*FORE*WARNED: SPORTS, TORTS, AND NEW YORK'S DANGEROUS ASSUMPTION

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On the morning of October 19, 2002, three friends set out to play a round of golf at a nine-hole course on Long Island.[1] At least two of the men—Dr. Azad Anand and Dr. Anoop Kapoor—were experienced golfers.[2] In fact, they often played together.[3] Yet this day would prove to be the final round of their playing partnership. It would also open the door to yet another round of a battle that has been fought in the New York State court system for decades—a battle that has consistently ended with courts barring recovery for injured plaintiffs under the assumption of risk doctrine rather than taking a more equitable approach under the principles of comparative negligence.[4]

The damage occurred on the first hole.[5] Each man played his first two shots.[6] Then the three players separated and walked to the differing spots where their respective golf balls had landed.[7] Dr. Anand's ball had landed further down the fairway from where Dr. Kapoor's ball had landed.[8] Exactly how much further would later become an object of dispute.[9] Balram Verma, the third member of

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[1] Anand v. Kapoor, 61 A.D.3d 787, 788, 877 N.Y.S.2d 425, 426 (App. Div. 2d Dep't 2009), *aff'd*, 15 N.Y.3d 946, 942 N.E.2d 295, 917 N.Y.S.2d 86 (2010).

[2] *See id.*

[3] *Id.*

[4] New York State courts have dealt with personal injury cases arising from the game of golf since at least the early 1930s. *See infra* Part I.

[5] *Anand*, 61 A.D.3d at 788, 877 N.Y.S.2d at 426.

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] This became a key component of the dispute, as Dr. Kapoor argued that Dr. Anand was not within the "zone of danger" of being hit by Dr. Kapoor's shot, and thus Dr. Kapoor owed Dr. Anand no duty to warn of the upcoming shot. *See id.* at 789, 877 N.Y.S.2d at 427. The

the threesome that day, would eventually testify that Dr. Anand's ball was approximately twenty feet ahead of Dr. Kapoor's ball.[10] Dr. Kapoor would disagree, testifying that Dr. Anand was standing "at a considerably greater distance in front of him" and claiming that Dr. Anand was positioned at an angle "approximately 60 to 80 degrees" away from the area where Dr. Kapoor planned to hit his shot.[11]

Where Dr. Kapoor intended to hit the ball and where the shot actually ended up, however, proved to be two extraordinarily different locations.[12] When he struck the ball, Dr. Kapoor was aiming toward the green, perhaps even hoping to pick up some lucky spin that would send the ball careening into the hole.[13] He missed miserably.[14] Yet his shot did reach a target, albeit an unintended one. Had Dr. Anand's left eye been the objective of the shot, Dr. Kapoor would have recorded a hole-in-one.[15]

A golf ball weighs no more than 1.620 ounces and has a diameter of not less than 1.680 inches.[16] Plummeting out of the sky at an alarming rate of speed, the compact spheroid carried with it the ability to cause some significant damage.[17] When it struck Dr. Anand in his left eye, it penetrated the outer membranes of the eye, causing a severe injury known as a "ruptured globe."[18] The ball also dislodged Dr. Anand's retina, tearing it away from its underlayer of support tissue.[19] Medical assistance proved to be of no avail.[20] The

Court of Appeals, however, paid no attention to the "zone of danger" arguments in their decision. *See* Anand v. Kapoor, 15 N.Y.3d 946, 942 N.E.2d 295, 917 N.Y.S.2d 86 (2010). As discussed in detail in Part II, this article strongly supports ending any further use of the "zone of danger" analysis to decide sports personal injury cases in New York State.

[10] *Anand*, 61 A.D.3d at 788, 877 N.Y.S.2d at 426.

[11] *Id.* at 788, 877 N.Y.S.2d at 427.

[12] In his affidavit, Dr. Anand's expert witness, a golf professional, noted that Dr. Kapoor's badly hit shot was described as a "shank" and was caused by Dr. Kapoor's club face being too open on impact. *See* Affidavit of Golf Professional Thomas W. Tatnall at 2, *Anand*, 61 A.D.3d 787, 877 N.Y.S.2d 425 (Index No. 15942 05).

[13] *See Anand*, 61 A.D.3d at 788, 877 N.Y.S.2d at 426.

[14] *See id.*

[15] *See id.*

[16] U.S. GOLF ASS'N, RULES OF GOLF 159 (eff. Jan. 1, 2012).

[17] *See, e.g.*, *Buffalo Hill Golf Course Multiple Use Policy*, BUFFALO HILL GOLF COURSE (Mar. 6, 2006), http://www.teeitupmarketing.com/955903/files/2012/05/AccessPolicy.pdf (noting that flying golf balls have been clocked at speeds up to one hundred-fifty miles per hour and routinely land at speeds of fifty miles per hour).

[18] *See* Brief for Plaintiffs-Appellants at 9, Anand v. Kapoor, 15 N.Y.3d 946, 942 N.E.2d 295, 917 N.Y.S.2d 86 (2010) (No. 2010-0222).

[19] *See Anand*, 15 N.Y.3d at 947, 942 N.E.2d at 296, 917 N.Y.S.2d at 87; *see also* Andrew A. Dahl, *Retinal Detachment*, MEDICINENET.COM, http://www.medicinenet.com/script/main/art.asp?articlekey=12740 (last visited Feb. 14, 2013).

[20] *See Anand*, 15 N.Y.3d at 947, 942 N.E.2d at 296, 917 N.Y.S.2d at 87.

ultimate verdict was severe: as a consequence of this accident, Dr. Anand will forever be blind in his left eye.[21]

In an act that likely damaged their friendship as rapidly as the golf ball damaged Dr. Anand's eye, Dr. Anand subsequently brought a lawsuit against Dr. Kapoor, claiming that Dr. Kapoor had been negligent in his actions on the golf course that day, and that his negligence had caused Dr. Anand's injuries.[22] At trial, Dr. Anand claimed that he never heard Dr. Kapoor shout any warning when he noticed that his shot was making a beeline for his playing partner's head,[23] a violation of a well-established rule of golf requiring that a player shout a "word of warning" (traditionally the word "Fore!")[24] if he "plays a ball in a direction where there is a danger of hitting someone."[25] Balram Verma, the third member of the playing party, agreed that he also heard no word of warning from Dr. Kapoor.[26] However, Dr. Kapoor disagreed, arguing that he "shouted out a warning" to Dr. Anand as soon as he "realized that the ball was headed in [Anand's] direction."[27]

In addition, Dr. Kapoor testified that he saw nobody standing between his ball and the hole that was the intended target of his shot.[28] However, Dr. Kapoor also acknowledged that he did not know where either Dr. Anand or Balram Verma were standing at the time he hit the shot.[29] His failure to determine the positions of his playing partners—or anyone else on the course—prior to hitting the shot violated provisions in *The Rules of Golf*, the United States Golf Association's official publication detailing the rules of the game, that directs golfers not to play a shot until they are certain

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[21] *See id.*

[22] *Id.*

[23] Anand v. Kapoor, 61 A.D.3d 787, 788, 877 N.Y.S.2d 426, 427 (App. Div. 2d Dep't 2009), *aff'd*, 15 N.Y.3d 946, 942 N.E.2d 295, 917 N.Y.S.2d 86 (2010).

[24] The word "fore!" is apparently a derivative of the phrase "ware before," referring to the signal for defenders of the East Port of Leith gate to drop to the ground to permit the ordnance guns to fire over them. *See* Brent Kelley, *Golf History FAQ :Why Do Golfers Yell 'Fore' for Errant Shots?*, ABOUT.COM, http://golf.about.com/cs/historyofgolf/a/hist_fore.htm (last visited Mar. 19, 2013). Through the years, the word of warning was shortened simply to "fore!" *See id.*

[25] U.S. GOLF ASS'N, *supra* note 16, at 18. The Second Department mistakenly referred to this rule as "a rule of golfing etiquette" in its opinion. *Anand*, 61 A.D.3d at 791, 877 N.Y.S.2d at 429. However, the Rules of Golf make it clear that although this rule is listed under a section marked "Etiquette; Behavior on the Course," the fundamental purpose of this rule is one of safety, both by listing it under the "Safety" subheading and by referencing the "danger" to other players that this rule is meant to avoid. *See* U.S. GOLF ASS'N, *supra* note 16, at 18.

[26] *Anand*, 61 A.D.3d at 788, 877 N.Y.S.2d at 427.

[27] *See id.*

[28] *Id.*

[29] *Id.*

that players in front of them are "out of range."[30] Thomas W. Tatnall, a golf professional furnished as an expert witness by Dr. Anand, noted in his affidavit that "[h]ad Dr. Kapoor taken the time to ascertain where the other players were and warned them, the accident would not have happened."[31] Mr. Tatnall continued on to state that Dr. Anand's injury was due to an unnecessary risk created on the golf course by the failure of Dr. Kapoor, an experienced golfer, to follow the fundamental rules and safety protocols of the sport.[32]

Still, this was not enough for Dr. Anand to win a victory in the trial court.[33] In fact, it was not even enough for this case to reach a jury.[34] Instead, the trial judge granted Dr. Kapoor's motion for summary judgment, ruling that although the injury was the result of a "terrible accident," it was an injury that arose from a risk that is inherent to the game of golf: namely, being struck by a wayward shot.[35] By merely stepping onto the golf course, according to the trial court's ruling, Dr. Anand had assumed the risk of this injury occurring, and thus was barred from recovering even a penny in damages.[36]

On appeal, the Second Department of the New York State Appellate Division affirmed the trial court's order, with the majority determining that Dr. Kapoor did not owe a duty to warn Dr. Anand of the shot and Dr. Anand had assumed the risk of such an injury by voluntarily taking part in the sport.[37] And on December 21, 2010, the New York State Court of Appeals issued an opinion affirming the Second Department's decision, holding—in a scant sixteen-sentence memorandum—that Dr. Anand's injury reflected "a commonly appreciated risk of golf" naturally assumed by all participants in the sport.[38]

To Dr. Anand, the decision may have come as a bitter shock. To anyone who has followed the opinions of New York's judiciary in

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[30] U.S. GOLF ASS'N, *supra* note 16, at 18. Again, note that this rule is specifically listed as a safety regulation by the Rules of Golf. *Id.*

[31] Sickmen Affirmation at 2, *Anand*, 61 A.D.3d 787, 877 N.Y.S.2d 425 (No. 15942 05).

[32] *See id.*

[33] *See Anand*, 61 A.D.3d at 789, 877 N.Y.S.2d at 427 (holding that "being struck by an errant golf ball was an inherent risk of the game of golf").

[34] *Id.*

[35] *Id.*

[36] *See id.*

[37] *Id.*

[38] *See* Anand v. Kapoor, 15 N.Y.3d 946, 948, 942 N.E.2d 295, 296–97, 917 N.Y.S.2d 86, 87–88 (2010) (affirming the lower court's decision that inherent in the game of golf is the risk of being hit by a golf ball).

personal injury cases involving sports over the past century, however, the outcome in *Anand v. Kapoor* was simply par for the course.[39] In the vast majority of negligence suits arising out of injuries not only from the game of golf, but also from a pantheon of other sports ranging from skiing to horse racing to donkey basketball, New York courts have cast aside crucial questions of fact with alarming frequency, instead preferring to grant summary judgment under the often-criticized assumption of risk doctrine, preventing the matter from ever reaching the hands of a jury.[40] The attitude of the state's courts towards plaintiffs in these matters over the past several decades—including cases which, like *Anand v. Kapoor*, leave plenty of opportunity for reasonable minds to differ about where the true fault of the injury lies—has been extremely negative.[41]

This article contends that New York State courts have failed to properly address the true issues in these cases, and have instead taken a dangerous escape route by applying the assumption of risk doctrine in almost blanket fashion. More specifically, this article investigates a more reasonable alternative for courts to apply in the majority of sports negligence cases, and puts forth a new rationale that courts can use in deciding these matters.

Part I of this article examines some of the many golf-based cases over the past century where New York State courts have dismissed complaints on assumption of risk grounds, despite the presence of bona fide questions of fact. Part II employs a similar analysis and discussion regarding New York State cases in a wide variety of other sports. Part III outlines some of the most common critiques of the assumption of risk doctrine and looks at how these critiques apply in the context of a sports negligence case. Part IV proposes that these cases could be more equitably resolved by employing a different doctrine: that of comparative negligence, in which a jury is permitted to apportion fault among the parties based on their findings of fact, and looks at the ways in which assumption of risk

[39] *See infra* Part I.

[40] *See, e.g.*, Turcotte v. Fell, 68 N.Y.2d 432, 436–37, 502 N.E.2d 964, 966–67, 510 N.Y.S.2d 49, 51–52 (1986) (holding that a jockey in a horse race was well aware of the risks associated with the sport); Maddox v. City of N.Y., 66 N.Y.2d 270, 271, 279, 487 N.E.2d 553, 554, 557, 496 N.Y.S.2d 726, 727, 730 (1985) (holding that a baseball player who kept playing despite knowledge of the wet and muddy field assumed the risks associated with playing in such conditions); Farone v. Hunter Mountain Ski Bowl, Inc., 51 A.D.3d 601, 602, 859 N.Y.S.2d 64, 65 (App. Div. 1st Dep't 2008) (holding that skiers skiing into each other is an inherent risk of downhill skiing which is assumed upon the beginning of the activity).

[41] *See infra* Part I.

has already been all but eliminated as a separate doctrine by New York State lawmakers.

Lastly, Part V presents a possible balancing test that courts could employ in evaluating sports participation personal injury cases under a comparative negligence framework. By considering six factors—what risks did the plaintiff take beyond mere participation in the sport, what risks are customarily understood to exist in the sport, what rule violations (if any) were committed by either party in contribution to the injury, what character of conduct is typically owed by one participant to another in this sport, what experience level did the plaintiff and defendant have in playing the sport, and what measures could the defendant have taken to avoid this injury to the plaintiff—courts will be able to determine whether the case should be discarded or whether it should be given over to the jury to apportion damages based on relative degrees of fault. Proper application of this test will enable courts to guard against the feared "chilling effect" on vigorous participation in sporting activities while still enabling plaintiffs to recover something when defendants unreasonably place them in a position of harm.

I. LOOKING DOWN THE FAIRWAY: AN EXAMINATION OF HOW NEW YORK STATE COURTS HAVE RESOLVED PARTICIPANT PERSONAL INJURY CASES IN THE GAME OF GOLF

Long before Dr. Anand and Dr. Kapoor ever set foot on a golf course, the courts of New York State were faced with questions about how to resolve issues of injuries on the links.[42] In fact, the state's judiciary has faced a minor deluge of cases on the subject over the past eight decades. As the examples in this section will show, these cases have almost exclusively been resolved in favor of defendants, with courts completely barring any recovery by the injured plaintiffs. Unfortunately, these decisions have also left an overly complex legacy of rules that materialize in one case and then dissolved in the next, leaving New York's courts without consistent and easily reproducible criteria for resolving these disputes.

