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## Civil Practice: Comparative Negligence

Jay C. Carlisle

*Elisabeth Haub School of Law at Pace University*

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affirmative defenses.

## X. COMPARATIVE NEGLIGENCE\*\*

Recent decisional law by the Court of Appeals has placed new limits on the applicability of article 14-A to some assumption of risk cases,<sup>215</sup> to matters involving some labor law violations,<sup>216</sup> and to violations of legal prohibitions.<sup>217</sup> These limitations are important to the practitioner representing clients who seek to benefit from New York's comparative negligence statute.

Article 14-A was enacted upon the recommendation of the Judicial Conference<sup>218</sup> by chapter 69 of the Laws of 1975 and became effective on September 1, 1975.<sup>219</sup> This article adopts the doctrine of pure comparative negligence;<sup>220</sup> its purpose is to permit a partial

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\*\* This section was contributed by Jay C. Carlisle, Assistant Professor of Law, Pace University School of Law; A.B., UCLA, 1965; J.D., University of California, 1969. Professor Carlisle is the revision author for WEINSTEIN-KORN-MILLER, *NEW YORK CIVIL PRACTICE* (articles 13, 14-A, 15, 30 and 78).

215. See *Arbegast v. Board of Educ. of South New Berlin Central School*, 65 N.Y.2d 161, 480 N.E.2d 365, 490 N.Y.S.2d 751 (1985); *Maddox v. City of New York*, 66 N.Y.2d 270, 487 N.E.2d 553, 496 N.Y.S.2d 726 (1985); *infra* notes 229-66 and accompanying text.

216. *Zimmer v. Chemung County Performing Arts, Inc.*, 65 N.Y.2d 513, 482 N.E.2d 898, 493 N.Y.S.2d 102 (1985); *infra* notes 267-71 and accompanying text.

217. *Barker v. Kallash*, 63 N.Y.2d 19, 468 N.E.2d 39, 479 N.Y.S.2d 201 (1984); *infra* notes 272-73 and accompanying text.

218. See *Report of the Judicial Conference of the State of New York to the 1975 Legislature*, reprinted in *TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE* 232 (1976). The Judicial Conference recommended that the provisions enacting a system of comparative negligence be inserted in the General Obligations Law, not in the CPLR. See *id.* at 239.

219. Act of May 6, 1975, ch. 69, 1975 MCKINNEY'S SESSION LAWS OF NEW YORK 94 (codified at N.Y. CPLR 1411 (McKinney 1976)).

220. With the passage of Article 14-A, New York has joined the rapidly growing number of states that have adopted some form of comparative negligence. The doctrine of comparative negligence has assumed a variety of guises, four of which may be briefly outlined.

Under the "slight-gross" system, if the plaintiff's negligence is slight when compared to that of the defendant, the plaintiff may recover a judgment, but his damages (as under all the systems of comparative negligence) will be diminished by the percentage of the fault attributable to him. If the plaintiff's negligence is more than "slight," however that term may be defined, then he may not recover for any of his damages. A second approach is to allow the plaintiff to recover if his negligence is less than fifty percent, or not more than forty-nine percent, of the total negligence of the parties contribution to his damages. In some states, the plaintiff's contributory negligence is not a bar to recovery if such negligence is not greater than the negligence of the person against whom recovery is sought. Finally, there is the system of pure comparative negligence that allows a party a recovery irrespective of whether he is more negligent than the defendant. For example, if a plaintiff, who suffered \$100,000 in damages, is adjudged to have been, compared with the defendant, ninety-eight percent negligent, he will be entitled to recover \$2,000 from the defendant. See

recovery for the plaintiff, even though the conduct of each party is culpable.<sup>221</sup> Article 14-A applies to any action, accruing on or after September 1, 1975,<sup>222</sup> for personal injury, injury to property, or wrongful death.<sup>223</sup> These provisions require that the claimant's recovery be reduced to the degree that his own negligence or other culpable conduct caused the injury.<sup>224</sup> Article 14-A is applicable to actions against a defendant for negligence, breach of warranty, and strict liability.<sup>225</sup>

