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COMMENT

BUCKING THE TREND: WHY MARYLAND DOES NOT NEED AN EQUINE ACTIVITY STATUTE AND WHY IT MAY BE TIME TO PUT ALL OF THESE STATUTES OUT TO PASTURE

By: Jennifer Dietrich Merryman

There is substantial misconception among horsemen as to the protection afforded by equine activity statutes and whether these statutes currently have an effect on procuring insurance and reducing insurance rates.¹ Every few years, Maryland legislators introduce an equine limited liability bill in response to constituent pressure.² The Maryland horse community is concerned with how best to protect and promote the local horse industry. Based on the horse industry's economic impact, these are admirable goals. This local industry has an annual economic impact of \$1.5 billion, and employs over 20,000 people.³

Although the demand for horse related activities is high, so is the risk of injury to people. Horses weigh in excess of 1,000 pounds and can travel up to 35 miles per hour. Horses are unpredictable and as a herd animal, they are endowed with a very strong flight instinct that can be triggered at any moment. Needless to say, horse related injuries are often severe.

An equine activity statute⁴ is designed to provide limited immunity to the horse professional and equine activity sponsors from lawsuits stemming from horse related injuries.⁵ Prior the establishment of comparative negligence theory, most states applied the common law

1. E-mail from Crystal Brumme Kimball, Secretary, Maryland Steeple Chase Association to Jennifer Merryman (June 1, 2005 12:44 P.M. EST) (on file with author).

2. *Id.*

3. Maryland Department of Agriculture, Maryland Horse Industry Board, <http://www.marylandhorseindustry.org/pdf/CensusBrochure.pdf>. *See also* <http://www.horsecouncil.org> (holding that nationwide, the horse industry supports 1.4 million jobs and pays over \$2 billion in taxes).

4. The author uses the terms equine limited liability statute and equine activity statute interchangeably.

5. *See, e.g.* WASH. REV. CODE. ANN. § 4.24.540 (West 2005).

doctrines of contributory negligence and assumption of risk⁶, both of which acted to protect the defendant from liability. Assumption of risk came into play when the plaintiff knowingly agreed to bear the responsibility of a certain risk or risks.⁷ Contributory negligence barred a plaintiff even when his or her injury was minuscule.⁸ Eventually, most states changed to a comparative fault system because it was considered more equitable than the common law fault system that allowed for contributory negligence.⁹ To address the role assumption of risk played within a comparative negligence regime, high risk sports statutes, including equine statutes, were created to unequivocally establish assumption of risk in specific situations.¹⁰

However, it makes more sense to develop a sound framework of general tort principles instead of having various sport specific statutes.¹¹ A global view based on primary implied assumption of risk obviates the need for legislative re-establishment of assumption of risk. The utility of primary implied assumption of risk is that it does not require legislative bodies to foresee the myriad of activities in which a person may voluntarily and enthusiastically engage. Under such a system, a person who voluntarily participates in a recreational activity or sport should not be able to sue for being injured by a risk that cannot be eliminated from the sport.

Part I of this comment will show the impetus behind equine activity statutes. Part II will show why the need for equine statutes no longer exists based on the doctrine of primary implied assumption of risk. Lastly, Part III will survey Maryland law to show that Maryland will not benefit from an equine activity statute and therefore should not adopt one.

6. VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE*, § 1.01 (4th ed. LexisNexis 2002).

7. *Infra* note 16.

8. *Id.*

9. VICTOR E. SCHWARTZ, *supra* note 6 at §22.02, §100.

10. *Infra* note 14.

11. See Frank H. Easterbrook, *Cyberspace and the Law of the Horse*, 1996 U. CHI. LEGAL F. 207, 208.

I. IMPETUS BEHIND EQUINE ACTIVITY STATUTES

A. Common Law Assumption of Risk

The high risk of injury and the change in tort law were the main driving forces behind equine protective statutes.¹² To understand why equine limited liability laws came about, it is important to understand how the evolution of fault systems¹³ created a period of time when it was unclear whether assumption of risk survived as a complete defense. At the same time, many states had important economic industries that evolved around high risk activities where accidents were inevitable.¹⁴ To provide immediate assistance to these industries, legislators enacted statutes establishing protection for specific activities.¹⁵

Traditionally, there were two complete defenses to negligence, contributory negligence and assumption of risk, both of which acted to bar a plaintiff from recovery.¹⁶ Scholars advocated for a comparative negligence system for fairness reasons. In part, this view is premised on the theory of loss distribution as a way to mitigate the perceived harshness of contributory negligence.¹⁷ Comparative negligence operates by apportioning the costs of negligent acts on the basis of fault.¹⁸ In other words, using comparative negligence, the court

