

## St. John's Law Review

---

Volume 76  
Number 2 *Volume 76, Spring 2002, Number 2*

Article 7

---

February 2012

### Sports and the Assumption of Risk Doctrine in New York

Lura Hess

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

---

#### Recommended Citation

Hess, Lura (2002) "Sports and the Assumption of Risk Doctrine in New York," *St. John's Law Review*. Vol. 76 : No. 2 , Article 7.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol76/iss2/7>

This Note is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact [selbyc@stjohns.edu](mailto:selbyc@stjohns.edu).

# SPORTS AND THE ASSUMPTION OF RISK DOCTRINE IN NEW YORK

LURA HESS<sup>†</sup>

## INTRODUCTION

Sports and athletic competition are an integral aspect of American life in all its varieties. Beginning in elementary school, and sometimes prior to, children are introduced to competitive sports and encouraged to embrace them as an analog to life and as a means of developing important life skills such as teamwork and discipline.<sup>1</sup> For adults, recreational sports and professional sports are a dominant part of mainstream American culture, providing much of the commonality that ties together our disparate and geographically diverse country.<sup>2</sup> But sports can be risky,<sup>3</sup> and injuries are an inherent part of athletic participation for students,<sup>4</sup> amateurs, recreational, and

---

<sup>†</sup> J.D. Candidate, June 2003, St. John's University School of Law; B.A., Jan. 1998, Cornell University.

<sup>1</sup> *Nabozny v. Barnhill*, 334 N.E.2d 258, 260 (Ill. App. Ct. 1975) ("One of the educational benefits of organized athletic competition to our youth is the development of discipline and self control.").

<sup>2</sup> For example, in the Seattle area, much of the Samoan population gathers weekly for cricket tournaments accompanied by festivities. The competitions have grown in size with the community and are said to "bring[] the whole community together like nothing else." *Phuong Cat Le, For Seattle Area's Samoans, Cricket is the Only Game in Town: A Swinging Sport for the Whole Family*, SEATTLE POST-INTELLIGENCER, Aug. 18, 2001, at A1. Cricket is also the sport of choice for a group of men from South Central Los Angeles who formed the Compton Cricket Club and whose team, the Compton Homes and Popz, recently toured England for a series of competitions. The group seeks to embrace the disciplined and civilized nature of the sport as a means of advancing positive social change in their community. *See Flavia Munn, Motto: Ball not Bullet*, W. DAILY PRESS, Sept. 3, 2001, at 17.

<sup>3</sup> *See William Powers, Sports, Assumption of Risk, and the New Restatement*, 38 WASHBURN L.J. 771 (1999); *see also Carol Christian, Heart Condition, Not Heat, Killed Football Player*, HOUSTON CHRON., Aug. 21, 2001, at A1 (discussing deaths of high school athletes caused by hypertrophic cardiomyopathy, including two in 2001 and one in 1996, 1995, 1992, and 1991 respectively).

<sup>4</sup> *See Evan Henderson, Sporting Chances; As More Students Play, Injuries Take a Greater Toll*, DAILY NEWS OF L.A., Sept. 17, 2001, at L3 (citing American Academy of Orthopedic Surgeons (AAOS) statistics finding "that more than 1.4 million

professional athletes<sup>5</sup> alike. The variety of ways and contexts in which injuries occur are seemingly limitless and range from those caused by the physical environment to those caused by the conduct of co-participants.<sup>6</sup> Not surprisingly, many injured sports participants press legal claims in seeking to be made whole for their injuries.<sup>7</sup> The apportionment of liability in sports injury cases is both important and difficult, as the variables involved in a particular incident may be as numerous as the contexts in which they occur. Many courts and commentators have recognized the public interest when apportioning liability in sports injury cases, so as not to dampen the vigor with which sports are played, while encouraging conduct that avoids unnecessary risks and injuries.<sup>8</sup> Although the approaches to

---

children under age 15 are treated in doctors' offices [for sports related injuries] each year," and that athletes between the ages of five and twenty-four make 2.6 million emergency room visits).

<sup>5</sup> See, e.g., *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 518 (10th Cir. 1979) (professional football player intentionally struck and injured by another player during a game); *Morgan v. State*, 685 N.E.2d 202, 204-06 (N.Y. 1997) (consolidating actions of three injured sports participants: an Olympic-level bobsledder who sustained injuries when the bobsled crashed through a wall of the exit run; an adult karate student injured when a fellow student raised the height of an obstacle plaintiff was attempting to jump over; and an adult recreational tennis player who tripped over a torn net on the court of a private tennis club); *Benitez v. New York City Bd. of Educ.*, 541 N.E.2d 29, 30 (N.Y. 1989) (high school football player paralyzed during varsity football game); *Turcotte v. Fell*, 502 N.E.2d 964, 966 (N.Y. 1986) (professional jockey injured during race after his horse collided with another horse); *Rubenstein v. Woodstock Riding Club*, 617 N.Y.S.2d 603, 604 (3d Dep't 1994) (twelve year old participant in equestrian competition sustained leg fracture from kick by another participant's horse). More recently, professional football player Corey Stringer died of heatstroke during pre-season practice. See Sally Jenkins, *Blame Vikings' Weak View of Toughness for Stringer's Death*, WASH. POST, Aug. 5, 2001, at D1.

<sup>6</sup> See *supra* notes 3-5.

<sup>7</sup> Stephen D. Sugarman, *The Monsanto Lecture: Assumption of Risk*, 31 VAL. U. L. REV. 833, 876 (1997) ("In recent years courts around the country have been presented with a great number of sporting injury lawsuits between participants, but outside the professional sports context.").

<sup>8</sup> See Daniel E. Wanat, *Torts and Sporting Events: Spectator and Participant Injuries—Using Defendant's Duty to Limit Liability as an Alternative to the Defense of Primary Implied Assumption of Risk*, 31 U. MEM. L. REV. 237, 278 (2001) ("When the Tennessee Court of Appeals and Supreme Court begin to consider the cases involving . . . sports . . . they would do well to consider the following question: Whether and when is it necessary not to impose a duty of care in order to encourage vigorous participation in the sport?"); see also *Nabozny v. Barnhill*, 334 N.E.2d 258, 260 (Ill. App. Ct. 1975) ("This court believes that the law should not place unreasonable burdens on the free and vigorous participation in sports by our youth . . . [but] some of the restraints of civilization must accompany every athlete

apportioning liability in sports injury cases varies by jurisdiction, the assumption of risk doctrine often plays an important, though differing role. This Note will explore the analytical framework currently in use by the New York courts for determining liability in cases involving injured athletes. It will also briefly review the approaches of other states. It will then suggest that New York implement an analytical distinction when apportioning fault in cases involving students compared to cases involving professional athletes. This distinction will center on the use of the assumption of risk doctrine as it applies in New York, which also utilizes the comparative fault scheme in tort cases. The essence of this Note's proposal is that in light of New York's application of the comparative fault scheme, the assumption of risk doctrine should be available as a defense, complete or otherwise, in the context of professional athletics only.

## I. THE ASSUMPTION OF RISK DOCTRINE

The philosophical underpinning of the assumption of risk doctrine, and particularly its use in sports injury cases, is best described by the language of Judge Cardozo in the seminal 1929 case *Murphy v. Steeplechase Amusement Co., Inc.*:<sup>9</sup>

Volenti non fit injuria. 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.<sup>10</sup>

Judge Cardozo further explained that by choosing to experience the "flopper," an amusement park ride, the plaintiff, who had witnessed the ride's effect on the other visitors, "made his choice to join them. He took the chance of a like fate, with whatever damages to his body might ensue from such a fall. The

---

onto the playing field."); *Ross v. Clouser*, 637 S.W.2d 11, 14 (Mo. 1982) ("Fear of civil liability . . . could curtail the proper fervor with which the game should be played and discourage individual participation . . ."); *Benitez*, 541 N.E.2d at 33 ("The policy underlying this tort rule is intended to facilitate free and vigorous participation in athletic activities."); *Marchetti v. Kalish*, 559 N.E.2d 699, 703 (Ohio 1990) ("[O]ur goal is to strike a balance between encouraging vigorous and free participation in recreational or sports activities, while ensuring the safety of the players.").

<sup>9</sup> 166 N.E. 173 (N.Y. 1929).

<sup>10</sup> *Id.* at 174.

timorous may stay at home."<sup>11</sup> The assumption of risk doctrine can be described as the idea that an individual is barred from recovery for injuries resulting from an activity in which the individual realized the risks, implicitly or expressly, and nevertheless voluntarily participated.