Legal battles among players on New York State's golf courses began when amateur golfer Teunis Fiero struck eleven-year-old

[42] The game of golf has historically inspired a stunning number of court cases, not only in personal injury and premises liability cases, but also product liability matters, environmental violations, and patent infringement claims. *See* Peter Applebome, *Golf Courses: A Gold Mine for Lawsuits*, N.Y. TIMES, Dec. 23, 2010, at A25. Golf is believed to lead to more lawsuits than any sport in America. *Id.*

caddie John Clifford Simpson with an errant shot in 1931.[43] In a set of circumstances that bear certain similarities to *Anand v. Kapoor*, Mr. Fiero failed to shout any word of warning when he played his shot.[44] Instead, he waited until the ball was in flight to call out to his young caddie, who turned his head at the sound of Mr. Fiero's voice and was promptly struck in the left eye by Mr. Fiero's shot.[45] The child's father then sued Mr. Fiero for damages resulting from the boy's injuries.[46] Unlike the result in *Anand*, however, the trial court allowed this case to go to a jury, which awarded the child a substantial recovery.[47] The jury concluded that because Mr. Fiero did not ascertain the boy's whereabouts before playing the shot, he had failed to exercise reasonable care in his actions, and thus violated a duty of care that he owed to the caddie.[48] Furthermore, the trial court determined that the child had not neglected "to exercise a degree of care commensurate with his years," and thus could not be barred from recovery on contributory negligence grounds.[49] On appeal, the Second Department of the Appellate Division affirmed the trial court's decision, adding the comment that "[t]hose of us who play golf know that caddies of the age of this boy are at times inattentive and oblivious to danger" and therefore should not be held to the same standards of conduct on the golf course as an adult participant.[50] Mr. Fiero appealed again, but the New York State Court of Appeals affirmed the decision in 1933.[51]

In writing the unanimous opinion of the Second Department, Judge Hagarty bemoaned the lack of precedent on which the court could rely.[52] "Notwithstanding the fact that golf is played by many thousands of people," the judge wrote, "there are few reported golf cases."[53] Yet the paucity of golf personal injury decisions was not

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[43] Simpson v. Fiero, 237 A.D. 62, 65, 260 N.Y.S. 323, 324 (App. Div. 2d Dep't 1932), *aff'd*, 262 N.Y. 41, 188 N.E. 20 (1933).

[44] *Id.* at 63–64, 260 N.Y.S at 324.

[45] *Id.*

[46] *Id.* at 62, 260, N.Y.S at 323.

[47] *Id.* at 63, 260, N.Y.S. at 324.

[48] *Id.* at 64, 260, N.Y.S. at 325.

[49] *Id.* at 65, 260, N.Y.S. at 326. There is no discussion of assumption of risk in this case, as this doctrine did not emerge as a central feature in American tort law until later. *See* William Powers Jr., *Sports, Assumption of Risk, and the New Restatement*, 38 WASHBURN L.J. 771, 772 (1999).

[50] *Simpson*, 237 A.D. at 65, 260 N.Y.S. at 326.

[51] Simpson v. Fiero, 262 N.Y. 461, 462, 188 N.E. 20, 20 (1933).

[52] *See Simpson*, 237 A.D. at 65, 260 N.Y.S. at 326.

[53] *Id.* Judge Hagarty went on to state that this lack of cases proved, in his opinion, that there exists "almost universal compliance with the rules of the game, and evidences the care, courtesy and sportsmanship on the part of those who play the game, all of which have

quite as severe as Judge Hagarty implied. Halfway around the world, a definite precedent in these cases had already been set.

It emerged, as the game itself did, from Scotland. In 1905, two gentlemen—Mr. Andrew and Mr. Stevenson—playing on one of the nation's venerable courses had their round abruptly cut short when Mr. Stevenson hit a shot that accidentally struck Mr. Andrew.[54] The injured Mr. Andrew brought suit against Mr. Stevenson in the local Sheriff's Court.[55] Much to Mr. Andrew's surprise, the court did not rule in his favor.[56] Applying the common law precept of *volenti non fit injuria* ("to a willing person, no injury is done")—a forerunner of the American assumption of risk doctrine—the court produced language that foreshadowed a century's worth of similar decisions on the other side of the Atlantic Ocean:

> The risks of an accident in golf are such, whether from those playing behind, or from those meeting the player or crossing his line of play, that, in my opinion, no one is entitled to take part in the game without paying attention to what is going on around and near him, and that one who receives an injury . . . should not be entitled to claim damages for that injury. . . . [P]ersons engage[d] in a game . . . must take all the risks which arise in its pursuit.[57]

The Second Department in *Simpson v. Fiero* did not follow the hardline reasoning used by the Scottish court in *Stevenson*; permitting the plaintiff to recover even though they acknowledged that the young caddie *may* have acted carelessly.[58] In 1936, however, the Second Department reached a result quite similar to *Stevenson* when it upheld a complete bar to recovery in *Rocchio v. Frers*; a case where a player's poor shot injured a young caddy under circumstances similar to those in *Simpson*.[59] The court

contributed so largely to its popularity." *Id.* This demonstrates the high expectations among golfers that others on the course will strictly follow the rules of this sport to the letter.

[54] Andrew v. Stevenson, (1905) 13 S.C.L.R. 581, 581 (ScotSC).

[55] *Id.*

[56] *Id.* at 582.

[57] *Id.*

[58] *See* Simpson v. Fiero, 237 A.D. 62, 64, 260 N.Y.S. 323, 325 (App. Div. 2d Dep't 1932), *aff'd*, 262 N.Y. 41, 188 N.E. 20 (1933). Importantly, though, the Second Department might have come to the same conclusion even if it were aware of the *Stevenson* decision. This case is distinguishable in that the *Stevenson* case involved two adult golfers, while this matter involved an injury that an experienced adult golfer caused to an eleven-year-old caddie. *Compare Andrew*, 13 S.C.L.R. at 582, *with Simpson*, 237 A.D. at 65, 260 N.Y.S. at 326. As Judge Hagarty wrote, the boy's age was "an essential feature in determining the question of contributory negligence." *Simpson*, 237 A.D. at 65, 260 N.Y.S. at 326.

[59] Rocchio v. Frers, 248 A.D. 786, 786, 290 N.Y.S. 432, 432 (App. Div. 2d Dep't 1936). *See also Simpson*, 237 A.D. at 63–64, 260 N.Y.S. at 324.

disposed of the case in a mere five sentences, with no discussion whatsoever of the facts of the case or any precedent leading to this decision.[60] Personal injury cases in golf were only four years old in New York State, and already the Second Department seemed to be growing weary of the subject.

In 1949, however, a golfing accident victim managed to record another win in a New York State court.[61] George Blanchard, playing a round with Roy Johnston, hit a shot that traveled so far away from its intended path that both players lost sight of the ball.[62] Mr. Johnston and Mr. Blanchard both went to search for the ball, with Mr. Blanchard locating the ball first.[63] Unfortunately, before Mr. Johnston had a chance to retreat safely out of the line of fire, Mr. Blanchard decided to place his ball back onto the course and play his next shot.[64] Without providing any word of warning, he struck the ball, which then struck Mr. Johnston in the head.[65] At trial, the jury awarded damages to Mr. Johnston, holding that Mr. Blanchard clearly had been negligent in his actions.[66]

After Mr. Blanchard appealed, the First Department of the Appellate Division affirmed the trial court's holding,[67] but not before

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[60] *Rocchio*, 248 A.D. at 786, 290 N.Y.S. at 432. In *Rocchio*, an adult golfer hit a poor shot that struck and injured an eighteen-year-old caddie. *Id.* The caddie was approximately one hundred seventy five yards away from the spot where the golfer played the shot. *Id.* The lack of detail does not make it clear whether the caddie took an unnecessary risk that led to the injury, or whether the case was dismissed solely on the rationale that being struck by a flying golf ball is a risk inherent to being on a golf course. *See id.*

[61] *See* Johnston v. Blanchard, 276 A.D. 839, 839, 93 N.Y.S.2d 338, 338 (App. Div. 1st Dep't 1949), *aff'd*, 301 N.Y. 599, 93 N.E.2d 494 (1950).

[62] *Id.* at 839, 93 N.Y.S.2d at 339 (Van Voorhis, J., dissenting).

[63] *Id.*

[64] *Id.* In his dissent, Judge Van Voorhis pays particular attention to the fact that Mr. Johnston clearly knew that it was Mr. Blanchard's turn to play a shot, and therefore knew that Mr. Blanchard was likely to swing. *Id.* Judge Van Voorhis also noted that Mr. Johnston saw Mr. Blanchard take his swing. *Id.* Therefore, according to Judge Van Voorhis, yelling a word of warning would have made little difference, because Mr. Johnston "was already in possession of the information which would have been conveyed to him if [the] defendant had called the word 'fore' before playing [the] shot." *Id.* However, this logic ignores an essential point, namely that Mr. Blanchard committed a careless act with total disregard for the safety of other players on the course, including his playing partner whom he knew was nearby when he struck the ball. Accordingly, if not for his careless act, Mr. Johnston's injury never would have occurred. Thus, while Mr. Johnston may have assumed some risk by failing to move out of the way when he knew Mr. Blanchard was about to hit the ball, Mr. Blanchard's negligent conduct was still the direct cause of the ensuing injury. The most equitable framework through which to resolve such a case would be under the theory of comparative negligence, in which a jury determines each party's degree of fault relative to each other and recovery is apportioned accordingly. *See infra* Part V.

[65] *See* Johnston v. Blanchard, 301 N.Y. 599, 600, 93 N.E.2d 494, 494 (1950).

[66] *See Johnston*, 276 A.D. at 839, 93 N.Y.S.2d at 339.

[67] *Id.*

the matter had evidently caused the First Department some consternation. The majority issued a brief affirmation, but provided no rationale as to why the trial court was correct.[68] Judge John Van Voorhis, however, issued a dissenting opinion stating that being hit by a ball was a risk commonly accepted by all golfers, and demanded to know why his colleagues would not overturn the lower court's decision.[69] When Mr. Blanchard appealed again, Judge Van Voorhis's rationale earned three votes on the Court of Appeals, including the approval of the Court's Chief Judge, John T. Loughran.[70] Nevertheless, the majority of the Court of Appeals upheld Mr. Johnston's recovery.[71] Noting that Mr. Blanchard knew that Mr. Johnston had "left a place of safety" to help him search for his ball, the majority determined that "the jury was free to find" that Mr. Blanchard had a duty to warn his playing partner in this situation before playing a shot.[72]

However, such plaintiff-friendly decisions soon proved to be rare among New York State courts, as over the subsequent decades, New York cases of golfers being struck by other players who failed to give a word of warning were resolved almost uniformly against the injured party.[73] New York courts during this period also began an ill-fated effort to impose clearer standards on golf negligence issues, beginning in 1955, when the Bronx County trial court denied recovery to the plaintiff in *Trauman v. City of New York*.[74] While playing the ninth hole of a course operated by the City of New York,

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[68] *See id.*

[69] *See id.* at 840, 93 N.Y.S.2d at 340 (Van Voorhis, J., dissenting).

[70] *See Johnston*, 301 N.Y. at 600, 93 N.E.2d at 494 (Loughran, C.J., dissenting) (arguing that Mr. Johnston, by participating in the game of golf, "assumed the ordinary risks . . . of an accident such as this").

[71] *Id.*

[72] *Id.*

[73] In the decades following *Johnston*, New York State courts began deciding the vast majority of cases in this area by applying the assumption of risk doctrine to automatically bar any recovery arising from an injury "inherent" to the game of golf; the same rationale that was applied in 2010 by the Court of Appeals in Anand v. Kapoor, 15 N.Y.3d 946, 942 N.E.2d 295, 917 N.Y.S.2d 86 (2010). *See, e.g.*, Trauman v. City of N.Y., 208 Misc. 252, 256, 143 N.Y.S.2d 467, 470–71 (Sup. Ct. Bronx County 1955).

[74] *Id.* at 257, 143 N.Y.S.2d at 471. Notably, Mr. Trauman also brought a negligence suit against the City of New York, charging that the public course was constructed in a dangerous manner that put the first tee box and the ninth fairway too close together, creating the hazardous condition that led to Mr. Trauman's injury. *Id.* at 254, 143 N.Y.S.2d at 468–69. This raises premises liability issues that are beyond the scope of this article. However, it is worth noting that Mr. Trauman was not successful in this claim either. *Id.* at 257, 143 N.Y.S.2d at 471. The court held that it would be unfeasible to expect a course to be designed in a way that made it impossible for a "sliced" or "hooked" shot to end up on the fairway of another hole. *Id.* at 256, 143 N.Y.S.2d at 470.

Mr. Trauman was struck by a wild shot from another player who was teeing off on the first hole.[75] The other player failed to give any word of warning when he noticed his shot hooking badly onto the fairway of the ninth hole.[76]

In resolving the case, the court began by applying the typical analysis of risks inherent to the sport.[77] Then, inexplicably, the court veered off its expected path almost as badly as the shot that struck Mr. Trauman. "The player . . . is under no duty to give advance warning to persons not in his line of play nor to persons on contiguous holes or fairways, where the danger to them is not reasonably anticipated," Judge Streit wrote in his opinion.[78] Just like that, without any real explanation about the origins of such a statement, the court had conjured up a new bright-line rule in golf negligence cases: a golfer injured by another player's errant shot could not recover if the injured player was standing on a contiguous hole or fairway, or was out of the shooting player's "line of play."[79]

Left unexplained by this decision, however, is the effect that this newly-implemented rule was meant to have on subsequent decisions in this area. Specifically, the Bronx County Court did not explain whether the "line of play" test was meant to overturn any other tests in golf negligence cases, or whether the traditional rationale that an injured golfer could recover only if he could show that the injury caused by a negligent party did not arise from a risk inherent to the sport was still effective.[80]

The confusion from this case spread to the Court of Appeals in 1972. In the case of *Jenks v. McGranaghan*, the court considered whether a golfer on the ninth tee could recover for injuries caused by a wayward tee shot launched without warning from the eighth tee, approximately one hundred fifty yards away.[81] The trial court

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[75] *Id.* at 254, 143 N.Y.S.2d at 468.

[76] *Id.* at 255, 143 N.Y.S.2d at 469.

[77] *Id.* at 256, 143 N.Y.S.2d at 470–71 (citing Johnston v. Blanchard, 301 N.Y. 599, 599, 93 N.E.2d 494, 494 (1950)) (other citations omitted).

[78] *Trauman*, 208 Misc. at 256, 143 N.Y.S.2d at 471.

[79] *Id.* at 256, 143 N.Y.S.2d at 471. In coming up with this rule, the Bronx County Court extrapolated principles from a variety of other decisions, including the Second Department's opinion in *Rocchio*. *Id.* at 256–57, 143 N.Y.S.2d at 471 (citing Rocchio v. Frers, 248 A.D.786, 290 N.Y.S. 432 (1936)) (other citations omitted). However, this rule had never before been articulated as a standard by any court in the state.