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12. Terence J. Centner, *The New Equine Liability Statutes*, 62 TENN. L. REV. 997, 998, 1002 (Summer 1995).
 13. VICTOR E. SCHWARTZ, *supra* note 6 (referring to fault systems as different laws that operate to find liability when a duty has been breached).
 14. John O. Spengler & Brian P. Burket, *Sport Safety Statutes and Inherent Risk: A Comparison Study of Sport Specific Legislation*, 11 J. LEGAL ASPECTS OF SPORT 135, 135 (Spring/Summer 2001).
 15. *Id.*; *see, e.g.* *Amburgey v. Sauder*, 605 N.W.2d 84, 93 (Mich. Ct. App. 1999).
 16. RICHARD J. GILBERT & PAUL T. GILBERT, MD. TORT LAW HANDBOOK § 11.4, 11.6 (Matthew Bender & Co., Inc. 3rd ed. Lexis Publishing 2000) (1986).
 17. VICTOR E. SCHWARTZ, *supra* note 6; 78 A.L.R. 3d 339 § 2b (noting that comparative negligence system stresses equitable distribution of losses in relation to the contribution of the parties). Maryland is a common law state that recognizes contributory negligence as a complete bar. In theory, the defense seems quite harsh. "Contributory negligence bars recovery, theoretically at least, even though by comparison the negligence is minuscule. In theory, if the defendant's negligence is 99.99% of the total negligence comprising the incident, and the plaintiff's negligence is .01%, the plaintiff is not, as a matter of law, entitled to recover." MD. TORT LAW HANDBOOK, *supra* note 16 at § 11.4.1. However, comments to the Maryland Jury Instructions suggest a more moderate approach. For example, using the "more likely than not" standard when assessing whether the plaintiff's contributory negligence was the proximate cause of his harm and not allowing a jury instruction if the evidence amounts to nothing more than conjecture. MD. Civ. Pattern Jury Instr. 19:11 cmt. 3(b)-(c) (2003).
 18. VICTOR E. SCHWARTZ, *supra* note 6 at § 2.01.

divides up the damages between the parties when the plaintiff's negligence has contributed to his injury.¹⁹ Therefore, in a comparative negligence regime, a plaintiff's contributory negligence ceases to act as a complete bar. Unfortunately, many of the peripheral issues surrounding comparative negligence were not framed; in fact, it was unclear whether assumption of risk survived a comparative negligence regime.²⁰ The argument used to support this position hinged on the idea that a system designed to distribute losses cannot allow an absolute defense that precludes such losses from being distributed.²¹

In the 1950's, a few states began changing to a comparative negligence fault system.²² Between the 1960's and the 1970's, the adoption of comparative fault by statute and judicial fiat surged.²³ By 1980, implied assumption of risk was virtually extinct.²⁴ This was also an era of continuous expansion in tort liability theories in almost every area of tort law.²⁵ Accordingly, the professional horseman began to see an increase in insurance premiums and, in some instances, the inability to procure insurance at all.²⁶

Although dividing damages based on fault assignments is equitable in theory, it can assign fault to a defendant for risks that are an integral part of a sport.²⁷ This is especially unfair when part of the attraction to the sport is the risk itself. Therefore, even when an injurious outcome is a collateral and customarily accepted facet of an activity, many states lost the ability to deal with such cases as a matter of law.²⁸ Instead, assumption of risk became one of the factors when apportioning fault.²⁹ By the mid-1980's, the legal community began to recognize the moderating effect that common law assumption of risk has on law suits, particularly with regard to sports and other recreational activities.³⁰

19. *Id.*

20. *Id.* at § 9.01 et seq.

21. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 68, 456-57 (4th ed. 1971).

22. VICTOR E. SCHWARTZ, *supra* note 6 at § 1.01.

23. *Id.*

24. Gary T. Schwartz, *The Beginning and Possible End of the Rise of Modern American Tort*, 26 GA. L. REV. 601, 671 (Spring 1992).

25. *Id.* at 604 (suggesting there is a slow down recently, but it may be only a pause in what could turn out to be a continuing rise in liability).

26. See Amburgey, *supra* note 15 at 93; see Centner, *supra* note 12 at 999.

27. *But see* Donald v. Triple S Well Serv., 708 So.2d 1318, 1325 (Miss. 1998) (noting a jury may find 0% fault on causation).

28. See VICTOR E. SCHWARTZ, *supra* note 6 at §§ 9.01(a)-9.04(a)(1), (b), (c).

29. *Id.* at § 9.04(b), (c)(3).

30. Ordway v. Superior Court of Orange County, 243 Cal. Rptr. 536 (Cal. Ct. App. 1988); Turcotte v. Fell, 502 N.E.2d 964 (N.Y. 1986).