Traditional common law doctrine has distinguished "express" assumption of risk from "implied" assumption of risk.<sup>12</sup> Express assumption of risk resulted from agreement in advance between the plaintiff and defendant that the defendant need not use reasonable care towards the plaintiff. Implied assumption of risk was premised on the plaintiff's willing and knowing placement of herself in the way of harm created by the defendant.<sup>13</sup> In recognizing implied assumption of risk as a separate defense,<sup>14</sup> the Second Restatement of Torts provides:

[A] plaintiff who fully understands a risk of harm to himself or his things caused by the defendant's conduct or by the condition of the defendant's land or chattels, and who nevertheless voluntarily chooses to enter or remain, or to permit his things to enter or remain within the area of that risk, under circumstances that manifest his willingness to accept it, is not entitled to recover for harm within that risk.<sup>15</sup>

With regard to sports, the Restatement provides direct language pertaining only to spectators,<sup>16</sup> but the principles it defines would presumably apply to a player who chooses to participate in a sport in spite of a known risk.<sup>17</sup>

<sup>11</sup> *Id.*

<sup>12</sup> See *Arbegast v. Buckeye Donkey Ball Co.*, 480 N.E.2d 365, 371 (N.Y. 1985) (noting that express assumption was held to preclude any recovery, and that implied assumption of risk may require that a plaintiff's consent to the risk involved be "unreasonable under the circumstances").

<sup>13</sup> See *id.*

<sup>14</sup> Fleming James, Jr., *Assumption of Risk: Unhappy Reincarnation*, 78 YALE L.J. 185, 185 (1968) ("The *Second Restatement of Torts* states that implied assumption of risk should be recognized as a separate defense.").

<sup>15</sup> RESTATEMENT (SECOND) OF TORTS § 496 C (1965).

<sup>16</sup> See *id.* at illus. 4. This illustration provides:

A, the owner of a baseball park, is under a duty to the entering public to provide a reasonably sufficient number of screened seats to protect those who desire it against the risk of being hit by batted balls. A fails to do so. B, a customer entering the park, is unable to find a screened seat, and although fully aware of the risk, sits in an unscreened seat. B is struck and injured by a batted ball. Although A has violated his duty to B, B may be barred from recovery by his assumption of the risk.

*Id.*

<sup>17</sup> See Powers, *supra* note 3, at 772.

The assumption of risk doctrine came into use in the late nineteenth and early twentieth centuries, before the advent of comparative responsibility.<sup>18</sup> The assumption of risk doctrine has proved difficult to integrate into comparative fault schemes and the results vary by jurisdiction.<sup>19</sup> Much debate has occurred and remains regarding the viability and usefulness of the assumption of risk doctrine's incorporation into analytical frameworks that apportion fault on a comparative basis.<sup>20</sup> The general argument advocating the abandonment of the assumption of risk doctrine is that comparative fault naturally encompasses the doctrine; the evaluation of whether a plaintiff knew and accepted a known risk in an activity is an essential element of a comparative fault determination.<sup>21</sup> Notably, the new Restatement rejects all forms of implied assumption of risk, maintaining only an equivalent of the express assumption of risk aspect of the doctrine.<sup>22</sup>

---

<sup>18</sup> See *id.* at 772–73. “Comparative responsibility” refers to a regime in which the plaintiff's recovery is reduced in proportion to the plaintiff's share of fault. See DAN B. DOBBS, *THE LAW OF TORTS* § 201, 503–06 (2000).

<sup>19</sup> Powers, *supra* note 3, at 772–73 (noting that after the advent of comparative fault, most jurisdictions abandoned the assumption of risk doctrine, most often by instructing juries on comparative fault principles only and including plaintiff's knowledge or risk as a factor for the jury to consider).

<sup>20</sup> See John L. Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717, 721–24, 749–50 (1991) (noting that the responses of jurisdictions and commentators to the inclusion of the assumption of risk defense in comparative faults schemes have been mixed). The author discusses three major approaches and advocates that “[i]n the absence of an applicable limited duty or a valid contract, the jury should allocate responsibility through a comparative evaluation of the defendant's and plaintiff's behavior.” *Id.*; see also Sugarman, *supra* note 7, at 835 (commenting that the assumption of risk doctrine should be replaced with various other tort doctrines, such as “no duty,” “no breach,” “no cause,” “no proximate cause,” or comparative negligence); James, *supra* note 14, at 185 n.2 (referring to a 1906 article which posited that implied assumption of risk should not be utilized as a separate defense and that a plaintiff's unreasonable assumption of risk would constitute contributory negligence).

<sup>21</sup> See Powers, *supra* note 3, at 772–73.

<sup>22</sup> See *id.* at 775 (explaining that the new Restatement rejects implied assumption of risk by stating that express assumption of risk does not apply to a plaintiff who “merely demonstrates that [he] was aware of a risk and voluntarily confronted it” (quoting RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i (Proposed Final Draft 1999))). The author adds that “[a] plaintiff's conduct in the face of a known risk, however, might constitute plaintiff's negligence and therefore result in a percentage reduction of the plaintiff's recovery.” *Id.* (quoting RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i (Proposed Final Draft 1999)). This follows the logic of those who have long

## II. NEW YORK'S APPROACH TO SPORTS INJURY CASES

In 1976, New York State replaced its common law rule of contributory negligence with a scheme of pure comparative fault.<sup>23</sup> The language of the statute refers specifically to assumption of risk, stating that it shall not bar recovery but rather requires the plaintiff's culpable behavior to be considered when determining the amount of the recovery.<sup>24</sup> New York courts have found some exceptions to this rule.<sup>25</sup> For example, in *Arbegast v. Board of Education*, the Court of Appeals found that the system of comparative negligence established by C.P.L.R. section 1411 did not extend to the express assumption of risk by the injured claimant.<sup>26</sup> Further, in *Turcotte v. Fell*,<sup>27</sup> the same court held that in the context of sporting events, participants may incur a "primary" assumption of risk composed of "risks . . . incidental to a relationship of free association between the defendant and the plaintiff," and, "if the risks of the activity are fully comprehended or perfectly obvious, plaintiff has consented to them."<sup>28</sup> In such instances, the defendant's duty of care to the

---

advocated a rejection of the assumption of risk doctrine as a separate defense. As Professor Powers explained, "Abandoning implied assumption of risk as an independent defense does not mean that a plaintiff's actual knowledge or voluntary decision is irrelevant." *Id.* Rather, the plaintiff's behavior and knowledge of the danger is considered in the evaluation of his or her culpability. *See id.*; *see also supra* note 19.

<sup>23</sup> The statute provides:

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.

N.Y. C.P.L.R. 1411 (McKinney 1997).

<sup>24</sup> *See id.*

<sup>25</sup> The four primary situations in which a plaintiff's conduct may be a complete bar against recovery from defendant are: (1) plaintiff's conduct is the sole cause of her injuries; (2) plaintiff's injuries are the direct result of her commission of serious criminal or illegal conduct; (3) express assumption of risk; and (4) primary assumption of risk. *See* Vincent C. Alexander, *Practice Commentaries*, MCKINNEY'S CONSOLIDATED LAWS OF NEW YORK ANNOTATED § 1411, 565 (1997).

<sup>26</sup> *Arbegast v. Bd. of Educ.*, 480 N.E.2d 365, 366 (N.Y. 1985). The *Arbegast* court found that the plaintiff had expressly assumed the risk by participating in a donkey basketball game after the defendant's employee told plaintiff that she participated "at her own risk." *Id.*

<sup>27</sup> 502 N.E.2d 964 (N.Y. 1986).

<sup>28</sup> *Id.* at 968; *see also infra* notes 41-42 and accompanying text.

plaintiff is eliminated, thereby barring any recovery for the plaintiff through comparative fault.<sup>29</sup> These two exceptions come into play particularly with regard to claims for injuries caused to participants in sporting events.<sup>30</sup>

Most importantly, in light of the adoption of the comparative negligence statute, New York courts have cast the assumption of risk doctrine as “a measure of the defendant’s duty of care,”<sup>31</sup> rather than an absolute defense, as it had been under the contributory negligence scheme. The defendant’s duty of care, however, is intricately related to both the plaintiff’s ability to comprehend and the plaintiff’s actual comprehension of the risks.<sup>32</sup> If a risk is not inherent and not otherwise obvious or assessable by the plaintiff, it will likely be found that the defendant did not fulfill his or her duty to the plaintiff, and that the plaintiff did not assume the risk.<sup>33</sup>

Stated more simply, in the context of the comparative fault scheme, the assumption of risk doctrine is an evaluation of the duty of care owed to the plaintiff that includes “considering the risks plaintiff assumed when he elected to participate in the

---

<sup>29</sup> See Alexander, *supra* note 25, § 1411, 565.