[80] All *Trauman* explains is that a golfer owes no duty to warn players on other holes or players not within the line of sight of the player who is striking the ball. *Trauman*, 208 Misc. at 256, 143 N.Y.S.2d at 471. Whether this is the only way in which a golfer should be absolved of a duty to warn, or whether this is just one of many ways in which a golfer may be held to assume the risk of an injury on the course, is left unsaid in this opinion. *See id.*

[81] Jenks v. McGranaghan, 30 N.Y.2d 475, 478, 285 N.E.2d 876, 877, 334 N.Y.S.2d 641,

completely barred recovery to the plaintiff,[82] and the appellate division affirmed.[83] The Court of Appeals unanimously affirmed the decision of the lower courts.[84] Yet the court did not base its decision on the justification that being struck by a ball is a risk inherent to the game of golf. Instead, relying heavily on the *Trauman* decision, the court focused on the fact that the plaintiff was not "within the foreseeable ambit of danger" from the other player's shot.[85] Therefore, the court held, the golfer playing the shot was under no duty to warn the plaintiff in this case.[86]

The opinion was a Pandora's box out of which several troubles spilled. First, the *Jenks* decision never defined the parameters of the "foreseeable ambit of danger" on a golf course.[87] Nor did the court provide even a list of factors for future courts to utilize in deciding cases based on this rationale. In fact, the court specifically abdicated this responsibility, stating that "[a]lthough there is no fixed rule regarding the distance and angle which [is] considered within the ambit of foreseeable danger, if the distance and angle are great enough, they are not within the danger zone as defined by previous cases."[88] In essence, the court confessed that it did not want to define the rule that it had just created.[89] The only test, therefore, was for judges to look at past case law and, based on those various opinions, decide for themselves if the injured player was in the "ambit of danger" when the shot was played.[90]

This is exactly what the Court of Appeals tried to do in *Jenks*. First, the judges examined the *Johnston* decision, where the court had upheld the jury verdict allowing recovery by the injured

642–43 (1972).

[82] *Id.* at 477, 285 N.E.2d at 877, 334 N.Y.S.2d at 642 (citation omitted).

[83] *Id.* at 478, 285 N.E.2d at 877, 334 N.Y.S.2d at 642.

[84] *Id.* at 480, 285 N.E.2d at 879, 334 N.Y.S.2d at 644.

[85] *Id.* at 479, 285 N.E.2d at 878, 334 N.Y.S.2d at 643 (citing Nussbaum v. Lacopo, 27 N.Y.2d 311, 318, 265 N.E.2d 762, 766, 317 N.Y.S.2d 347, 353 (1970)). *Nussbaum* was an unusual case in which a golfer's poorly hit shot damaged a house that was built adjacent to the golf course. *Nussbaum*, 27 N.Y.2d at 314, 265 N.E.2d at 764, 317 N.Y.S.2d at 349. Adding to the complications was the fact that the golfer was trespassing on the course at the time when he hit the shot. *Id.* Using *Trauman* and other related cases, the Court of Appeals held that the golfer was not liable for the damage he had caused, as the house was not in a position where danger to it would reasonably be anticipated by the golfer playing that particular shot. *See id.* at 318–19, 265 N.E.2d at 766–67, 317 N.Y.S.2d at 353–54 (citing *Trauman*, 208 Misc. at 256–57, 143 N.Y.S.2d at 470–71).

[86] *See Jenks*, 30 N.Y.2d at 480, 285 N.E.2d at 879, 334 N.Y.S.2d at 644.

[87] *Id.* at 479, 285 N.E.2d at 878, 334 N.Y.S.2d at 643 (citing *Nussbaum*, 27 N.Y.2d at 318, 265 N.E.2d at 766, 317 N.Y.S.2d at 353).

[88] *Jenks*, 30 N.Y.2d at 480, 285 N.E.2d at 878, 334 N.Y.S.2d at 644.

[89] *See id.*

[90] *See id.*

plaintiff.[91] In that case, the court noted, both players were on the same hole, and were only seventy yards apart from each other.[92] Next, the judges looked at the outcome in *Trauman*, and noted that the plaintiff had been standing one hundred feet away from the defendant at the time of the shot, as well as twenty to twenty-five feet from the "intended line of flight" of the defendant's ball.[93] Finally, the judges looked at the facts of the case at hand, and pointed out that the plaintiff in this case was one hundred fifty yards away from the defendant at the time the defendant played his shot and twenty-five yards away from the intended line of flight of the ball—four-and-a-half times further away and three times further off line than the plaintiff in *Trauman*.[94] Since the court in *Trauman* had denied recovery to the plaintiff, and the plaintiff in this case was further away from the defendant than the plaintiff in *Trauman* had been, the Court of Appeals determined that denial of recovery for the plaintiff in this case was proper.[95]

This analysis was dissatisfying on several levels. For instance, despite basing its opinion solely on the distance between players and the intended line of the shot, the *Jenks* decision never specifically stated whether these two factors are the *only* two elements to be considered when determining whether a golfer was in the "foreseeable ambit of danger."[96] Additionally, the *Jenks* court did not provide any guidance as to whether either one of these factors should be given more weight than the other. In *Trauman*, for example, where the plaintiff had been standing just twenty to twenty-five feet away from the intended flight of the defendant's ball, more emphasis seemed to be placed on the plaintiff's distance from the defendant at the time the defendant played his shot.[97] In *Jenks*, however, the court seemed to weigh both factors equally.[98]

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[91] *Id.* (holding that the *Johnston* decision is not inconsistent with the rationale employed in *Jenks*).

[92] *Id.*

[93] *Id.* at 479, 285 N.E.2d at 878, 334 N.Y.S.2d at 643 (citing *Trauman*, 208 Misc. at 254–55, 143 N.Y.S.2d at 469).

[94] *Jenks*, 30 N.Y.2d at 480, 285 N.E.2d at 878, 334 N.Y.S.2d at 644.

[95] *See id.* at 480, 285 N.E.2d at 879, 334 N.Y.S.2d at 644.

[96] This seems to have caused problems in future cases, with courts trying to determine what *Jenks* really stood for. *See, e.g.*, Jackson v. Livingston Country Club, Inc., 55 A.D.2d 1045, 1045, 391 N.Y.S.2d 234, 234 (App. Div. 4th Dep't 1977) ("A golfer is under a general duty of reasonable care to avoid injury to others which may include warning others in his line of play by the traditional call of 'fore' before hitting the ball.").

[97] *See Trauman*, 208 Misc. at 257, 143 N.Y.S.2d at 471 (emphasizing that the plaintiff was standing at least one hundred twenty five feet away from the defendant, thus showing that the plaintiff was not in the "zone of danger").

[98] *See Jenks*, 30 N.Y.2d at 480, 285 N.E.2d at 878–79, 334 N.Y.S.2d at 644 (using both the

Most importantly, the *Jenks* decision failed to say whether all previous rationales employed for determining whether one golfer owed a duty of care to another on the course were now null and void. In examining *Johnston*, for instance, the court ignored several critical factors that led to the decision in favor of the plaintiff, including the fact that the plaintiff had gone to help the defendant look for the ball, that the defendant knew the plaintiff had left an area of safety to do so, and that the defendant still failed to give any warning before playing his shot after the plaintiff had returned the ball to him.[99] Instead, the court treated *Johnston* solely as a question of distance between the players.[100] Oddly, though, the court noted that the two players in *Johnston* were seventy yards apart from each other, a distance equivalent to two hundred ten feet.[101] In *Trauman*, the players were only around one hundred feet apart from each other, despite being on separate holes.[102] Yet the court stated that the physical space between the players in *Trauman* was far enough apart to deny recovery, while the distance between the players in *Johnston*—despite being greater than the distance in *Trauman*—was close enough to grant recovery.[103] Out of this reasoning, another new rule seemed to emerge: a player on one hole is never within the ambit of danger of a player on a different hole, regardless of how close those holes might be.

In sum, the decision in *Jenks* confounded the issues of golf negligence cases more than it managed to resolve them. This could explain why, five years later, the Fourth Department in *Jackson v. Livingston Country Club, Inc.,* seemed to move away from the tangle of *Jenks*, despite citing it in their opinion.[104] However, this court managed to alter the parameters of these cases yet again, holding that golfers are "under a general duty of reasonable care to

distance between plaintiff and defendant and the distance between the defendant and the intended flight of defendant's ball as reasons to uphold the bar of recovery to plaintiff).

[99] *See* Johnston v. Blanchard, 301 N.Y. 599, 600, 93 N.E.2d 494, 494 (1950).

[100] *See Jenks*, 30 N.Y.2d at 480, 285 N.E.2d at 878, 334 N.Y.S.2d at 644 (noting that *Johnston* is not inconsistent with the outcome in *Jenks* because of the closer proximity between the two players in *Johnston*).

[101] *See id.* (citing Johnston v. Blanchard, 276 A.D. 839, 839, 93 N.Y.S.2d 338, 338 (App. Div. 1st Dep't 1949)).

[102] *Jenks*, 30 N.Y.2d at 479, 285 N.E.2d at 878, 334 N.Y.S.2d at 643 (citing *Trauman*, 208 Misc. at 254–55, 143 N.Y.S.2d at 469–70).

[103] *See Jenks*, 30 N.Y.2d at 479–80, 285 N.E.2d at 878, 334 N.Y.S.2d at 643–44 (citing *Johnston*, 276 A.D. at 839, 93 N.Y.S.2d at 338).

[104] *See* Jackson v. Livingston Country Club, Inc., 55 A.D.2d 1045, 1045, 391 N.Y.S.2d 234, 235 (App. Div. 4th Dep't 1977) (reversing a trial court's grant of summary judgment on the grounds that factual questions remained as to whether the plaintiff had assumed the risk of injury, with little attention to the "zone of danger" rationale that formed the basis of *Jenks*).

avoid injur[ies] to others which *may* include warning others in his line of play by the traditional call of 'fore' before hitting the ball."[105] Once again, new issues arose. First, the court provided no guidance as to how a golfer's "line of play" should be determined. In addition, the Fourth Department noted that a golfer's duty of care to others on the course *may*—as opposed to "must"—include warning others in the line of play.[106] This, of course, created another question: if the duty of care between golfers does not include warning golfers within your line of play, then what, if anything, does this duty of care actually include?

In the years following *Jackson*, New York courts seemed willing to employ the "foreseeable ambit of danger" language from *Jenks* as long as the ultimate decision of whether the plaintiff actually was in the ambit of danger was left in the hands of the jury. For example, in 1989, the Second Department upheld the trial court's denial of summary judgment in a case involving conflicting stories regarding whether the plaintiff was standing "near the intended line of flight" and whether the defendant yelled a word of warning before playing his shot.[107] Similarly, in 1991, the Fourth Department upheld a denial of summary judgment in a case where the plaintiff and defendant were on adjoining holes but were only twenty to twenty-five feet apart from each other at the time defendant played his shot.[108] "Under these circumstances," the Fourth Department held in a memorandum opinion, "we conclude that whether [the] plaintiff was in the foreseeable ambit of danger cannot be determined as a matter of law but, rather, presents a question of fact for determination by a jury."[109]

Yet in *Anand v. Kapoor*, both the trial court and the Second Department determined that despite extensive use of the "ambit of

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[105] *Id.* (citing *Jenks*, 30 N.Y.2d at 479–80, 285 N.E.2d at 878–79, 334 N.Y.S.2d at 643–44; Sampson v. Viero, 237 A.D. 62, 64, 260 N.Y.S. 323, 325–26 (App. Div. 2d Dep't 1932), *aff'd*, 262 N.Y. 461, 188 N.E. 20 (1933); *Trauman*, 208 Misc. at 256, 143 N.Y.S.2d at 470) (emphasis added).

[106] *Compare Jenks*, 30 N.Y.2d at 479–80, 285 N.E.2d at 878–79, 334 N.Y.S.2d at 643–44 (stating golfer's have a general duty to warn others that are within the foreseeable ambit of danger), *with Jackson*, 55 A.D.2d at 1045, 391 N.Y.S.2d at 235 (stating the golfer's general duty may include warning other players). Despite citing *Jenks* in making this statement, the Fourth Department seemed to depart from *Jenks*; a decision which strongly indicated that golfers *always* owed a duty to warn other golfers in the zone of danger. *Jackson*, 55 A.D.2d at 1045, 391 N.Y.S.2d at 235.

[107] McDonald v. Huntington Crescent Club, Inc., 152 A.D.2d 543, 544, 543 N.Y.S.2d 155, 156 (App. Div. 2d Dep't 1989).

[108] Richardson v. Muscato, 176 A.D.2d 1227, 1227–28, 576 N.Y.S.2d 721, 722 (App. Div. 4th Dep't 1991).

[109] *Id.* at 1228, 576 N.Y.S.2d at 722.

danger" analysis in the case, summary judgment for the defendant was the proper result.[110] Paying close attention to testimony claiming that Dr. Anand was at least fifty degrees away from the intended line of flight of Dr. Kapoor's ball, the Second Department ruled that under *Jenks*, this was reason enough to grant summary judgment to Dr. Kapoor.[111] The court devoted no attention to the distance between the players at the time of the shot; a component of the analysis in *Jenks* and in virtually all "ambit of danger" cases prior to this one.[112] Instead, the Second Department essentially narrowed the "ambit of danger" test to include just one factor: whether the plaintiff was "in the intended line of flight when the defendant struck the ball."[113]

Once again, the court failed to provide any guidance along with its new interpretation of the test. Despite using the "intended line of flight" as the basis of much of the opinion,[114] the Second Department neglected to state what this phrase meant and how future courts can calculate whether a golfer is within the "intended line of flight" of another golfer's shot. Nor did the Second Department explain the policy rationale behind a test that seems to promote complete disregard for other golfers on the course. Under this "test," it seems, a golfer who injures another golfer need only prove that he did not *intend* for his shot to travel in that direction. The distance between the golfers on the course, the issue of whether a golfer ever looked to see if there were people near him before he played the shot, the question of whether the golfer ever shouted a warning after noticing the shot traveling badly off its intended path—all of these elements, it seems, evaporate under this latest rationale.

The Second Department also devoted part of their opinion to the assumption of risk doctrine, holding that Dr. Anand should be

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[110] Anand v. Kapoor, 61 A.D.3d 787, 789, 877 N.Y.S.2d 425, 427 (App. Div. 2d Dep't 2009), *aff'd*, 15 N.Y.3d 946, 942 N.E.2d 295, 917 N.Y.S.2d 86 (2010).

[111] *Id.* at 790, 877 N.Y.S.2d at 428 ("Accordingly, under the *Jenks* line of authority, the defendant owed no duty to the plaintiff to give warning of his intent to hit the ball, and cannot be held liable for his misdirected shot on this basis.").

[112] *See, e.g.*, Jenks v. McGranaghan, 30 N.Y.2d 475, 480, 285 N.E.2d 876, 878, 334 N.Y.S.2d 641, 644 (1972) ("Although there is no fixed rule regarding the distance and angle which are considered within the ambit of foreseeable danger, if the distance and angle are great enough, they are not within the danger zone as defined by previous cases.").

[113] *See Anand*, 61 A.D.3d at 789–90, 877 N.Y.S.2d at 427–28 (considering only the testimony that Dr. Anand was fifty degrees away from the intended line of flight in ruling that Dr. Anand was not in the "zone of danger" from Dr. Kapoor's shot).