There are many sports besides equestrian activities that have sport specific limited liability statutes, for example, hockey, baseball, outfitters, and skiing to name a few.³¹ But if many comparative negligence states recognize the no-duty theory of primary implied assumption of risk,³² then it appears that these statutes, while once probably necessary, have outlived their usefulness. Additionally, most jurisdictions recognize a heightened standard of care when it comes to personal injury resulting from voluntary participation in recreational activities.³³ This means that the defendant's simple negligence or carelessness is not enough to attach liability. The negligence must reach a recklessness or gross standard.³⁴ This further bolsters the idea that the need for these types of sport specific statutes may be over.

If the legislatures and lobbyists, insist on these types of statutes, perhaps an omnibus recreational statute addressing sports and recreational activities in general would be more appropriate. But whether or not such a statute would provide better protection for the organizers and providers of recreational activities is debatable. For example, an omnibus statute, including a general provision and sport specific subsections containing comprehensive lists of the inherent risks in each sport, raises the question of how realistic is it to outline every single risk or contingency.³⁵ Alternatively, if the omnibus sports statute only has a general provision for inherent risks, the judge would make a determination, based on the facts of the case, whether or not

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31. Terence J. Centner, *Modifying Negligence Law for Equine Activities in Arkansas: A New Good Samaritan Paradigm for Equine Activity Sponsors*, 50 ARK. L. REV. 637, 642 (1998).
 32. See, e.g. *Howell v. Clyde*, 620 A.2d 1107, 1112 (Pa. 1993); *Stanton v. Miller*, 583 N.E.2d 1080, 1081 (Ohio Ct. App. 1990) (recognizing no-duty theory but distinguishing primary assumption of risk from implied assumption of risk); *Chapman v. Craig*, 431 N.W.2d 770, 771 (Iowa 1988) (referring only to primary assumption of risk). See Alexander J. Drago, *Assumption of Risk: An Age-Old Defense Still Viable in Sports and Recreation Cases*, 12 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 583, 590, (Winter, 2002).
 33. *Kelly v. Mccarrick*, 155 Md. 82, 101, 841 A.2d 869, 880 (2004) (citing Stanley L. Grazis, *Liability of Participant in Team Athletic Competition for Injury to or Death of Another Participant*, 55 A.L.R. 5th 529, *2 (1998 2003 Supp.); *Crawn v. Campo*, 643 A.2d 600, 603 (citing *Knight v. Jewett*, 834 P.2d 696, 716 (Cal. 1992))).
 34. *Knight*, at 716 (citing *Southwest Key Program, Inc. v. Gil-Perez*, 81 S.W.3d 269, 271 (Tex. 2002)).
 35. Inherent risks are risks that are either integral to the sport or risks that simply exist, for example falling rocks, etc. Catherine Hansen-Stamp, *Recreational Injuries and Inherent Risks: Wyoming's Recreational Safety Act-An Update*, 33 LAND & WATER L. REV. 249, at § V(B) (1998). *Knight*, 834 P.2d at 708 (stating that the careless conduct of others can be an inherent risk, for example a player being hit by a carelessly thrown baseball).

the defendant owed a duty to the plaintiff. In other words, the judge is right back at common law primary implied assumption of risk.

II. PRIMARY IMPLIED ASSUMPTION OF RISK

Assumption of risk is a complicated concept because courts have used the term in different situations using various analytical concepts.³⁶ The Restatement Second of Torts describes at least four different ways the doctrine is used.³⁷ However, in general, assumption of risk occurs when the plaintiff voluntarily and knowingly assumes responsibility for any mishaps resulting from the activity he or she is engaged in at the time of the injury. Assumption of risk is expressed or implied. Express assumption of risk means the plaintiff expressly agrees not to hold the defendant responsible in the event of an injury.³⁸ For example, a defendant may ask plaintiff to sign a consent form or waiver. Implied assumption of risk occurs when, based on the relationship between the plaintiff and defendant, the plaintiff tacitly agrees to assume a known risk and thus relieves the defendant from liability.³⁹ An example is sports and recreational activities which involve some risks that cannot be eliminated with reasonable care.⁴⁰

36. See, e.g. 57A AM. JUR. 2D *Negligence* et seq. (2004).

37. *RESTATEMENT (SECOND) OF TORTS* § 496A cmt. c(1)-c(4) (1965).

c1. In its simplest form, assumption of risk means that the plaintiff has given his express consent to relieve the defendant of an obligation to exercise care for his protection, and agrees to take his chances as to injury from a known or possible risk. The result is that the defendant, who would otherwise be under a duty to exercise such care, is relieved of that responsibility, and is no longer under any duty to protect the plaintiff.

c2. A second, and closely related, meaning is that the plaintiff has entered voluntarily into some relation with the defendant which he knows to involve risk, and so is regarded as tacitly or impliedly agreeing to relieve the defendant of responsibility, and to take his own chances. . .

c3. In a third type of situation the plaintiff, aware of a risk created by the negligence of the defendant, proceeds or continues voluntarily to encounter it. . .

c4. . . . The plaintiff's conduct in voluntarily encountering a known risk is itself unreasonable, and amounts to contributory negligence. There is thus negligence on both plaintiff and defendant, and plaintiff is barred from recovery, not only by his implied consent to accept the risk, but also by the policy of the law which refuses to allow him to impose upon the defendant a loss for which his own negligence was in part responsible.

