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UPDATE

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ASSUMPTION OF RISK ON THE FIELD OF PLAY – A 2014 NEW YORK ROUNDUP

By Matthew J. Kelly Jr.

Assumption of Risk is a simple doctrine. If you head down the ski slope, you assume the risk that you will wipe out – or that another skier will lose control and smack into you. If you play baseball, you assume the risk that you will get hit by a pitch or skin your knee sliding into second.

Despite its simple premise, the doctrine has subtle nuances. The slightest factual distinction can turn a sure plaintiff's win into a defense victory. In 2014, New York courts have ruled for both sides: While some courts give plaintiffs the benefit of the doubt, others show no patience for a plaintiff's complaints of bruises from the field of play.

What is Assumption of Risk?

As a general rule, a plaintiff who voluntarily participates in a sporting or recreational event is considered to have consented to those commonly-appreciated risks that are inherent in, and arise from, participating in the sport.[1] This includes injury-causing events, which are the known, apparent, or reasonably foreseeable risks of participation.[2]

The "voluntary" nature of the participation is plaintiff-specific, assessed by the individual's skill and experience. Thus if the risks are known by the plaintiff, or should have been known by a plaintiff with like skill and experience, plaintiff has consented to them. Likewise, if the risks are perfectly obvious, the plaintiff will be presumed to have been aware of them – getting hit by a batted ball or tripping over a track hurdle, for example. The duty of care of the defendant, in particular a landowner or event operator, is thus qualified by the plaintiff's assumed risks. Yet the defendant always has a duty to protect even a risk-taking plaintiff from injuries arising out of unassumed, concealed, or unreasonably increased risks[3] – for instance, dangerously-positioned or missing mats at a gymnastics facility.

[1] *Morgan v. State of New York*, 90 N.Y.2d 471 (1997)

[2] *Cotty v. Town of Southampton*, 64 A.D.3d 251 (2d Dep't 2009)

[3] *Manoly v. City of New York*, 29 A.D.3d 649 (2d Dep't 2006); *Turcotte v. Fell*, 68 N.Y.2d 432 (1986)

In 2014, New York courts have primarily examined two main areas involving sports-related assumption of risk: (1) dangers on the field itself; and (2) the "experienced" plaintiff.

Dangers on the Field Itself

Four recent cases provide good examples of dangers arising from the field of play itself. Two resulted in the Appellate Division affirming for the defendant on summary judgment. In *Perez v. N.Y.C. Dep't of Education*[4] (Second Department), a 17-year-old boy attempting to stifle a fast-break layup on an indoor basketball court jumped into an entrance door of the gymnasium and thrust his arm through a pane of glass on the door. Plaintiff unsuccessfully argued that the door was too close to the court, but the appellate court held that the danger was not hidden or even unreasonable – plaintiff knew or should have known that the court was tight, but he chose to play there anyway and assumed the risk.

Similarly, plaintiff in *Latimer v. City of N.Y.*[5] (First Department) tripped over the raised, cracked, and uneven edge of the concrete sidewalk adjacent to the blacktop where he chose to play catch with a football. While the unkempt playing surface may seem like an actionable defect, the appellate court disagreed. By engaging in even a casual game of catch, the court determined plaintiff consents to commonly appreciable risks, including risks associated with the construction of the playing surface, even where that construction is "less than optimal."

This same reasoning applied to a sledding hill in *Bakkensen v. City of NY*[6] (Supreme Court New York County). Plaintiff, careening down the hill in some after-dark sledding, headed toward a tree surrounded by fencing and injured her leg on protruding metal on the fencing. The New York County jury found plaintiff assumed the risk of sledding, and the court agreed. An experienced sledder assumes risks like "terrain, weather conditions, ice, natural and man-made objects that are incidental" to the sledding hill. A tree wrapped in fencing is one of these risks plaintiff assumed when she took off down the hill, absent any evidence that the fencing was defective.

In some cases, however, courts have rejected the defense argument that the plaintiff accepted the risk of injury from a dangerous field by participating in the activity. In *Agosto v. City of New Rochelle*[7], decided by the Second Department, a sandy condition on an asphalt parking lot where camp activities took place was considered too dangerous to put the risk of injury on the plaintiff. Additionally, the minor plaintiff was playing the touch football game with adult counselors. The court found that the "inherent risks" of the game were unreasonably increased.