[114] *See generally id.* at 789–90, 877 N.Y.S.2d at 428 (basing their decision on the conclusion that the defendant was not in the "intended line of flight").

denied recovery because his injury arose from a known risk within the sport.[115] Even if Dr. Kapoor were negligent in failing to ascertain if any players on the course were close to the intended line of his shot, the court ruled, "such carelessness does not rise to the level of creating a dangerous condition over and above the usual dangers inherent in participating in the sport of golf."[116] According to the court, to rule otherwise could have a chilling effect on "the policy goal of facilitating free and vigorous participation" in the sport.[117]

Yet this rationale also seems odd. As noted in the affidavit of the golf professional that was Dr. Anand's expert witness, the accident never would have occurred if Dr. Kapoor had only taken the time to see where the other players were and warned them that he was playing a shot.[118] Such an action takes very little time and involves very little effort. Furthermore, a fundamental safety rule in the game of golf requires such conduct.[119] In their effort to facilitate "free and vigorous participation" in the sport,[120] the Second Department provided a shield for players who carelessly violate a well-established rule of the game and do so in complete disregard for the safety of other participants. It is difficult to see how a requirement to shout "Fore!" in adherence with the rules of golf will create a chilling effect on participation in the sport. Rather, a more likely consequence of such a ruling could be that people refrain from playing golf, knowing that other players now owe no duty to warn other players that an extremely dangerous projectile is headed in their direction.[121]

In sort of a *coup de grace* of confusion, the Court of Appeals affirmed the Second Department's decision without devoting one sentence to the "intended line of flight" analysis. In fact, the court did not even cite *Jenks* in its final opinion. Instead, the Court of

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[115] *Id.* at 790–91, 877 N.Y.S.2d at 428–29.

[116] *Id.* at 791, 877 N.Y.S.2d at 429 (citing Morgan v. State, 90 N.Y.2d 471, 485, 685 N.E.2d 202, 208, 662 N.Y.S.2d 421, 427 (1997)).

[117] *Anand*, 61 A.D.3d at 792, 877 N.Y.S.2d at 430.

[118] Sickmen Affirmation, *supra* note 31, at 2.

[119] U.S. GOLF ASS'N, *supra* note 16, at 18.

[120] *Anand*, 61 A.D.3d at 792, 877 N.Y.S.2d at 430.

[121] Other commentators have noted that such an effect could result from cases similar to *Anand*. *See, e.g.*, *California Supreme Court Extends Assumption of Risk to Noncontact Sports*, 121 HARV. L. REV. 1253, 1259 (2008) (noting that personal injury cases that protect "sports-related injurers" expose sports injury victims "to the risk of bearing the full cost of harms inflicted on them by nonreckless fellow participants," potentially causing people to "shy away from vigorous participation in sports, out of fear of absorbing the burden of nonremediable, nonreckless injuries").

Appeals focused its attention solely on the assumption of risk rationale, agreeing with the Second Department's findings that Dr. Anand's injury arose from a "commonly appreciated risk of golf."[122]

What all of this means for the future is unclear, primarily because the case law in this area leaves a jumbled picture with no clear map for future courts to follow. With the Court of Appeals refusing in *Anand* to engage in any analysis about "ambit of danger" or "intended line of flight," one can hope that we have seen the end of the muddy reasoning employed by *Jenks* and its progeny. If this is indeed true, then we have returned to the place where we began in 1932, with courts examining whether the plaintiff voluntarily accepted the risk of injury by simply stepping onto the golf course. As noted below, this is consistent with the way in which New York State courts have resolved other personal injury suits arising from sports participation.[123] Yet it is inconsistent with basic policy goals of promoting general safety, encouraging compliance with rules of an activity, respecting other participants in an activity, acting with due caution when empowered with an instrument that can cause bodily harm to others, and other fundamental objectives of this nature.[124]

Completely banning any recovery by injured plaintiffs could push some recreational golfers away from the game for fear of shouldering the full burden if injured by another participant's negligence.[125] It could also encourage golfers to act in a careless manner with regard to their fellow players, knowing that they typically will not be held legally responsible for their actions, even if the resulting injury is largely attributable to their negligence.[126] Clearly, a better solution for resolving these cases is necessary.

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[122] Anand v. Kapoor, 15 N.Y.3d 946, 947–48, 942 N.E.2d 295, 296–97, 917 N.Y.S.2d 86, 87–88 (2010).

[123] *See infra* Part II.

[124] *See, e.g.*, *California Supreme Court Extends Assumption of Risk to Noncontact Sports*, *supra* note 121, at 1259–60 (describing possible negative policy impacts of sports participant personal injury cases where assumption of risk is used as a complete bar to recovery).

[125] *See id.*

[126] *See id.* at 1260; *see also* Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 877 (criticizing courts for being "so eager to free defendants" from any liability after their negligent conduct causes injury to a fellow sports participant).

II. APPROACH SHOTS: HOW NEW YORK STATE COURTS HAVE TREATED PARTICIPANT PERSONAL INJURY LAWSUITS ARISING OUT OF OTHER SPORTS

The widespread use of the assumption of risk doctrine to resolve sports negligence cases is hardly limited to the game of golf. New York State courts have historically applied this doctrine to a wide variety of athletic activities.[127] Throughout the state, the concept that a plaintiff cannot recover anything if his injury arises from a voluntarily assumed risk has received staunch support in personal injury cases arising from athletic pursuits.[128] While this section hardly provides a comprehensive look at the state's treatment of participant negligence actions in all sports, it examines a select number of cases that have applied the assumption of risk doctrine and explores the possible ramifications of the decisions that do so.

A. Horse Racing

The so-called "Sport of Kings" produced one of the most important assumption of risk decisions in New York State history with the 1986 case of *Turcotte v. Fell*.[129] It arose when Ronald J. Turcotte, the jockey who rode Secretariat to the coveted Triple Crown in 1973, suffered an accident five years later during a race at Belmont Park.[130] Mr. Turcotte proved that the accident, which left him paralyzed from the waist down, was caused by another jockey's "foul riding," a violation of the rules of the sport as promulgated by the New York Racing and Wagering Board.[131] Seeking to recover damages for his injuries, Mr. Turcotte brought suit against the other jockey, claiming that the other jockey's negligent disregard for other competitors on the racetrack had caused the accident.[132]

The trial court, in a decision ultimately affirmed by the Court of

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[127] Along with the sports listed in this part, New York State courts have granted summary judgment on assumption of risk grounds in personal injury cases for sports ranging from bobsledding, Morgan v. State, 90 N.Y.2d 471, 479, 486, 685 N.E.2d 202, 204, 209, 662 N.Y.S.2d 421, 423, 428 (1997), to floor hockey, Mayer v. Gulmi, 64 A.D.3d 754, 755, 883 N.Y.S.2d 579, 580 (App. Div. 2d Dep't 2009).

[128] *See infra* Part III.

[129] Turcotte v. Fell, 68 N.Y.2d 432, 502 N.E.2d 964, 510 N.Y.S.2d 49 (1986).

[130] *Id.* at 435, 502 N.E.2d at 966, 510 N.Y.S.2d at 51.

[131] *Id.* at 436, 502 N.E.2d at 966, 510 N.Y.S.2d at 51 (footnote omitted).

[132] *See id*. Mr. Turcotte also sued the New York Racing Association for failure to properly maintain the racetrack, but failed here, too, on assumption of risk grounds, as the court ruled that he was able to understand the poor condition of the track and "accepted the risk" by taking part in the race anyway. *Id.* at 442–43, 502 N.E.2d at 970–71, 510 N.Y.S.2d at 55–56.

Appeals, barred Mr. Turcotte from recovery, granting summary judgment to the defendant under an assumption of risk rationale.[133] In examining the case on appeal, the Court of Appeals held that "Turcotte, by engaging in the sport of horseracing, relieved other participants of any duty of reasonable care with respect to known dangers or risks which inhere in that activity."[134] Even though the resulting injury arose from a clear infraction of the sport's rules, the court determined that this was not enough for the case to be heard by a jury.[135] Common rule infractions by co-competitors were included in the spectrum of risks inherent to the sport, the court ruled.[136] Thus, a participant in the sport inherently accepts the risk of such conduct by engaging in the athletic activity, and should not be allowed to recover any damages for any foreseeable injuries caused by a co-competitor breaking the rules.[137]

The holding in *Turcotte* has been cited in virtually every subsequent sports negligence case in New York State.[138] At first glance, the ruling seems clear and firm: any voluntary participant in an activity cannot recover damages from any injury arising from a risk inherent to the sport, regardless of the other party's negligence in causing the injury.[139] Yet while the Court of Appeals reached this ultimate result, it considered a number of key factors along the way—components that are often overlooked by courts that cite *Turcotte* in support of their opinions.

To begin with, the Court of Appeals paid significant attention to the fact that Mr. Turcotte was a professional athlete, not an amateur or recreational sportsman.[140] The Court noted that a professional athlete has significantly more experience in playing the sport than an amateur, and therefore is expected to have a heightened awareness of the dangers inherent to the activity.[141] The question of assumption of risk, according to the *Turcotte* Court, necessarily includes sub-queries of "the participant's knowledge and

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[133] *Id.* at 436–37, 502 N.E.2d at 966–67, 510 N.Y.S.2d at 51–52.

[134] *Id.* at 436, 502 N.E.2d at 966, 510 N.Y.S.2d at 51.

[135] *See id.* at 437, 502 N.E.2d at 967, 510 N.Y.S.2d at 52.

[136] *See id.* at 441, 502 N.E.2d at 970, 510 N.Y.S.2d at 55.

[137] *Id.*

[138] Almost all of the post-1986 sports negligence cases cited in this article reference *Turcotte*. *See, e.g.*, Anand v. Kapoor, 61 A.D.3d 787, 790, 877 N.Y.S.2d 425, 428 (App. Div. 2d Dep't 2009) (citing *Turcotte*, 68 N.Y.2d at 438, 502 N.E.2d at 968, 510 N.Y.S.2d at 53), *aff'd*, 15 N.Y.3d 946, 942 N.E.2d 295, 917 N.Y.S.2d 86 (2010).

[139] *See Anand*, 61 A.D.3d at 791–92, 877 N.Y.S.2d at 429–30 (using references to *Turcotte* in this manner).

[140] *See Turcotte*, 68 N.Y.2d at 437, 502 N.E.2d at 967, 510 N.Y.S.2d at 52.

[141] *See id.* at 440, 502 N.E.2d at 969, 510 N.Y.S.2d at 54.

experience in the activity generally."[142] In addition, the *Turcotte* court put forth several factors to be used in deciding whether assumption of risk should be applied in a sports negligence case,

> including but not limited to: the ultimate purpose of the game and the method or methods of winning it; the relationship of [the] 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.[143]

Thus, it becomes clear that this often-cited case really stands for more than originally meets the eye. Many recent decisions tend to use *Turcotte* to support a sweeping proposition of denying recovery in any situation where an athlete voluntarily engages in a sporting activity.[144] However, *Turcotte* really demands a deeper fact-specific analysis, requiring a consideration of factors such as the objectives and traditions of the sport in question, the safety requirements regarding participants in the game, and the experience level of the athlete(s) in the particular case at hand.[145] Truly, *Turcotte* does not stand for a blanket ban on recovery for voluntary participants in a sport, but merely leaves this door ajar, to be fully opened, only if a court determines that this outcome is appropriate after considering several factors within the context of the case.[146]

B. Baseball

In *Maddox v. City of New York*,[147] the Court of Appeals held that a professional baseball player assumed the risk of injury by playing on a muddy field and therefore could not recover for injuries caused by slipping on that field.[148] The player argued that he had not assumed the risk, as he had alerted the grounds crew earlier in the game that the field was "awfully wet" with "standing water above the grass line."[149] However, the Court of Appeals affirmed the trial

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[142] *Id.*

[143] *Id.*

[144] *See, e.g.*, *Anand*, 61 A.D.3d at 792, 877 N.Y.S.2d at 429–30 (favoring a very broad interpretation of the *Turcotte* decision).

[145] *See Turcotte*, 68 N.Y.2d at 440, 502 N.E.2d at 969, 510 N.Y.S.2d at 54.

[146] *See id.* The Court of Appeals' consideration of these various factors provides support for the multi-part balancing test advocated by this article. *See infra* Part VI.

[147] Maddox v. City of N.Y., 66 N.Y.2d 270, 487 N.E.2d 553, 496 N.Y.S.2d 726 (1985).

[148] *Id.* at 274–75, 487 N.E.2d at 554, 496 N.Y.S.2d at 727.

[149] *Id.* at 275–76, 487 N.E.2d at 555, 496 N.Y.S.2d at 728.

court's finding that because the baseball player voluntarily remained in the game after alerting the grounds crew of the dangerous condition in the field, the player assumed the risk of any injury arising from that condition.[150]

Once again, the court paid particular attention to the fact that plaintiff was an experienced athlete.[151] Acknowledging that "awareness of risk is not to be determined in a vacuum," the Court of Appeals established that an assessment of whether a party assumed the risk of injury must be made "against the background of the skill and experience of the particular plaintiff."[152] Given the high level of skill and experience assumed to be possessed by a professional baseball player, the court held that under these circumstances, there was no remaining issue of fact as to whether the plaintiff here had assumed the risk of injury.[153]

C. Skiing

Unlike most sports, skiing receives special attention in the statutes of New York State. A provision of the state's General Obligations Law, anticipating potential negligence claims on the slopes, spells out a number of specific risks inherent to the sport.[154] Furthermore, the law describes the need for skiers not to take unnecessary risks in pursuit of this activity, and asks that skiers be apprised of the risks that naturally arise out of a day on the trails.[155]

However, this does not prevent personal injury litigation from occurring within this sport. The most recent significant case in this area, *Farone v. Hunter Mountain Ski Bowl Inc.*,[156] was decided by the First Department in 2008, after a skier brought suit for injuries suffered after another skier ran into him.[157] Predictably, the First Department reversed the trial court's denial of summary judgment in favor of the defendant, barring recovery on assumption of risk grounds.[158] Here, however, unlike other sports participant personal

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[150] *Id.*

[151] *Id.* at 278, 487 N.E.2d at 556–57, 496 N.Y.S.2d at 730.

[152] *Id.* at 278, 487 N.E.2d at 556, 496 N.Y.S.2d at 730 (citing Dillard v. Little League Baseball, 55 A.D.2d 477, 480, 390 N.Y.S.2d 735, 737 (App. Div. 4th Dep't 1977)).

[153] *Id.* at 279, 487 N.E.2d at 557–58, 496 N.Y.S.2d at 730–31.

[154] *See* N.Y. GEN. OBLIG. LAW § 18-101 (McKinney 2013).

[155] *See id.*

[156] Farone v. Hunter Mountain Ski Bowl, Inc., 51 A.D.3d 601, 859 N.Y.S.2d 64 (App. Div. 1st Dep't 2008).

[157] *Id.* at 602, 859 N.Y.S.2d at 65.

[158] *See id.*

injury lawsuits in New York State, the court was able to point to specific provisions in the General Obligations Law to demonstrate precisely how the plaintiff had assumed the risk of the injury sustained, greatly easing the court's burden in disposing of the plaintiff's claims.[159]

The neat and tidy results in *Farone* and other similar skiing injury cases[160] demonstrate the great advantage of having a particular statute to utilize when deciding a personal injury matter. Of course, expecting the state legislature to pass separate statutes detailing the risks inherent to every sport imaginable is unrealistic. Furthermore, it still does not resolve the same nagging question that these cases present: is it fair to completely bar recovery for an injured party when blame for that injury truly rests with both parties?