38. VICTOR E. SCHWARTZ, *supra* note 6 at § 9.02. See also *RESTATEMENT (SECOND) OF TORTS* § 496B cmt. B (1965) (stating that assumption of risk is usually written, however, other forms of consent may be sufficient).

39. VICTOR E. SCHWARTZ, *supra* note 6 at § 9.01; see also Drago, *supra* note 31.

40. Drago, *supra* note 31.

Therefore, courts in comparative negligence states began to reinstate the defense of implied assumption of risk by dividing it further into two subcategories: primary implied assumption of risk and secondary implied assumption of risk.⁴¹

Under the doctrine of primary implied assumption of risk, a defendant does not have a duty to the plaintiff. Therefore, the defendant's negligence is not examined.⁴² Thus, it survives comparative negligence and remains a complete bar to a lawsuit.⁴³ The defendant merely has a limited duty towards the plaintiff to not increase the inherent risks of the sport.⁴⁴ The public policy behind this concept is recognition of inherent risks⁴⁵ and the important role recreational activities play in society.⁴⁶ For example, moguls on a ski slope pose a unique risk of injury to skiers that would not exist if they were removed. However, the risks posed by the moguls are part of the sport of skiing and the ski resort operators have no duty to remove them.⁴⁷ So even if a novice skier, with no knowledge or appreciation of the risk of moguls, becomes injured as a result of skiing over them, the ski resort operators are not liable.⁴⁸ In this regard, an analysis of primary implied assumption of risk will be unique to every sport or recreational activity⁴⁹ allowing for flexibility as new sports and activities evolve.

Secondary implied assumption of risk occurs when the defendant has a duty to the plaintiff but the plaintiff acts unreasonably in voluntarily accepting the risk created by the defendant's breach of that duty.⁵⁰ Therefore, the plaintiff's unreasonable conduct constitutes

41. Kelly, 155 Md. at 95, 841 A.2d at 876 ; Crews v. Hollenbach, 358 Md. 627, 641, 751 A.2d 481, 488 (2000) (stating Maryland has not adopted this distinction). Some courts call this reasonable primary implied assumption of risk, or no-duty rule, and unreasonable (secondary) implied assumption of risk. Knight, 834 P.2d at 703 (distinguishing between unreasonable/reasonable and primary/secondary); Turcotte, 502 N.E.2d at 968. However, some courts refer to express assumption of risk as primary assumption of risk. This is possibly because express assumption of risk involves analysis of whether the defendant owes a duty to the plaintiff. Knight, 834 P.2d at 703.

42. Kelly, 155 Md. at 95, 841 A.2d at 876; Turcotte, 502 N.E.2d at 968; Mark W. Milam, *Assumption of Risk in Tennessee Subsequent to the Adoption of Comparative Fault: Perez v. McConkey*, 60 TENN. L. REV. 1007, 1012 (Summer 1993).

43. *Id.*; Crews, 358 Md. at 640, 751 A.2d at 488.

44. *See* Kelly, 155 Md. at 104, 841 A.2d at 882.

45. *Id.* (identifying inherent risks as those that are integral to the sport, game, or recreational activity).

46. *Crawn v. Campo*, 643 A.2d 600, 607 (N.J. 1994).

47. Knight, 834 P.2d at 708.

48. *Id.*

49. *Id.*

50. Kelly, 155 Md. at 95, 841 A.2d at 876; *see also* Crews, 358 Md. at 641, 751 A.2d at 488.

contributory negligence.⁵¹ In a comparative fault regime, this does not survive as a complete defense.⁵² Instead, the plaintiff's conduct is submitted to the jury for consideration in reducing damages incurred from the defendant's breach.⁵³

A. *Equine Activity Statutes*

Equine activity statutes first emerged in the late 1980's, at a time when the question of whether assumption of risk as a defense was still being settled.⁵⁴ Economic factors appear to have been one of the main motivations behind high risk sport statutes.⁵⁵ As more and more states adopted these statutes, there may have been a stabilizing affect on insurance costs. Across the nation, insurance rates are determined by nationwide averages and cost calculations.⁵⁶ Under these circumstances the statutes make sense, as the real value was to clearly broadcast that personal responsibility was a cannon that had not been marginalized. Given the rise in states choosing comparative negligence fault systems and the fact that insurance rates were at an all time high with implied assumption of risk non-existent, the statutes circumvented the confusion over assumption of risk.⁵⁷ Having equine statutes in place would have helped the professional horseman at the time.

