Civil Practice: Comparative Negligence

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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,\(^{216}\) to matters involving some labor law violations,\(^{218}\) and to violations of legal prohibitions.\(^ {217}\) 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\(^ {218}\) by chapter 69 of the Laws of 1975 and became effective on September 1, 1975.\(^ {219}\) This article adopts the doctrine of pure comparative negligence;\(^ {220}\) its purpose is to permit a partial

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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 $9500 from the defendant. See
recovery for the plaintiff, even though the conduct of each party is culpable.221 Article 14-A applies to any action, accruing on or after September 1, 1975,222 for personal injury, injury to property, or wrongful death.223 These provisions require that the claimant’s recovery be reduced to the degree that his own negligence or other culpable conduct caused the injury.224 Article 14-A is applicable to actions against a defendant for negligence, breach of warranty, and strict liability.225

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.226 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.227 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.228

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,229 neither article 14-A nor its legislative history defines “assumption of risk.”230 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.
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.
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.
comparison.231 Recently, the Court of Appeals clarified this relationship in Arbegast v. Board of Education.232

In Arbegast, the plaintiff was thrown from a donkey while playing donkey basketball.233 Prior to mounting the donkey, the plaintiff was informed by the defendant that she was participating at her own risk.234 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.235 The Court stated that once a party gives express consent, they are foreclosed from the use of CPLR 1411 and recovery is barred.236 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.237

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."238 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."239 The Court also ruled that in light of that concession, the trial judge should have di-

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).
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.
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.\textsuperscript{240} 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.\textsuperscript{241}

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.\textsuperscript{242} The \textit{Arbegast} Court limited this intention by holding that the benefits of CPLR 1411 do not extend to parties who expressly assume the risk.\textsuperscript{243} The practitioner should be aware that \textit{Arbegast} has received further support. For example, in \textit{Santangelo v. State},\textsuperscript{244} the Court of Claims, relying on \textit{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.\textsuperscript{245} The \textit{Santangelo} court extends the \textit{Arbegast} holding by ruling that persons who partake in inherently dangerous occupations would not be allowed to take advantage of CPLR 1411.\textsuperscript{246}

In \textit{Maddox v. City of New York},\textsuperscript{247} 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

\begin{itemize}
\item \textsuperscript{240} See \textit{Arbegast}, 65 N.Y.2d at 171, 480 N.E.2d at 372, 490 N.Y.S.2d at 758.
\item \textsuperscript{241} See \textit{id.} at 169, 480 N.E.2d at 371, 490 N.Y.S.2d at 757.
\item \textsuperscript{242} See \textit{id.} at 167, 480 N.E.2d at 369, 490 N.Y.S.2d at 755.
\item \textsuperscript{243} See Conason, supra note 237, at 2; see also \textit{Weinstein-Korn-Miller}, supra note 220, § 1411.03.
\item \textsuperscript{244} 129 Misc. 2d 898, 494 N.Y.S.2d 49 (Ct. Cl. 1985).
\item \textsuperscript{245} See \textit{id.} at 907, 494 N.Y.S.2d at 54.
\item \textsuperscript{246} See \textit{id.}
\end{itemize}
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. Although Maddox's cause of action accrued before the application of the comparative negligence statute, 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. It would appear that the Arbegast holding is consistent with the Court's analysis in Maddox.

The Arbegast and Maddox holdings may also affect the liability of one sports participant to another. In Turcotte v. Fell, a professional jockey was injured during a race due to the alleged negligence of another jockey. 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. 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. 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 276, 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 161, 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).
251. See Conason, supra note 237, at 2.
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 518 (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 1981) (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." 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.

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, the Second Department barred recovery by an injured swimmer who was struck by a powerful wave. The court found that the claimant had observed the turbulent water prior to the accident and still decided to surf. 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. 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. In addition, the Court prevented recovery because it determined that the claimant had previously visited the area six times that summer.

Both decisions found that the defendants had no duty to warn, thus there was no basis for a negligence claim. 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. 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.

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.
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 \textit{Zimmer v. Chemung County Performing Arts, Inc.},\textsuperscript{267} 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\textsuperscript{268} because the Legislature intended its violation to establish absolute liability.\textsuperscript{269} 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.\textsuperscript{270} 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.\textsuperscript{271}

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 \textit{Barker v. Kallassh},\textsuperscript{272} 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.\textsuperscript{273}

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.

\textsuperscript{269} See Zimmer, 65 N.Y.2d at 520-21, 482 N.E.2d at 900-01, 493 N.Y.S.2d at 105.
\textsuperscript{270} See id. at 524, 482 N.E.2d at 903, 493 N.Y.S.2d at 107.
\textsuperscript{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-Fehlhuber, 55 N.Y.2d 154, 433 N.E.2d 115, 448 N.Y.S.2d 132 (1982).
\textsuperscript{273} See id. at 28-29, 468 N.E.2d at 43, 479 N.Y.S.2d at 205-06.