D. Wrestling

In the pantheon of assumption of risk cases involving sports, the Second Department's 2009 decision in *Farrell v. Hochhauser*[161] may involve the oddest fact pattern of all of them. In the case, Mr. Farrell, an amateur high school wrestler, alleged that he contracted herpes simplex I from skin-to-skin contact with another wrestler during a match.[162] Mr. Farrell sued both the other wrestler and the high school that hosted the match, claiming that their failure to take proper precautions led to him acquiring this disease.[163] The Second Department—holding that the constant close contact in a wrestling match made acquiring a disease through skin-to-skin contact an inherent risk of the sport—ruled that summary judgment should be granted to both defendants on assumption of risk grounds.[164]

Once again, the court came to this decision through weighing a number of factors, including the fact that Mr. Farrell had specifically been informed by his coach of the risk of contracting a

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[159] *See id.* (describing how an accident, which occurred while one of the skiers was trying to make a complicated maneuver, was listed in the law as one of the risks inherent to downhill skiing).

[160] *See, e.g.*, Painter v. Peek'n Peak Recreation, Inc., 2 A.D.3d 1289, 1289–90, 769 N.Y.S.2d 678, 679 (App. Div. 4th Dep't 2003) (holding that hitting a "submerged ice divot" while skiing was included in the statutory description of risks inherent to skiing).

[161] Farrell v. Hochhauser, 65 A.D.3d 663, 884 N.Y.S.2d 261 (App. Div. 2d Dep't 2009).

[162] *See id.* at 663, 884 N.Y.S.2d at 262.

[163] *See id.* at 664, 884 N.Y.S.2d at 263.

[164] *Id.* at 663–64, 884 N.Y.S.2d at 262–63.

"communicable disease" from wrestling.[165] Furthermore, the coach had instructed Mr. Farrell in proper safety procedures to take after each practice or match to avoid contracting herpes simplex or a similar disease.[166] This was enough, according to the Second Department, to provide a clear showing that Mr. Farrell had assumed the risk of contracting such a disease as soon as he stepped into the ring.[167]

As with so many assumption of risk cases, however, the court's reasoning ends up seeming rather one-sided. For the reasons cited by the Second Department, there seems to be little doubt that Mr. Farrell was fully apprised of the disease-related risks associated with the sport of wrestling and voluntarily engaged in the sport anyway.[168] Yet, the result reached in this case seems to pay little attention to another important aspect: the fact that the other wrestler, despite having a disease that could be communicated through the type of contact common to wrestling, voluntarily participated in the competition and put his co-competitors at risk of contracting the disease by doing so.[169] In fact, the Second Department pays no attention whatsoever to the conduct of the other wrestler, treating it as irrelevant because Mr. Farrell knew that such an adverse outcome was necessary when he decided to partake in the sport of wrestling.[170]

Thus, we do not know whether the other wrestler knew that he had herpes simplex[171] before he entered the match. If this were true, it would seem an exceptionally unjust result to completely bar Mr. Farrell from any recovery. If indeed herpes simplex is a disease commonly transmitted through wrestling, as the Second Department asserts,[172] then it would seem logical that participants in the sport would owe a duty of care to other competitors to determine whether they had this disease prior to engaging in a wrestling match. Additionally, it seems logical that wrestlers would

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165 *Id.* at 664, 884 N.Y.S.2d at 263.

166 *Id.*

167 *See id.* at 663–64, 884 N.Y.S.2d at 262.

168 *See id.* at 664, 884 N.Y.S.2d at 263.

169 *See id.* at 663–64, 884 N.Y.S.2d at 262–63 (discussing the assumed risk of Mr. Farrell, but not the other wrestler's decision to put other competitors at risk of contracting herpes).

170 Discussion throughout the case is limited to what the plaintiff knew about the risks of the sport. *See id.* There is no reference whatsoever to the defendant's knowledge or conduct with regard to the disease and with regard to taking part in the wrestling match. *See id.*

171 *Cf. id.* at 663, 884 N.Y.S.2d at 262 (stating that the other wrestler, Eric Hochhauser, allegedly had herpes simplex I).

172 The Second Department notes that expert testimony in the case asserted "that herpes 'may exist in 29.8%' of high school wrestlers." *Id.* at 664, 884 N.Y.S.2d at 263.

owe a responsibility not to take part in a wrestling match if they knew that they had herpes simplex or any other disease likely to be transmitted through skin-to-skin contact, as doing so places their competitor at a high risk of contracting the disease—a risk that likely could be avoided through proper precautions.[173]

Thus, it seems that the more equitable result would have paid at least some attention to whether the conduct of the wrestler who had the disease and chose to wrestle anyway constituted a lack of reasonable care. The policy implicitly created by the decision in this case, however, places no duty of care on the wrestler who has a disease that is easily transmitted by contact common to wrestling. He is free to wrestle and expose other wrestlers to the disease without exposing himself to one penny of liability.

E. Skating

New York State courts have faced several personal injury cases arising from skating accidents, both on the ice[174] and in the roller rink.[175] The vast majority of these cases have emerged from collisions between skaters.[176] Most of these cases have ended in summary judgment for the defendant on assumption of risk grounds, as courts have held that the risk of colliding with other skaters is inherent to the sport.[177] Courts have applied assumption of risk as a matter of law in situations where a group of teenagers traveling too fast on a crowded ice rink knocked over a mother trying to teach her five-year-old how to skate,[178] and where an out-

[173] While herpes simplex II often displays no physical symptoms, herpes simplex I typically produces noticeable sores on the infected person's body. *See*, *e.g.*, *Herpes Simplex: Signs and Symptoms*, AM. ACAD. OF DERMATOLOGY, http://www.aad.org/skin-conditions/dermatology-a-to-z/herpes-simplex/signs-symptoms (last visited Feb. 16, 2013). Thus, it seems reasonable that someone would know that they have this condition, and then take proper precautions to avoid spreading it to others.

[174] *See, e.g.*, Reid v. Druckman, 309 A.D.2d 669, 670, 765 N.Y.S.2d 878, 878 (App. Div. 1st Dep't 2003) (discussing a legal malpractice case where the underlying claim was a personal injury action at an ice skating rink); Zambrana v. City of N.Y., 262 A.D.2d 87, 87, 691 N.Y.S.2d 471, 472 (App. Div. 1st Dep't 1999).

[175] *See, e.g.*, Lopez v. State Key, Inc., 174 A.D.2d 534, 534, 571 N.Y.S.2d 716, 717 (App. Div. 1st Dep't 1991).

[176] *See, e.g.*, Bleyer v. Recreational Mgmt. Serv. Corp., 289 A.D.2d 519, 520, 735 N.Y.S.2d 616, 616 (App. Div. 2d Dep't 2001); Engstrom v. City of N.Y., 270 A.D.2d 35, 35, 704 N.Y.S.2d 224, 225 (App. Div. 1st Dep't 2000); *Zambrana*, 262 A.D.2d at 87, 691 N.Y.S.2d at 472; *Lopez*, 174 A.D.2d at 534, 571 N.Y.S.2d at 717.

[177] *See, e.g.*, *Bleyer*, 289 A.D.2d at 520, 735 N.Y.S. at 616–17; *Engstrom*, 270 A.D. at 35, 704 N.Y.S. at 225; *Zambrana*, 262 A.D.2d at 87, 691 N.Y.S.2d at 472; *Lopez*, 174 A.D.2d at 534, 571 N.Y.S.2d at 717.

[178] *See Zambrana*, 262 A.D.2d at 89, 91, 691 N.Y.S.2d at 473, 474 (Rosenberger, J.,

of-control skater struck a young girl scout who was in the process of exiting the roller rink.[179]

In 2003, however, the Bronx County Supreme Court denied summary judgment in a matter brought by a woman suing for injuries which she alleged were caused by an ice skating rink employee who was skating out-of-control.[180] The First Department affirmed the trial court's denial of summary judgment, holding that although the risk of colliding with other skaters is inherent in the sport; this risk is not so broad as to encompass the reckless on-ice actions of a skating rink employee.[181] However, this decision focused primarily on the duty of care owed by an employee to a patron rather than by one participant in the sport to another.[182] Thus, the action typically taken by courts in skating accident cases *not* involving rink personnel still seems to be a grant of summary judgment on assumption of risk principles.

F. Donkey Basketball

The prize for the most unusual sport in a New York State torts case probably should be awarded to the matter of *Arbegast v. Board of Education of South New Berlin Central School*.[183] Ms. Arbegast, a student-teacher at the school, took part in a game of "donkey basketball"—in which participants tried to play basketball while riding around the court on donkeys—as part of a school fundraising effort.[184] During the game, the donkey that Ms. Arbegast was riding put its head down, and Ms. Arbegast fell off.[185] Hitting the gym floor, she suffered permanent damage to her left arm.[186] She brought suit against both the school district and the company that supplied the donkeys for the basketball game, claiming both parties had failed to properly instruct her in the risks that could be involved in taking part in this game.[187]

The case made it to the Court of Appeals, which affirmed the

dissenting).

[179] *See Lopez*, 174 A.D.2d at 534, 571 N.Y.S.2d at 717.

[180] Reid v. Druckman, 309 A.D.2d 669, 669–70, 765 N.Y.S.2d 878–79 (App. Div. 1st Dep't 2003).

[181] *Id.* at 670, 765 N.Y.S.2d at 878–79.

[182] *See id.*

[183] Arbegast v. Bd. of Educ. of S. New Berlin Cent. Sch., 65 N.Y.2d 161, 480 N.E.2d 365, 490 N.Y.S.2d 751 (1985).

[184] *Id.* at 162–63, 480 N.E.2d at 366–67, 490 N.Y.S.2d at 752–53.

[185] *Id.* at 162, 480 N.E.2d at 366–67, 490 N.Y.S.2d at 752–53

[186] *Id.* at 163, 480 N.E.2d at 367, 490 N.Y.S.2d at 753.

[187] *Id.*

Appellate Division's order that Ms. Arbegast had assumed the risk of such an injury by participating in the game.[188] After a discussion of the assumption of risk doctrine's history in New York, the Court of Appeals reached a rather straightforward conclusion: that because Ms. Arbegast had been told before the game that "participants are at their own risk," and she played anyway, she automatically assumed the risk of any injury inherent to the sport—including falling off the donkey.[189]

Even here, though, one can make a reasonable argument that assumption of risk was not the correct remedy. The mere statement that "participants are at their own risk" fails to explain the extent of that risk to anyone taking part in the game.[190] Even more importantly, the Court of Appeals paid little attention to the possible fault that could reside with the defendants, including lack of proper instruction about how to ride the donkeys and absence of proper supervision while the participants were on the donkeys.[191] Even though Ms. Arbegast clearly knew that there was some risk involved in taking part in the game and played in spite of this knowledge, it is difficult to swallow a result in which the court essentially seems to hold that the defendants owed no duty of care to participants in this sport.

In general, as evinced by the examples above, barring injured plaintiffs from recovery through application of the assumption of risk doctrine appears to be the most common outcome in New York State for personal injury cases arising from participation in a sport.[192] Yet the policies created as a result of such decisions often do not seem to be advantageous for anyone involved. Instead, they frequently seem to absolve defendants of liability for injuries caused by their unduly risky behavior, forcing plaintiffs to bear the entire burden of injuries caused by other parties who are certainly not free of fault. In many of these cases, the injurer walks away with no accountability for his actions, while the injured party suffers significant losses merely because of a voluntary decision to take

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[188] *Id.* at 171, 480 N.E.2d at 372, 490 N.Y.S.2d at 758.

[189] *See id.*

[190] According to the Court of Appeals, this simple phrase—by itself—was enough to completely deny recovery to Ms. Arbegast. *See id.*

[191] The court does contemplate whether a comparative negligence result would be proper in this case, but then suddenly and summarily dismisses it by noting that Ms. Arbegast had been told that participants play at their own risk. *See id.* at 170–71, 480 N.E.2d at 371–72, 490 N.Y.S.2d at 757–58. However, there is nothing in New York State's comparative negligence statute that demanded such a result. *See infra* Part IV.

[192] *See supra* discussion in Part I.

part in the sport.[193]

It is true, as Judge Benjamin Cardozo said in 1929 that "[t]he timorous may stay at home."[194] Yet keeping people at home and discouraging them from taking part in athletic activities should not be the desired outcome in these cases. Doing so would likely have negative physical, social, and economic results for the state.[195] Furthermore, it would provide an outcome that seems to be upside-down from a perspective of justice, as described above. A method that produces more equitable results and furthers more desirable public policy objectives is therefore needed.

III. IN THE ROUGH: AN OVERVIEW OF THE DOCTRINE OF ASSUMPTION OF RISK AND ITS LOGICAL SHORTCOMINGS

The assumption of risk doctrine was born from one of the most fundamental principles of common law: the notion that people who knowingly take chances have only themselves to blame for any resulting personal harms.[196] It has existed as a legal principle in the United States since the mid-nineteenth century, in varying

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[193] *See* Sugarman, *supra* note 126, at 877–78.

[194] Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929). Judge Cardozo's point is well-taken, but the case in which this point was made is distinguishable from most of the matters described in this article. In *Murphy*, the plaintiff sued for injuries caused on a ride called the "Flopper." *Id.* at 481, 166 N.E. at 174. Recovery was denied on the basis of assumption of risk, with Cardozo writing that everything about the ride, including its name, suggested that the ride would "jerk" around, putting participants at risk of injury from the "flopping." *Id.* at 481, 483, 166 N.E. at 174. Judge Cardozo compared this to a fencer accepting the risk of "a thrust by his antagonist." *Id.* at 482, 166 N.E. at 174. However, the cases described in this article involve more than just an expected action like the thrust of a fencing opponent or a ride called the "Flopper" making sudden movements. Rather, this article focuses on cases where another party's unexpected negligent act—like hitting a golf ball without first ascertaining whether anybody was in the line of fire—clearly led to the plaintiff's injury. Sports participants do take a chance, as Judge Cardozo notes in this opinion, but it does not seem to be a proper result to completely bar recovery when that risk is significantly increased by another's wrongdoing. *See generally id*. at 483, 166 N.E. at 174 (referencing the "dangers inherent in . . . sport").

[195] *See generally* Gale Norton & Michael Suk, *America's Public Lands and Waters: The Gateway to Better Health?*, 30 AM. J.L. & MED. 237 (2004) (outlining the benefits of physical activity, including (1) decreasing obesity, (2) increasing economic productivity, (3) improving health, and (4) promoting pleasurable lifestyle).

[196] *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 450 (3d ed. 1964) (describing both the underlying principles behind the doctrine of assumption of risk and many of the critiques that have emerged about the doctrine's use in negligence cases); John W. Wade, *The Place of Assumption of Risk in the Law of Negligence*, 22 LA. L. REV. 5 (1961) (describing the doctrine of assumption of risk and the role it should play in negligence cases). The common law precept behind assumption of risk, "*volenti non fit injuria*," is referenced in many early assumption of risk decisions, including Judge Cardozo's opinion in *Murphy*. *See Murphy*, 250 N.Y. at 482, 166 N.E. at 174.

forms and with varying degrees of acceptance.[197] On one side of the debate over this doctrine, it is an unambiguous and important safeguard against parties recovering for injuries caused by their own careless actions.[198] On the other side, the doctrine "has been attacked as 'sinister' and 'dangerously misleading,'" and has been deemed an unnecessary bar to recovery that is hopelessly outdated in the modern tort law framework.[199] The New York State Legislature has even gone so far as to ban the use of assumption of risk as an absolute defense against a personal injury action.[200] Nevertheless, the doctrine lives on.