By adopting article 14-A, the Legislature specifically designated both assumption of risk and contributory negligence as culpable conduct to be considered in proportioning the comparative fault of the parties.<sup>226</sup> Under CPLR 1411, the relationship of each party's conduct to the injury, and the amount of damages that are recoverable is based upon a comparison of conduct that the law considers blameworthy.<sup>227</sup> If the claimant's conduct was wrongful, but did not contribute to causing his injuries or to their aggravation, there is no diminution of the recoverable damages.<sup>228</sup>

#### A. Assumption of Risk

Although assumption of risk was designated by the Legislature as culpable conduct to be considered in assessing the parties' comparative fault,<sup>229</sup> neither article 14-A nor its legislative history defines "assumption of risk."<sup>230</sup> In addition, CPLR 1411 left it "unclear whether express assumption of risk is subject to

WEINSTEIN-KORN-MILLER, *NEW YORK CIVIL PRACTICE* § 1411.01 (1986).

221. See *Arbegast*, 65 N.Y.2d at 167, 480 N.E.2d at 369, 490 N.Y.S.2d at 755.

222. See WEINSTEIN-KORN-MILLER, *CPLR MANUAL* § 11.07 (1985 rev. ed.) [hereinafter cited as *CPLR MANUAL*].

223. N.Y. EPTL 5-4.2 and 11-3.2(b) were amended by chapter 69 of the Laws of 1975 to assure that the provisions of article 14-A relating to comparative negligence are applicable in wrongful death actions. See 1975 *McKinney's Session Laws of New York* 94.

224. See *CPLR MANUAL*, *supra* note 222, § 11.07.

225. See *Report of the Judicial Conference of the State of New York to the 1975 Legislature*, reprinted in *TWENTY-FIRST ANN. REP. N.Y. JUD. CONFERENCE* at 239; Memorandum of Assemblyman Fink in support of 1975 Bill No. A4178-S3277, reproduced in *N.Y.L.J.*, Apr. 23, 1975, at 7, col. 1; see also *CPLR MANUAL*, *supra* note 222, § 11.02.

226. See *Hoyt v. McCann*, 88 A.D.2d 633, 634, 450 N.Y.S.2d 231, 232 (2d Dep't 1982); see generally WEINSTEIN-KORN-MILLER, *supra* note 220, § 1411.03; see also *N.Y. CPLR 1411* (McKinney 1976).

227. See *Arbegast*, 65 N.Y.2d at 168, 480 N.E.2d at 370, 490 N.Y.S.2d at 756.

228. See *id.* at 168-69, 480 N.E.2d at 370-71, 490 N.Y.S.2d at 756-57.

229. See *supra* note 226 and accompanying text.

230. See *Arbegast*, 65 N.Y.2d at 169, 480 N.E.2d at 371, 490 N.Y.S.2d at 757.

comparison."<sup>231</sup> Recently, the Court of Appeals clarified this relationship in *Arbegast v. Board of Education*.<sup>232</sup>

In *Arbegast*, the plaintiff was thrown from a donkey while playing donkey basketball.<sup>233</sup> Prior to mounting the donkey, the plaintiff was informed by the defendant that she was participating at her own risk.<sup>234</sup> The Court of Appeals held that it was a complete defense to the plaintiff's cause of action that she expressly agreed to assume the risk involved in the activity that caused her injury.<sup>235</sup> The Court stated that once a party gives express consent, they are foreclosed from the use of CPLR 1411 and recovery is barred.<sup>236</sup> The *Arbegast* Court made it clear, however, that if the assumption of risk is not expressed, but is only implied from the plaintiff's participation in the activity, then the comparative negligence principles of CPLR 1411 are applicable. The plaintiff, thus, would be allowed to recover damages based upon a comparison of each party's culpable conduct.<sup>237</sup>

In *Arbegast*, the Court noted: "[t]he existence of such an express assumption of risk by the injured party is a matter of defense upon which the burden of proof will be on the party claiming to have thus been absolved of duty . . . and will be a factual issue for the jury, unless there is no real controversy as to the facts."<sup>238</sup> The Court then observed that the plaintiff would have been entitled to a comparative causation charge on implied assumption of the risk had she not conceded that she was told before the games began that "participants are at their own risk."<sup>239</sup> The Court also ruled that in light of that concession, the trial judge should have di-

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231. See *id.* CPLR 1411 does not address the issue of express assumption of risk, in fact the section is merely entitled "[d]amages recoverable when contributory negligence or assumption of risk is established." N.Y. CPLR 1411 (McKinney 1976).