<sup>30</sup> See, e.g., *Traficenti v. Moore Catholic High Sch.*, 724 N.Y.S.2d 24, 25 (1st Dep’t 2001) (finding that high school cheerleader freely assumed the risk posed by performing on a hardwood floor because it was “obvious”); *Fisher v. Syosset Cent. Sch. Dist.*, 694 N.Y.S.2d 691, 692 (2d Dep’t 1999) (holding that high school cheerleader assumed the risks posed by performing stunts on a bare hardwood floor); *Clark v. Sachem Sch. Dist.*, 641 N.Y.S.2d 890, 892 (2d Dep’t 1996) (holding that high school swimmer voluntarily assumed the risk when he dove off starting blocks into shallow end).

<sup>31</sup> *Morgan v. State*, 685 N.E.2d 202, 207 (N.Y. 1997) (holding that because a bobsled rider and martial arts student assumed the risk of injury, the owners and operators of the premises were relieved of liability (citing *Turcotte*, 502 N.E.2d at 968)).

<sup>32</sup> Defendant’s duty of care “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.” *Turcotte*, 502 N.E.2d at 968; see also *Morgan*, 685 N.E.2d at 207–08 (“[A] participant consents to those commonly appreciated risks which are inherent in and arise out of the nature of the sport generally and flow from such participation. . . . [F]or purposes of determining the extent of the threshold duty of care, knowledge plays a role but inherency is the sine qua non.”).

<sup>33</sup> See *Turcotte*, 502 N.E.2d at 968. As suggested by Professor James regarding the rejection of the assumption of risk doctrine, perhaps the framing of the doctrine as an evaluation of duty owed to the plaintiff “reflects a recognition that this defense is inconsistent with newer policies which underlie the imposition of a duty to take care of others that extends beyond merely warning them.” James, *supra* note 14, at 192.



event."<sup>34</sup> Therefore, a New York analysis of an injured athlete-plaintiff's claim includes an assessment of the "skill and experience of the particular plaintiff" to determine what degree of risk awareness should be imputed to him or her.<sup>35</sup> As the Court of Appeals has noted, "[A]wareness of risk is not to be determined in a vacuum."<sup>36</sup> It is not necessary, however, for the plaintiff to 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."<sup>37</sup>

A critical aspect of the New York analytical framework for determining liability in sports injury cases is a lack of distinction between professional and student athletes. As noted in *Maddox v. City of New York*, New York courts, using the identical rationale for all athletes, simply recognize that "a higher degree of awareness will be imputed to a professional than to one with less than professional experience in the particular sport."<sup>38</sup>

Perhaps the most notable New York case involving a professional athlete's claim for recovery is *Turcotte v. Fell*,<sup>39</sup> where a famous jockey suffered paralyzing injuries after his horse clipped the heels of another horse during a race, causing the jockey to fall.<sup>40</sup> The Court of Appeals granted the defendants' motion for summary judgment and held that because the danger was inherent in the sport, Turcotte consented to relieve the defendant of his legal duty to use reasonable care to

---

<sup>34</sup> *Morgan*, 685 N.E.2d at 208.

<sup>35</sup> *Maddox v. City of New York*, 487 N.E.2d 553, 556 (N.Y. 1985). This case was decided before the enactment of N.Y. C.P.L.R. 1411; nonetheless, the Court of Appeals has noted that the same result would have been reached under a comparative negligence analysis. See *Turcotte*, 502 N.E.2d at 971.

<sup>36</sup> *Maddox*, 487 N.E.2d at 556.

<sup>37</sup> *Id.* at 557.

<sup>38</sup> *Id.* at 556-57 (finding that professional baseball player's continued participation in the game despite his knowledge of the wet and muddy conditions in which he was playing constituted assumption or risk as a matter of law); see *Turcotte v. Fell*, 502 N.E.2d 964, 970 (N.Y. 1986) ("[A] professional clearly understands the usual incidents of competition resulting from carelessness, particularly those which result from the customarily accepted method of playing the sport, and accepts them.").

<sup>39</sup> 502 N.E.2d 964 (N.Y. 1986).

<sup>40</sup> *Id.* at 967. Plaintiff (*Turcotte*) commenced the action against the co-participant (*Fell*), the New York Racing Association, which owned the Belmont Park racetrack where the accident occurred, and David Reynolds, the owner of the horse which *Fell* rode. In his career, *Turcotte* had ridden in over 22,000 races, achieving international fame after winning the "Triple Crown" of racing in 1973. *Id.*

avoid the incident.<sup>41</sup>

In another notable case, *Benitez v. New York City Board of Education*,<sup>42</sup> the Court of Appeals denied recovery on a summary judgment basis to a high school football player who suffered paralyzing injuries during an interscholastic varsity game.<sup>43</sup> The injury-causing game was played against a more advanced team, and the plaintiff had become fatigued and did not inform his coach. The *Benitez* court determined that the voluntary nature of the plaintiff's participation and his experiences in playing high school football the previous eighteen months amounted to the plaintiff putting himself "at risk in the circumstances of this case for the injuries he ultimately suffered."<sup>44</sup> The court emphasized that fatigue and injury were inherent in competitive sports, particularly football, and that the injury in this case was a "luckless accident arising from vigorous voluntary participation in competitive interscholastic athletics."<sup>45</sup> Since *Benitez*, New York courts have continued to decide sports injury cases on a summary judgment basis.<sup>46</sup>

---

<sup>41</sup> *Id.* at 969-70. The court further determined that 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." *Id.* The court listed the following factors for determining whether a professional athlete can be held to have consented to an act or omission of a co-participant:

The ultimate purpose of the game and the method or methods of winning it; the relationship of defendant's conduct to the game's ultimate purpose, especially his conduct with respect to rules and customs whose purpose is to enhance the safety of the participants; and the equipment or animals involved in the playing of the game.

*Id.* The *Turcotte* court found the fact that plaintiff had testified to the dangers of horse racing and the inability of every jockey to keep the horse under perfect control to be important. *Id.*

<sup>42</sup> 541 N.E.2d 29 (N.Y. 1989).

<sup>43</sup> *Id.* at 30.

<sup>44</sup> *Id.* at 34. The high school for which Benitez played had asked to be placed in a lower-level league because it felt that players were likely to suffer serious injuries by playing at the higher level. *Id.* at 31. The request was denied. In addition, the school's coach testified that he advised the school's principal to pull the team out of the particular game in which Benitez's injury occurred because he felt it was unsafe due to the mismatch in skill level between the two teams. *Id.* During the game, Benitez played most of the first half and became fatigued. *Id.* The court did note, however, that "a high school athlete, even an outstanding one, does not assume all the risks of a professional sports person." *Id.* at 33.

<sup>45</sup> *Id.* at 34. The court also dismissed the plaintiff's claim of inherent compulsion—i.e., his freedom of choice was overcome by the direction of a superior—by finding that plaintiff presented no evidence that he was compelled to follow the coach's directions. *Id.*

<sup>46</sup> See *Fisher v. Syosset Cent. Sch. Dist.*, 694 N.Y.S.2d 691 (2d Dep't 1999);

The definition of a defendant's duty to a sports participant who becomes injured is of particular interest and relevance in the context of scholastic sports because a school owes some duty to its students at all times. The classic statement of a school's duty of care to children is found in the 1939 case *Hoose v. Drumm*,<sup>47</sup> which provides in part, "[A] teacher owes to his charges to exercise such care of them as a parent of ordinary prudence would observe in comparable circumstances."<sup>48</sup>

The "parent of ordinary prudence" standard, however, seems only to apply when students are engaged in compulsory activities,<sup>49</sup> and it has been noted that a school's duties as gauged by the prudent parent is limited to an extent, because schools are not to be insurers of their students' safety.<sup>50</sup> Further, in the context of claims for negligent supervision, schools have been held to a duty to adequately supervise the students in their

---

*egger v. St. Dominic High Sch.*, 657 N.Y.S.2d 85 (2d Dep't 1997) (finding that smaller than regulation-size mat used for high school wrestling practice did not present unassumed, concealed, or unreasonably increased risk); *Clark v. Sachem Sch. Dist.*, 641 N.Y.S.2d 890 (2d Dep't 1996); *Rubenstein v. Woodstock Riding Club*, 617 N.Y.S.2d 603 (3d Dep't 1994) (holding that twelve year old plaintiff assumed the risk of being injured by a horse when she participated in a horse show). *But see In re Kraszewski v. Mohawk Cent. Sch. Dist.*, 715 N.Y.S.2d 357 (4th Dep't 2000) (finding that a triable issue of fact exists whether eight year old participating in pee-wee wrestling program assumed the risk of injury and whether coaches exercised reasonable care in providing instruction and supervision).

