a blow to his head which left him with permanent physical damage. The Court held that there were questions of fact as to the scope of plaintiff's knowledge of what was expected of him and of the risks to which he was exposed in the classes. DeAngelis v. Izzo et al, 192 A.D.2d 823, 596 N.Y.S.2d 560 (Third Department, 1993).

Bicycling

The plaintiff, a student at Hobart College, was riding his bicycle on campus at night, when he veered off the path onto the grass and struck a tree root, catapulting the plaintiff over the handlebars onto the ground and leaving him a quadriplegic. The Court held that the defendants owed the plaintiff a duty to exercise reasonable care in inspecting the bike path for hazards, and that the plaintiff did not assume the risk of hitting a tree root while on the path. Weller v. Colleges of the Senecas, 217 A.D.2d 280, 635 N.Y.S.2d 990 (Fourth Department, 1995).

Bowling

The plaintiff, an experienced bowler, was injured when she stepped over the foul line and slipped on oil which had been applied to the lane by the defendant. The Court found that there were questions of fact as to whether the plaintiff had assumed the risks of injury in such an occurrence. Conary v. Clover Lanes, Inc., 199 A.D.2d 1067, 605 N.Y.S.2d 607 (Fourth Department, 1993).

Some Closing Thoughts

While it can be argued that some of the decisions have led to a harsh result, especially in light of the severe injuries that some of these plaintiffs have suffered, it is also equally clear that the path of decision by the courts in New York has, for the most part, been paved with common sense. After all, is it unreasonable to hold that a person is responsible for his or her actions, and the consequenses that flow from such actions, in the course of voluntary participation in sporting activity? To the extent that others have created unassumed, concealed or unreasonably increased hazards or conditions that have caused injury, such persons or entities have been held responsible; however, there is risk attendant to every human endeavor, and sport is no different. Participants in any sporting activity - from donkey basketball to ring-o-levio to karate - must assume, and in fact do assume, the risks of injury from their participation. The legal system cannot offer absolute protection from such injury; it can only offer hope of redress in the event injury occurs.

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