However, the protection provided to horse communities from equine statutes is somewhat variable. The language of each statute has an impact on the scope of immunity provided. Therefore, a defendant horseman goes to trial if the judge determines that the equine statute does not apply to him or her. For instance, some equine statutes

51. Drago, *supra* note 31 at 604-05.

52. *Id.*

53. *Id.*

54. *See id.* WASH. REV. CODE. ANN. § 4.24.540.

55. *See, e.g. supra* note 35 at 251.

56. E-mail from Christopher Heavrin, Agricultural Underwriter, AFIS to Jennifer Merryman (April 20, 2006 11:12 A.M. EST) (on file with author).

57. All states have comparative negligence fault systems except Alabama, District of Columbia, Maryland, North Carolina, and Virginia. Ala. Power Co. v. Schultz, 215 So.2d 447, 452 (Ala. 1968); Wingfield v. People's Drug Store, 379 A.2d 685, 687 (D.C. 1994); Bd. of County Comm'r of Garrett County v. Bell Atl., 346 Md. 160, 180, 695 A.2d 171, 181 (1997); Baskett v. Banks, 45 S.E.2d 173, 177 (Va. 1947). *See* ALA. TORT LAW, § 2.01 (Matthew Bender & Co. Inc., 2004); MD. TORT LAW HANDBOOK, *supra* note 16 at § 11.4; N.C. LAW OF TORTS, § 16 (Matthew Bender & Co. Inc., 2004); PERSONAL INJURY LAW IN VA., § 5.1.1 (Matthew Bender & Co. Inc., 2004); D.C. CIV. JURY INSTR. § 5.15 (2004).

preclude spectators of equine events from bringing forth a lawsuit for personal injuries sustained by a horse, while others do not.⁵⁸

Under primary implied assumption of risk, it is not necessary to foresee the specific risk that a spectator or participant may encounter at an equine event. Instead, it is only necessary for the judge to decide, based on the facts, if the risk was inherent to being in close proximity to horses.

The scope of protection provided by statute versus that provided by common law is illustrated in *Freidli v. Kerr*.⁵⁹ The plaintiffs were passengers in a horse drawn carriage.⁶⁰ The horse spooked from a loud noise and eventually broke free from the carriage despite the coachman's efforts.⁶¹ As a result, the carriage overturned injuring the occupants.⁶² The judge determined that the state equine statute did not provide immunity as a matter of law to the defendant carriage owners because the passengers were not participants of an equine activity and the carriage owners were not providers of an equine activity.⁶³

Analyzing the unique facts of this case under primary implied assumption of risk might yield a different outcome. The judge would determine if a trained carriage horse which became frightened by a loud crack or popping noise is a risk inherent in a carriage ride in the streets of an urban area. If the risk is one that cannot be eliminated despite reasonable efforts to do so, then the risk is inherent and no duty exists on behalf of the defendants.

III. MARYLAND LAW

Maryland does not recognize primary implied assumption of risk because the defense of assumption of risk was never abandoned.⁶⁴ Therefore, the cases do not turn on an in depth analysis of the defendant's duty by the court. Instead, the focus is on whether or not the plaintiff abandons his or her right to complain through voluntary exposure to known risks. Additionally, in a common law state, such

58. See, e.g. TENN. CODE ANN. §§ 44-20-101 to 44-20-104; OHIO REV. CODE ANN. § 2305.321(B)(1).

59. *Friedli v. Kerr*, 2001 Tenn. App. LEXIS 108 (2001).

60. *Id.* at 1.

61. *Id.*

62. *Id.*

63. *Id.* at 4-5.

64. MD. TORT LAW HANDBOOK *supra* note 16 at § 11.6; see, e.g. Kelly, 155 Md. at 93, 841 A.2d at 875.

as Maryland, adopting an equine statute designed to reinstate common law defenses is unnecessary and a waste of legislative resources.

To date, forty-four other states have passed equine statutes.⁶⁵ Interestingly, even though some states have not relinquished the common law defenses of contributory negligence and assumption of risk, they nevertheless enacted equine statutes. Alabama, North Carolina, and Virginia, like Maryland, never adopted a comparative fault regime.⁶⁶ As mentioned previously, one possible explanation for