<sup>47</sup> 22 N.E.2d 233 (N.Y. 1939).

<sup>48</sup> *Id.* at 234. This principle has been consistently upheld. *See Merson v. Syosset Cent. Sch. Dist.*, 730 N.Y.S.2d 132, 134 (2d Dep't 2001); *Kennedy v. Waterville Cent. Sch. Dist.*, 569 N.Y.S.2d 278, 279 (4th Dep't 1991); *Merkley v. Palmyra-Macedon Cent. Sch. Dist.*, 515 N.Y.S.2d 932, 933 (4th Dep't 1987); *Harker v. Rochester City Sch. Dist.*, 661 N.Y.S.2d 332, 334 (4th Dep't 1997) ("Stated another way, a school district has a 'special relationship to its students . . . analogous to that between carriers and their passengers or innkeepers and their guests.'" (citing *Pratt v. Robinson*, 349 N.E.2d 849 (N.Y. 1976))).

<sup>49</sup> *See Merkley*, 515 N.Y.S.2d at 934 (noting that "the injury occurred while the students were engaged in a required activity"); *Kennedy*, 569 N.Y.S.2d at 279 (plaintiff was injured in an occupational education shop class where he was "in the custody and control of [defendant] and [thus, defendant] had a duty to exercise toward him the same degree of care that a reasonably prudent parent would exercise under the same circumstances") (citation omitted).

<sup>50</sup> *See Lawes v. Bd. of Educ.*, 213 N.E.2d 667, 668-69 (N.Y. 1965) ("A school is not liable for every thoughtless or careless act by which one pupil may injure another." (citing *Hoose v. Drumm*, 22 N.E.2d 233 (N.Y. 1939))); *Harker*, 661 N.Y.S.2d at 334 ("The duty of a school district to its students 'is strictly limited by time and space' and exists 'only so long as a student is in its care and custody during school hours, and terminates when the child has departed from the school's custody.'" (citing *Norton v. Canandaigua City Sch. Dist.*, 624 N.Y.S.2d 695, 697 (4th Dep't 1995))).

charge and are only liable for those injuries that are foreseeable and proximately caused by the absence of such supervision.<sup>51</sup> Moreover, when students are engaged in what are deemed to be "voluntary" activities, such as after school sports programs, the duty owed to them is reduced to the lower standard of "ordinary reasonable care."<sup>52</sup>

### III. OTHER APPROACHES

#### A. California

Besides New York, California is the state with perhaps the best developed assumption of risk doctrine as used in the comparative fault context. In the 1992 case *Knight v. Jewett*,<sup>53</sup> the California Supreme Court attempted to clarify and settle differences among its lower courts regarding the application of the assumption of risk doctrine, in light of the adoption of comparative fault principles.<sup>54</sup> In *Knight*, an adult plaintiff was injured during a recreational touch football game played among acquaintances. In evaluating the plaintiff's claim the court noted that adoption of comparative fault principles had only

---

<sup>51</sup> See *Mirand v. City of New York*, 637 N.E.2d 263, 266 (N.Y. 1994); *Oehler v. Diocese of Buffalo*, 716 N.Y.S.2d 849, 851 (4th Dep't 2000) (citing *Foster v. New Berlin Cent. Sch. Dist.*, 667 N.Y.S.2d 994 (3d Dep't 1998)).

<sup>52</sup> *Benitez v. New York City Bd. of Educ.*, 541 N.E.2d 29, 32 (N.Y. 1989) ("In the context of wholly voluntary participation in intramural, interscholastic and other school-sponsored extracurricular athletic endeavors, we have required the exercise of the less demanding ordinary reasonable care standard."). The *Benitez* court also stated, with regard to duty, that "a 19-year-old senior star football player and college scholarship prospect [does not] fall within the extra protected class of those warranting strict parental duties of supervision." *Id.*; see also *Edelson v. Uniondale Union Free Sch. Dist.*, 631 N.Y.S.2d 391, 392 (2d Dep't 1995) (appellant school district's duty of care was "limited to exercising ordinary reasonable care in protecting the plaintiff from unassumed, concealed or unreasonably increased risks" regarding student voluntarily participating in wrestling match); *Traficenti v. Moore*, 724 N.Y.S.2d 24, 25 (1st Dep't 2000) (holding that although plaintiff cheerleader assumed the risk of injury posed by a bare, wooden gym floor, genuine issues of material fact existed as to whether the school breached its supervisory duty); *In re Kraszewski v. Mohawk Cent. Sch. Dist.*, 715 N.Y.S.2d 357, 357 (4th Dep't 2000) (refusing to dismiss the case on a summary judgment basis because it found issues of fact as to the plaintiff's assumption of risk and whether the defendant school district had exercised reasonable care in providing instruction and supervision to the pee-wee wrestlers).

<sup>53</sup> 834 P.2d 696 (Cal. 1992).

<sup>54</sup> *Id.* at 699-701 (noting that the assumption of risk doctrine has long been a source of confusion in definition and application because of the myriad of different factual settings in which it is applied, sports-injury cases being only one scenario).

*partially* absorbed the assumption of risk doctrine, and that the critical aspect of analysis was whether the defendant possessed, and had breached, a duty of care towards the plaintiff.<sup>55</sup> Unlike New York, the plaintiff's assessment of the risk and reasonableness in encountering it are not important issues.<sup>56</sup> Once the defendant is found to have breached a duty to the plaintiff, it is irrelevant for the purpose of recovering damages whether or not the plaintiff assumed any risk.<sup>57</sup> Nonetheless, the assumption of risk doctrine will serve as a complete bar to recovery if the court determines that the defendant owed no duty of care to the plaintiff.<sup>58</sup> The Court of Appeals, in interpreting *Knight*, held that the determination of the existence of a duty is a question of law.<sup>59</sup>

### B. Other States

Not all jurisdictions have formulated assumption of risk doctrines as distinct as New York and California, particularly with regard to sports injury cases.<sup>60</sup> Even fewer opinions have

---

<sup>55</sup> *Id.* at 701.

<sup>56</sup> *See id.* at 703. In a previous case, *Li v. Yellow Cab Co.*, 532 P.2d 1226 (Cal. 1975), the court referred to a distinction between instances of "primary" and "secondary" assumption of risk. Primary assumption of risk refers to the legal conclusion that there is "no duty" on the part of the defendant towards the plaintiff. Secondary assumption of risk refers to those situations in which the defendant does owe a duty but the plaintiff knowingly encounters a risk of injury caused by the defendant's breach of that duty. *See id.* at 1240-41. The *Knight* court suggested that the critical distinction in *Li* was "not a distinction between instances in which a plaintiff unreasonably encounters a known risk imposed by defendant's negligence and instances in which a plaintiff reasonably encounters such a risk." *Knight*, 834 P.2d at 703; *see also* Harrold v. Rolling "J" Ranch, 23 Cal. Rptr. 2d 671, 674 (Cal. Ct. App. 1993) ("[T]he inquiry does not begin with the question whether the plaintiff assumed the risk . . . . Rather the inquiry begins—and ends—with an analysis of whether the defendant owed a duty to a plaintiff . . .").

<sup>57</sup> *See Knight*, 834 P.2d at 705 (explaining that while it may be accurate to suggest that one who voluntarily participates in a risky sport may have consented to certain risks inherent in the sport, it is unrealistic to suggest that such an individual consents to a breach of duty by others that increases the risks beyond what the individual impliedly consented to, even where the individual is aware of the possibility of misconduct by others).

<sup>58</sup> *Id.* at 708.

<sup>59</sup> *Staten v. Superior Court*, 53 Cal. Rptr. 2d 657, 659 (Cal. Ct. App. 1996). The court also stated that whether the defendant owes a duty to the plaintiff is a legal question that depends on the "nature of the sport or activity in question and on the parties' general relationship to the activity, and is an issue to be decided by the court, rather than the jury." *Id.* (citing *Knight*, 834 P.2d at 706).

