MASSACHUSETTS RECREATIONAL LIABILITY

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LIABILITY ARISING FROM COMPETITIVE ATHLETIC CONTEST

The leading case with regard to liability of a participant in an athletic contest for injuries sustained by another is *Gauvin v. Clark*, 404 Mass. 450, (1989). The case involved an intercollegiate hockey game in which one of the participants "butt-ended" another participant with his stick in the plaintiff's abdomen resulting in a loss of his spleen. While the practice of "butt-ending" was specifically prohibited by the rules governing intercollegiate hockey games, the defendant was absolved of liability as he was held not to the standard of ordinary negligence, but rather to the standard of willful, wanton and reckless conduct. The jury found that he had not violated that standard.

The SJC said:

> *We hold that participants in an athletic event owe a duty to other participants to refrain from reckless misconduct and liability may result from injuries caused a player by reason of a breach of that duty. Id. at 451.*

The Court also remarked:

> *The problem of imposing duty of care on participants in sports competitions is a difficult one. Players, when they engage in sport, agree to undergo some physical contacts which would amount of assault and battery absent player's consent. Restatement (Second) of Torts §50 comment b (1965) The courts are wary of imposing wide tort liability on sports participants lest the law chill the vigor of athletic competition*. Id. at 454.

It said that "[v]igorous and active participation in sporting events should not be chilled by the threat of litigation". Id. at 454. Willful, wanton and reckless misconduct is defined as: "Intentional conduct, by way either of commission or of omission, where

there is a duty to act, which conduct involves a high degree of likelihood that substantial harm will result to another." *Manning v. Nobile*, 411 Mass. 382, 387 (1991) quoting, *Commonwealth v. Katalina*, 407 Mass. 779, 789 (1990).

The majority of foreign jurisdictions have applied the same standard with respect to competitive athletic activities. *Jaworski v. Kiernan*, 241 Comm. 399 (1997); 696 A.2d 3332 (1997) (co-ed soccer game*); Ice Skating Ritchie – Gamester v. City of Berkley*, 461 Mich. 73, 597 N.W. 2d 517 (1999*); Air Rifles Conrad v. Morant,* 89 Ohio App. 3d 803, 627 N.E.2d 1007 (1993).

In the recent decision of *Borella v. Renfro*, 96 Mass. App. Ct. 617 (2019) the Appeals Court revisited the issue of liability arising out of a contact sport, specifically ice hockey. The defendant player checked the plaintiff hard causing him to fall to the ice. In attempting to wrest the puck from the plaintiff, one of the blades of the defendant's skates sliced the plaintiff's wrist causing a permanent loss of use. The Appeals Court made a distinction between aggressive play in the ordinary course of the athletic contest and "extreme misconduct outside the range of the ordinary activity inherent in ice hockey". It found that the defendant's conduct fell in the former category and did not meet the recklessness standard to affix liability. The Court also observed that a violation of the rules of the game did not automatically equate to recklessness.

In the case of *Gray v. Giroux*, 49 Mass. App. Ct. 436 (2000), the context of what is typically a "non-contact" athletic pursuit, the Appeals Court applied the same willful, wanton and reckless misconduct standard to golf. In *Gray*, the parties were in the same group playing a particular hole. The defendant hit an errant shot, which struck the plaintiff in the head, causing serious injury. The defendant, an experienced golfer did

not issue the verbal warning, ”fore”, either before or after hitting his shot. The Court concluded that the fact that the shot did not follow the defendant’s intended path did not amount of willful, wanton or reckless conduct. The allowance of summary judgment was affirmed. In the case of *Katz v. Gow*, 321 Mass. 666, 667 (1947) the SJC noted “It is common knowledge that a golf ball does not always fly straight toward its intended mark, especially when hit by an unskilled person.” In the decision of *Hill v. Bosma*, 1993 Mass. App. Div. 128, the Court remarked “…in golf a player may wish to take certain shots to reduce his or her score. This determination should not be influenced by the possibility of litigation based on an ordinary negligence standard.”

However, the reckless standard does not apply to related activity which is not intrinsic to the sport. In the case of *St. Laurent v. Touisset Country Club*, 2002 WL 33945049 (Mass. Super.) the plaintiff a passenger in a golf cart operated by a playing partner was thrown from the cart when the operator swerved. The court concluded that the ordinary negligence standard was applicable as opposed to the recklessness standard, as the operation of the cart was distinct from participation in the athletic activity.

VICARIOUS LIABILITY ARISING FROM ATHLETIC COMPETITION

In the decision of *Kavanagh v. Trustees of Boston University*, 440 Mass. 195 (2003), a college basketball player sought to impose liability upon the university for the violent behavior of a member of the defendant's basketball team in the course of a game. The defendant's student/player struck the plaintiff, a member of the opposing basketball team, in the face resulting in bodily injury. The plaintiff alleged that because the offending player was attending Boston University on an athletic scholarship that the university should be held accountable for his misconduct. The plaintiff further alleged that the basketball coach encouraged his players to act in an overly aggressive fashion. The Court held that to affix liability to a coach the plaintiff must show that the coach's behavior was not merely negligent, but reckless. The SJC concluded that the status of the offending player as a student of the defendant did not make that student a "employee" or "servant" of the university. The fact that the offending player was on a full athletic scholarship did not "transform the relationship between the academic institution and the student into any form of employment relationship" by which vicarious liability might be imposed. Id. at 199.

PREMISES LIABILITY ASSOCIATED WITH RECREATIONAL PURSUITS

The 2004 decision of *Costa v. The Red Sox Baseball Club*, 61 Mass. App. Ct. 299 (2004) concerned a woman who suffered severe, permanent facial injuries as a result of being struck by a foul ball. Plaintiff, not a baseball aficionado, arrived late and was seated in an unscreened area of the ball park. The Appeals Court upheld summary judgment in favor of the Red Sox on the basis that the sole theory of recovery was a failure to warn. A ball struck by a professional baseball player hit the plaintiff at a speed of 90 m.p.h., travelling at 132 feet per second. The plaintiff's expert concluded that the plaintiff had no more than 1.0 seconds from the time the ball was batted until being struck to take evasive action. It was determined that foul ball injuries occur in Fenway Park with some regularity. After the accident a sign was erected "Be Alert, Foul Balls and Bats Hurt". Significantly the plaintiff did not contend that netting, or some other screen, should have been in place to prevent errant balls from striking spectators. The Appeals Court concluded that the hazard of being struck by a baseball while in the ballpark seats was sufficiently obvious that a person of ordinary intelligence could perceive the risk and act accordingly. The viability of this decision, given the narrow theory of recovery – failure to warn – is perhaps, at present, suspect. The National Baseball League has requested stadium owners to extend netting or screening to protect spectators. Subsequently a young girl was killed in the Midwest after being struck by a hockey puck while in the spectator area at a professional game. Given the frequency of this sort of a mishap, currently it seems likely that a stadium owner will be held accountable for injuries sustained by spectators by balls or pucks when there is a history of the injuries sustained in proximity to the athletic field or rink.

