



ASSUMPTION OF RISK DOCTRINE SURVIVES COMPARATIVE NEGLIGENCE RULE

Under the heading of *Morgan v. State of N.Y.*, 90 N.Y.2d 471, 685 N.E.2d 202, 662 N.Y.S.2d 421, (1997), the New York Court of Appeals decided four cases and addressed the role of the assumption of risk doctrine under CPLR Article 14-A, New York's comparative negligence statute. All four cases involved plaintiffs who were injured while participating in voluntary sports activities on the premises of athletic facilities owned or operated by the various defendants. Citing its prior decision in *Turcotte v. Fell*, 68 N.Y.2d 432, 502 N.E.2d 964, 510 N.Y.S.2d 49 (1986), the Court held that the assumption of risk doctrine is not an absolute defense, but a measure of defendant's duty of care. Thus, the assumption of risk doctrine continues to be a viable and powerful defense.

Prior to the enactment of Article 14-A in 1975, assumption of risk was a complete bar to any recovery for injuries sustained while voluntarily participating in a sporting activity. Under the current comparative negligence rule, liability is apportioned in relative degrees of fault, and recovery is diminished by the proportion of a plaintiff's own negligence bears to the full amount of damages. Assumption of risk became merely one of many factors in determining overall comparative fault.

By applying the assumption of risk doctrine to bar a claim at the outset on a motion for summary judgment, the Court reestablished the assumption of risk doctrine as a powerful tool for defendants. Although it is not treated as a separate defense, the Court sanctioned the use of evidence of assumption of risk in a threshold inquiry to determine the duty of care owed by the defendant to the plaintiff. Thus, the standard for determining negligence in these cases is whether the defendant created a dangerous condition over and above the ordinary dangers of the sport. Though not a bright line rule, a defendant may succeed on a summary judgment motion by showing that plaintiff's injuries resulted from the risks inherent in the nature of the sport, and not by some other action or inaction by the defendant.

In three of the four cases, the Court affirmed Appellate Division decisions which found that no duty of care was owed the plaintiffs because they had assumed the inherent risks of participating in their respective activities. In *Morgan*, the plaintiff was an experienced amateur bobsledder who suffered severe injuries when his bobsled tipped over due to a steering error, went through an exit chute and crashed into a concrete wall. In *Beck v. Scimeca*, the plaintiff, a 30-year old karate student, was injured when he attempted to perform a tumbling maneuver over an obstacle. Similarly, the plaintiff in *Chimerine v. World Champion John Chung Tae Kwan Do Inst.* was injured while attempting a kick maneuver. The risk of each of these injuries was deemed to be inherent in the nature of each sport, commonly appreciated risks to which each plaintiff was deemed to have consented. Since the participants were held to have accepted personal responsibility for these risks, each defendant's duty was defined to exercise care to make conditions as safe as they appear to be. In each of these cases, the Court noted a lack of evidence to suggest that the defendant created the condition "over and above the usual dangers...inherent in the sport."

On the other hand, in *Siegel v. State of New York*, which involved a tennis player who had tripped over a torn net separating indoor courts, the Court found a continuing and separate duty to keep the nets in good repair. A torn net was not, as a matter of law, an inherent risk in the sport. Thus, the assumption of the risk doctrine was deemed

INSIDE

Effect given to change of life insurance beneficiary notwithstanding absence of compliance with required procedures Page 2

"No prejudice" rule applies to excess insurers..... Page 3

AND MORE . . .

See Page 2 for a complete listing of articles in this issue.

insufficient to bar the action, leaving ordinary negligence and comparative negligence principles to apply.

The *Morgan* decision is significant in that it establishes a standard for determining the duty of an operator or owner of a sports facility that takes into account the doctrine of assumption of risk. It is clear that assumption of risk still plays a valuable role for defendants in sports-related liability cases. 🍷

EFFECT GIVEN TO CHANGE OF LIFE INSURANCE BENEFICIARY NOTWITHSTANDING ABSENCE OF COMPLIANCE WITH REQUIRED PROCEDURES

In a 3-2 decision, the Appellate Division, First Department gave effect to a change of beneficiary made by a life insurance policyholder notwithstanding the insured's failure to follow the stated procedure. In *McCarthy v. Aetna Life Ins. Co.*, 231 A.D.2d 211, 661 N.Y.S.2d 625 (A.D. 1st Dep't 1997), the insured's ex-wife sued to enforce the beneficiary designation as stated in the policy, which named her as beneficiary, in the face of certain subsequently created extrinsic evidence manifesting the insured's intent to change the beneficiary.

The insured was diagnosed with multiple sclerosis in 1973 and purchased the life insurance policy in the same year. He designated his wife as the beneficiary. The couple later divorced and the insured moved in with his father so the father could care for his ailing son, which he did for seven years, until the son's death.