232. 65 N.Y.2d 161, 480 N.E.2d 365, 490 N.Y.S.2d 751 (1985).

233. See *id.* at 162, 480 N.E.2d at 366-67, 490 N.Y.S.2d at 752-53.

234. See *id.* at 163, 480 N.E.2d at 367, 490 N.Y.S.2d at 753.

235. See *id.* at 170, 480 N.E.2d at 371, 490 N.Y.S.2d at 757-58.

236. See *id.*

237. See *id.* at 170, 480 N.E.2d at 371, 490 N.Y.S.2d at 757; see also Conason, *Tort Law: Sports Injury—A New Concept of Risk Assumption*, N.Y.L.J., August 9, 1985, at 1, col. 1; Orzeske, *Comparative Fault and Strict Products Liability*, 8 J. PROD. LIAB. 283, 290 (1985).

238. *Arbegast*, 65 N.Y.2d at 171, 480 N.E.2d at 372, 490 N.Y.S.2d at 758.

239. See *id.* The Court made a connection between express assumption of the risk and an expression on the part of the defendant that the plaintiff participates at his own risk. See Conason, *supra* note 237, at 2; *infra* notes 264-66 and accompanying text.

rected a verdict for the defendant.<sup>240</sup> In specifically exempting express assumption of risk from CPLR 1411, the Court of Appeals relied on the common law definition of express assumption. Under the common law, an express assumption of the risk was held to preclude any recovery. An advance agreement between the parties specifically would state that the defendant did not owe the plaintiff a duty of reasonable care and the defendant would not be held liable for any conduct that was subsequently labeled negligent.<sup>241</sup>

By enacting article 14-A, the Legislature intended New York's comparative negligence statute to permit a recovery even though the conduct of both parties was culpable.<sup>242</sup> The *Arbegast* Court limited this intention by holding that the benefits of CPLR 1411 do not extend to parties who expressly assume the risk.<sup>243</sup> The practitioner should be aware that *Arbegast* has received further support. For example, in *Santangelo v. State*,<sup>244</sup> the Court of Claims, relying on *Arbegast*, held that police officers could not recover for injuries sustained in apprehending a mental patient, who escaped from a mental institution due to the State's negligence, because as police officers, their activity was in the line of work for which they had expressly assumed the risk.<sup>245</sup> The *Santangelo* court extends the *Arbegast* holding by ruling that persons who partake in inherently dangerous occupations would not be allowed to take advantage of CPLR 1411.<sup>246</sup>

In *Maddox v. City of New York*,<sup>247</sup> a professional baseball player slipped and fell while playing at Shea Stadium, severely injuring his knee. Subsequently, Maddox had three knee operations and was forced to prematurely end his professional career with the New York Yankees. After suing a number of parties, Maddox testified at a deposition that he was aware of the wet field and had prior notice of the particular puddle in which he fell. Four of the

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240. See *Arbegast*, 65 N.Y.2d at 171, 480 N.E.2d at 372, 490 N.Y.S.2d at 758.

241. See *id.* at 169, 480 N.E.2d at 371, 490 N.Y.S.2d at 757.

242. See *id.* at 167, 480 N.E.2d at 369, 490 N.Y.S.2d at 755.

243. See Conason, *supra* note 237, at 2; see also WEINSTEIN-KORN-MILLER, *supra* note 220, § 1411.03.

244. 129 Misc. 2d 898, 494 N.Y.S.2d 49 (Ct. Cl. 1985).

245. See *id.* at 907, 494 N.Y.S.2d at 54.

246. See *id.*

247. 66 N.Y.2d 270, 487 N.E.2d 553, 496 N.Y.S.2d 726 (1985). For a discussion of the Second Department's decision in *Maddox*, see Taddeo, *Catastrophic Sports Injuries and the Law: Maddox v. City of New York, et al.*, 194 N.Y.L.J., July 12, 1985, at 5, col. 1.

defendants and other parties thus moved for summary judgment on the ground that Maddox had assumed the risk. In response, Maddox argued that he had only assumed the risk of the game, not of the dangerous condition of the playing field.