In the matter of *Judge v. Carrai*, 77 Mass. App. Ct. 803 (2010) summary judgment in favor of the owners of a residence and the organizer of an informal softball game was reversed by the Appeals Court. The plaintiff and others were invited to attend a First Communion party at the defendant homeowners' residence. One of the attendees took it upon himself to use the owner's bats, balls and other equipment to organize an impromptu softball game some twenty feet from an unenclosed porch. During the course of the game the plaintiff, seated with her back to the game, was struck by a batted ball, sustaining significant injury. Prior to that, another ball was struck and hit the roof of the porch. The Appeals Court distinguished between the duty of care to protect others from unreasonable risks of harm on one's property and the duty to warn. It concluded that the risk that someone might be struck by a batted ball was foreseeable. The fact that a danger is open or obvious did not negate a duty to protect visitors to one's premises. The owners of property may be held accountable for the conduct of a third person, in this case the organizer of the softball game, for injuries caused to those present. Here, the owners of the residence owned the baseball equipment, and were aware that the game was occurring in proximity to the porch. The decision did not mandate a finding of liability against the organizer or the owners of the residential premises, but left that open for the finder of fact by reversing an award of summary judgment.

In the unpublished opinion of *Connors v. The Town of Pembroke*, 81 Mass. App. Ct. 1114 (2012) the Appeals Court affirmed summary judgment in favor of a municipality with respect to a claim made by the plaintiff, a spectator standing ten feet from the sidelines at a Thanksgiving, high school, football game. In a rather perfunctory opinion

the Court, following the *Costa* decision found that the danger of being struck by a player overrunning the field was open and obvious and, thus not a basis for liability. It appears that the decision as to whether the ordinary negligence standard or the reckless misconduct standard will be applied to the owner or controller of premises will depend in part whether the plaintiff was engaged in activity integral to the sport or whether he or she was engaged in a separate activity such as that of a spectator. If the plaintiff falls in the latter category it seems likely that the ordinary negligence standard will apply.

There are two Massachusetts decisions addressing the layout of golf courses with respect to personal injury claims. In the case of *Reardon v Country Club at Coonamessett, Inc.*, 353 Mass. 702 (1968) the plaintiff was making her way to a parking lot after playing golf and was struck on the head by an errant tee shot from an adjacent fairway. The Court noted that the design of the golf hole would encourage some players to cut the dogleg angle and to play the shot over the trees where the plaintiff was walking. There was evidence that a protective fence and warning signage had been removed and not replaced. A finding in the plaintiff's favor was affirmed. In the case of *Hill v. Bosma*, 1993 Mass. App. Div. 128 (Super. Ct. 1992) the plaintiff was struck by a ball driven by a fellow golfer. With respect to the claim against the golf course owner the standard of ordinary negligence would apply. The owner's reliance on the statute of repose G.L.c. 260 §2B, on the basis that the course was designed and constructed decades before was unavailing. With respect to the defendant golfer the Court said: "…in golf a player may wish to take certain shots to reduce his or her score. This determination should not be influenced by the possibility of litigation based on an ordinary negligence standard. "

In the case of *Matteo v. Livingstone*, 40 Mass. App. Ct. 658 (1996) the Appeals Court affirmed a jury verdict for the owner of a variety store located in a historical building in Franklin County. The plaintiff, an avid bicyclist, elected to ride his mountain bike off the entry porch of the store, landing badly and sustaining injuries which left him quadriplegic. The plaintiff sought to affix liability on the owner of the store based on the theory that the porch in question lacked adequate railings and violated various codes. The Appeals Court observed that a "violation of a regulation is relevant to the question of negligence only if the risk materialized was within the contemplation of the regulation..." at 661. Given the age of the building, which pre-dated the Civil War, and the purpose of the regulation, the Court questioned whether the regulation was applicable to the building, or applicable to the risk and injury sustained by the plaintiff. A jury verdict in favor of the defendant was sustained.

A federal district court decision by Judge Douglas Woodlock in the case of *Godsoe v. Maple Park Properties, Inc.,* 2007 WL 2316468 (D.Mass. 2007) dealt with the liability of a campground owner for injuries sustained by a thirteen year old boy who went head first down a metal slide positioned within a lake. The minor plaintiff suffered fractured cervical vertebrae when his head hit bottom in a depth of two feet of water. The water was murky. The defendant asserted that the danger was open and obvious to a thirteen year old boy. In denying the defendant's motion for summary judgment, Judge Woodlock concluded that the fact that a hazard is open and obvious does not relieve the premises owner from the obligation of maintaining its property in an reasonably safe condition. Moreover, the slide, as constructed and installed, violated

safety standards. Whether the minor plaintiff should be held to the standard of care for adults given his age was a question of fact for the jury.

An adult plaintiff in the case of *Greenslade v. Mohawk Par*k, *Inc.* 59 Mass. App. Ct. 850 (2003) sustained severe injuries as a result of falling from a rope swing suspended over a river near the defendant's campsite. On the bank of the Deerfield River opposite the defendant's campsite a rope swing had been suspended from a tree over a rocky incline, so that individuals could swing over the river, let go of the rope and land in the water. Plaintiff, in his second attempt to use the swing, became entangled with the rope and fell head first into the rocky ledge. It was undisputed that the swing was not on property owned by the defendant campground. In its decision affirming summary judgment for the defendant, the Appeals Court acknowledged that, under appropriate circumstance, the premises owner must protect lawful visitors from hazards on adjacent land of which the owner is aware. The Court observed that there is no duty to warn of a danger which is open and obvious. The Court remarked that the defendant did not construct or install the swing, and the use of the swing was not an activity promoted by the defendant.