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65. ALA. CODE § 6-5-337 (Westlaw current through End of 2004 First Spec. Sess.); ARIZ. REV. ANN. § 12-533 (Westlaw current through May 2005); ARK. CODE ANN. § 16-120-201 (Westlaw current through November 2004); COLO. REV. STAT. ANN. § 13-21-119 (Westlaw current through chapter 153 of the First Reg. Sess. 65th Reg. Sess.); CONN. GEN. STAT. ANN. § 52-557p (Westlaw current through Jan. 2005 Reg. Sess.); DEL. CODE ANN. tit. 10, § 8140 (Westlaw current through the First Reg. Sess. 2005); FLA. STAT. ANN. § 773.01-.05 (Westlaw current through 2005 First Reg. Sess.); GA. CODE ANN. 4-12-1 (Westlaw current through end of 2004 First Spec. Sess.); HAW. REV. STAT. 663B-1 (Westlaw current through 2004 Reg. Sess.); IDAHO CODE 6-1801 (Westlaw current through 2004 Sess.); 745 ILL. COMP. STAT. ANN. 47/1-47/999 (Westlaw current through 2005 Reg. Sess.); IND. CODE ANN. 34-4-44-1 to 34-4-44-12 (Westlaw current through 2005); IOWA CODE ANN. § 673.1 (Westlaw current through 2005 First Reg. Sess.); KAN. STAT. ANN. 60-4001 to 60-4004 (Westlaw current through 2004 Reg. Sess.); KY. REV. STAT. ANN. § 247.401 (Westlaw current through 2004 Reg. Sess.); LA. REV. STAT. ANN. 9:2795.1 (Westlaw current through 2004 First Extraordinary Sess. 2004); ME. REV. STAT. ANN. TIT. 7, 4102-4103 (Westlaw current through 2005 First Reg. Sess.) (noting this statute has been repealed); MASS. GEN. LAWS ANN. ch. 128, 2D (Westlaw current through 2005 First Annual Sess.); MICH. COMP. LAWS 691.1661 (Westlaw current through 2005); MINN. STAT. ANN. 604A.12 (Westlaw current through 2005 Reg. Sess.); MISS. CODE ANN. 95-11-1 to 95-11-7 (Westlaw current through 2004 Third Extraordinary Sess.); MO. ANN. STAT. 537.325 (Westlaw current through 2005 First Reg. Sess.); MONT. CODE ANN. 27-1-725 to 27-1-727 (Westlaw current 2003 Reg. Sess.); NEB. REV. STAT. ANN. § 25-21,249 (Westlaw current through 2004 Second Reg. Sess.); N.H. REV. STAT. ANN. § 508:19 (Westlaw current through 2004 Reg. Sess.); N.J. STAT. ANN. § 5:15-1 (Westlaw current through 2005); N.M. STAT. ANN. 42-13-1 to 42-13-5 (Westlaw current through 2005 First Reg. Sess.); N.C. GEN. STAT. § 99E-1 (Westlaw current through 2005 Reg. Sess.); N.D. CENT. CODE 53-10-01 to 53-10-02 (Westlaw current through 2003 Gen & Special Sess.); OHIO REV. CODE ANN. 2305.321 (Westlaw current through 2005); OKLA. STAT. ANN. tit. 76 § 50.1 (Westlaw current through 2005 Reg. Sess.); OR. REV. STAT. 30.687-.697 (Westlaw current through 2003 Reg. Sess.); R.I. GEN. LAWS 4-21-1 to 4-21-4 (Westlaw current through 2004); S.C. CODE ANN. 47-9-710 (Westlaw current through 2004 Reg. Sess.); S.D. CODIFIED LAWS ANN. 42-11-1 to 42-11-5 (Westlaw current through 2005 Reg. Sess.); TENN. CODE ANN. 44-20-101 to 44-20-105 (Westlaw current through 2005 First Reg. Sess.); TEX. CIV. PRAC. & REM. CODE ANN. 87.001-.005 (Westlaw current through 2005 Reg. Sess.); UTAH CODE ANN. 78-27b-101 to 78-27b-102 (Westlaw current through 2004 Gen. Election); VT. STAT. ANN. tit.12 § 27.1039 (Westlaw current through 2004); Va. Code Ann. 3.1-796.130-.133 (Westlaw current through 2005 Reg. Sess.); WASH. REV. CODE ANN. 4.24.530-.540 (Westlaw current through 2005); W. VA. CODE 20-4-1 to 20-4-7 (Westlaw current through 2005); WIS. STAT. ANN. 895.481 (Westlaw current through 2005); WYO. STAT. 1-1-121 to 1-1-123 (Westlaw current through 2004). To date, Maine's equine statute has been repealed.
66. See ALA. CODE § 6-5-337; N.C. GEN. STAT. § 99E-1; VA. CODE ANN. 3.1 796.130-.133 (listing the non-comparative negligence states other than Maryland). Violation of an

the adoption of equine statutes in these states is the nature of the insurance industry and how premiums are calculated and determined. However, that initial stabilization appears to be over. According to Markel Insurance, the rates in Virginia, North Carolina, and Alabama, have not been affected by their equine statutes.⁶⁷ In fact, the rates in those states are comparable to the rates Marylanders pay.⁶⁸ Thus, if Maryland were to enact an equine statute, the local horse community could not expect to see a reduction in insurance premiums.

Another reason for equine limited liability statute popularity among horsemen is the misguided perception that equine statutes afford better protection than the common law.⁶⁹ These statutes are modeled after the common law, so this belief is simply unfounded.⁷⁰ A brief survey of Maryland law indicates that Maryland's common law provides ample protection to the local horsemen.