Section 496A of the Restatement (Second) of Torts defines assumption of risk by stating that "[a] plaintiff who voluntarily assumes a risk of harm arising from the negligent or reckless conduct of the defendant cannot recover for such harm."[201] The

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[197] Eric A. Feldman & Alison Stein, *Assuming the Risk: Tort Law, Policy, and Politics on the Slippery Slopes*, 59 DEPAUL L. REV. 259, 259 (2010) (using a case study approach to reexamine the assumption of risk doctrine); *see* Wade, *supra* note 196, at 5–6 & 6 n.6.

[198] *See* Feldman & Stein, *supra* note 197, at 299–303 (describing the validity of the assumption of risk doctrine in certain aspects of modern tort law).

[199] *See id.* at 259 (quoting LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 413 (1973); Sugarman, *supra* note 126, at 836)); *see also* PROSSER, *supra* note 196, at 456 (describing the assumption of risk doctrine as being "by no means a favored defense" and noting a trend to "cut it down" in many areas of tort law); Wade, *supra* note 196, at 14 (asserting that "[a]ccurate analysis in the law of negligence would probably be advanced if" assumption of risk was no longer adopted by courts deciding cases in this area).

[200] *See* Jacqueline Mandell & Dennis J. Dozis, *Primary Assumption of the Risk: Still Viable Defense, With Limitations*, N.Y.L.J., Nov. 1, 2010, at 4, col. 1 (explaining that after the 1972 Court of Appeals decision in Dole v. Dow Chemical Co., 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972), the legislature abolished assumption of risk as an absolute defense through the passage of CPLR 1411).

[201] RESTATEMENT (SECOND) OF TORTS § 496A (1965). It bears mentioning that the American Law Institute has now developed a Restatement (Third) of Torts, which has passed through various drafts and is now being published in stages. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (2000). Because New York State courts, like many other courts across the country, seem to cite almost exclusively to the Restatement (Second) of Torts, the principles discussed in this article contain references to the Restatement (Second) rather than the still-emerging Restatement (Third). Notably, though, if we were to analyze these cases under the Restatement (Third), it seems that the discussion of whether to apply assumption of risk or comparative negligence would largely be moot. The Restatement (Third) seems to strongly endorse comparative negligence—which it terms "comparative responsibility"—as the norm, and situations where plaintiffs are completely barred from recovery as the exception. *See id.* § 3 ("Ameliorative Doctrines for Defining Plaintiff's Negligence Abolished."); *id.* § 3 cmt. c ("This Section applies to a plaintiff's negligence even when the plaintiff is actually aware of a risk and voluntarily undertakes it."); *id.* § 7 ("Plaintiff's negligence . . . that is a legal cause of an indivisible injury to the plaintiff reduces the plaintiff's recovery in proportion to the share of responsibility the factfinder assigns to the plaintiff (or other person for whose negligence the plaintiff is responsible)."); *id.* § 7 cmts. a, k (explaining that while other doctrines, such as assumption of risk, continue to exist, the preference is for comparative responsibility); s*ee also id.* § 8 cmt. a (noting the preference in the Restatement (Third) for using the phrase "comparative responsibility" rather than

Comments to this section of the Restatement list four scenarios in which courts can apply the doctrine.[202] In the context of most of the sports negligence cases at issue in this article, the most relevant of these four situations is found in Comment c(2), which applies assumption of risk to a situation where the plaintiff voluntarily enters into some activity that he or she knows to involve a risk from the defendant.[203] In such a situation, according to this Comment, the defendant is absolved of a duty to the plaintiff, as the plaintiff has implicitly agreed to assume the risk of the activity.[204]

The basis of the assumption of risk doctrine is the plaintiff's choice to engage in a dangerous activity as compared to a less risky alternative.[205] Professor Kenneth Simons describes the framework of the classic assumption of risk situation as one where the plaintiff faces three possible choices: "[n]ot engaging in the activity [at all, e]ngaging in the activity and encountering a tortiously created risk, . . . or [e]ngaging in the activity and not encountering that risk."[206] In a negligence case, the plaintiff argues that the defendant allowed only one option: to engage in the activity and encounter the risk created by the defendant's negligent conduct.[207] The defendant can then argue that the plaintiff assumed the risk by choosing to partake in the activity rather than not taking part in that activity at all.[208] If the court finds that the plaintiff was aware of the risk at the time when he made this choice to take part in the activity, or that the plaintiff reasonably should have been aware of the risk at this time, then the court can find that the plaintiff assumed the risk and deny recovery for the resulting injury.[209]

On paper, this doctrine sounds like a perfectly fine idea.[210] As a

"comparative negligence"). Assumption of risk seems to be unavailable except in certain contractual situations, which are far different from the sports participation cases addressed here. *See id.* § 3 cmt. a. This indicates that tort law is moving away from absolute bars of recovery under assumption of risk and toward a more nuanced comparative negligence framework, the point of view advocated for by this article. *See infra* Parts IV–V.

[202] *See* RESTATEMENT (SECOND) OF TORTS, *supra* note 201, § 496A cmt. c.

[203] *Id.* § 496A cmt. c(2). This notion of "implied assumption of risk" is also dealt with in greater detail in § 496C of the Restatement. *Id.* § 496C.

[204] *See id.* § 496A cmt. c(2). Along with the nebulous area of "implied assumption of risk," recovery is barred if a plaintiff is held to have clearly stated an intent to absolve the defendant of all liability, such as consenting through a waiver to assume all the risks of a given activity. *See id.* § 496B. This is known as "express assumption of risk." *Id.*

[205] *See, e.g.*, Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 216–17 (1987).

[206] *Id.* at 220.

[207] *Id.*at 220–21.

[208] *Id.* at 221.

[209] *See id.* at 218–19.

[210] *See* Powers, *supra* note 49, at 771 (citing RESTATEMENT (SECOND) OF TORTS, *supra* note

society, we prefer to discourage risky behaviors.[211] Assumption of risk therefore is a policy consistent with this goal of holding people responsible for the consequences of their own risk taking.[212] A closer examination, however, reveals chinks in the doctrine's armor. The most significant question is one of fairness.[213] Accidents frequently occur where both parties involved are at fault to some extent.[214] Under the application of assumption of risk described in the Restatement, however, the plaintiff is denied from recovering one cent in this situation—even if the injury was primarily the defendant's fault—if the court determined that the injury was inherent to the risks taken by the plaintiff in that particular activity.[215]

Such an outcome may actually encourage risky behavior rather than achieving the desired objective of preventing it.[216] Potentially, it could open the door to participants in a given activity taking more risks—knowing that they will not be held liable for another participant's injury as long as they can show that the injury arose from a risk inherent to the activity—and could wind up frightening people away from participation in sports.[217] One party winds up shouldering the entire burden for an injury that really arose from risks taken by two parties, an inequitable and undesirable end to such disputes.

For example, look at how the doctrine can and has been applied in the context of the golf cases described earlier.[218] It seems

201, § 496C) (noting the general temptations of a widespread application of the doctrine because we wish to discourage people from financial recovery after voluntarily assuming the risk of injury).

[211] *See generally* John H. Mansfield, *Informed Choice in the Law of Torts*, 22 LA. L. REV. 17, 49–50, 62–63 (1961) (noting that a fundamental purpose of the doctrine is to make people accountable for the risky behaviors in which they engage).

[212] *See id.* at 62–63.

[213] *See, e.g.*, Powers, *supra* note 49, at 774–75 (noting that in light of fairness concerns, a draft version of the Restatement (Third) of Torts had "reject[ed] all forms of implied assumption of risk").

[214] Consider the cases described in Parts I and II. In all of these cases, while the plaintiffs may have been aware of the potential risk of injury from the sport, the defendant nevertheless engaged in careless conduct that caused the harm. *See supra* Parts I–II. It does not seem a just result to completely ban recovery for the plaintiff in such scenarios.

[215] RESTATEMENT (SECOND) OF TORTS, *supra* note 201, § 496A; *see, e.g.*, *supra* discussion in Parts I–II.

[216] *See California Supreme Court Extends Assumption of Risk to Noncontact Sports*, *supra* note 121, at 1259.

[217] *See id.* at 1259–60 (stating that widespread application of assumption of risk to sports participant cases could actually end up having a "chilling effect" on sports participation, the very outcome that use of the doctrine in these cases was designed to avoid).

[218] *See supra* Part I.

reasonable that a golfer takes a risk of being hit by an errant shot when he steps on the course. However, it does not seem reasonable that this same golfer has no recourse when the injury was caused by another golfer who failed to ascertain his surroundings and neglected to give a word of warning, thus risking significant harm to other people on the course. In this latter situation, both the plaintiff and the defendant took risks. Furthermore, the defendant actually increased the risk to the plaintiff by his actions, in that the probability of being struck with a golf ball greatly increases when a golfer plays a shot without looking to see if anyone is around him and fails to shout a warning. To hold only one of these parties accountable for their respective risks does not seem to be an appropriate result.[219]

IV. ONTO THE GREEN: A LOOK AT THE ADVANTAGES OF COMPARATIVE NEGLIGENCE OVER ASSUMPTION OF RISK IN NEGLIGENCE CASES INVOLVING SPORTS PARTICIPANTS

A better solution in such cases does exist. It resides in the theory of comparative negligence, a concept that has gained much traction in recent years among the so-called "modernist" school of tort law reform.[220] The basic premise of the idea is simple: in a case where two parties are at fault, one party should not be permitted to walk away scot-free.[221] Instead, a court using a comparative negligence framework examines the "relative degrees of fault borne by each party" in the incident at issue.[222] The jury is permitted to exercise its role as fact-finder to allocate fault, usually in the form of a percentage, based on the evidence about each party's "contributions" to the resulting injury, and damages are awarded based on the relative fault found in each party.[223] For instance, if the jury in a particular case found that the defendant was seventy-five percent

[219] Such outcomes could be what Dean Wade feared when he wrote that the simplicity of assumption of risk "proves to be misleading" and can lead to results that are adverse to public policy aims. Wade, *supra* note 196, at 5.

[220] *See* Simons, *supra* note 205, at 213–14 (noting "[t]he dramatic emergence of comparative negligence in recent years"); *see also* John L. Diamond, *Assumption of Risk After Comparative Negligence: Integrating Contract Theory into Tort Doctrine*, 52 OHIO ST. L.J. 717, 719 (1991) (writing that comparative negligence is utilized "in a majority of American states" in contemporary tort law); Powers, *supra* note 49, at 772–73 (stating that "most courts abandoned [assumption of risk]" following "the advent" of comparative negligence).

[221] *See* Feldman & Stein, *supra* note 197, at 270.

[222] *Id.*

[223] *See id.*; Legal Info. Inst., *Comparative Negligence*, CORNELL UNIV. L. SCH., http://www.law.cornell.edu/wex/comparative_negligence (last updated Aug. 19, 2010).

responsible for the accident and the plaintiff was twenty-five percent responsible for the accident, then the defendant will be ordered to pay seventy-five percent of the total damages awarded.[224] Thus, a plaintiff who contributed to his own injury is held accountable for his own actions. However, that same plaintiff is not completely barred from recovery, as he would be under the assumption of risk doctrine.[225] Instead, he is permitted to receive an appropriate piece of the pie, a portion of the total award that is proportional to the degree of fault that lies with the defendant.[226]

This is not a concept that is foreign to New York State law. Indeed, the state legislature adopted the doctrine of pure comparative negligence on September 1, 1975, by passing Article 14-A of the New York Civil Practice Law and Rules.[227] Article 14-A permits a partial recovery for the plaintiff in an action for negligence, breach of warranty, or strict liability, even though the plaintiff is partially at fault for the injury in question.[228] Under CPLR 1411, the amount recoverable by the plaintiff is based on "the proportion which the culpable conduct attributable to the [plaintiff] bears to the culpable conduct which caused the damages."[229] CPLR 1412 further states that comparative negligence is to be used as an affirmative defense "to be pleaded and proved by the party asserting the defense."[230]

Importantly, Article 14-A does not eliminate the concept of assumption of risk entirely. Instead, it merely subordinates the doctrine's importance, making assumption of risk one of the factors to be considered when making a comparative negligence determination.[231] Thus, a plaintiff found to have assumed the risk of the resulting injury will almost certainly have his or her financial recovery reduced, perhaps even by a very significant percentage. Yet this plaintiff will not face a total bar to recovery for having assumed the risk, a result that seems far more reasonable than the black-and-white outcomes produced by the assumption of risk doctrine.

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224 Feldman & Stein, *supra* note 197, at 270; Legal Info. Inst., *supra* note 221.

225 RESTATEMENT (SECOND) OF TORTS, *supra* note 201, § 496A.

226 Feldman & Stein, *supra* note 197, at 270; Legal Info. Inst., *supra* note 221.

227 N.Y. C.P.L.R. 1411 (McKinney 2013).

228 *Id.*

229 *Id.*

230 N.Y. C.P.L.R. 1412 (McKinney 2013).

231 *See* C.P.L.R. 1411 (noting that the amount of the plaintiff's recovery shall be reduced in proportion with the plaintiff's "culpable conduct," and defining "culpable conduct" as "including contributory negligence or assumption of risk").

Consider how an application of comparative negligence, as described in Article 14-A, might have altered the result in *Anand v. Kapoor*. Instead of dismissing the case, the court would have permitted the decision to rest in the hands of the jury. With evidence such as Dr. Kapoor's admitted failure to determine whether any people were nearby before playing his shot, the testimony from Dr. Anand and Balram Verma that Dr. Kapoor allegedly failed to yell a word of warning when he saw the shot moving far away from its intended target, the affidavit from Dr. Anand's expert witness stating that Dr. Kapoor's actions clearly violated some of the most elementary rules and safety standards of golf, and the relatively close proximity between Dr. Anand and Dr. Kapoor at the time Dr. Kapoor played his shot, the jury would then be permitted to determine whether the actions of both parties led to the injury and, if so, to what degree each party was responsible for the adverse outcome.[232]

The jury would thus have been allowed to exercise its role as fact-finder to resolve the key factual questions that existed in this case.[233] Even more importantly, the outcome of the case probably would have involved an apportionment of fault to both parties relative to their roles in the injury—Dr. Anand for assuming the risk of injury by playing a game where this type of injury is somewhat likely to occur, Dr. Kapoor for failing to take elementary precautions that are well-known to be necessary to protect other participants in this sport. This likely ultimate outcome would have been reflective of reality, in that both doctors played a part in the injury occurring. Dr. Anand's reduced recovery would reflect the fact that he assumed a risk inherent to the game of golf. Dr. Kapoor's payment of damages would demonstrate that he had failed to take basic precautions and increased the risk of injury to other participants as a result.

Most importantly of all, the policy implications from such an outcome would have been productive. On one hand, it would acknowledge that individuals must be accountable for their voluntary risk-taking behavior. On the other hand, it would send a

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[232] *See supra* text accompanying notes 5–38.