In the decision of *Cohen v. Elephant Rock Beach Club, Inc.*, 63 F.Supp. 3d 130 (2014). Judge Woodlock addressed the liability of a recreational club for a hazard adjacent to the club's premises. The plaintiff, a guest at the beach club, observed several others swim out to a rock owned by the state in the Atlantic Ocean and jump off the rock. She elected to do the same. This natural feature was two hundred fifty feet from the shore of the beach owned by the club. The club posted warnings with respect to surf and rip currents. It also would post a warning "rock closed" in turbulent

conditions. There were also signs indicating that use of the rock was at one's own risk. The defendant proceeded on two theories: a duty of care to maintain the rock in a safe condition; and a duty to warn the plaintiff of known hazards. The Court observed that control over the hazard, rather than legal ownership, was a central issue. If one assumed control of the hazard then one could not escape liability for injuries resulting from its use. Liability may exist on the part of a premises owner when the duty to exercise reasonable care includes known dangers on adjacent land. While a duty of care may not have required the beach club to maintain, or modify, the rock, it did include a duty to warn members and guests concerning the hazards of using the rock. defendant's motion for summary judgment was denied as the Court felt that there were facts which could lead a jury to conclude that the club exercised some control over access to the rock and, thus had a duty to warn of the hazards of jumping from the rock.

In *Thorson v. Mandell*, 402 Mass. 744 (1988) the plaintiff, an actress who was involved in dance rehearsals, was paralyzed when she attempted a back flip in the auditorium owned by the co-defendant, a YMCA. The acting troupe leased the auditorium for purposes of the rehearsal. The plaintiff's attorney theorized that liability should be found against the YMCA for failing to enforce a written policy against gymnastics in the auditorium; and for failing to inquire as to the acting troupe's qualifications to conduct safe physical activity. The SJC reversed judgment in favor of the plaintiff against the YMCA as it found that the YMCA had no obligation to investigate the qualifications, or competence, of the acting troupe's director. The Court also observed that there was no duty to warn the plaintiff of the dangers of attempting to do an unfamiliar gymnastic maneuver over a hardwood floor.

In the case *O'Sullivan v. Shaw*, 431 Mass. 201 (2000) involved an action by the plaintiff, a twenty-one year old man, against the owners of a residential swimming pool when the plaintiff, during the evening, dove into the shallow end of the pool sustaining a broken neck. Liability was theorized on the basis of a failure to warn. Sullivan had been swimming in the pool previously and was somewhat familiar with its dimensions and characteristics. He had observed others performing a "racing dive" in the four foot depth of the shallow end. He was attempting to do the same but took too steep an angle striking his head on the bottom. The SJC concluded that "landowners are relieved of the duty to warn of open and obvious dangers on their premises because it is not reasonably foreseeable that a visitor exercising (as the law presumes) reasonable care for his own safety would suffer injury from such blatant hazards". Id. at 204. The focus is not on the plaintiff but rather on the defendant's conduct and whether the hazard is "so obvious that the defendant would be reasonable in concluding that an ordinarily intelligent plaintiff would proceed and avoided, and, therefore, that any further warning would be superfluous". Id. at 206. Summary judgment awarded by the trial court was affirmed by the SJC.

In the case of *DosSantos v. Coleta*, 465 Mass. 148 (2013) the plaintiff suffered paralysis when he attempted to perform a front flip from a trampoline into an adjacent, shallow, inflatable pool. The SJC reversed a judgment for the defendant which had been affirmed by the Appeals Court, in favor of the owner of the residential, rental property. The defendant owners held title to a two family residence, occupying one of the units. They had acquired both the trampoline and the inflatable pool, and positioned them adjacent to each other in the yard. The defendants were aware that people were

using the trampoline to jump into the two foot deep pool. The defendants/owners thereafter changed their residence to North Carolina, but retained ownership of the residential, rental property. The plaintiff and his family were renting the other unit in the two-family home. The SJC again recognized that landowners are relieved of a duty to warn a visitor of an open and obvious danger, yet it concluded that an open and obvious danger does not necessary relieve a landowner of all duties with regard to that hazard. The Court distinguished between the duty to warn and a duty to remedy. The premises owner retains the obligation to maintain his or her property in a reasonably safe condition even if a hazard is obvious. Here, the premises owner actively facilitated this improper and highly dangerous use, and given the shallow depth of the water, there was no reliably safe way to propel oneself from the trampoline into the pool. The SJC found that the trial court's instruction to the jury to return a verdict for the defendant if they found the hazard was open and obvious were incorrect and reversed judgment for the defendants. It stated that the trial court should have instructed the jury that beyond the open and obvious condition, there may remain an obligation on a premises owner to remedy an unsafe condition, as it was foreseeable that someone could suffer harm as a result of the open and obvious hazard.

105 Code of Mass. Regulations 435.00 contains the "Minimum Standards for Swimming Pools".

RECREATIONAL USE STATUTE

G. L. c. 21, § 17C provides in relevant part:

> *Any person having an interest in land, including the structures, buildings and equipment attached to the land…who lawfully permits the public to use such land for recreational…purposes without imposing a charge or fee therefor…shall not be liable for personal injuries…sustained by such members of the public, including without limitation a minor, while on said land in the absence of willful, wanton, or reckless conduct by such person.*

The announced purpose for the enactment of this statute in 1972 was to "encourage landowners to permit broad, public, free use of land for recreational purposes by limiting their obligations to lawful visitors under the common law". *Ali v. Boston*, 441 Mass. 233, 238 (2004). The statute deems recreational users a "discrete subgroup of lawful visitors owed only the standard of care applicable to trespassers: that is, landowners must refrain from willful, wanton, or reckless conduct as to their safety". Id. at 237. Thus, a landowner cannot be accountable for injuries sustained on his premises because of ordinary negligence. The recreational use statute creates an exemption for the premises owner for liability to the plaintiff for ordinary negligence when "(1) a defendant has an interest in the land, (2) the was injured when engaged in a recreational activity on that land, and (3) the defendant did not impose a charge or a fee for the injured plaintiff's use of the land". *Patterson v. Christ Church and the City of Boston*, 85 Mass. App. Ct. 157, 159 (2014).