<sup>60</sup> *See* Wanat, *supra* note 8, at 237 (discussing spectator injuries and the courts')

been written about students injured in school athletics. The Washington approach applies concepts similar to those used in California. In *Kirk v. Washington State University*,<sup>61</sup> the Washington Supreme Court held that the assumption of risk doctrine, in light of the adoption of comparative negligence principles, may not serve as a complete bar to recovery; rather, the doctrine "may act to limit recovery but only to the extent the plaintiff's damages resulted from the specific risks known to the plaintiff and voluntarily encountered."<sup>62</sup>

In contrast, courts in other states denounce the assumption of risk doctrine or find other methods of negligence analysis more useful.<sup>63</sup> For example, Arizona has expressly rejected the reformulation of assumption of risk as a "no-duty rule"<sup>64</sup> in favor of an analysis of defendant's negligence and the reasonableness of risk the plaintiff chose to encounter.<sup>65</sup> In *Crawn v. Campo*,<sup>66</sup>

treatment of professional and amateur participant injuries). In his discussion, the author relies on no cases dealing expressly with students injured in school-sponsored sports (high school age or younger); see also Sugarman, *supra* note 7, at 834, 847-52.

<sup>61</sup> 746 P.2d 285, 288-90 (Wash. 1987). The *Kirk* plaintiff sustained a permanent elbow injury after being injured during a college cheerleading practice while performing a stunt on astro turf. *Id.* at 287.

<sup>62</sup> *Id.* at 289. The court found Professor Schwartz's articulation compelling: A rigorous application of implied assumption of risk as an absolute defense could serve to undermine seriously the general purpose of a comparative negligence statute. . . . [E]very commentator who has addressed himself to this specific problem has agreed that plaintiff should not have his claim barred if he has impliedly assumed the risk, but rather that this conduct should be considered in apportioning damages under the statute.

VICTOR E. SCHWARTZ, COMPARATIVE NEGLIGENCE § 9.5, 180 (2d ed. 1986) (footnotes omitted), quoted in *Kirk*, 746 P.2d at 290.

<sup>63</sup> See *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658 (Tex 1999); *Pfister v. Shusta*, 657 N.E.2d 1013 (Ill. 1995); *Marchetti v. Kalish*, 559 N.E.2d 699 (Ohio 1990); *Estes v. Tripson*, 932 P.2d 1364 (Ariz. Ct. App. 1997); *Crawn v. Campo*, 630 A.2d 368 (N.J. Super. Ct. App. Div. 1993); *Nabozny v. Barnhill*, 334 N.E.2d 258 (Ill. App. Ct. 1975), *aff'd*, 643 A.2d 600 (N.J. 1994).

<sup>64</sup> See *Estes*, 932 P.2d at 1365-66. Indeed, Arizona has dealt a legislative blow to the assumption of risk doctrine. As the court noted, "To judicially apply assumption of risk as a dispositive defense in Arizona would violate article 18, section 5 of the Arizona Constitution." *Id.* at 1365. Article 18, section 5 of the Arizona Constitution provides: "The defense of contributory negligence or of assumption of risk shall, in all cases whatsoever, be a question of fact and shall, at all times, be left to the jury." ARIZ. CONST. art. 18, § 5.

<sup>65</sup> See *Estes*, 932 P.2d at 1366-67. The duty owed is to "act reasonably in the light of foreseeable and unreasonable risks." *Id.* at 1366 (citing *Rogers v. Retrum*, 825 P.2d 20, 21 (Ariz. Ct. App. 1991)). Whether the risk is unreasonable "depends substantially on the context." *Id.*

<sup>66</sup> 630 A.2d 368 (N.J. Super. Ct. App. Div. 1993), *aff'd*, 643 A.2d 600 (N.J. 1994).

the New Jersey Superior Court noted that the concept of assumption of risk was "essentially written out of our jurisprudence."<sup>67</sup> On appeal, the Supreme Court of New Jersey concluded that in the context of "mutual, informal, recreational sports activity," the standard of liability should be raised to that of recklessness or intent to harm.<sup>68</sup>

Similarly, in the older but illustrative case *Nabozny v. Barnhill*,<sup>69</sup> the Appellate Court of Illinois, as a matter of first impression, required the type of conduct needed to impute liability to a player for injuries caused to another player to be "deliberate, wilful [sic] or with a reckless disregard for the safety of the other player so as to cause injury to that player, the same being a question of fact to be decided by a jury."<sup>70</sup> The court viewed itself as creating a carefully drawn rule to control "a new field of personal injury litigation."<sup>71</sup> The Supreme Court of

---

The case involved injuries to a participant in a "pick-up" softball game caused by a co-participant. *Id.* at 369. The New Jersey Superior Court Appellate Division agreed with the trial judge's finding that the "great weight of case authority in the various states," requires proof of reckless or intentional conduct in sports-injury cases. *Id.* at 370. Upon review, the New Jersey Supreme Court agreed with the appellate division's finding that sports activities should not be granted broad immunity from tort. *See* *Crawn v. Campo*, 643 A.2d 600, 605 (N.J. 1994). It further noted that a heightened standard of recklessness will better distinguish between unreasonable and unacceptable conduct and the "risk-laden" conduct inherent in sports, and affix liability appropriately. *Id.* at 607.

<sup>67</sup> *Crawn*, 630 A.2d at 372 (citing *Meistrich v. Casino Arena Attractions, Inc.*, 155 A.2d 90 (N.J. 1959)). The court referred to the dissenting opinion in *Knight*, arguing that the assumption of risk doctrine invites analysis of "esoteric terms" and "abstruse distinctions." *Id.*; *see* *Knight v. Jewett*, 834 P.2d 696, 712-13 (Cal. 1992) (Mosk, J., concurring in part and dissenting in part). The court further used the facts in *Crawn* to demonstrate the "emptiness" of the assumption of risk concept, and noted the simplicity of substituting ordinary negligence terms:

A co-participant who creates only risks that are "normal" or "ordinary" to the sport acts as a "reasonable [person] of ordinary prudence under the circumstances." If the co-participant creates an unreasonably great risk, he is negligent. Assumption of risk does nothing except obfuscate the analysis by wrongly suggesting that a sports participant can or should be barred from recovery without regard to ordinary negligence principles.

*Crawn*, 630 A.2d at 373 (citations omitted).

<sup>68</sup> *Crawn*, 643 A.2d at 605.

<sup>69</sup> 334 N.E.2d 258 (Ill. App. Ct. 1975). The facts of the case involved a high school soccer player kicked in the head by a member of the opposing team. *Id.* at 260.

<sup>70</sup> *Id.* at 261. The court also stated that a "reckless disregard for the safety of other players cannot be excused. To engage in such conduct is to create an intolerable and unreasonable risk of serious injury to other participants." *Id.*

<sup>71</sup> *Id.*

Illinois upheld this standard in the more recent case *Pfister v. Shusta*<sup>72</sup> and noted that the court and legislature have defined willful and wanton conduct as “a course of action which shows actual or deliberate intent to harm or which, if the course of action is not intentional, shows an utter indifference to or conscious disregard for a person’s own safety or the safety or property of others.”<sup>73</sup>

Likewise, in determining for the first time the proper standard for evaluating the duty of persons engaged in a recreational or sporting activity, the Supreme Court of Ohio, in *Marchetti v. Kalish*,<sup>74</sup> followed the Illinois Supreme Court’s lead in *Nabozny* and held that recovery is allowed for injuries caused as a result of a sports activity only where reckless or intentional conduct exists.<sup>75</sup> The *Marchetti* court expressly stated that the same standard would be applied regardless of whether the injury-involving activity was organized or unorganized, involved children or adults, or was supervised or unsupervised.<sup>76</sup> Interestingly, in 2000, an Ohio Court of Appeal found a gym teacher immune from suit under state law for failing to require

---

<sup>72</sup> 657 N.E.2d 1013, 1017 (Ill. 1995) (noting that “[p]articipants in team sports . . . assume greater risks of injury than nonparticipants or participants in noncontact sports”). The court held that “[r]ecovery will be granted for injuries sustained by participants in contact sports only if the injuries are caused by willful and wanton or intentional misconduct of co-participants.” *Id.*

<sup>73</sup> *Id.* at 1016 (citing *Ziarko v. Soo Line R.R.*, 641 N.E.2d 402 (Ill. 1994)).

<sup>74</sup> 559 N.E.2d 699 (Ohio 1990).