The separation agreement between the plaintiff and the insured, dated February 27, 1978, which was incorporated into the divorce decree, provided for a complete property settlement. Not only did the insured specifically not make any provision for the plaintiff which was to survive the divorce, but the plaintiff agreed to pay the insured alimony for four years. The court also considered the insured's 1977 holographic will (written by him, without any witnesses and apparently, without the advice of counsel) as a clearer manifestation of his intent to deprive his ex-wife of any financial benefits. In this will, the insured revoked a prior will bequeathing his estate to the plaintiff, and instead, left his entire estate, including the proceeds from all insurance policies, to his father.

IN THIS ISSUE

Assumption of risk doctrine survives comparative negligence rule

Court of Appeals focuses on participant's awareness of inherent risks 1

Effect given to change of life insurance beneficiary notwithstanding absence of compliance with required procedures

Court credits extrinsic evidence manifesting insured's intent 2

"No prejudice" rule applied to excess insurers

Held more akin to primary insurers than reinsurers... 3

Failure to suggest higher coverage limits does not render broker liable for excess judgment

Court of Appeals holds that brokers have no continuing duty to advise, guide or direct a client to obtain additional coverage..... 4

Sledding accident award upset based on application of immunity statute

Municipal sledding area held not to be supervised public park facility 5

New Jersey Supreme Court holds no coverage for sexual assault

Relies on criminal conduct exclusion..... 5

Editor: Steven H. Rosenfeld

Editorial Staff: Julia Davidson, Michele Brown

Contributors: Thomas Imperato, Alyssa Young

When the insured died in 1984, the plaintiff, as the beneficiary of record, and the insured's father both submitted claims on the policy to Aetna. Aetna paid the proceeds into the court, effectively removing itself from the dispute. Plaintiff initiated suit against Aetna, which interpleaded the father. Both the trial court and the initial appellate court (the Appellate Term) held that "plaintiff was the beneficiary designated in the policy application and that the insured had not taken affirmative steps to do all that he reasonably could have done to effect a change in the designated beneficiary of the policy prior to his death." On appeal, the Appellate Division reversed.

The court stated that the procedure for changing beneficiaries as set forth in the policy, which in this case was to be made in writing and on a form to be filed with the insurer, was "designed to protect the interest of the carrier from multiple inconsistent claims, but strict compliance with such may be waived by the carrier. By not contesting the obligation to pay a beneficiary, manifested by surrendering the proceeds for court-ordered disbursement, so that only the rights of the respective claimants are before the court, the carrier may be deemed to have abandoned its insistence on technical compliance with these procedures." Furthermore, "when one party waives the method of amending a term of the contract, we may inquire into whether the other party, now deceased, took steps to amend the effect of that term. Then, the intent of the insured, *if sufficiently* evidenced, may prevail over the technical designation in the policy." (emphasis in original).

Here, the court held that "a will, duly admitted to probate, clearly manifesting the insured's intent, especially when supported by corroborative documentation evincing the insured's intent, may effectively change the beneficiary of the policy under appropriate circumstances." The adequacy of proof is determined on a case-by-case basis, or the equitable approach, which is more flexible compared to the "substantial compliance" rule which "required the insured to do all in his or her power to comply with the procedure. The more flexible approach only requires evidence of "*manifest*" intent, "some steps beyond a statement, uttered during the decedent's lifetime, of *mere* intent." (emphasis in original).

The court found that the facts in this case indicated that the decedent did manifest his intent to

deprive the plaintiff of the proceeds of his life insurance policy through the terms of their divorce decree and by revoking the old will in the more currently made will. "Since the insurance carrier does not demand strict adherence to the company's method for doing so, the potential bar to the effective change has been removed and we are free to exercise our equitable jurisdiction to give effect to the insured's manifest intent." It should be noted that the dissent would have applied the substantial compliance test to achieve a change in beneficiary. 🚫

"NO PREJUDICE" RULE APPLIED TO EXCESS INSURERS

In *American Home Assurance Co. v. International Ins. Co.*, 90 N.Y.2d 433, 684 N.E.2d 14, 661 N.Y.S.2d 584 (1997), the New York Court of Appeals made it clear that an excess carrier is not required to show that it sustained prejudice as a result of untimely proper notice in order to deny coverage, thereby restricting its holding in *Unigard Sec. Ins. Co. v. North River Ins. Co.*, 79 N.Y.2d 576, 594 N.E.2d 571, 584 N.Y.S.2d 290 (1992), to cases involving reinsurers.