The protection afforded a premises owner by the statute may include a plaintiff engaged in a passive pursuit such as watching a baseball game or other recreational activity. *Seich v. Canton*, 426 Mass. 84 (1997). In *Seich* a mother was injured while

watching her daughter play basketball on town property. The mother argued that the fee the town charged for her daughter to play in the league constituted a payment for use of the town's recreational facility and thereby, the town was prevented from enjoying the protections of the recreational use statute. The SJC rejected this argument and focused on the fact that regardless of whether or not the mother watched her daughter play, she still had to pay the fee to register her daughter. Further, had the mother not paid the fee to register her daughter, she like other members of the public could have attended the game as a spectator without paying a fee. Id. The Court also noted that a person may be deemed to be "engaged in a reactional pursuit" for purposes of the statute, even if he or she is a mere spectator. Id. *See also Gernate v. 202 Sports Complex, LLC*, 95 Mass. App. Ct. 455 (2019)

The Mass. Appeals Court in 2019 *Gernate*, cited *Seich* in affirming the dismissal of a personal injury brought by a spectator against an indoor sports facility. In *Gernate*, a mother brought an action against the owner of a dekhockey (street hockey) facility after she fell and injured her knee on the bleachers while watching her son play dekhockey. The mother argued that the recreational use statute did not apply, because although she paid an "indirect fee" to the sports facility for her son to play in the tournament. The Appeals Court acknowledged that the indirect fee paid for the son to play may impact the sports facility's ability to enjoy the protections of the recreational use statute with regard to any injuries he sustained while using the facility. However, the indirect fee was not paid by the mother to watch her son her play and the mother was deemed no different from any other member of the public who could have come and watched.

The Plaintiff in *Gernate* attempted to argue that her spectatorship at the dekhockey tournament was akin to the of the Plaintiff in *Amaral v. Seekonk Grand Prix Corp.*, 89 Mass. App. Ct. 1 (2016). In the *Amaral* case, the plaintiff paid for her two sons to participate in a go-cart race. She paid no fee to observe the race. One of the participants lost control and struck the plaintiff as she observed the competition, causing significant injury. The defendant's argument that the plaintiff was precluded from recovery absent a showing of willful, wanton or reckless conduct was denied on the basis that she had paid for her children's participation in the activity; and, therefore, the defendant was without the shield of the recreational use statute. The Appeals Court in *Gernate* distinguished the *Amaral* case, on the basis that in *Amaral*, the plaintiff paid the fee to accompany her minor children, purchase their tickets and remained to supervise her children. *Gernate*, 95 Mass. App. Ct. at 460-461.

The statute applies equally to publicly and privately owned land. *Seich v. Town of Canton*, 426 Mass. 84 (1997).

In the case of *Moore v. Billerica*, 83 Mass. App. Ct. 729 (2013) a four-year old girl was struck by an errant baseball while on a playground adjacent to a little league field. Some teenage boys were playing "home run derby" in the baseball field; and one of them struck the ball with such force causing it to travel above a protective fence separating the playground and the field. The Appeals Court reversed the denial of the town's motion for summary judgment indicating that the town's actions, or inactions, could not be reasonably deemed as willful, wanton or reckless.

For purposes of the Recreational Use Statute reckless conduct is defined as:

> *Reckless failure to act involves an intentional or unreasonable disregard for the risk that presents a high degree of probability that substantial harm will result to another. The risk of death or grave bodily injury must be known or reasonably apparent, and the harm must be a probable consequence of the defendant's election to run that risk or his failure to reasonably recognize it. Sandler v. Commonwealth,* 419 Mass. 334, 336 (1995).

Where the premises owner charges a fee "solely to reimburse it for the marginal cost directly attributable to a specific user's recreational use of the property, the landowner remains exempt from ordinary negligence claims [under the statute]. *Marcus v. City of Newton*, 426 Mass. 148, 156 (2012). Yet when a group or organization collectively pays a fee for the use of municipal land for a recreational activity, i.e., softball game, and a participant is injured because of an alleged defect on the premises, the recreational use statute's limited immunity did not apply.

EQUINE LIABILITY

In Massachusetts equine activity sponsors and equine professionals are statutorily afforded limited liability for personal injuries arising out of equine accidents. Liability is not dependent on the payment of a fee to the equine professional or sponsor. By statute both riding instructors and stables are required to obtain a license from the state. The definition of equine activity is quite broad, as is the definition of an equine activity sponsor. The statute recognizes the "inherent risk" of equine activities arising from the propensity of horses to behave in ways which may result in injury, harm or death; and the unpredictably of an equine's reaction to events. The statute also recognizes hazards such as the surface conditions upon which the equine activity is conducted and the potential of a participant to act in a negligent manner increases the potential for harm as a result of equine activity.

The equine liability statute was enacted in 1992. G.L. c.128 §2D provides, in part, that an equine activity sponsor will not be liable for the "injury to or death of a participant resulting from the inherent risk of equine activities" absent certain exceptions. Exceptions include the provision of faulty equipment, or "tack"; a failure to make reasonable efforts to determine the ability of a participant to engage in the activity proposed; and to make a determination as to whether the ability of a participant to manage a particular horse on the basis of the participant's representations regarding his or her equine experience or skill. Liability can also be imposed upon an equine activity sponsor because of a dangerous, latent condition of the land upon which the activity is performed. The statute also requires that every equine activity professional maintain a sign on premises advising potential participants that the equine professional

is not liable for injury or death to a participant in equine activity as a consequence of the inherent risk of such activity. There are also regulations designed for the protection of the health and well being of the horses, as well as a requirement that any riding school or stable be licensed by the Commonwealth.

There are few decisions from the Massachusetts appellate courts regarding equine liability. The case of *Pinto v. Revere-Saugus Riding Academy, Inc.,* 74 Mass. App. Ct. 389 (2009) involved a claim for damages as a result of personal injury to a prospective purchaser of horse during a "test drive". The allowance of a motion to dismiss the action against the stable was reversed on the basis that the plaintiff, who was considering the purchase of a horse for her daughter, requested a docile animal; but while being ridden by an equine professional, the subject horse exhibited contentious behavior. The Appeals Court found that the claim of defective tack was not sustainable, yet the claim of a failure to determine the plaintiff's ability to manage the horse was sustainable in view of the horse's erratic behavior while under the control of an equine professional, just prior to the plaintiff mounting the horse. In the decision of *Markovitz v. Cassenti*, 90 Mass. App .Ct. 1102 (2016) the Appeals Court described the equine liability statute as "overall bar" to liability which may allow a plaintiff to proceed with a negligence claim in certain limited circumstances. Id. at 1102.