<sup>75</sup> *Id.* at 703–04. The court elaborated, “[W]here individuals engage in recreational or sports activities, they assume the ordinary risks of the activity.” *Id.* In so holding, the *Marchetti* court upheld an earlier ruling that there is no liability for participants in sporting events for behavior falling short of an intentional tort. See *Hanson v. Kynast*, 526 N.E.2d 327, 329 (Ohio Ct. App. 1987) (“We believe that a cause of action does exist in such a situation, but only for an intentional tort, *i.e.*, an intentionally inflicted injury not arising out of the ongoing conduct of the sport itself . . .”).

<sup>76</sup> “Whether the activity is organized, unorganized, supervised or unsupervised is immaterial to the standard of liability.” *Marchetti* 559 N.E.2d at 702 (citing *Keller v. Mols*, 509 N.E.2d 584, 586 (Ill. App. Ct. 1987)). The court also stated, “We find no basis for imposing a greater duty of care on youths merely because their games have shifted from the school gymnasium to their homes.” *Id.* (quoting *Keller*, 509 N.E.2d at 586). Further, in expressly rejecting the approach adopted by the Restatement, which utilizes a negligence analysis requiring an evaluation of the plaintiff’s “scope of consent,” the court stated, “We believe that requiring courts to delve into the minds of children to determine whether they understand the rules of the recreational or sports activity they are engaging in could lead to anomalous results. In this context, we perceive no reason to distinguish between children and adults.” *Id.* at 703.



students to wear protective gear when roller skating in class unless his acts were made "with malicious purpose, in bad faith, or with wanton recklessness."<sup>77</sup>

The Supreme Court of Texas first addressed the issue of tort liability for injuries resulting during sports activities in 1999.<sup>78</sup> Although the majority of the court declined to lay out a rule for applying the assumption of risk doctrine, Justice Enoch, in his dissent, discussed at length the posture of the assumption of risk doctrine in Texas after the adoption of comparative negligence.<sup>79</sup> The Justice found clear judicial precedent to hold that voluntary participation in an activity is no longer a total bar to recovery, participation in a "risky sports activity" is not to be considered an express assumption of the risk, and the defense of implied assumption of risk has been completely absorbed by allocation of damages through comparative responsibility.<sup>80</sup> Like the New York courts, the dissenters found that the issue of duty should play a role in liability determination.<sup>81</sup>

#### IV. LIABILITY WAIVERS/RELEASES

As a practical matter, the increased use of signed liability "waivers" or "releases" may have a significant impact on a school's liability with regard to a particular student-plaintiff. Often those who seek to participate in school sports find themselves confronted with the option of either signing a release, in which they agree to waive their legal rights to recover for any injuries sustained as a result of involvement in the activity, or

---

<sup>77</sup> See *Hughes v. Wadsworth City Sch. Dist.*, No. 2961-M, 2000 Ohio App. Lexis 1271, at \*6 (Ohio Ct. App. Mar. 29, 2000).

<sup>78</sup> See *Phi Delta Theta Co. v. Moore*, 10 S.W.3d 658 (Tex. 1999).

<sup>79</sup> *Id.* at 659-60 (Enoch, J., dissenting).

<sup>80</sup> *Id.* at 660 (Enoch, J., dissenting). The court here makes no mention of applying different standards of liability to different situations giving rise to injury, and refers generally to "sports or recreational participants." *Id.* (Enoch, J., dissenting).

<sup>81</sup> *Id.* at 661 (Enoch, J., dissenting). The dissent set forth the following proposed rule: "[A] defendant does not owe a duty to protect a participant from risks inherent in the sport or activity in which the participant has chosen to take part." *Id.* (Enoch, J., dissenting). Further, it explained that a defendant cannot owe a duty to protect a plaintiff from unavoidable risks of the sport, and that the duty determination in sports cases should, therefore, focus on whether the risk that resulted in the plaintiff's injury was "inherent in the nature of the sport or activity." If it is found not to be inherent, the case may proceed on an ordinary negligence theory. *Id.* at 662 (Enoch, J., dissenting).

not participating at all.<sup>82</sup> The Second Restatement of Contracts defines a release as “a writing providing that a duty owed to the maker of the release is discharged immediately or on the occurrence of a condition.”<sup>83</sup> In general, courts do not look favorably upon these types of exculpatory agreements.<sup>84</sup> In what some commentators have noted to be the seminal case on the issue of releases in athletics,<sup>85</sup> the Washington Supreme Court held that exculpatory agreements releasing public schools from liability for their negligence in a sports program are void as against public policy.<sup>86</sup> In doing so, the Court expressly

---

<sup>82</sup> For example, the language of the disputed release in *Zivich v. Mentor Soccer Club, Inc.* provides:

Recognizing the possibility of physical injury associated with soccer and for the Mentor Soccer Club . . . accepting the registrant for its soccer programs and activities, I hereby release, discharge and/or otherwise indemnify the Mentor Soccer Club . . . , its affiliated organizations and sponsors, their employees, and associated personnel, including owners of the fields and facilities utilized by the Soccer Club, against any claim by or on behalf of the registrant as a result of the registrant's participation in the Soccer Club.

696 N.E.2d 201, 203 (Ohio 1998).

<sup>83</sup> RESTATEMENT (SECOND) OF CONTRACTS § 284 (1981). Such agreements are also known as “exculpatory agreements.”

<sup>84</sup> See Anthony S. McCaskey & Kenneth W. Biedzynski, *A Guide to the Legal Liability of Coaches for a Sports Participant's Injuries*, 6 SETON HALL J. SPORT L. 7, 54 (1996) (“The practical consequence of using such agreements is that they are frowned upon by both participants and their parents . . . [and] are difficult to enforce.”); see also *Doyle v. Bowdoin Coll.*, 403 A.2d 1206, 1207 (Me. 1979) (“Courts have traditionally disfavored contractual exclusions of negligence liability and have exercised a heightened degree of judicial scrutiny when interpreting contractual language which allegedly exempts a party from liability for his own negligence.”).

<sup>85</sup> See McCaskey & Biedzynski, *supra* note 84, at 56.

<sup>86</sup> See *Wagenblast v. Odessa Sch. Dist.*, 758 P.2d 968, 971–72 (Wash. 1988). The court utilized the following test, established by the California Supreme Court in *Tunkl v. Regents of the University of California*, 383 P.2d 441, 445–46 (Cal. 1963), to determine whether the exculpatory agreement violated public policy:

[T]he attempted but invalid exemption involves a transaction which exhibits some or all of the following characteristics. It concerns a business of a type generally thought suitable for public regulation. The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public. The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least for any member coming within certain established standards. As a result of the essential nature of the service, in the economic setting of the transaction, the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services. In exercising a superior bargaining power the party confronts the public with a standardized adhesion contract of exculpation, and makes no

acknowledged that to relieve a defendant of liability in these situations violates public policy, regardless of whether the agreements are termed "releases" or "express assumptions of risk."<sup>87</sup>

In contrast, the Sixth Circuit recently upheld a decision of the district court and the Ohio Supreme Court affirmed summary judgment dismissal of a paralyzed minor hockey player's claim against, among others, the sponsoring hockey club because his parents had each signed a form that contained an exculpation clause.<sup>88</sup> The court found the release to be valid as a matter of law, and noted the principle of contract law that a person who signs a contract is held to understand its contents.<sup>89</sup>

Similarly, the Supreme Judicial Court of Maine recently held that the injuries sustained by a racetrack crew pit member were not recoverable because the plaintiff had previously signed a liability waiver.<sup>90</sup> The *Hardy* court carefully analyzed the

---

provision whereby a purchaser may pay additional reasonable fees and obtain protection against negligence. Finally, as a result of the transaction, the person or property of the purchaser is placed under the control of the seller, subject to the risk of carelessness by the seller or his agents.

*Wagenblast*, 758 P.2d at 971 (quoting *Tunkl*, 383 P.2d at 445-46). The *Wagenblast* court also relied on the fact that interscholastic school sports are "part and parcel of the overall educational scheme in Washington." *Id.* at 972.

<sup>87</sup> *Wagenblast*, 758 P.2d at 974.

<sup>88</sup> *Mohney v. USA Hockey, Inc.*, No. 00-3105, 2001 U.S. App. LEXIS 3584, at \*6 (6th Cir. Mar. 1, 2001) (unpublished opinion). The language of the relevant provision is as follows:

Upon entering events sponsored by USA Hockey and/or its member districts, I/We agree to abide by the rules of USA Hockey as currently published. I/We understand and appreciate that participation or observation of the sport constitutes a risk to me/us of serious injury, including permanent paralysis or death. I/We voluntarily and knowingly recognize, accept, and assume this risk and release USA Hockey . . . from any liability therefore.