While all equine limited liability statutes are designed to support the horse community by limiting liability from the inherent risks associated with horse activities, they are not intended to absolve defendants from all liability.⁷¹ Generally, mishaps that involve non-

equine statute may allow a defendant to bring forth the defense of contributory negligence when the plaintiff's action warrants such a defense. The defense of contributory negligence may become unavailable when the defendant has violated a statute when the statute expressly states so or the statute was enacted to protect a specific class of persons and the legislature intended for the defendant to be responsible. Equine statutes are directed to the public at large and do not contain this express language and thus do not fall into one of these exceptions. *See also* O'Neill v. Windshire-Copeland Assoc., 595 S.E.2d 281, 284-85 (2004); Brower v. Robert Chappell & Assoc., 328 S.E.2d 45, 47 (1985); Absolon v. Dollahite, 376 Md. 547, 554, 831 A.2d 6, 10 (2003) (stating in Maryland, violation of a statute, even if the language of the statute is mandatory, is merely evidence of negligence and a defendant may bring forth the defense of contributory negligence unless the statute expressly states the contrary).

67. See e-mail from Christopher Heavrin *supra* note 57.

68. *Id.*

69. *Horse Interests Seek Lawsuit Shield*, GREENSBORO NEWS & RECORD, July 28, 1997, at B2 (citing fear of possible lawsuits as another reason for support of the statute).

70. Krystyna M. Carmal, *The Equine Activity Liability Acts: A Discussion of Those in Existence and Suggestions for a Model Act*, 83 KY. L.J. 157, 166-67 (1994).

71. See, e.g. TENN. CODE ANN. 44-20-104(b)(1)-(4):

(b) Nothing in 44-20-103 shall prevent or limit the liability of an equine activity sponsor, an equine professional, or any other person if the equine activity sponsor, equine professional, or person:

(1) (A) Provided the equipment or tack, and knew or should have known that the equipment or tack was faulty, and such equipment or tack was faulty to the extent that it did cause the injury; or

(B) Provided the equine and failed to make reasonable and prudent efforts to determine the ability of the participant to engage safely in the equine activity

inherent risks fall outside of the statute.⁷² For example, faulty tack or equipment, failing to supply an appropriate mount (also called negligent mismatch), intentional torts, and latent defects on the land, may allow the plaintiff to prevail.

A. *Inherent Risk and Public Policy in Maryland*

A recent case illustrates the desire by the Maryland judiciary to maintain the ability for individuals to continue to pursue and enjoy sporting activities by ensuring that those who provide for such opportunities are not unreasonably exposed to litigation. In *Kelly v. Mccarrick*, the Court of Special Appeals of Maryland decided whether the Catholic Youth Organization League was negligently responsible for the severe ankle injury of a thirteen-year-old softball player sustained in a slide-tagout play.⁷³ The Court opined that a voluntary participant in a sport assumes all risks that are an integral part of that sport,⁷⁴ stating that:

As a matter of policy, it would not be appropriate to recognize a duty of care when to do so would require that an integral part of the sport be abandoned, or would discourage vigorous participation in sporting events. Accordingly defendants generally do not have a duty to protect the plaintiff from the risks inherent in the sport . . .⁷⁵

B. *Negligently Faulty Tack*

Many equine statutes impose a duty on the professional horseman to supply serviceable tack to a rider.⁷⁶ Tack is equipment used in

and determine the ability of the participant to safely manage the particular equine based on the participant's representations of the participant's ability;

(2) Owns, leases, rents, or otherwise is in lawful possession and control of the land or facilities upon which the participant sustained injuries because of a dangerous latent condition which was known to the equine activity sponsor, equine professional, or person and for which warning signs have not been conspicuously posted;

(3) Commits an act or omission that constitutes willful or wanton disregard for the safety of the participant, and that act or omission caused the injury; or

(4) Intentionally injures the participant.

72. *Id.*, Centner, *supra* note 12 at 1018; Carmal, *supra* note 73 at 173.

73. *Kelly*, 155 Md. at 88-89, 841 A.2d at 871-72.

74. *Id.* at 96-97, 841 A.2d at 877.

75. *Id.* 155 Md. at 104, 841 A.2d at 882.