In a Superior Court decision of *Hendricks v. JAFI, Inc.*, 1999 WL 133069 (Mass. Super.) the judge remarked that there was no doubt that the defendant was an equine professional, and the activity he engaged in at the time of the plaintiff's accident was an equine activity. In the midst of a horseback riding lesson the animal assigned to the plaintiff behaved erratically. The Court concluded that the obligation of an equine

professional to assess the ability of a rider entrusted to his or her care is one of a continuing nature, and there existed a question of fact for decision by a jury as to whether during the course of the lesson the behavior of the horse warranted reassignment of the plaintiff to a more docile animal.

The case of *Fraumeni v. Aleppo Temple Shriners,* 2003 WL 25507153 (Mass. Super.) Judge Borenstein of the Superior Court recognized "the inherent dangerous propensities of horses" as described in G.L. c.128 §2D. Summary judgment for the defendant was allowed on the basis that the plaintiff, who had some equine experience had to prove that the defendants, as owners or keepers of the animal, had some foreknowledge of the animal's combative tendencies. In *Fraumeni* the Court declared that the plaintiff had failed to introduce sufficient evidence of any malevolent tendencies of the subject horse.

In the Superior Court decision of *Duval v.* Howe, 20 Mass. L. Rptr. 83 (2005) the plaintiff, while riding her own horse, was caused to jump for safety because of the aggressive nature of another horse permitted to enter the riding arena. The plaintiff sought to establish liability on the part of the premises owner based on common law negligence. The Court decided that, because of the nature of the activity, G.L. c.28 §2D would apply as it represented "a clear determination of the Massachusetts Legislature to restrict the liability of landowners in cases of equine activities just as forty-four other states have done." Id.

In summary, the statute governing liability for equine accidents recognizes the unpredictable nature of horses and the inherent dangers associated with equine

activities. Nonetheless it preserves an avenue for plaintiff's suffering injuries or death as a result of equine activity to bring a claim for compensation falling within the four exceptions to limited immunity consisting of:

1. Faulty tack;
2. A failure to inquire as to the prospective rider of his or her riding experience and abilities;
3. A failure to match the rider with an appropriately tempered animal, and
4. Engaging in willful, wanton or reckless behavior or conduct intentionally designed to cause the rider harm.

SKIING LIABILITY

The bulk of claims/lawsuits as the result of injuries sustained while skiing are lodged against the ski area operator. There is a series of statutes pertaining to skiing liability known as the Massachusetts Ski Safety Act, G.L. c 143, § 71I et seq. ("MSSA") These define the circumstances under which liability may be found against a ski area operator. While MSSA pertains to skiing it must be assumed that it will also be applied to accidents and injuries arising from snowboarding. The most prominent elements of that statuary scheme are as follows:

> G.L. c. 143, § 71N. A ski operator shall:
>
> *(1) whenever maintenance or snow-making equipment is being employed on any ski slope or trail open to the public, conspicuously place or cause to be placed, notice at or near the top of any ski slope or trail being maintained that such equipment is being so employed, and shall conspicuously indicate the location of any such equipment in a manner to afford skiers reasonable notice of the proximity of such equipment;*
>
> *(2) mark and identify all trail maintenance and emergency vehicles, including snowmobiles, and furnish such vehicles with flashing or rotating lights, which shall be operated during the time that said vehicles are in operation within the ski area;*
>
> *(3) with respect to the emergency use of vehicles within the ski area, including but not limited to uses for purposes of removing injured or stranded skiers, or performing emergency maintenance or repair work to slops, trails or tramway equipment, not be required to post such signs as is required by clause (1), but shall be required to maintain such lighting equipment required by clause (2);*
>
> *(4) mark the location of any hydrants used in snow-making operations and located within or upon a slope or trail;*
>
> *(5) conspicuously place within the ski area, in such form, size and location as the board may require, and on the back of any lift ticket issued notice, in plain language, of the statute of limitations and notice period established in section seventy-one P; and*

> *(6) maintain a sign system on all buildings, recreational tramways, ski trails and slopes in accordance with rules and regulations promulgated by the board and shall be responsible for the maintenance and operation of ski areas under its control in a reasonably safe condition or manner; provided, however, that ski area operators shall not be liable for damages to persons or property, while skiing, which arise out of the risks inherent in the sport of skiing.*

The statute primarily deals with the erection of signage on both stationary and mobile equipment used in the operation of a ski area. It also requires that statute of limitations information be placed on the back of any ski ticket issued by the operator. The Recreational Tramway Board was created for the purpose of promulgating administrative regulations with respect to the operation of ski areas, which have specific provisions regarding the contents and size of the signage. See: 526 CMR 2.00 et seq. Most importantly §71N absolves ski area operators from injuries to persons or property which arise out of the of the risks inherent in the sport of skiing.

G.L.c. 143 §71O provides:

> *No skier shall embark or disembark upon a recreational tramway except at a designated location and during designated hours of operations, throw or expel any object from any recreational tramway while riding thereon, act in any manner while riding on a recreational tramway that may interfere with its proper or safe operations, engage in any type of conduct which may injure any person, or place any object in the uphill ski track which may cause another to fall while traveling uphill on a ski lift, or cross the uphill track of a recreational tramway except at designated locations. A skier shall maintain control of his speed and course at all times, and shall stay clear of any snow-grooming equipment, any vehicle, towers, poles, or other equipment. A skier who boards a recreational tramway shall be presumed to have sufficient abilities to use the same, and shall follow any written or oral instruction given regarding its use and no skier shall embark on a recreational tramway without authority of the operator. A skier skiing down hill*

shall have the duty to avoid any collision with any other skier, person or object on the hill below him, and, except as otherwise provided in this chapter, the responsibility for collisions by any skier with any other skier or person shall be solely that of the skier or person involved and not that of the operator, and the responsibility for the collision with any obstruction, man-made or otherwise, shall be solely that of the skier and not that of the operator, provided that such obstruction is properly marked pursuant to the regulations promulgated by the board. No skier shall ski on any ski slope or trail or portion thereof which has been designated closed, nor ski on other than an identified trial, slope or ski area. Any person skiing on other than an open slope or trial within the ski area shall be responsible for any injuries resulting from his action. A skier shall be presumed to know the range of his own ability to ski on any slope, trial or area. A skier shall be presumed to know of the existence of certain unavoidable risks inherent in the sport of skiing, which shall include, but not be limited to, variations in terrain, surface or subsurface snow, ice conditions, or bare spots, and shall assume the risk of injury or loss caused by such inherent risks. A skier shall, prior to his entrance onto the slope or trail, other than one designated for cross-country skiing, or embarking on any recreational tramway, have attached on his skis, a strap or other device for the purpose of restraining or preventing a runaway ski. A ski operator who finds a person in violation of this section, may issue an oral warning to that individual. A person who fails to heed the warning issued by such ski area operator shall forfeit his recreational tramway ticket and recreational tramway use privileges and may be refused issuance of another such ticket to the recreational tramway.