[233] These questions were ignored by both the Second Department and the Court of Appeals, as both courts focused their analysis on the fact that Dr. Anand voluntarily participated in the sport and thus assumed the risk of all inherent injuries, regardless of the existing ambiguities of the facts surrounding Dr. Kapoor's injury-causing conduct. *See, e.g.*, Anand v. Kapoor, 15 N.Y.3d 946, 947–48, 942 N.E.2d 295, 296–97, 917 N.Y.S.2d 86, 87–88 (2010).

needed message that people who increase the likelihood of a participant's injury by their own negligence are liable when their careless conduct causes harm to another person. This result would avoid the undesired consequence of scaring people away from participation in sports for fear that co-participants could inflict harm on them without any exposure to liability, an outcome that could have negative ramifications to the physical and social well-being of individuals, and to the economic gains that sports participation provide to the state. At the same time, it would not eliminate "vigorous participation" in athletics, as the "split decision" allowed by comparative negligence pays attention to the fact that voluntary participants in sports do assume *some* risk of injuries inherent to the game.[234]

Yet this is not what transpired in *Anand v. Kapoor*. Nor is this the conclusion that New York courts have reached in the majority of personal injury cases involving sports participants.[235] Most of these recent decisions, including the *Anand* opinion, do not even mention the possible application of Article 14-A.[236] Those cases that do mention this section of the CPLR often seem to draw artificial lines between when Article 14-A should apply and when it should not,[237] despite the fact that these distinctions do not exist in the law itself. For instance, in *Arbegast*, the donkey basketball case, the Court of Appeals ruled that when a party gives *express consent* to assuming a risk—which, according to the court, the student teacher did by

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[234] *See* Anand v. Kapoor, 61 A.D.3d 787, 792, 877 N.Y.S.2d 425, 430 (App. Div. 2d Dep't 2009), *aff'd*, 15 N.Y.3d 946, 942 N.E.2d 295, 917 N.Y.S.2d 86 (2010). Professor Simons observes that the notion of "consent," from an assumption of risk standpoint, is often flawed in cases regarding injuries to sports participants. *See* Simons, *supra* note 205, at 273–74. He notes that limiting the examination of the plaintiff's consent to two choices—play or don't play—is not enough. *Id.* at 274. Instead, he argues that courts should look at whether the "defendant can reasonably demand that plaintiff play on these terms if he is to play at all." *Id.* In the context of *Anand*, therefore, a more appropriate question under Professor Simons' model would be whether a golfer can require another golfer to play under the terms that the first golfer will fail to warn him before playing a shot, and will fail to make certain that all players are out of the way before striking the ball.

[235] *See supra* Parts II–III.

[236] The fact that New York courts dispose of many of these cases by holding that the defendant had no duty to warn the plaintiff before doing something in the context of the sport, as the Court of Appeals decided in *Anand*, suggests that the courts would determine that CPLR 1411 does not apply, as a party cannot be negligent if they had no duty to begin with. However, it seems that in many of these cases, a plaintiff could and should be able to convince a court that the defendant had breached other fundamental duties, such as a duty to exercise reasonable care in ascertaining that nobody is in danger of being struck before you hit a golf ball, thus making a comparative negligence analysis under CPLR 1411 quite legitimate.

[237] *See, e.g.*, Arbegast v. Bd. of Educ. of S. New Berlin Cent. Sch., 65 N.Y.2d 161, 171, 480 N.E.2d 365, 372, 490 N.Y.S.2d 751, 758 (1985).

playing after being told that "participants are at their own risk"—that party is immediately banned from seeking a comparative negligence result under Article 14-A.[238] The language of Article 14-A does not provide any exception for plaintiffs who expressly assume a risk.[239] Still, this did not stop the highest court in the state from writing this previously unexpressed exception into the law.[240]

As a consequence, the state of personal injury law in this area remains disagreeably unsettled in New York. It is logically inconsistent to maintain this distinction between comparative negligence and assumption of risk when state law plainly shows that assumption of risk is now just one of several factors considered in the comparative negligence evaluation.[241] Nevertheless, New York courts have continually barred recovery to plaintiffs in sports participation cases using the traditional assumption of risk doctrine, the language of Article 14-A notwithstanding.[242] In fact, the courts have even appeared willing to recognize exceptions to Article 14-A that do not exist anywhere in the language of the law itself, as with *Arbegast*. No matter how well-founded these exceptions may seem, this practice is dangerous, as it once again leaves judges, attorneys, and members of the general public without a clear understanding of the true state of the law in this area. Instead of leading the law down such an unclear pathway, the courts of New York would be better-served by looking back at the principles common to these various cases and developing a comprehensive framework of what factors should guide their outcomes in a more equitable comparative negligence structure—

238 *See id.* (holding that Ms. Arbegast was not entitled to a comparative negligence analysis under CPLR 1411 because she "conceded that she was told before the games began that 'participants [were] at their own risk'").

239 *See* N.Y. C.P.L.R. 1411 (McKinney 2013).

240 *See* Bernard M. Brodsky, *Civil Practice*, 37 SYRACUSE L. REV. 263, 301–04 (1986).

241 This logical inconsistency has been recognized clearly by courts in other states. *See, e.g.*, Leavitt v. Gillaspie, 443 P.2d 61, 68 (Alaska 1968) ("As a matter of policy, we disapprove of a concept which could result in a situation where an accident victim, even though not contributorily at fault, could be barred from recovery because he knew or should have known of a negligently created risk. . . . [O]nly the traditional notions of negligence and contributory negligence should govern cases such as we have here and . . . the defense of assumption of risk should not be a defense and should not be used."); Blackburn v. Dorta, 348 So.2d 287, 293 (Fla. 1977), (merging the affirmative defense of assumption of risk into "the defense of contributory negligence and the principles of comparative negligence"); McGrath v. Am. Cyanamid Co., 196 A.2d 238, 239–40 (N.J. 1963) ("[I]n truth there are but two issues—negligence and contributory negligence—both to be resolved by the standard of the reasonably prudent man, and that it was erroneous to suggest to the jury that assumption of the risk was still another issue.").

242 *See supra* Parts I–II.

one in which assumption of risk is part of the comparative negligence test, not a separate and logically unwieldy doctrine.

V. TOWARD THE HOLE: A PROPOSED BALANCING TEST FOR DETERMINING HOW COMPARATIVE NEGLIGENCE AS DESCRIBED IN ARTICLE 14-A SHOULD BE USED IN RESOLVING SPORTS PARTICIPATION PERSONAL INJURY CASES

It seems that no area of tort law is complete until a court has thrust a multi-part balancing test upon it. Most states, for example, have formed complex multi-factor balancing tests to decide whether one party owed a duty of care to another, led by California's often-referenced eight-element framework.[243] Admittedly, such tests do have their critics. Detractors of these balancing tests complain about their complexity, noting that most common law rules are functionally simpler and do not necessarily produce less equitable results.[244] In a similar vein, commentators criticize the strain that balancing tests can place on the judicial system, as they require judges to analyze and weigh multiple factors rather than applying a seemingly simple, single rule.[245] Finally, people criticize the potential malleability of these tests.[246] Introduce enough factors to the equation, these critics claim, and a court can play word games within the balancing test to take the decision whatever way he or she chooses.[247]

Such questioning is not without some merit. However, judges through the years have managed to find flexibility even in the simplest expression of a legal principle. Use of a balancing test at least confines the court to considering certain essential factors, hopefully ensuring that these critical elements will not be overlooked or disregarded by the court in their ultimate analysis of the case.

In an era of overcrowded dockets, concerns about judicial economy are certainly relevant. However, the complexity of certain areas of tort law simply cannot be avoided, no matter how simplistic—or over-simplistic—the legal standard in that area becomes.[248] The

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[243] *See* Ballard v. Uribe, 715 P.2d 624, 628 n.6 (Cal. 1986).

[244] *See, e.g.*, HEURISTICS AND THE LAW 130 (Gerd Gigerenzer & Christoph Engel eds., 2006).

[245] *See id.*

[246] *See id.* at 150.

[247] *See id.* at 130 (using the development of products liability as an example).

[248] *See California Supreme Court Extends Assumption of Risk to Noncontact Sports*, *supra* note 121, at 1258 (noting that in participant personal injury lawsuits, "laborious, situation-

determinations that should be made by courts in sports participant personal injury lawsuits fall into this category of inborn complexity.[249] Judges and legal scholars across the nation have agreed that a decision of what risks are truly inherent in a sport is a nebulous exercise at best, and a borderline impossibility at worst.[250] Furthermore, these cases demand an extremely fact-specific analysis from courts in order to truly understand what the plaintiff and defendant actually did within the context of the sport in question.[251]

What a multi-factor balancing test will do, however, is create a sense of structure for the court. Instead of starting from scratch in analyzing the case, judges will be able to follow the guidance provided by the factors in the balancing test, using each element as a sort of stepping stone for investigation into the case's context. With these guideposts present, courts will be able to spend less time wandering in the wilderness that can be created in these cases. Thus, the test will hopefully prove to be a benefit rather than a hindrance to judicial efficiency.

With this in mind, we proceed to the factors that courts should consider when evaluating personal injury cases involving sports participants under a comparative negligence framework.

1. Did the injured party take any risk beyond mere participation in the sport?

Courts can—and should—deal with this aspect at the forefront of their analysis.[252] If the plaintiff voluntarily took additional risks outside of just taking part in the game—for instance, a golfer who was repeatedly warned that another player was teeing off and opted to stand twenty feet away from the tee box anyway—then the court should take this into account in evaluating to what degree each party was at fault for the injury. In such a situation, where the voluntary risk taken by the plaintiff is blatantly unreasonable, the

specific determinations" can be "virtually inescapable").

[249] *See id.*

[250] *See, e.g.*, *id.* at 1259.

[251] *See id.* at 1258; Simons, *supra* note 205, at 274 (describing the inherent analytical complexity in negligence suits over injuries to sports participants); *see also* Sugarman, *supra* note 126, at 877 (emphasizing the importance of courts not cutting analytical corners in their decisions in sports injury cases).

[252] This is a classic assumption of risk question. *See, e.g.*, Powers, *supra* note 49, at 778 (stating that recovery in these cases should be barred if plaintiff's conduct "constitute[s] an unforeseen intervening or superseding cause" of plaintiff's own injury).

likelihood that the plaintiff should be completely barred from recovery increases significantly. People should typically be made to bear the burden of injuries from taking chances that enter the realm of knowingly frivolous risks.

2. What risks are customarily understood by any participant in the sport?

Before the court can determine each party's relative contribution to the resulting injury, the court must first scrutinize what risks truly are inherent to the sport. Of course, this will vary widely from sport to sport. As a result, this prong of the test will require an extraordinarily fact-specific analysis.[253] Yet it is an essential component, one that has been considered in virtually every personal injury case involving sports participants.[254]

Importantly, though, the "inherent risks" element will not be the sole deciding factor under this test.[255] Instead, this will be just one of several factors considered. This recognizes the fact that sports can be risky undertakings, and that the risks can actually be part of the sport's appeal, but it also acknowledges that participants who negligently expose other participants to a greater-than-necessary degree of risk might deserve to face some sort of liability for their role in the plaintiff's injury.[256]

3. Were any specific rules of the sport violated by either party in the events leading to the injury?

This is admittedly a controversial element to include in the test. Indeed, it seems to fly in the face of cases like *Turcotte*, where the

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[253] *See California Supreme Court Extends Assumption of Risk to Noncontact Sports*, *supra* note 121, at 1258.

[254] *See, e.g.*, Turcotte v. Fell, 68 N.Y.2d 432, 441, 502 N.E.2d 964, 969, 510 N.Y.S.2d 49, 54 (1986) (determining that falling from a horse when bumped by another rider is a danger "inherent in the sport"); Farone v. Hunter Mountain Ski Bowl, Inc., 51 A.D.3d 601, 602, 859 N.Y.S.2d 64, 65 (App. Div. 1st Dep't 2008) (holding that hitting an ice patch is "one of the risks inherent in downhill skiing").

[255] This is consistent with the Court of Appeals' rulings in cases like *Turcotte* and *Maddox*. *See Turcotte*, 68 N.Y.2d at 440, 502 N.E.2d at 969, 510 N.Y.S.2d at 54 (stating that such decisions require "consideration of a variety of factors" including contextual elements of the game and the participant's experience); Maddox v. City of N.Y., 66 N.Y.2d 270, 278, 487 N.E.2d 553, 556–57. 496 N.Y.S.2d 726, 729–30 (1985) (holding that courts should consider "the skill and experience of the particular plaintiff" in question).

[256] *See* Sugarman, *supra* note 126, at 877–78 (criticizing courts that become "mesmerized by the idea that participants in these activities know that they might get hurt, and so ought not complain about it").

Court of Appeals barred the paralyzed jockey from any recovery even though the injury was caused by another jockey's violation of the rule prohibiting "foul riding."[257] Breaches of this rule, the court determined, were typical in the sport of horse racing.[258] Therefore, by voluntarily participating in the sport, each jockey relieved the other jockeys of the legal duty to use reasonable care not to break this rule.[259]

However, it is difficult to see what ultimate advantage is gained by establishing no duty of care among participants to follow rules of safety.[260] Recognition of such a duty of care—if applied reasonably—would promote basic principles of safety during athletic competitions. This would have the overall effect of keeping the participants safer, thus generally making their playing experience more enjoyable and increasing the chance that they will return to participate in the sport again; an outcome that is likely to improve their physical and social well-being as well as benefit the state economically.[261]

Additionally, it is unlikely that imposing a duty to follow many of these safety rules will stifle the desired "free and vigorous competition" of the sport. For instance, take a safety rule from golf that has been discussed several times in this article: the obligation of a golfer to shout "Fore!" to notify other participants that he is about to play a shot.[262] It is difficult to discern how a holding that golfers owe a duty of care to follow this rule about warning other golfers will have a chilling effect on the ability to enjoy the sport—particularly when the safety benefits to other golfers gained by following this rule are so substantial.

Therefore, it does not seem unreasonable to include this factor in the test. Importantly, it is but one of several factors used here, and thus is not dispositive by itself. Given the degree to which a risk of

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[257] *Turcotte*, 68 N.Y.2d at 436, 502 N.E.2d at 966, 510 N.Y.S.2d at 51.

[258] *See id.* at 441, 502 N.E.2d at 969–70, 510 N.Y.S.2d at 54–55.

[259] *See id.* at 441, 502 N.E.2d at 970, 510 N.Y.S.2d at 55.

[260] Notably, the Restatement mentions that "[p]articipating in such a game does not manifest consent to contacts which are prohibited by rules or usages of the game if such rules or usages are designed to protect the participants and not merely to secure the better playing of the game as a test of skill." RESTATEMENT (SECOND) OF TORTS, *supra* note 201, § 50 cmt. b.

[261] Professor Simons states his concern that this standard could have the effect of permitting recovery "whenever [a] defendant violates a safety rule" even when there is only a routine breach of the rules. Simons, *supra* note 205, at 273. This concern, however, will be tempered by the fact that this is just one of several factors considered in the proposed balancing test, rather than being the only test on which the outcome of the case is based. *See supra* Part V.

[262] *See supra* text accompanying notes 23–25.

injury inherent to the sport can be increased when someone violates a safety-oriented rule of the game, though, it seems quite proper that this element be part of the equation considered by courts in these cases.

4. What is the typical character of conduct understood to be owed to other participants in the sport?

This is an exceptionally important factor, yet one that is surprisingly absent from many decisions in this area of law.[263] The way in which this element works can be best exemplified using two contrasting sports: golf and ice hockey.