It has long been the rule in New York that compliance with a policy's notice provisions is a prerequisite to an insurer's obligation to provide coverage. Lack of timely notice vitiates coverage, even if the insurer was not prejudiced by the delay. In *Unigard*, the Court of Appeals held that breach of the prompt notice provisions in a reinsurance policy is not a ground for disclaiming coverage unless the reinsurer can show that it was actually harmed by the delay. Part of the rationale for the *Unigard* decision was that reinsurers are far less likely to be harmed by late notice because, unlike primary insurers, they are not responsible for providing a defense, investigating claims, or negotiating early settlements.

Excess insurers, on the other hand, are more akin to primary carriers in that their ability to participate in the investigation, defense, and settlement negotiations is greatly affected by lack of proper notice of a claim. In *American Home*, the Court noted that the only apparent difference between primary and excess carriers is when in the life of a claim coverage attaches. Therefore, the Court reasoned that excess insurers should be entitled to the same late notice defense as primary insurers with-

out the additional burden of proving prejudice. The rule in New York is now clear that with respect to primary and excess insurers, failure to comply with notice provisions can vitiate coverage without the insurer needing to make a showing of actual prejudice. 🍷

FAILURE TO SUGGEST HIGHER COVERAGE LIMITS DOES NOT RENDER BROKER LIABLE FOR EXCESS JUDGMENT

In *Murphy v. Kuhn*, 90 N.Y.2d 266, 682 N.E.2d 972, 660 N.Y.S.2d 371 (1997), an insured commenced an action against its broker, alleging professional negligence and breach of implied contract because of its failure to advise the insured of the need for a higher liability limit on a commercial auto policy.

Plaintiff's son was involved in an auto accident, in a vehicle registered in plaintiff's name and insured under his business' commercial automobile policy. The policy had a limit of \$500,000, which was exhausted in settling the claims resulting from the accident. The plaintiff claimed to have paid an additional \$194,429 in connection with the settlement and \$7,500 in attorney's fees out of his own pocket.

Relying on his long-standing relationship with his broker, plaintiff claimed that the broker owed him a duty to inform him that his policy limits were insufficient. Plaintiff admitted on the record, however, that he never requested information regarding the sufficiency of his coverage, nor did he request to have the limits increased. Nevertheless, plaintiff "contend[ed] that a special relationship developed from a long, continuing course of business between plaintiff[] and defendant insurance agent, generating special reliance and an affirmative duty to advise with regard to appropriate or additional coverage."

Although there is a relationship between an insurance broker and its client, the New York Court of Appeals refused to expand the responsibilities of that relationship to include an unsolicited opinion regarding sufficiency of coverage from the broker to the client. The Court stated that "the law is reasonably settled on initial principles that insurance agents have a common-law duty to obtain requested

coverage for their clients within a reasonable time or inform the client of the inability to do so; however, they have no continuing duty to advise, guide or direct a client to obtain additional coverage." The court distinguished another recent case (*Kimmell v. Schaefer*, 89 N.Y.2d 257, 263, 675 N.E.2d 450, 652 N.Y.S.2d 715 (1996)), which imposed liability "only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified." In the *Kimmell* case, the injured party relied on a statement made by the other person in the relationship, unlike *Murphy* which involved an alleged failure to speak. The court specifically held that *Kimmell* had no precedential application in the "insurance relationship context," and that there was no shift in responsibility from the insured to the broker with respect to obtaining more coverage. Moreover, the Court noted that there had been no reliance by the insured on any expertise or superior knowledge of the broker to justify imposing liability on the broker.

In response to the plaintiff's plea to "avoid generally absolving insurance agents from legal principles which subject other individuals to duties beyond those rooted in common law," the Court stated that both plaintiff's concern and the effect of the decision were overstated. The Court noted that the decision neither broke any new ground nor "immunize[d] insurance brokers and agents from appropriately assigned duties and responsibilities. Exceptional and particularized situations may arise in which insurance agents, through their conduct or by express or implied contract with customers and clients, may assume or acquire duties in addition to those fixed at common law. [T]he issue of whether such additional responsibilities should be recognized and given legal effect is governed by the particular relationship between the parties and is best determined on a case-by-case basis."

Notwithstanding the Court's own contention that its decision did "not break any new ground," the future application of its holding and rationale by the lower courts will be the only true test. 🍷

SLEDDING ACCIDENT AWARD UPSET BASED ON APPLICATION OF IMMUNITY STATUTE

A divided Appellate Division, Third Department recently overturned a \$2 million verdict against the Town of Greenfield in Saratoga County, holding that it was immune from liability under New York's recreational use statute. General Obligations Law § 9-103 provides immunity for ordinary negligence to both municipalities and private landowners who allow their land to be used by the public for certain recreational activities, including sledding, tobogganing, hiking, skiing, boating, and many other commonly enjoyed sports.