Although the case involved an implied assumption of risk, as opposed to an express agreement, the Court of Appeals affirmed the Second Department's dismissal of the plaintiff's complaint.<sup>248</sup> Although Maddox's cause of action accrued before the application of the comparative negligence statute,<sup>249</sup> the decision might have a bearing on future cases where a knowledgeable person engages in activity which he knows to entail the very risk resulting in his injury.<sup>250</sup> It would appear that the *Arbegas* holding is consistent with the Court's analysis in *Maddox*.

The *Arbegas* and *Maddox* holdings may also affect the liability of one sports participant to another.<sup>251</sup> In *Turcotte v. Fell*,<sup>252</sup> a professional jockey was injured during a race due to the alleged negligence of another jockey.<sup>253</sup> The court barred recovery on the grounds that the claimant knew of the dangers associated with the sport and, by mere participation, agreed to relieve the defendant of any duty owed to him.<sup>254</sup> The court stated that CPLR 1411 did not apply because the defendant owed no duty of care to the plaintiff with respect to the injury-causing event.<sup>255</sup> It is significant to note

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248. See *Maddox*, 66 N.Y.2d at 279, 487 N.E.2d at 558, 496 N.Y.S.2d at 731.

249. See *id.* at 275, 487 N.E.2d at 554, 496 N.Y.S.2d at 727 (the injury occurred on June 13, 1975); see also *Lamphear v. State*, 91 A.D.2d 791, 458 N.Y.S.2d 71 (3d Dep't 1982); *McDaniel v. Clarkstown Central School Dist.*, 111 A.D.2d 151, 488 N.Y.S.2d 783 (2d Dep't 1985) (plaintiff's contributory negligence was a complete bar to recovery when the cause of action accrued prior to New York's system of comparative negligence, but a claim accruing after September 1, 1975, in this case for wrongful death, does create a triable issue as to the degree of defendant's negligence).

250. See Hoenig, *Product Liability*, 195 N.Y.L.J., Mar. 27, 1986, at 1, col. 1.

251. See Conason, *supra* note 237, at 2.

252. 123 Misc. 2d 877, 474 N.Y.S.2d 893 (Sup. Ct., Nassau Co. 1984).

253. See *id.* at 877-78, 474 N.Y.S.2d at 894.

254. See *id.* at 883-84, 474 N.Y.S.2d at 897-98; see also *Clapman v. City of New York*, 63 N.Y.2d 669, 468 N.E.2d 697, 479 N.Y.S.2d 515 (1984) (the owner of a baseball field only has a duty to provide adequate screening behind home plate where the danger of being struck by a ball is greatest). *Accord Davidoff v. Metropolitan Baseball Club*, 61 N.Y.2d 996, 463 N.E.2d 1219, 475 N.Y.S.2d 367 (1984); *Akins v. Glens Falls City School Dist.*, 53 N.Y.2d 325, 424 N.E.2d 531, 441 N.Y.S.2d 644 (1981). *Compare Zambito v. Village of Albion*, 100 A.D.2d 739, 473 N.Y.S.2d 651 (4th Dep't 1984) (an owner of a field had a duty to provide adequate screening where the seats were located because there were no seats located behind home plate); *Sawyer v. State*, 127 Misc. 2d 295, 485 N.Y.S.2d 695 (Ct. Cl. 1985).

255. See *Turcotte*, 123 Misc. 2d at 884, 474 N.Y.S.2d at 896.

that the issue of duty preceded any discussion of "culpable conduct."<sup>256</sup> In light of the *Arbegast* decision, it would seem viable for a court, in a position similar to the *Turcotte* court, to allow a claimant to take advantage of article 14-A as long as there is no express assumption of the risk.<sup>257</sup>

Courts have also barred recovery of injured amateur sports participants, but not on the *Arbegast* theory of an express assumption of risk. In *Cimino v. Town of Hempstead*,<sup>258</sup> the Second Department barred recovery by an injured swimmer who was struck by a powerful wave.<sup>259</sup> The court found that the claimant had observed the turbulent water prior to the accident and still decided to surf.<sup>260</sup> In another swimming case, the Court of Appeals barred recovery by a swimmer injured when he dove onto a sandbar not visible from the water's surface.<sup>261</sup> The Court held that the State was not put on notice as to the dangerousness of the area because very few accidents had occurred there.<sup>262</sup> In addition, the Court prevented recovery because it determined that the claimant had previously visited the area six times that summer.<sup>263</sup>

Both decisions found that the defendants had no duty to warn, thus there was no basis for a negligence claim.<sup>264</sup> Due to the fact that the plaintiffs in these cases could not establish a cause of action, a decision could not be made as to the applicability of CPLR 1411.<sup>265</sup> If, in fact, the defendants did owe a duty to forewarn and failed to do so, the *Arbegast* decision would suggest that, at best, only an implied assumption of the risk existed in these cases and CPLR 1411 would apply.<sup>266</sup>

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256. See Conason, *supra* note 237, at 2.