This law regulates the manner in which a skier may conduct his or her self while skiing. It imposes a duty to control one's speed, and to avoid vehicles and equipment. It imposes the duty of a skier to avoid collisions with other skiers on the skiing terrain. The uphill skier has the primary burden of avoiding contact with those downhill. It absolves the ski area operator from responsibility for collisions between skiers. It also absolves the ski area operator for injuries sustained by skiers who do not confine their activity to a "identified trail, slope or ski area", in other words the skiable terrain. This

section points out the inherent dangers in the sport of skiing including icy conditions or bare spots and says that the skier "shall assume the risk of injury or loss by such inherent risk." The SJC characterized the statute as being "intended to provide the ski area operators with protection from liability in certain circumstances, while still ensuring skiers safety. *McHerron v. Jiminy Peak, Inc.*, 422 Mass. 678, 679 (1996). By enactment of the statute the legislature enumerated "certain unavoidable risks inherent in the sport of skiing," exercising its judgment and determined that the proper balance of liability between the skier and the ski area operator required that the ski area operators not be liable for injuries or loss caused by the risks inherent in the sport. Id. at 680. In the *McHerron* decision summary judgment for the ski area operator was affirmed. The plaintiff was injured while encountering a bare spot on the skiable terrain. The statute explicitly construes that condition to be a risk inherent in the sport of skiing. In the case of *Atkins v. Jiminy Peak, Inc.*, 401 Mass. 81 (1987) the SJC observed that the legislature enacted the statute on the basis that there was perceived threat to the economic stability of ski area operators.

G.L. c. 143, § 71Q imposes a fine against any skier who after having been involved in a collision or other accident departs without identifying himself and obtaining assistance for any others involved in the accident who may have been injured.

The MSSA affords protections to ski area operators but also provides an avenue for liability if the operator departs from the requirements of the statute and the code of regulations. The statutes have been described as having "somewhat contradictory purposes, (1) to limit the liability of ski area operators in order to ensure their economic survival and (2) to ensure a skier's safety". *Brush v. Jiminy Peak Mountain Resort, Inc.,*

626 F.Supp. 2d 139, 147 (2009). MSSA provides no immunization to a skier who through misconduct causes harm by colliding with another skier. However, as with other athletic pursuits in order for a plaintiff who suffers personal injury or death to recover against a fellow skier it is likely that the plaintiff must show the defendant was engaged in willful, wanton and reckless misconduct as opposed to mere negligence. A violation of MSSA is evidence of the negligence of the violator but does not automatically establish liability on the part of the defendant. G.L. c. 143, § 71P imposes strict notice requirements and a short statute of limitations with regard to any claim against a ski area operator as follows:

> G.L.c. 143, § 71P:
>
> *For the purpose of sections seventy-one I to seventy-one R, inclusive, in any action brought against a ski area operator based on negligence, it shall be evidence of due care where the conduct of an operator has confirmed with the provisions of this chapter or rules or regulations of the board made pursuant to section seventy-one J.*
>
> *No action shall be maintained against a ski area operator for injury to a skier unless as a condition precedent thereof the person so injured shall, within ninety days of the incident, give to such ski area operator notice, by registered mail, of the name and address of the person injured, the time, place and cause of the injury. Failure to give the foregoing notice shall bar recovery, unless the court finds under the circumstances of the particular case that such ski area operator had actual knowledge of said injury or had reasonable opportunity to learn of said injury within said ninety-day period, or was otherwise not substantially prejudiced by reason of not having been given actual written notice of said injury within said period. In a case where lack of written notice, actual knowledge, or a reasonable opportunity to obtain knowledge of any injury within said ninety-day period is alleged by such ski area operator, the burden of proving substantial prejudice shall be on the operator.*
>
> *An action to recover for such injury shall be brought within one year of the date of such injury.*

However, in an accident resulting in death the statute of limitations associated with wrongful death actions brought pursuant to G.L. c. 229, § 2 applies as opposed to the short statute of limitations established by § 71P. *Grass v. Catamount Development Corp.,* 390 Mass. 551 (1983). The Court observed that "personal injury claims by skiers that do not involve death, unlike death claims may be myriad in number, run a whole range of harm, and constitute a constant drain on the ski industry." Id. at 553. And yet the SJC, in *Atkins v. Jiminy Peak, Inc.*, 401 Mass. 81 (1987) found that the short statute of limitations enunciated in § 71P would also apply to a claim against a ski area for renting allegedly defective ski equipment. The Court said:

> *The one year limitation period applies only to actions brought against ski area operators seeking compensation for injuries sustained while skiing. The statute would not apply, for instance, to an action brought by one who slipped and fell, or consumed tainted food, in the operator's lodge. But an action, such as this one, plainly seeking compensation for injuries suffered when the plaintiff fell while skiing on the defendant's slopes, is within the scope of the statute. Id. at 81.*

In the case of *Walsh v. Jiminy Peak, Inc.,* 2005 WL6404248 (D. Mass. 2005) the Court allowed summary judgment for the defendant ski area operator in a wrongful death action arising from a ski accident. It said that while the longer statute of limitations for wrongful death actions would be applied instead of the short statute pursuant to § 71P, the substantive law of the MSSA would apply to an evaluation of the circumstances of the accident and resultant death. The Court further observed that in exceeding the minimum standards for signage denoting hazard as set forth in § 71N the ski area operator did not expose itself to a more rigid standard of liability. The area

would not be held accountable for injuries sustained beyond the "skiable boundary of the trail." In *Eipp v. Jiminy Peak, Inc.,* 154 F. Supp. 2d 110 (2001), summary judgment in favor of the ski area operator was denied when the plaintiff suffered injury from a collision with a "snow gun" in the midst of the skiable terrain which was not properly marked by the ski area operator. The Court remarked that the inherent risks of skiing enumerated in § 71N, such as "variations in terrain, surface or subsurface snow, ice conditions or bare spots" do not include the presence of a snow gun in the middle of a ski trail.