In the game of golf, which is played without supervision of a referee or umpire, participants are expected to follow an established code of etiquette that governs everything from pace of play, to safety on the course, to respect toward other players.[264] Golfers are expected to "conduct themselves in a disciplined manner, demonstrating courtesy and sportsmanship at all times, irrespective of how competitive they may be."[265] Contrast this with the general character of ice hockey, in which body-checking and even fighting are long-established traditions of the game.[266] While hockey does have rules and etiquette standards,[267] the typical interactions between players in a hockey game are quite different than the relations among participants in golf.

Thus, it is clear that athletes in different sports treat other participants in very different ways. This fact has significant bearing on the type of participant negligence cases discussed in this article. In golf, for instance, the rules demand that players ascertain their surroundings before playing a shot,[268] and given the

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[263] It is a factor which is gaining some notice from legal scholars. For instance, Professor Powers writes that "[w]hen the context of a game alters the defendant's duty, the *particular* plaintiff's state of mind is irrelevant. The proper inquiry is what similar plaintiffs have a *right* to expect." Powers, *supra* note 49, at 780. While this seems to take the context of the game's traditions and styles too far, at the expense of ignoring other factors, such as that particular plaintiff's experience in the sport, it does pay proper attention to this important element.

[264] *See* U.S. GOLF ASS'N, *supra* note 16, at 18.

[265] *Id.*

[266] *See* NATIONAL HOCKEY LEAGUE: OFFICIAL RULES 67 (effective 2011–12), *available at* http://www.nhl.com/nhl/en/v3/ext/pdfs/2011-12_RULE_BOOK.pdf. This custom has given rise to a well-worn, although not entirely truthful, expression: "I went to a fight and a hockey game broke out."

[267] *See generally id.* (outlining the rules and standards of the National Hockey League).

[268] *See* U.S. GOLF ASS'N, *supra* note 16, at 18.

strict adherence to the rules that is customary in the traditions of the game, a participant can reasonably expect that fellow golfers on the course will follow these rules closely. In hockey, on the other hand, fighting is punished by a penalty under the rules,[269] yet anyone who knows anything about the game knows that fighting certainly is not an uncommon practice among players. Therefore, a golfer who is injured when another player does the unexpected and violates the rules of the game has a greater opportunity to show that he would not reasonably expect such conduct to occur than would a hockey player who is injured in a fight. In both instances, the injuries are caused by careless rule-breaking conduct by another player, but the violation is clearly more of a shock to the golfer than to the hockey player, given the way fellow participants are typically treated in these sports.

One final note as to this factor: it is important for courts to examine not only the sport under review, but also the type of competition in which the injury took place. Many recreational hockey leagues, for instance, are specifically "non-checking" leagues, in which body-checking is actually a penalty.[270] These leagues are particularly common for older players who want to be part of the game without risking their body to substantial injury. The customary relations between players in such a league is therefore quite different than the type of conduct between players in a full-contact hockey league geared toward twenty-year-olds. A player who is injured by a hit in a non-checking league should therefore be considered differently than a player injured in a full-contact league, as these two players—although taking part in the same sport—voluntarily entered the competition with extremely different sets of expectations, and with very different implicit obligations toward their fellow participants.

5. What is the experience level in the sport of the plaintiff and the defendant?

This is a factor frequently cited in participant personal injury case law, including *Turcotte*, *Maddox*, and several others.[271] An

[269] *See* NATIONAL HOCKEY LEAGUE, *supra* note 266, at 67.

[270] *See, e.g., Twin Rinks Adult Hockey League: Rules and Regulations*, TWIN RINKS ICE PAVILION, http://www.twinrinks.com/adulthockey/league_rules.htm (last updated Aug. 27, 2012). This is customary in so-called "house" leagues, such as the Twin Rinks Adult Hockey League. *Most Youth Hockey Injuries Caused by Accidents, Not Checking, Study Shows*, SCI. DAILY (Jul. 30, 2010), http://www.sciencedaily.com/releases/2010/07/100729133440.htm.

[271] *See, e.g.*, Turcotte v. Fell, 68 N.Y.2d 432, 440, 502 N.E. 964, 969, 510 N.Y.S.2d 49, 54

individual who is a more experienced athlete in the sport in question naturally will have a better understanding of the risks involved than a "rank amateur."[272] Therefore, it logically follows that somebody who has been playing the sport for twenty years should be expected to possess a greater ability than a first-day neophyte to take measures against increasing the risks of injury for other participants.[273]

An argument can be made that including experience level in the analysis of these cases is unfair, because it seems to punish experienced players for their longevity in the sport. However, this is not the true purpose of this factor. In any walk of life, people are understood to have greater expertise in an area—and are expected to assume greater responsibility in that area—if they have been working in that area for a substantial period of time. There is no discernable reason why we should treat sports any differently. Furthermore, this factor does not impose a burden on more experienced players to be better athletes. It asks them only to have a greater awareness of the rules of the game, the potential hazards of the game, and the ways to *reasonably* guard against increasing the likelihood of injury to others. Such a standard certainly does not seem to be an unreasonable part of the test.

6. What measures, if any, could the defendant have taken to prevent causing the injury to the plaintiff, and how costly or difficult would those measures have been for the defendant to take?

Many tort law balancing tests include a cost/benefit analysis factor of some sort.[274] The idea behind this factor is a classic "law and economics" framework: if the cost of the harm is greater than the cost you would have borne in taking reasonable measures to prevent the harm, and the probability of the harm occurring was not unreasonably low under the circumstances, then you likely were negligent for failing to exercise reasonable care.[275] In cases

(1986); Maddox v. City of N.Y., 66 N.Y.2d 270, 278, 487 N.E.2d 553, 556–57, 496 N.Y.S.2d 726, 729–30 (1985).

[272] *See, e.g.*, John J. Kircher, *Golf and Torts: An Interesting Twosome*, 12 MARQ. SPORTS L. REV. 347, 348 n. 6, 352 (2001) (stating that the duty owed by a golfer to others on the course "certainly may relate" to the golfer's skill level and experience).

[273] *See id.* at 352.

[274] *See, e.g.*, United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

[275] The most well-known of these cost/benefit tests is the so-called "Hand Test" articulated by Judge Learned Hand in *United States v. Carroll Towing Co*. *See Carroll Towing*, 159 F.2d

involving sports participants, though, the classic economic analysis framework often does not precisely fit with the facts of the case. The cost of the injury can typically be measured in dollars and cents, but the cost of any risk-mitigating measures by another athletic competitor rarely has a distinguishable monetary figure.[276]

Therefore, in using this factor for sports participant negligence cases, the analysis will typically stack the cost of the plaintiff's injury against the burden or degree of difficulty in the defendant taking a measure that would have mitigated the harm done to the plaintiff. If the only possible way for the defendant to have prevented or reduced the harm to the plaintiff would have involved extraordinary efforts on the defendant's part, then this portion of the test would favor a minimal recovery or no recovery at all for the plaintiff. On the other hand, if the defendant clearly could have chosen alternative courses of action that would have imposed only a slight burden on him, then this would indicate that both parties could bear some culpability for the injury, favoring a determination that the defendant's contribution to the injury was significant and that the plaintiff's award should reflect this.

The interests that are balanced through these factors reflect the central struggle described in this article: the goal of promoting safe conduct toward other people against the feared loss of enjoyment in vigorous athletic participation.[277] This test brings courts faced with this conflict close to the proverbial state of having their cake and eating it too. It allows for, and even promotes, free and vigorous participation in sport by judging each case in the context of the sport and the reasonable expectations held by participants in that sport.

Yet it also pays close attention to the measures taken and not taken by the party causing the injury. If the defendant violated basic safety-based rules of the game or otherwise put the plaintiff

at 173. "Judge Hand put it in 'algebraic terms,' stating, 'if the probability be called P; the injury, L; and the burden, B; liability depends upon whether B is less than L multiplied by P: i.e., whether B < PL.'" Aaron Gershonowitz, *Crisis in the Gulf Of Mexico: Is New Federal Legislation the Answer and if So, to What Question?*, 74 ALB. L. REV. 531, 532 n.4 (2011) (quoting *Carroll Towing*, 159 F.2d at 173).

[276] For instance, in a golf case, there is no precise economic burden that can be assigned to requiring a golfer to yell "Fore!" and follow the other basic safety rules of the game. However, an argument can be made that there is a sort of intangible burden on the golfer in the additional time and effort needed to take these precautions.

[277] As recently as *Anand*, the Appellate Division paid significant attention to furthering "the policy goal of facilitating free and vigorous participation in such activities." Anand v. Kapoor, 61 A.D.3d 787, 792, 877 N.Y.S.2d 425, 430 (App. Div. 2d Dep't 2009), *aff'd*, 15 N.Y.3d 946, 942 N.E.2d 295, 917 N.Y.S.2d 86 (2010).

into an extremely unnecessary risky situation, the factors will likely weigh out in favor of holding the defendant accountable by having to pay a greater amount in damages. Alternatively, if the injury is one that arises from conduct understood to be normal and typical to the sport, and preventing the harm would have demanded a substantial burden on the defendant, the plaintiff's recovery under the test will be much more limited, if not barred entirely.

Use of this test will address Judge Cardozo's point by warning the "timorous" that sports can be risky.[278] Yet it also does not force them to stay at home. Instead, it allows them some recourse if injured by another participant's wanton disregard for the rules or for general human safety. Thus, this test should have the effect of still encouraging vigorous and active sports participation, but also emphasizing that basic safety standards and expectation are not abandoned simply by stepping onto the field of play. It will not only continue to encourage people to get out of the house and take part in sports, but also incentivize basic safety and care within the context of the sport, thereby providing an overall better experience when people do come out to play.

VI. THE NINETEENTH HOLE: CONCLUSIONS AND A POSSIBLE WINDOW INTO THE FUTURE

The entanglement of tort law principles with injuries caused by participants in athletic competitions creates far more problems than one would initially suspect. Across the state, these problems are far from over, as torts and sports remain odd and "murky" companions.

The crux of the issues in New York resides in this ongoing battle of the doctrines between assumption of risk and comparative negligence. Despite the fact that the state legislature has endorsed in Article 14-A the more equitable role comparative negligence can and should play in personal injury cases, assumption of risk continues to prevail as the legal conclusion in many of these cases involving sports participants, completely barring plaintiffs from recovering damages for their injuries. Use of a multi-factor balancing test, such as the one outlined in this article, would provide greater stability for courts in determining how to apply the more equitable and logically sound concept of comparative negligence in these cases.

Indeed, there are some signs that New York State courts are

[278] Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929).

willing to give comparative negligence more than a suspicious glance in participant personal injury cases. One of the more encouraging signals came from the Court of Appeals in April 2010, in a case involving the beloved childhood "sport" of sliding down the banister.[279] An eleven-year-old boy left unattended in a school was injured while sliding, and the boy's father sued the school district for negligence.[280] The school argued for summary judgment on assumption of risk grounds.[281]

Writing for the majority of the Court of Appeals, Chief Judge Jonathan Lippman explained that although the child was injured from an activity that he voluntarily undertook, the assumption of risk doctrine did not apply.[282] With no compelling policy reasons for applying the doctrine to this situation, comparative negligence was the proper result.[283] The Chief Judge specified that assumption of risk should be "closely circumscribed" in these cases to prevent it from swallowing up the now-preferred principles of comparative negligence.[284]

Eight months after deciding this case, however, the Court of Appeals was unwilling to extend the logic of *Trupia* to *Anand v. Kapoor*. Instead, the court decided to once again base their decision entirely on assumption of risk, barring still another injured plaintiff from recovering a cent—despite the fact that his injury was caused in large measure by the defendant's extremely careless conduct.[285] Thus, the outcome of the next round of cases of this ilk remains in doubt, every bit as uncertain as the flight that will be taken in those fateful moments after the head of the golf club meets the ball.

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[279] Trupia v. Lake George Cent. Sch. Dist., 14 N.Y.3d 392, 392, 393, 927 N.E.2d 547, 547, 548, 901 N.Y.S.2d 127,127, 128 (2010).

[280] *Id.* at 393–94, 927 N.E.2d at 548, 901 N.Y.S.2d at 128.

[281] *Id.* at 394, 927 N.E.2d at 548, 901 N.Y.S.2d at 128.

[282] *Id.* at 395–96, 927 N.E.2d at 549–50, 901 N.Y.S.2d at 129–30.

[283] *Id.* at 396, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.

[284] *Id.* at 395–96, 927 N.E.2d at 549, 901 N.Y.S.2d at 129.

[285] Anand v. Kapoor, 15 N.Y.3d 946, 947–48, 942 N.E.2d 295, 296–97, 917 N.Y.S.2d 86, 87–88 (2010). Subsequent to *Anand*, the Court of Appeals decided the case of *Bukowski v. Clarkson Univ.*, holding that a college baseball pitcher hit in the jaw by a batted ball should be completely barred from any financial recovery. *See* Bukowski v. Clarkson Univ., 19 N.Y.3d 353, 971 N.E.2d 849, 948 N.Y.S.2d 568 (2012). In what seems to be a nod to the principles at work in *Anand* (and the majority of sports participant personal injury cases studied in this article), the Court of Appeals decided this case entirely on assumption of risk grounds. *See id.* at 358, 971 N.E.2d at 852, 917 N.Y.S.2d at 571. This is not to suggest that the Court of Appeals reached an incorrect outcome in this case. Indeed, if the Court of Appeals had applied multi-factor test described above, it probably would have reached the same result. Yet basing this decision solely upon the fact that the injury arose from "voluntary participation" in athletics does not seem to be the most equitable rationale for deciding this type of case, for all of the reasons stated in this article.

This uncertainty does not need to continue. It is true that even the great Judge Cardozo championed the use of assumption of risk in these cases, ordering the timorous to stay at home. Yet Judge Cardozo wrote these words in 1929, many years before comparative negligence existed as a fully developed legal doctrine in New York.[286] If he were faced with this case today, at a time when comparative negligence is a recognized option, there is no guarantee that he would not choose this more evenhanded and realistic means of fault distribution. After all, Judge Cardozo also recognized that "[l]aw ought to be guided by consideration of the effects of its decisions, rules, doctrines, and institutions on social welfare."[287] As this article proves, decisions like *Anand* pose a substantial risk of leaving negative effects upon the social welfare of the state, from its citizens who participate in sports to the businesses that benefit from them. A far better societal result would be achieved by a legal framework that strikes the necessary balance between "vigorous participation" and safe participation, as the multi-part test described in this article seeks to do.

"The life of the law has not been logic: it has been experience," wrote United States Supreme Court Justice Oliver Wendell Holmes in 1881.[288] As shown above through multiple examples, the experience over the past several decades in New York State with these cases has been one of inequity and confusion, a clear signal that a change in this area by the state's courts is necessary. Until New York courts make this change and move away from employing the assumption of risk doctrine to completely bar recovery in sports participant personal injury cases, the state's decisions in this area will only continue to wind up deeply embedded in the rough.

[286] *See* Murphy v. Steeplechase Amusement Co., 250 N.Y. 479, 483, 166 N.E. 173, 174 (1929).

[287] *See* RICHARD A. POSNER, CARDOZO: A STUDY IN REPUTATION 26 (1990).

[288] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 1 (1923).