All four cases posed a situation where there was something imperfect – "less than optimal" – about the field of play. Whether the court found for plaintiff hinged, at least in part, in whether or not the plaintiff knew or should have known – and in a sense, embraced – the imperfect conditions. A "tough" player risks the skinned knees from the blacktop, but also risks potentially more serious injuries. If plaintiff in *Latimer* had not simply fallen while trying to catch a pass, but instead dove, suffering serious cuts and bruises from the uneven pavement, there would likely be no cause of action due to the rough blacktop surface. He chose to engage in a sporting activity in

[4] *Perez v. NYC Dep't of Education*, 115 A.D.3d 921 (2d Dep't March 26, 2014)

[5] *Latimer v. City of N.Y.*, 118 A.D.3d 420 (1st Dep't June 3, 2014)

[6] *Bakkensen v. City of NY*, 2014 NY Slip Op 31965(U) (Sup. Ct. New York Co. July 29, 2014)

[7] *Agosto v. City of New Rochelle*, 114 A.D.3d 625 (2d Dep't Feb. 5, 2014)

a place where a reasonable person would expect to get scuffed up if they hit the ground. Under these decisions, there is no difference between accidentally falling and purposefully diving – both could happen over the course of the game.

The Experienced Plaintiff

Plaintiff's background of skill and experience was important to a number of cases recently, *Bakkensen* included. *Bakkensen* highlighted that this was not plaintiff's first time on a sled. She was admittedly experienced, and chose a "flimsy" plastic sled without steering or stopping mechanisms for unsupervised nighttime sledding. Though the New York County court did not say, "She should've known better," one can imagine that being defendant's best argument.

Two recent health club cases out of the Appellate Division, Second Department – *DiBenedetto v. Town Sports International, LLC*[8] and *Rosenblatt v. St. George Health and Racquetball Assoc.*[9] – also hinged on a plaintiff being experienced enough to know better. In *DiBenedetto*, plaintiff suffered injuries when she inadvertently stepped onto a moving treadmill. The record was clear: She was a longtime treadmill user at the club, and could have very easily noticed that it was running. Plaintiff in *Rosenblatt* had been attending the same body sculpting class twice a week for two years. The court found her well able to know what she could and could not do, so when the substitute instructor offered her and the class an exercise ball to use, she was experienced enough to know there was a risk she might roll right off – which is what happened. The court, finding she could have easily asked for help, ruled for the defense.

Contrast those plaintiffs with the one in *Blumenthal v. Bronx Equestrian Ctr., Inc.*[10] (Supreme Court, Bronx County), where plaintiff's horse threw her after she had allowed it to stop and graze (something an experienced rider would know is ill-advised). Plaintiff was an arguably experienced horseback rider, though not in recent years. She similarly did not voice any concerns about getting on the horse. Defendant, however, unlike in *Rosenblatt*, did not ask about her skill level or otherwise provide any sort of instruction (nor was there adequate proof that plaintiff read, understood, and signed a waiver). In large part because of defendant's failure to determine plaintiff's background of skill and experience, the Bronx Supreme Court determined that, issues of fact remained, allowing plaintiff to proceed to trial.

An experienced plaintiff only absolves defendant of liability for those generally appreciable risks, not hidden or increased risks that are not inherent to the sport. In *Torres v. Long Island Motocross Assoc.*[11], the Suffolk County Supreme Court found plaintiff to be an experienced motocross rider, having even ridden at the subject course. However, experience was not the issue; a potentially dangerous piece of PVC pipe lay exposed, just off a turn where riders were known to crash. Crashing into mud and dirt was a risk naturally assumed in motocross; crashing into PVC equipment was not.

All of these cases show that factual subtleties can determine the outcome. It may not matter if plaintiff had a certain level of experience. If a defendant did not seek to make that determination itself, or if the dangers were hidden or unreasonable, a plaintiff will survive summary judgment.

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[8] *DiBenedetto v. Town Sports International, LLC*, 118 A.D.3d 663 (2d Dep't June 4, 2014)

[9] *Rosenblatt v. St. George Health and Racquetball Assoc.*, 119 A.D.3d 45 (2d Dep't April 30, 2014)

[10] *Blumenthal v. Bronx Equestrian Ctr., Inc.*, 2014 NY Slip Op 31653(U) (Sup. Ct. Bronx Co. May 14, 2014)

[11] *Torres v. Long Island Motocross Assoc*., 2014 NY Slip Op 31855(U) (Sup. Ct. Suffolk Co. July 14, 2014)

To Consider

The decisions of the New York courts thus far in 2014 in the assumption of risk context show the court's willingness to grant defendants summary judgment where a plaintiff, having voluntarily engaged in a sport or recreational activity, gets hurt in the normal course. In many athletic and recreational activities, accidents do happen and people get hurt. By and large, there is not necessarily liability unless there is that something more that takes the factual situation out of what is normal – extra sand that makes the blacktop abnormally slippery like in *Agosto* or exposed PVC piping like in *Torres*. But all in all, courts in 2014 still abide by Judge Cardozo's 1929 truism: "The plaintiff was not seeking a retreat for meditation… He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home." ◆

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