In *Fetzner v. Jiminy Peak, The Mountain Resort*, 1995 Mass. App. Div. 55 (1995) the plaintiff suffered injury while walking from the ski lodge to the chairlift before attaching her skis. She fell due to icy conditions. The Court found that the location of the fall was part of the skiable terrain and that the limitations of liability afforded the ski area operator applied even though the plaintiff was not actually skiing at the time the injury was suffered.

In certain circumstances, a ski area operator may be held vicariously responsible for the negligence of its employees in the operation of a skiing enterprise, notwithstanding MSSA. In the case of *Tilley v. Brodie Mountain Ski Area, Inc.,* 412 Mass. 1009 (1992), the plaintiff skier was struck by a ski patrolman employed by the defendant ski area operator. The SJC noted that §71O absolves ski area operators from injuries caused by other skiers. However, it found that the operator was obligated to exercise control over the selection, training and experience of its ski patrol members and would be vicariously liable for the misconduct of its employee. Id. at 1009. Similarly, in the case of *Sanchez-Souquet*, 7 Mass. L. Rptr. 583 (1997), a Superior

Court judge denied a motion for directed verdict by a ski area with respect to a claim for a serious injury sustained by a child who had been negligently placed in a ski school class well beyond her abilities.

Many injuries in the sport of downhill skiing occur when the skier departs from the skiable terrain. The Court in the case of *Brush v. Jiminy Peak Mountain Resort,* supra, concluded that a ski area operator has no obligation to provide netting, padding or other protection around obstacles off the trail. In the *Brush* case a competitive racer involved in intercollegiate competition left the trail and collided with an obstacle resulting in paralysis. The Court observed that "competitive skiers thus have the same responsibility to avoid collisions with objects off the trail as other skiers". Supra at 149.

G.L.c 231 §85I provides for an exemption from civil liability for members of ski patrol while assisting injured skiers.

RELEASES/WAIVERS

It is often the practice of a recreational activity sponsor to require that the participant, or in the case of a minor his or her guardian/parent, execute a document absolving the organizer or premises owner from liability resulting from an accident in the course of participation in the recreational activity. In Massachusetts, absent fraud, a person may make a valid contract exempting himself from any liability to another, which he may, in the future incur as a result of his negligence or that of his agents or employees acting on his behalf. *Sharon v. City of Newton*, 437 Mass. 99 (2002) quoting *Schell v. Ford,* 270 F.2d 384, 386 (1st Cir. 1959). The leading decision of *Zavras v. Capeway Rovers Motorcycle Club, Inc.,* 44 Mass. App. Ct. 17 (1997) held that a release signed by a participant in a recreational activity is enforceable to protect the organizer, or premises owner, from claims by the participant as a result of personal injury for ordinary negligence.

However, such a release will not protect the organizer or the premises owner if he, she or it is grossly negligent. "Gross negligence involves 'materially more want of care than constitutes a simple inadvertence, though it is something less than willful, wanton and reckless conduct'". *Altman v. Aronson,* 231 Mass. 588, 591-592 (1919). Essentially, it "is very great negligence or the absence of slight diligence, or want of even scant care". Id. at 591. In other words, "while a party may contract against liability for harm caused by its negligence, it may not do so with respect to its gross negligence". Id. *Zavras v. Capeway Rovers Motorcycle Club, Inc.,* 44 Mass. App, Ct. at 19.

The *Zavras* decision involved the plaintiff's participation in a motorcycle race. A release or written waiver executed by the person who subsequently claims compensation for personal injury will not be effective if it violates a statutory duty or where there is an obvious difference in bargaining power, such as between a public utility and a consumer. The case of *Brush v. Jiminy Peak Mountain Resort, Inc.* supra involved a competitive ski racer rendered paralyzed by a collision with an off trail obstacle. The release signed by the plaintiff was deemed enforceable so as to prevent recovery against the defendants as there was no evidence of gross negligence.

The decision of *Lautieri v. Bae*, 17 Mass. L. Rptr. 4 (Super. Ct. 2003) involved a action for compensation for injuries suffered by a triathlon participant against the driver of a motor vehicle and the organizer of the event. The plaintiff had signed two pre-event releases/waivers. The Court held that the same were unambiguous and enforceable against claims against ordinary negligence but not against a claim of recklessness. The organizer had failed in a number of respects to adhere to guidelines of US Triathlon Inc., which purportedly sanctioned the event, in particular control of intersections during the bicycling segment of the event and the Court determined that summary judgment for the organizer was unwarranted.

Recently in 2020 the Appeals Court in *Brandt v. Davis* affirmed the lower court's dismissal on summary judgment of a plaintiff's claims against her softball teammate and Suffolk University arising from injuries she sustained during practice. 98 Mass. App. Ct. 734 (2020). The plaintiff played softball for the Suffolk University women's team. She was required, as a condition to participate on the team, to sign a participant waiver and release of liability form. The waiver released Suffolk University and its employees and

agents from liability for any claims arising out of her participation in the athletic program to the extent "permitted by the law of the Commonwealth of Massachusetts." During practice the plaintiff was hit in the back of her head by her teammate's swing after the teammate hit a ball off the tee. The plaintiff asserted separate claims for negligence, gross negligence and recklessness against her teammate and Suffolk University.

The Appeals Court applied the standard of care of that owed to other participants in an athletic event, to refrain from reckless conduct, finding the same reasoning would apply to athletic practices. Id. at 738. In so doing, it dismissed all claims against the teammate, on the basis that a jury could not find that the teammate's conduct amounted to recklessness.

Turning to the Suffolk University defendants, the Court reasoned that while the coach's duty of care to opposing players is the same recklessness standard that applies to the players she coaches, the Court assumed without deciding that a coach ordinarily has a duty of ordinary reasonable care to her own players. However, it was uncontested that Suffolk had an enforceable liability waiver barring the plaintiff from bringing a suit based on ordinary negligence. Therefore, the plaintiff's claims only for gross negligence and recklessness were analyzed and ultimately dismissed because based on the facts presented, the coach's conduct was at most negligent.