Plaintiffs often attempt to avoid the application of this statute by claiming that the area where an accident occurred was a supervised public park facility. Earlier, in *Ferres v. City of New Rochelle*, 68 N.Y.2d 446, 502 N.E.2d 972, 510 N.Y.S.2d 57 (1986), the Court of Appeals held that the recreational use state does not bar negligence claims against a municipality that has "assumed a higher duty incident to the operation and maintenance of a supervised and regulated public park."

In *Sena v. Town of Greenfield*, ___ N.Y.S.2d ___, 1997 WL 706926 (A.D.3rd Dep't November 13, 1997), the plaintiff was injured while sledding down a hill, when he hit a "brownish, protruding area" throwing him and his son into the air, causing the son to land on top of the plaintiff. The property, an unimproved area adjoining the municipality's highway garage, was at one time used to remove gravel for highway repairs. As a result, a "gravel pit" developed. Subsequently, the Highway Department regraded the "gravel pit" to make it safer for sledding. Another part of the property had previously been used as a baseball field (in fact, "a pavilion-like shed" had been erected) without a permit or approval from the municipality.

"Far from creating a regularly supervised public recreational facility," the court held, "this grading simply indicated that [the municipality] was affording permission to its residents and others to sled there and that the 'gravel pit' as graded was suitable for that purpose." Thus, the Court held that neither this improvement nor the baseball field and shed changed the character of the land to a "regularly supervised public recreational facility" which would

have rendered General Obligations Law § 9-103 inapplicable. ❄️

NEW JERSEY SUPREME COURT HOLDS NO COVERAGE FOR SEXUAL ASSAULT

As reported in the Spring/Summer 1997 issue of the Insurance Newsletter, a New Jersey intermediate appellate court recently held that a medical malpractice policy provided coverage to a gynecologist for a sexual assault against a patient as a "medical incident." In so holding, the court also determined that the policy's criminal acts exclusion did not bar coverage. It was also reported that the New Jersey Supreme Court had accepted the case for review. *See New Jersey Supreme Court to Consider Coverage for Sexual Assault*, OHRENSTEIN & BROWN INS. NEWSLETTER, Spring/Summer 1997 at 3.

The Supreme Court has heard the case, which, it noted was one of first impression in New Jersey, and, in *Princeton Ins. Co. v. Chunmuang*, 151 N.J. 80, 698 A.2d 9 (1997), reversed the lower court ruling. Although the Court agreed that the assault was a "medical incident" as defined by the policy, it held that the criminal acts exclusion did bar coverage.

The Court stated that since the assault occurred in the course of furnishing professional services, "[w]e have no difficulty in concluding that those acts constituted a 'medical incident' as defined by Chunmuang's insurance policy." Nevertheless, the Court said that finding was not dispositive "because the policy contained an exclusion for claims based on injuries resulting from 'the performance of a criminal act' by the insured." Further holding "that claims based on injuries caused by a physician's criminal conduct are properly excluded from coverage..." the Court ruled that "Princeton is not responsible to [the patient] for the damages she suffered as a result of Chunmuang's sexual assault."

The court found that exclusions for criminal acts are valid and not against public policy. While acknowledging that there is a public interest "in compensating innocent victims," the Court recognized that "malpractice insurance ... is essentially a contract between the insurer and the insured. Civil liability for [a] criminal act is dramatically different from the liability typically contemplated when a physician purchases malpractice insurance.... The damages caused by a physician's criminal conduct,

such as a sexual assault, inevitably will be significantly distinct from damages occasioned by acts of medical malpractice not involving criminal conduct.”

The Court remanded the case to the lower court for a determination on the amount of the injured woman’s claims that arose out of the medical malpractice, distinct from the damage from his criminal conduct. In a concurring opinion, one judge stated “I have little doubt that a judge or jury will be able to assess the damages that this young woman suffered as a result of the doctor’s deviations from accepted medical standards. Although the policy does not insure against a criminal act, the policy does insure against an unprofessional act. Plaintiff, therefore, may be compensated to the full extent of the law for the treatment of her condition that fell below standards generally accepted in the medical profession.”

In a strong dissent subscribed to by two members of the seven judge court, it was argued that the criminal misconduct and the medical malpractice were “so intertwined... that it is not realistically possible to identify, differentiate, and quantify the injuries attributable to the sexual misconduct.”

©1997 OHRENSTEIN & BROWN, LLP
230 Park Avenue, New York, NY 10169
1050 Franklin Avenue, Garden City, NY 11530

This newsletter is intended solely to alert readers to issues of general interest and should not be construed as legal advice. For advice about particular facts and legal issues, readers should consult legal counsel.

Printed on Recycled Paper. 