76. *See, e.g.* TENN. CODE ANN. 44-20-104 (b)(1)(A) (listing non-inherent risks).

riding horses, such as saddles, bridles, reins etc. The equipment is usually leather and requires maintenance to prevent dry rot which may cause the equipment to break while in use. Maryland also recognizes that this may be a cause of action in negligence.⁷⁷ In *Pahanish v. Western Trails, Inc.*, the plaintiff rented horses from the defendant for a guided trail ride.⁷⁸ During the trail ride, one of the horses kicked the horse the plaintiff was riding, causing it to rear up.⁷⁹ As a result, the plaintiff and the saddle fell.⁸⁰ One of the arguments advanced by the plaintiff was negligent faulty equipment.⁸¹ Although the Court of Special Appeals found no direct evidence to show that the defendant had been alerted to the possibility of a defective saddle, by implication, when the evidence is such to support a negligent faulty tack cause of action, a defendant may be liable.⁸²

C. *Negligent Mismatch*

Another exception to many equine statutes is the requirement that a horse professional make inquiries into the rider's abilities and select an equine partner that is complimentary.⁸³ Although there are no cases on point involving horses, Maryland acknowledges that in sports generally, part of a coach's or sponsor's responsibilities is not to pit players of disparate size and skill against each other.⁸⁴ This stated policy, together with the repeated admonishing of other jurisdictions indicating that the equine provider must act reasonably in selecting a horse to be ridden, suggests that Maryland law is harmonious with those states with equine statutes that consider negligent mismatching a non-inherent risk to a rider.

77. *Pahanish v. Western Trails, Inc.*, 69 Md. 342, 517 A.2d 1122 (1986).

78. *Id.* at 355, 517 A.2d at 1128.

79. *Id.* at 351, 517 A.2d at 1126.

80. *Id.*

81. *Id.* at 363, 517 A.2d at 1132.

82. See *Cooperman v. Wyoming Rivers & Trails*, 214 F.3d 1162, 1168 (10th Cir. 2000) (noting the slipping of a saddle due to a loose cinch was an inherent risk of horse back riding absent evidence to the contrary); *Easterling v. English Point Riding Stables, Inc.*, 1994 U.S. Dist. LEXIS 3470, 3-4 (holding that Summary Judgment was not appropriate because there was an issue of fact regarding whether the martingale used during the riding lesson broke as a result of it being faulty).

83. *Hendricks v. JAFI, Inc.*, 1999 WL 1336069 (Mass. 1999); *Willeck v. Mrotek, Inc.*, 616 N.W.2d 526, (unreported).

84. *Kelly*, 155 Md. at 115, 841 A.2d at 888.

D. Landowner Liability

Maryland has long held that landowners have a duty to business invitees to use ordinary and reasonable care to safely maintain their premises.⁸⁵ However, this is balanced by the idea that landowners are not insurers of safety to their business invitees.⁸⁶ In addition, what is reasonable and ordinary will differ from circumstance to circumstance.⁸⁷ In *Maryland v. Thurston*, the plaintiff, a race horse owner, brought his horse to the track near Fair Hill training complex.⁸⁸ While the rider was exercising the horse around the track, it suddenly veered into a large gap between the rail and the infield of the track.⁸⁹ As a result, the horse struck the end of the rail and was impaled by a metal rod.⁹⁰ The Maryland Court of Special Appeals stated the Department of Natural Resources had an obligation to exercise ordinary care to maintain the premises and to warn of concealed dangers that may not be obvious to the business invitee.⁹¹ However, a forty foot gap in the continuous white rail, directly across the entrance to the track, was obvious and therefore it was not a latent defect that required any warning by the landowner.⁹²

IV. CONCLUSION

The goals of equine statutes are to support the horse industry by providing a statutory exception to assumption of risk. However, most jurisdictions currently acknowledge a heightened standard of care with regard to personal injuries incurred from voluntary participation in recreational activities and sports.⁹³ Additionally, many jurisdictions also recognize primary implied assumption of risk. It appears that comparative negligence states are coming full circle back to common law basic principles, a place Maryland never left. Maryland legislators are to be commended for their interest in meeting the local horse community's needs. However, the local horse community's efforts

85. MD. TORT LAW HANDBOOK *supra* note 16 at § 11.3 (stating that the duty a landowner owes is based on the status of the person entering the landowner's property).

86. *Md. State Fair & Agric. Soc'y v. Lee*, 29 Md. 374, 378, 348 A.2d 44, 47 (1975).

87. *Giant Food, Inc. v. Mitchell*, 334 Md. 633, 636, 640 A.2d 1134, 1135 (1994).

88. *Maryland v. Thurston*, 128 Md. 656, 661, 739 A.2d 940, 943 (1999).

89. *Id.* at 660, 739 A.2d at 942.

90. *Id.*

91. *Id.* at 661, 739 A.2d at 943.

92. *Id.* at 661-62, 739 A.2d at 943.

93. *Kelly*, 155 Md. at 101, 841 A.2d at 880.

should be refocused from lobbying legislators to enact unnecessary statutes, to educating the community about the current protections and responsibilities that stem from the common law. “The best way to learn the law applicable to specialized endeavors is to study general rules.”⁹⁴ The reality is Maryland’s horsemen have nothing to gain from such a statute, neither a decrease in insurance nor better protection than the common law already offers.

94. Easterbrook, *supra* note 11 at 207.