INSTITUTIONAL LIABILITY

The case of *Moose v. MIT,* 43 Mass. App. Ct. 420 (1997) involved an action by a former student against both his track coach and the university he had attended for injuries sustained in a pole vaulting accident. The landing pit was positioned close to a hard, running track surface. The plaintiff was using a pole too light for his weight. The defendant coach was aware of situations where a vaulter would land outside the pit with associated risk of serious harm. The pit used by MIT was old and barely met the NCAA requirements. To avoid this type of an accident it is the responsibility of the supervising coach to control the participant's speed by verbal admonitions. Here the defendant coach acknowledged that he saw the plaintiff's final approach and realized that he was running too fast, but failed to order him to abort the attempt. The jury found in favor of the plaintiff who suffered a skull fracture and brain contusions. The award against the university was monetarily limited by the qualified immunity afforded non-profit organizations.

In the case of *Torres v. University of Massachusetts,* 20 Mass. L. Rptr. 310 (Super. Ct. 2005), a member of the university cheerleading squad was engaged with fellow members in a practice involving a "pyramid" wherein participants stand atop one another. It was planned that the plaintiff would perform a maneuver called the "flying squirrel". She was an experienced cheerleader but had not attempted that maneuver previously. The coach placed "spotters" on either side of the pyramid, but none behind the pyramid. The stunt went badly causing the plaintiff to fall to the floor and suffered fractures requiring surgery. The Superior Court denied the defendant's motion for summary judgment and rejected the notion that the standard of willful, wanton and

reckless misconduct should be applied, but rather the standard of ordinary negligence was applicable. It reasoned that at the time of the accident the plaintiff was not engaged in competition, but rather in a practice; and, thus, the ordinary standard of care would apply.

In the decision of *Capua v. Town of North Reading*, 2004 WL 7308584 (Mass. Super. Ct.) a female soccer player was injured when she was struck in head by a male player attempting to score a goal during a co-ed scrimmage between the high school's varsity girl's and boy's teams. Suit was brought against the coaches and school officials. The Court applied the reckless conduct standard in its finding for the defendants indicating that the injury was encountered in the particular sport on a regular basis, and that fact that the players were of different sexes did not alter the circumstances to warrant a finding of liability.

The case of *Everett v. Bucky Warren, Inc.,* 376 Mass. 280 (1978) was essentially a products liability action involving the design of a helmet to be worn while playing ice hockey. The helmet had gaps, thereby exposing the player's head to the risk of a direct impact. There was also a claim against the school for whom the plaintiff was playing and the hockey coach. The jury's conclusion that the coach was negligent was affirmed on appeal because of his extensive experience in ice hockey and knowledge of alternative, and arguably safer helmets.

In the case of *Kavanagh v. Trustees of Boston University,* 440 Mass. 195 (2003), discussed elsewhere in this paper, the plaintiff proposed the theory of vicarious liability on the part of the university for the assaultive conduct of a scholarship basketball player in an intercollegiate game. A player struck an opposing player with his fist resulting in

significant harm. Notwithstanding the receipt of monetary benefit, the SJC did not find the university vicariously responsible for the scholarship player's misbehavior. The plaintiff also asserted a claim against the university's basketball coach whose "animated style of coaching effectively pushed [the assailant] beyond the boundaries of aggressive physical play into criminal violence". Id. at 204. The Court observed that "some degree of aggressiveness in play is essential to athletic competition…". Id. at 204-205. It found that a coach, therefore, may encourage his or her players to compete aggressively without fear of liability should an injury result.

In the Superior Court decision of *Duggan v. Thayer Academy,* 32 Mass. L. Rtr. 657 (Super. Ct. 2015), the plaintiff, a member of the women's field hockey team received successive blows to the head in competition. The coach was aware of both impacts and took no steps to evaluate the plaintiff for continued participation notwithstanding

G. L. c. 111, § 222 (Procedure for the Prevention and Management of Head Injuries Sustained by Students in Athletic Activities). The trial judge rejected a motion to dismiss the complaint by both the school and its employee/coach. The defendants contended that the plaintiff must demonstrate willful, wanton and reckless conduct on the part of the school and or the coach to obtain recovery pursuant to prior decisions involving injuries sustained in athletic competition. The motion judge acknowledged the validity of that principle, but indicated it did not apply with respect to the conduct of one's own coach for failing to obtain a medical evaluation, and care as opposed to the manner and means of competition. It said, "Nothing in the heat of competition should release a coach of the obligation to assure a player's fitness to engage in a particular

type of competition or to secure medical assistance as may be needed. Nor should a coach be relieved of the duty to use ordinary care in the sober evaluation between games of whether a player is fit to take the field".

STATUTORY PROTECTION FOR INDIVIDUALS WHO VOLUNTEER IN THE MANAGEMENT OF SPORTS PROGRAMS

General Laws, Chapter 231, § 85V provides in part that:

> *…no person who without compensation as a volunteer, tenders services as a manager, coach, umpire or referee…in a sports program of a non-profit association or who renders services to a sailing program of a non-profit association shall be liable to any person for any action in tort as a result of any acts or failures to act in rendering such services or in conducting such sports program. The immunity conferred by this section shall not apply to any acts or failures to act intentionally designed to harm, or any grossly negligent acts or failures to act which result in harm to the person.*

There are exceptions to this qualified immunity if the activity is primarily commercial in nature; involves transporting participants to games or practices; or involves the failure to maintain premises used in conjunction with the sports program. In decision of *Goodwin v Youth Sports Ass'n Purchasing Group*, 12 Mass. L. Rptr. 655 (Super. Ct. 2001) an action for compensation by an adult participant in a "coaches" softball game resulted a summary judgment for the defendant association. The plaintiff alleged that the association was negligent in failing to provide appropriate bases tethered to the ground to support the weight of an adult participant in contrast to light, untethered bases used in young children's games. The plaintiff suffered a broken wrist when the base upon which he planted his foot slid out from under him. After extensive discussion of the sports volunteer immunity statute, the Court concluded that the organizers and sponsors of informal athletic events do not owe a greater duty to participants than is owed by fellow players, namely to refrain from reckless misconduct.

General Laws Chapter 231 §85R exempts members of a sail boat racing committee from liability for injuries arising out of the conduct of a race absent willful, wanton or reckless conduct.