257. See *id.*

258. 110 A.D.2d 805, 488 N.Y.S.2d 68 (2d Dep't 1985).

259. See *id.* at 805, 488 N.Y.S.2d at 69.

260. See *id.*

261. See *Herman v. State*, 63 N.Y.2d 822, 472 N.E.2d 24, 482 N.Y.S.2d 248 (1984).

262. See *id.* at 823, 472 N.E.2d at 25, 482 N.Y.S.2d at 249.

263. See *id.*

264. See *id.*; *Cimino*, 110 A.D.2d at 805, 488 N.Y.S.2d at 70.

265. See *Herman*, 63 N.Y.2d at 823, 472 N.E.2d at 25, 482 N.Y.S.2d at 249; see also *Clark v. Goshen Sunday Morning Softball League*, 129 Misc. 2d 401, 493 N.Y.S.2d 262 (Sup. Ct., Orange Co. 1985) (plaintiff assumed the risk by virtue of attending a sporting event even though he did not intend to view the game as a spectator).

266. See Conason, *supra* note 237, at 2.

### B. Labor Law Violations

Notwithstanding CPLR 1411, a contractor or owner of a site is strictly liable for any injuries which are caused by a violation of certain safety provisions of the Labor Law. For example, in *Zimmer v. Chemung County Performing Arts, Inc.*,<sup>267</sup> the Court of Appeals held that plaintiff's contributory negligence was not subject to comparison with the defendant's statutory violation of section 240(1) of the Labor Law<sup>268</sup> because the Legislature intended its violation to establish absolute liability.<sup>269</sup> The Court held that the trial court should have directed a verdict in the plaintiff's favor because there was no evidence at trial to support a finding that the statutory violation was not a proximate cause of the injuries.<sup>270</sup> Thus, comparative negligence principles are not applicable whenever statutory liability is held to be absolute and a plaintiff's recovery should not be affected by his own fault.<sup>271</sup>

### C. Legal Prohibitions

There is also an absolute bar to recovery by a plaintiff whose injuries were the direct result of a "serious violation" of a statute prohibiting the conduct involved. For example, in *Barker v. Kalash*,<sup>272</sup> the plaintiff was injured while unlawfully making a bomb. Because of his knowing and intentional participation in a criminal act, he could not recover for any portion of his injuries.<sup>273</sup>

### D. Conclusion

The practitioner should be alert for situations where decisional law bars the application of CPLR article 14-A. This is particularly true when a party admits to an express assumption of the risk or when a "highly trained" party impliedly assumes the risk.

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267. 65 N.Y.2d 513, 482 N.E.2d 898, 493 N.Y.S.2d 102 (1985).

268. See N.Y. LABOR LAW § 240(1) (McKinney 1965 & Supp. 1986).

269. See *Zimmer*, 65 N.Y.2d at 520-21, 482 N.E.2d at 900-01, 493 N.Y.S.2d at 105.

270. See *id.* at 524, 482 N.E.2d at 903, 493 N.Y.S.2d at 107.

271. See *id.* Accord *Wright v. State*, 110 A.D.2d 1060, 488 N.Y.S.2d 917 (4th Dep't 1985) (which also distinguishes between the applicability of comparative negligence standards under N.Y. LABOR LAW §§ 240(1) and 241(6)). See also *Long v. Forest-Fehlhaber*, 55 N.Y.2d 154, 433 N.E.2d 115, 448 N.Y.S.2d 132 (1982).

272. 63 N.Y.2d 19, 468 N.E.2d 39, 479 N.Y.S.2d 201 (1984).

273. See *id.* at 28-29, 468 N.E.2d at 43, 479 N.Y.S.2d at 205-06.