*Id.* The court found the release to apply to injuries sustained during the training season, except those caused by the defendants' willful or wanton misconduct. *See id.* at \*17.

<sup>89</sup> *See id.* at \*18. ("A person who signs a contract without making a reasonable effort to know its contents cannot, in the absence of fraud or mutual mistake, avoid the effect of the contract." (quoting *Pippin v. M.A. Hauser Enters., Inc.*, 676 N.E.2d 932, 937 (Ohio Ct. App. 1996)); *see also Zivich v. Mentor Soccer Club, Inc.*, 696 N.E.2d 201, 205 (Ohio 1998). The court in *Zivich* found such liability waivers signed by parents of minors to in fact be supported by public policy concerns because the waivers may protect volunteers who coach youth sports and, therefore, may "promote more active involvement by . . . families, which, in turn, promotes the overall quality and safety of these activities." *Id.*

<sup>90</sup> *Hardy v. St. Clair*, 739 A.2d 368, 370 (Me. 1999). The Agreement at issue

agreement to determine if the injury-causing event was covered by its terms and concluded that it was.<sup>91</sup> It is unclear from the decision whether or not the plaintiff was a professional or an amateur, and the court frequently cited to a case involving a minor plaintiff who sued a college after sustaining a hockey injury.<sup>92</sup> The implication, therefore, is that the plaintiff's status and age are relatively unimportant in determining the validity of liability releases.

There are few significant New York cases on this topic and seemingly none related to injured student athletes. A recent case decided by the appellate division, however, found that a plaintiff injured during the course of a fox hunt assumed the risk of all injury, evidenced by the fact that she signed a release and waiver of liability.<sup>93</sup> Yet in two other cases, the appellate division has ruled that plaintiffs' claims were not barred, despite their signing of liability waivers.<sup>94</sup> In its determination of these cases, the court did not articulate a public policy-based aversion to waivers of liability, but rather found that the language of the particular waivers failed to unequivocally express the intention of the parties to relieve the defendant of liability as a result of negligence. This indicates that New York may be more like Ohio than Washington in evaluating the validity of releases of liability for sports-related injuries.

## V. PROPOSED APPROACH

In most every way, from age and experience to structure and administration of the sport, there is a vast difference between professional athletes and student athletes.<sup>95</sup> Given these

---

exempted the racetrack for liability for injuries "arising out of or related to the EVENT(S)." Plaintiff was injured by falling bleachers, and it was argued that this was not an "event" as defined. *Id.* at 369-70.

<sup>91</sup> *Id.* ("In light of the plain language of the Agreement, the trial court did not err in concluding that the Agreement barred Brent's negligence claim.")

<sup>92</sup> *Id.* at 369 (citing *Doyle v. Bowdoin Coll.*, 403 A.2d 1206 (Me. 1979)).

<sup>93</sup> See *Tindall v. Ellenberg*, 722 N.Y.S.2d 16 (1st Dep't 2001).

<sup>94</sup> See *Doe v. Archbishop Stepinac High Sch.*, 729 N.Y.S.2d 538, 539-40 (2d Dep't 2001) (ruling that claim of a parochial high school student assaulted by classmates on a school sponsored trip was not barred by a waiver); *Machowski v. Gallant*, 651 N.Y.S.2d 832, 833 (4th Dep't 1996) (holding that claim of adult karate student who suffered a heart attack while undertaking the test to receive a black belt was not barred by a waiver).

<sup>95</sup> Fundamentally, by the very nature of their status as professionals, professional athletes have significantly more experience with the sport, a greater

differences, it seems logical for New York to implement a different analytical structure to evaluate the claims of these two disparate groups. Specifically, the assumption of risk doctrine should be allowed as a defense, complete or otherwise, only with regard to professional athletes. The application of the assumption of risk doctrine with regard to student athletes is illogical, cumbersome, and unnecessarily harsh.

First, it is simply nonsensical to argue that a student who fails to speak up when she is fatigued during a big game, or who experiences a lapse in judgment and, for example, attempts a flip without the proper mat beneath her, intended to assume the risks of both her physical *and legal* injury.<sup>96</sup> Additionally, the New York courts' determination that schools at all times owe their students a minimum duty of ordinary reasonable care,<sup>97</sup> coupled with their recasting of the assumption of risk doctrine as the equivalent of finding an absence of any duty toward the plaintiff,<sup>98</sup> make it seemingly impossible to apply the assumption

---

understanding of the nature of the game, and, therefore, a substantially increased subjective awareness of the risks involved. New York courts have recognized this distinction by holding that a higher level of awareness of the risk is imputed to professional athletes than to amateur athletes. *See Maddox v. City of New York*, 487 N.E.2d 553, 556-57 (N.Y. 1985); *see also supra* note 38 and accompanying text.

Actually, professional sports have institutionalized methods of resolving disputes and compensating athletes for injuries. These methods exist outside the legal system and adequately serve the social objectives of tort law; there is no analogue in scholastic athletics. *See Sugarman, supra* note 7, at 848 (discussing the "elaborate structure" which exists in most professional sports to create rules and deal with the issues of "deterrence, punishment and justice," which is enforced by umpires, referees and the penalty structure both during the game and after it ends). Further most professional athletes have access to insurance policies that may compensate beyond what workers' compensation would provide, and which "arguably, eclips[e] tort law's compensatory function." *Id.* Age is an important distinction also, as adults can be held to a higher standard regarding both knowledge of, and responsibility for, the consequences of their actions. Finally, professional athletes are paid to assume, to some extent, the risks inherent in a sport.

<sup>96</sup> *See Sugarman, supra* note 7, at 877 ("Assumption of the physical risk is essentially equated with assumption of the legal risk."); *see also Fisher v. Syosset Cent. Sch. Dist.*, 694 N.Y.S.2d 691, 692 (2d Dep't 1999) (affirming the dismissal of complaint made by cheerleader injured during practice); *Egger v. St. Dominic High Sch.*, 657 N.Y.S.2d 85, 86 (2d Dep't 1997) (dismissing complaint of a wrestler injured when practice was held on smaller than regulation-size mat); *Clark v. Sachem Sch. Dist.*, 641 N.Y.S.2d 890, 891 (2d Dep't 1996) (complaint of a swimmer injured during a "false start" off diving blocks placed at the shallow end of the pool dismissed on summary judgment basis).

<sup>97</sup> *See supra* note 52 and accompanying text.

<sup>98</sup> *See Morgan v. State*, 685 N.E.2d 202, 208 (N.Y. 1997).

of risk doctrine to student athletes participating in school sports.

Furthermore, application of the assumption of risk doctrine to student injuries, especially in light of compulsion arguments,<sup>99</sup> is especially unfair because schools, school officials, and coaches are in positions of authority. Although it rejected this argument, the Court of Appeals did acknowledge that liability for foreseeable risks may be imputed to a defendant (such as a school district) when "an assurance of safety generally implicit in the supervisor's direction supplants the plaintiff's assumption of risk."<sup>100</sup> Yet this theory seems particularly appropriate in the school context, where students may assume a certain degree of safety if the program is run by the school, on school property, and by personnel hired and paid for by the school. By submitting to the authority of school officials, such as coaches and administrators, students implicitly subordinate their evaluation of the risks to those made by adult officials. Application of the assumption of risk doctrine for injuries resulting from school-related activities, therefore, holds students liable for not knowing when to substitute their judgment for their coaches' judgment.<sup>101</sup> This is an unfair result and contrary to one of the primary lessons to be learned by student athletes: respect for rules and authority.

---

<sup>99</sup> See *Benitez v. New York City Bd. of Educ.*, 541 N.E.2d 29 (N.Y. 1989). The plaintiff argued, and the lower court agreed, that although the plaintiff's participation in football was voluntary, the risk of injury was "unreasonably enhanced by the 'indirect compulsion' of the teacher-student relationship." *Id.* at 32 (citation omitted). This argument was rejected by the majority on appeal. *Id.*; see also *supra* note 45.

<sup>100</sup> *Benitez*, 541 N.E.2d at 33. The court noted that the second factor generally necessary to sustain a finding of liability on an inherent compulsion theory is "an economic compulsion or other circumstance which equally impels' compliance with the direction." *Id.* (quoting *Verduce v. Bd. of Higher Educ.*, 192 N.Y.S.2d 913, 918 (1st Dep't 1959)). This factor, however, may have been present in *Benitez's* situation, as well as that of other student athletes. See *infra* note 103 and accompanying text.

