

Legislation Report

COMMITTEE ON CIVIL PRACTICE LAW AND RULES

REPORT NO. 15

March 11, 2003

A. 231

By: M. of A. Lentol
Assembly Committee: Codes
Effective Date: Immediately

AN ACT to amend the civil practice law and rules, in relation to the recovery of damages

LAW AND SECTIONS REFERRED TO: CPLR 1411

REPORT PREPARED BY THE COMMITTEE ON CIVIL PRACTICE LAW AND RULES(#12)

THIS BILL IS DISAPPROVED

In an era in which various efforts at “tort reform” seek to reduce the cost and increase the availability of liability insurance through limitations on existing bases for liability and the extent of damages, this bill would seek to eliminate a judicially established liability limitation. Expansion of liability has a cost, however, both in dollars and in societal impact. Some on the Committee would recommend disapproval because the cost is too high. Yet even were the goal of the legislation deemed appropriate, this bill fails to address critical legal foundations for the judicial determinations it would overturn and would improperly retroactively revive cases long-ago dismissed. For these reasons, the bill is disapproved.

In *Maddox v City of NY*, 66 NY2d 270 (1985), the Court of Appeals confirmed that one engaging in a sport activity presumptively assumes the risks inherent in the sport, including those created by obvious or known conditions of the playing field. In *Turcotte v Fell*, 68 NY2d 432 (1986), where the operative events occurred after the effective date of CPLR 1411, the comparative negligence statute, the Court nevertheless reconfirmed the absence of liability of either another participant or of a landowner for injuries sustained during sports activity which arise out of risks inherent in the sport. The Court reasoned that the assumption of risk doctrine was not merely a causation theory, but one which molds the scope of the duty owed by the alleged tortfeasor: a landowner or sports participant has no duty to protect one engaging in sports from the risks inherent in that recreational conduct. The same lack-of-duty reasoning was reiterated in *Benitez v New York City Board of Educ.*, 73 NY2d 650 (1989) and most forcefully in *Morgan v State of NY*, 90 NY2d 471 (1997).

This bill would overturn all these decisions, yet fails to address the principal of law underlying them. In proposed added subdivision (b) of CPLR 1411, the bill would state that the “culpable conduct” of a voluntary participant in “competitive athletics” (query: what about skiing? Ice-skating? Aerobics?) would not bar recovery, but the amount of damages would be subject to diminishment on a proportion-to-fault basis. This treats the sports assumption of risk doctrine as if it affected only allocation of fault; the Court, however, said it delimits duty as well. Stating that a party’s conduct will not bar recovery does not impose a new duty upon other sports participants and/or landowners. Thus, the statute may not even be effective as written to accomplish its purpose.

Another seriously objectionable aspect of this bill is proposed subdivision (c) of CPLR 1411, purporting to revive and reinstate any claim for sports-related injury which was dismissed “because subdivision (b) of this section was not in effect.” Issues concerning the constitutionality of such a provision aside, it is bad policy to retroactively impose a newly created form of liability. It undermines principles of finality and repose, especially as written, with no limit to the rearward look. Of perhaps greater import, it may seriously impact on unprepared defendants and their insurers. Obviously, insurers wrote policies and determined premiums for schools and others premised on the existing law - - a law which has been enforced for nearly a century (see *Murphy v. Steeplechase Amusement Co.*, 250 NY 479 [1929]). There is no opportunity for an insurer or large self-insured entity to retroactively spread the risk of retroactively imposed liability.

That is not to suggest that the underlying purpose of the bill -- to permit recovery for sports-related injuries -- is universally seen as appropriate. Imposing additional liability on organizers, managers, and supervisors of, and participants in, voluntary sporting events, and upon owners of property on which they take place, may result in increased premiums for, and diminished availability of, insurance. This in turn may impact not only on businesses, but on schools and youth groups, potentially resulting in curtailment or elimination of sports programs, especially those with significant inherent risks such as football or hockey (see *Sharon v City of Newton*, 437 Mass. 99, 110, 769 NE2d 738, 747 [Sup Ct 2002]). (The sponsor’s suggestion that this measure would have no fiscal implications is curious, since it would likely subject Boards of Education and State and City colleges to a class of additional liability lawsuits and related defense cost.)

In any event, as written, this bill would not address the foundation for the common-law rule it would purport to overturn, and would improperly apply its revision retroactively. On these grounds, if no others, the bill is disapproved.

For these reasons, the bill is **DISAPPROVED**.

Person who prepared the report: David B. Hamm, Esq.

Chair of the Committee: Sharon Stern Gerstman, Esq.