<sup>101</sup> See *Daniel v. City of Morganton*, 479 S.E.2d 263 (N.C. Ct. App. 1997). The court dismissed on summary judgment the claim of a member of the softball team who sustained injuries while practicing on a rough field still under construction, despite the fact that it found one defendant, the coach, to be negligent in conducting the practice there. The court relied on the fact that the student also knew it was dangerous, and chose to remain. In doing so, the court failed to acknowledge any compulsion on behalf of the coach that may have been felt by the student, and required the student to substitute her judgment for the coach's in order to recover. *Id.* at 267.

The notion that participation in extracurricular sports is a wholly voluntary endeavor is problematic as well. Many courts and commentators have noted the importance of athletic participation to students,<sup>102</sup> and for many, sports are an avenue to higher education.<sup>103</sup> For these reasons, it seems inaccurate to consider participation in school sports truly voluntary.

By omitting the confusing language and ideology of the assumption of risk doctrine and analyzing the facts of these cases under strict comparative fault principles, the proposed approach implicitly takes these concerns into consideration. For example, a jury apportioning fault between the plaintiff athlete and defendant school district in *Benitez* would necessarily consider that Benitez was a nineteen year old star athlete, who had received numerous college scholarships for his abilities, and that despite his intimate knowledge of football, he most likely was under considerable pressure to maintain his standing and opportunities and to continue to carry the team the way he had in the past.<sup>104</sup>

---

<sup>102</sup> See *Zivich v. Mentor Soccer Club*, 696 N.E.2d 201, 205 (Ohio 1998) (“[Sports activities] offer children the opportunity to learn valuable life skills. It is here that many children learn how to work as a team and how to operate within an organizational structure. Children also are given the chance to exercise and develop coordination skills.”).

<sup>103</sup> See *Benitez*, 541 N.E.2d at 33–34. Following its discussion of the inherent compulsion theory, the court, in *Benitez*, noted that the plaintiff may have feared that if he reported his fatigue or asked to be rested, then “his athletic standing or scholarship opportunities might be jeopardized.” *Id.* at 34. This is arguably a form of the “economic compulsion” necessary to sustain a finding of liability despite the foreseeability of the risk to the plaintiff.

Additionally, it has been found that in the “high-profile sports,” such as football and basketball, college games are a “national business,” and that being an athlete may improve an applicant’s chances of admissions by up to fifty percent over non-athletes with comparable grades and SAT scores. See Alan Ryan, *Playing Go for Broke with Their Eyes Shut*, THE TIMES HIGHER EDUC. SUPPLEMENT, June 1, 2001, at 27 (discussing JAMES L. SHULMAN & WILLIAM G. BOWEN, *THE GAME OF LIFE: COLLEGE SPORTS AND EDUCATIONAL VALUES* (2001)). It is hard to argue that a high school student, especially a gifted athlete, would not feel pressure to play beyond his or her limits given such an advantage.

Further demonstrating the pressure on student athletes to compete, even before getting to high school, is the noticeable trend of increased aggression among parent-spectators occurring, in part, because the prospect of athletic scholarships has “raised the ante” for participants. Jessica Garrison, *Enforcing Etiquette on the Sidelines*, L.A. TIMES, Aug. 12, 2001, at 1.

<sup>104</sup> See *Benitez*, 541 N.E.2d at 31 (“Prior to his injury, he engaged, as was customary for him, in the great majority of plays for his team’s offensive, defensive and special squads.”).

Likewise, in evaluating the defendant's share of the fault, the jury would necessarily weigh the duty that schools generally owe to students as established by judicial precedent,<sup>105</sup> as well as the fact that, in this case, the coach had repeatedly tried to exempt his team from the particular game in question because he felt that the ability level between the two teams was mismatched and presented a danger for his students; these requests were denied by the principal of the school.<sup>106</sup> The coach also testified that he knew his players were tired during the game and that the risk of injury was heightened for this reason as well.<sup>107</sup> A reasonable jury could conclude that, by nature of his experience and ability, Benitez was indeed fully responsible for the consequences of his actions. Or it could decide that the district was, at least in part, responsible for this "luckless accident."<sup>108</sup> Alternatively, under a "pure" comparative fault analysis, free from the complication of assumption of risk doctrine, a jury would have its responsibility of apportioning blame among the parties clearly defined. Moreover, such an approach is eminently more compatible with the policy in New York of imposing liability in proportion to responsibility.

In other cases, the proposed approach is likely to lead to the same outcome as did the actual analysis. For example, in *Edelson v. Uniondale Union Free School District*,<sup>109</sup> the fact that the plaintiff had three years of wrestling experience and was informed prior to the match that his opponent was in a higher classification could easily result in a finding that the plaintiff was fully responsible for his injuries.<sup>110</sup> The facts of *Traficenti v. Moore Catholic High School*<sup>111</sup> provide an apt illustration of how the proposed analysis may be less cumbersome. The *Traficenti* court affirmed a denial of the school's summary judgment motion because it found that the school's failure to supervise the

---

<sup>105</sup> The *Benitez* court determined the standard to be that of "ordinary reasonable care" in the context of intramural, interscholastic activities. *Id.* at 33.

<sup>106</sup> *Id.* at 31.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 34.

<sup>109</sup> 631 N.Y.S.2d 391 (2d Dep't 1995).

<sup>110</sup> The court reversed the finding of the lower court, which denied defendant its motion for summary judgment. The court found that "the plaintiff assumed the risk of incurring the blow to the jaw . . . [and hence, the] appellant did not breach its duty of care." *Id.*

<sup>111</sup> 724 N.Y.S.2d 24 (1st Dep't 2001).



students raised a triable issue as to whether the risk of injury was increased and the supervisory duty breached. Yet the court also determined that the plaintiff must be deemed to have freely assumed the risk of performing a cheerleading stunt on a bare hardwood floor.<sup>112</sup> Under straight comparative fault analysis, the trier of fact would view the circumstances as a whole, and take into consideration both the plaintiff's irresponsibility in performing a stunt without a mat and the defendant's irresponsibility in leaving the minors unsupervised while performing dangerous stunts. This analysis is simplified and more likely to reach a rational conclusion.

Finally, because most of the reasons for abolishing the assumption of risk doctrine as a defense in the school-sports doctrine involve justifications peculiar to student athletes, and because professionals are, and operate in, a context substantially different from student athletes, the assumption of risk doctrine should be maintained with regard to professionals.<sup>113</sup> By nature of their status as professionals, these athletes are keenly aware of the risks they are paid to undertake, thereby making the determination of whether a particular athlete can be said to have assumed a given risk much simpler than in the case of student athletes. Further, as adults, professional athletes are better able to bear the consequences of their decisions made during the course of play and can more easily be said to have forgone their legal rights by behaving negligently or irrationally. For these reasons, the assumption of risk doctrine with regard to professional athletes should be maintained so that these cases may continue to be decided on a summary judgment basis, thereby effectuating the interests of judicial efficiency.<sup>114</sup>

---

<sup>112</sup> See *id.* at 25.

<sup>113</sup> As noted by the *Turcotte* court, "[A] professional clearly understands the usual incidents of competition resulting from carelessness, particularly those which result from the customarily accepted method of playing the sport, and accepts them." *Turcotte v. Fell*, 502 N.E.2d 964, 970 (N.Y. 1986).

<sup>114</sup> See *Celotex Corp. v. Catrett*, 477 U.S. 317, 327-28 (1986). Justice Rehnquist, writing for the majority, noted that the Federal Rules of Civil Procedure have authorized motions for summary judgment upon demonstration of a lack of a triable issue of material fact. He stated that "[s]ummary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed to 'secure the just, speedy and inexpensive determination of every action.'" *Id.* at 327 (quoting FED. R. CIV. P. 1). Additionally, summary judgment is the tool by which insufficient claims or defenses are identified and kept from wasting public resources by going to trial. *Id.*

## CONCLUSION

Because of the confusion created by applying the assumption of risk doctrine to principles of comparative fault, that doctrine should play no role in considering claims brought by student athletes. This is especially appropriate since assumption of risk cannot readily be applied to students who have increased pressure to defer to the judgment of their coaches and to participate, no matter the cost. Nonetheless, both the difference in circumstance and the interest in judicial expediency warrant continued use of the assumption of risk doctrine with respect to claims by professional athletes.

